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THE

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VOLUME 36.

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST VIRGINIA, AND SUPREME COURTS OF NORTH CAROLINA, SOUTH CAROLINA, GEORGIA.

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OF THE

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[1] Deceased August 19, 1900.
[2] Ceased to be President January 11, 1900.
[3] Became President January 11, 1900.

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AMENDMENTS TO RULES.

SUPREME COURT OF GEORGIA.[1]

By orders passed on February 26 and March 10, 1900, the rules of this court were amended as follows:

Rule 15 adds the following words: "Whenever a cost execution is paid by an attorney for a plaintiff in error, the same may, upon his request, be transferred and assigned to him by an appropriate indorsement thereon signed by the clerk."

Rule 22 now reads as follows: "Criminal cases filed during vacation, or after the docket of a term has been closed, will, without notice to counsel, be in order for a hearing on the third Monday of the next ensuing term. It shall be the duty of the clerk to mail to counsel for the plaintiff in error, in each criminal case not provided for as above, and to the solicitor general or city court solicitor concerned (and, in capital cases, also to the attorney general), a written or printed notice stating when said case will be heard. If eight or more days, including Sundays, will elapse between the mailing of the notice and the third Monday of the month in which it is mailed, that Monday shall be named as the day for the hearing. If less than eight days will so elapse, the third Monday in the next month shall be named: provided that if any day to be designated in compliance with the foregoing directions would arrive after the adjournment of a term, the clerk shall name in its stead the third Monday of the next term. Argument will not, at the instance of counsel, be postponed in any criminal case except for providential cause; but the court may, on its own motion, order such postponement during a term as the exigencies of its business may require. Unless otherwise specially ordered, the criminal docket for each October term will stand closed on the last Saturday but one before the third Monday in the month of February following the beginning of such term. The criminal docket of each March term will be closed by special order."

Rule 32 is amended by inserting the following as the second sentence thereof: "The chief justice may, at any other time, order a change in the personnel of the two divisions, either temporary or to continue till the beginning of the next ensuing October term, as may be deemed expedient."

Rule 35 now reads as follows: "Remittitur —Rehearing. The remittitur from this court shall contain the judgment of the court. It shall be duly certified by the clerk, and, unless otherwise ordered, shall be transmitted to the clerk of the trial court as soon as practicable after the expiration of ten days from this court's approval of the minutes containing the judgment. No motion for a rehearing will be considered by this court unless the same is filed in the office of the clerk thereof during the term at which the judgment sought to be reviewed was rendered, and before the remittitur in the case to which said motion relates has been forwarded to the clerk of the trial court. The certificate to every remittitur shall state the amount of costs taxed in the case, and by whom paid."

[1] For rules as originally adopted, see 26 S. E. vi.

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REHEARINGS DENIED.

[Cases in which rehearings have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

Bank of Columbia v. Gadsden (S. C.) 33 S. E. 575.
Jackson v. Jackson (S. C.) 33 S. E. 749.
Merchants' & Planters' Nat. Bank v. Clifton Mfg. Co. (S. C.) 33 S. E. 750.
Neal v. Suber (S. C.) 33 S. E. 463.
Thomson v. Brown (S. C.) 33 S. E. 454.

See End of Index for Tables of Southeastern Cases in State Reports and Additional Tables.

THE

SOUTHEASTERN REPORTER.

VOLUME 36.

ROSS v. JONES et al. ORMAND v. SAME. MILLER et al. v. SAME.

(Supreme Court of South Carolina. May 11, 1900.)

LAW OF THE CASE—APPEAL—SUPREME COURT OPINION—CONSTRUCTION—EVIDENCE — COMPETENCY — RECORD — INSUFFICIENT OBJECTIONS—SUBSEQUENT ADMISSION—EFFECT.

1. Where in deciding an appeal the supreme court, in its opinion, said, "We must not be understood, by any means, as expressing any dissatisfaction with the ruling of the circuit judge that the telegrams and letters [set out in his judgment] were competent, under the circumstances of this case," such statement constitutes a decision that the telegrams and letters were competent evidence; and the assumption, in a petition for rehearing, that the court regarded them as incompetent, and only made competent for the purposes of the case by not having been objected to, is erroneous.

2. Where the only objections to testimony noted in the record are in the words "objected to," without any specific ground of objection being shown, the supreme court would be justified on appeal in regarding the testimony as not objected to.

3. Where it appears from the record that a witness' testimony was objected to and excluded at the hearing of one of three associated cases, but was admitted without objection at the subsequent hearing of all the cases, had under a stipulation that they be heard together, the supreme court on appeal properly regarded such testimony as unobjected to.

Petition for rehearing. Denied.

For former opinion, see 35 S. E. 402.

PER CURIAM. This court has examined with care the petition and its exhibits, asking for a rehearing of the three cases above stated.

The first ground stated by the petitioners is: "Because it is respectfully submitted that the court, by misapprehension, reached the conclusion that the telegrams and letters set forth in the decree of his honor, Judge Klugh ('case,' folios 1915–1920), and in the fifth exception of appellants ('case,' folios 1932–1945), were not objected to when introduced in evidence by the plaintiffs (appellants), and for this reason said telegrams and letters, while incompetent in themselves, became competent; the cause of such misapprehension being that the court overlooked the uncontroverted facts" set up in the petition. In the first place, nowhere in the opinion of this court or in the judgment of Judge Klugh were the telegrams and letters referred to by petitioners held to be incompetent testimony, either per se or because unobjected to. The language of this court on this point was as follows: "We must not be understood, by any means, as expressing any dissatisfaction with the ruling of the circuit judge that the telegrams and letters [set out in his judgment] were competent, under the circumstances of this case;" and we now affirm such statement. So that it is a mistake when appellants conclude, as they do in their petition, that this court regarded the telegrams and letters in question as incompetent testimony, and only made competent for the purpose of this case by not being objected to. In the second place, this court, when referring to the testimony of A. K. Eskridge not being objected to, might very well have relied upon the entire absence of any ground for such objection, as it appears by the "case" here. But we find in the "case" itself that A. K. Eskridge was not allowed to testify as to any of the telegrams and letters now in question in Ross' case, as it appears from page 97 of the "case," although the witness had been allowed prior to the ruling by the court on the objection of plaintiffs' attorneys to testify, without objection, as follows: "Well, sir, I received a great many telegrams,—not many letters. * * * Question. Who wrote the letters? Ans. I had letters coming to me, in the name of Jones, Blanton & Co., from Mr. Harris, the president of the company, Mr. Johnson, the general manager, and Dr. Black, who was considered to be the assistant general manager for the Augusta Division. * * * I received letters from Mr. Harris stating that everything was all right, or would be in a few days, or words to that effect. Question. What did you do with them? Ans. I delivered them very frequently to the contractors, as they would come to the office." See, also, pages 276 to 277 of the "case." And it will be seen that the letters and telegrams were admitted without objection. See, also, pages 360 to 362 of the "case," where it appears that Eskridge testified without objection that

the letters and telegrams were exhibited, and the same were produced and put in evidence. It is true, at folios 387 to 390 objection was made, but the objection was sustained, and the testimony was not admitted. But that was only at the rehearing of the first case by Judge Townsend. As to the reference by the appellants to their objections found at folios 640 to 644, if they will examine the "case" they will find that such citation of objections has reference to the testimony of Ormond, and not that of Eskridge. Ormond was their witness, and no reference is made to his testimony in the opinion of this court. In the opinion of this court it is admitted that appellants did object to testimony, by the use of the words "Objected to," either printed in the body of the testimony or in the margin; but the reference to the absence of such words in the "case" itself, in relation to the witness Eskridge's testimony, is above stated.

The second ground has reference to this court having overlooked the fact that the circuit judge based his conclusion upon incompetent testimony. We have already answered this objection, in considering the appellants' first ground for a rehearing. No reference is needed to establish the fact that the circuit judge did make use of the telegrams and letters in question for a certain purpose, which purpose this court has already declared to be proper and legitimate. It follows, therefore, that the petition upon a rehearing must be dismissed, and the further stay of the remittitur in each of these three cases denied.

HENDERSON et al. v. BENNETT et al.

(Supreme Court of South Carolina. May 11, 1900.)

TRESPASS—VENUE—DEFENDANT'S RESIDENCE—PLEADING—GENERAL DENIAL—EVIDENCE—IN AVOIDANCE.

1. Under Code Civ. Proc. § 144, providing that actions for the recovery of real property, or of an estate or interest therein, and for injuries to real property must be tried in the county in which the subject of the action, or some part thereof, is situated, a circuit court has jurisdiction to try an action of trespass in the county in which the land is situate, though all the defendants live in another county.

2. In an action for trespass on real estate, the defendants, under a mere general denial, could not introduce in evidence as justification a warrant of a magistrate against the plaintiff to eject her from the premises, nor testimony tending to show they entered under a claim of right believing they had a right, and that some of them entered as a posse, since, under the general denial, only those facts that tend to disprove the material allegations of the complaint are admissible.

Appeal from common pleas circuit court of Bamberg county; W. C. Benet, Judge.

Action by Rosa L. Henderson and others against Abe Bennett and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Robt. Aldrich, for appellants. J. Ham Kirkland and Izlar Bros., for respondents.

JONES, A. J. The circuit court having rendered judgment for damages for the trespasses alleged in the complaint, it is now sought to reverse the same on exceptions which raise practically two questions: (1) Whether the circuit court had jurisdiction to try this case in Bamberg county when the defendants all reside in Colleton county; (2) whether, in an action for trespass on real estate, the defendant, under a mere general denial, may introduce evidence in justification of the entry.

As to the first question, we think the court had jurisdiction. It is true that the defendants all reside in Colleton county, but section 144 of the Code of Civil Procedure provides that actions "for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property," "must be tried in the county in which the subject of the action, or some part thereof, is situated," etc. The circuit correctly construed the allegations of the complaint as falling under this provision, and it is not disputed that the land upon which the trespasses were alleged to have been made is situated in Bamberg county, where the case was tried.

On the second question presented we agree also with the circuit court. The action was like the old action of trespass quare clausum fregit. The answer was a general denial. Under this plea, defendants sought to introduce in evidence a warrant issued by a magistrate against the plaintiff Rosa L. Henderson to eject her from said premises in justification of the acts complained of. This evidence was excluded as matter of justification of the alleged trespass on the ground that such evidence was inadmissible under a general denial. Under the Code the answer must contain (1) a general or specific denial; (2) a statement of any new matter constituting a defense or counterclaim. Under a general denial only those facts which tend to negation or disprove the material allegations of the complaint are admissible. In this case the general denial contested the facts alleged, but the evidence offered was not in disproof of such allegations, but was in the nature of a confession and avoidance,—an independent defense, which constituted new matter, and ought to have been specially pleaded. 1 Enc. Pl. & Prac. 845. It follows that there was no error in excluding all evidence tending to justify the acts complained of. While so ruling, the circuit court nevertheless allowed the defendants to introduce under their plea of general denial all testimony offered tending to show that their entry upon said premises was under a claim of right, that they believed they had a right to enter lawfully, and that certain of them were pressed in as a posse, as testimony in mitigation of

damages, as such testimony would tend to negative the allegations that the conduct of the defendants was willful and wanton. The judgment of the circuit court is affirmed.

CHAFEE v. CITY OF AIKEN.

(Supreme Court of South Carolina. May 8, 1900.)

Petition for rehearing. Denied.
For former opinion, see 35 S. E. 800.

PER CURIAM. After careful consideration of this petition, we do not find that any material fact or principle of law has either been overlooked or disregarded, and hence there is no ground for a rehearing. It is therefore ordered that the petition be dismissed, and that the stay of the remittitur heretofore granted be revoked.

TUCKER v. RICHARDS et al.

(Supreme Court of South Carolina. May 11, 1900.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—INTEREST.

1. Where, on accounting by trustee or administrator, it appears that the disbursements during any given year exceed the receipts of such year, the amount on which the administrator is to be charged interest is to be determined by adding to the annual balance in his hands on January 1st to the receipts for that year and deducting from the result the amount of disbursements during the year.

2. Where the last payment of an administrator was made on July 6, 1891, he was properly charged with interest on the sum in his hands January 1, 1891, less the payments up to July 6, 1891, until the decree on final accounting.

Appeal from common pleas circuit court of Union county; Ernest Gary, Judge.

Suit by William J. Tucker, as administrator, etc., of James A. Tucker, deceased, against J. Berry Richards, as administrator of J. C. Richards, deceased, and others. Judgment in favor of defendants, and plaintiff appeals. Affirmed.

The following are plaintiff's exceptions and the decree of the trial judge:

"Exception 1. It was error, in stating the executor's account, in not charging him interest on $4,671.73, the balance brought forward from 1887, for the year 1888, and in only charging him with interest for 1888 on $1,981.88."

"Exception 3. It was error not to bring forward the true balances against the executor to and for the following years, to wit, 1889, $2,300.23; 1890, $1,617.73; 1891, $1,726.63; and not to have charged interest against the executor for one year on the true balance so brought forward for each year; and to have charged interest on the following sums only for the said several years, to wit, 1889, $1,347.42; 1890, $1,436.85; 1891, $253.75. And it was error to add the balance brought forward to each year to the sums received in that year, and from the result to take all payments for that year, and charge interest only on the balance for one year."

"Exception 5. It was error, in stating the executor's account, to rest the same in July, 1891, and in not making the last rest on December 31, 1891, and run from January 1, 1891, to January 1, 1892."

Exceptions 2, 4, and 6 are omitted, as not material.

Decree: "This is an appeal from the court of probate. The questions made relate to the manner of charging interest against the defendant administrator, the plaintiff complaining of the omission or failure to charge interest for the year 1887. It was agreed in writing between plaintiff and defendants that the account should begin with a fixed amount January 1, 1888, the agreement being set forth in the record; and it is admitted by the parties that the agreement is binding. No error is shown in the mode of calculation, or in the calculation of the interest as allowed by the court of probate. The decree of that court finds that the defendant administrator is indebted to the plaintiff administrator in the sum of $405.82 at the date of the decree. This finding is approved, and the plaintiff should have judgment against the defendants for that amount. The appeal is, therefore, dismissed, the judgment of the court of probate is sustained, and the case remanded to that court."

J. Clough Wallace, for appellant. Munro & Munro, for respondents.

McIVER, C. J. This was a proceeding in the court of probate for Union county for an accounting by the defendant J. Berry Richards, as administrator of J. C. Richards, deceased, who was the qualified executor of the will of James A. Tucker, deceased, for an account of his intestate's dealings as executor with his testator's estate; to which proceeding the sureties on the administration bond of J. Berry Richards were made parties defendant. The cause was heard in the court of probate on the pleadings and an agreed statement, together with the returns of J. C. Richards as executor. The following is a copy of so much of said agreed statement as affects the questions involved in this appeal: It "is agreed in the above-stated case that the account of J. C. Richards as executor shall be stated, and the liability fixed as follows: No matter previous to January 1, 1888, shall be called in question or enter into the accounting except that he shall be charged with $4,671.73, the balance on hand on January 1, 1888, brought forward from 1887, and excepting further that the questions whether he is to be charged interest on said balance, and, if so, in what manner, and how interest is to be charged for the year 1888 and subsequent years, are to be judicially passed upon by the court, and considered as entering into the

accounting, with right of appeal reserved to plaintiff or defendants on the questions of interest. In stating the account the executor shall be charged with the balance on hand January 1, 1888, $4,671.73, with or without interest thereon, as the court shall judicially determine, and the account stated for each year." Then follows a specification of certain charges to be made, and a specification of certain credits to be allowed, and certain items to be disallowed, which need not be set out in detail, as they are not involved in this appeal; and then the agreement proceeds as follows: "The executor is not to be charged with any other items or matters than those herein specified, but this does not exclude lawful interest on the balance of $4,671.73, brought forward from 1887, and any balances thereafter; but no interest is to be charged on any sum or balance previous thereto, and the executor is not to be credited with any other matters than those herein specified. All the executor's returns to be in evidence before the court for considering questions and making up the account." The judge of probate rendered his decree, accompanied by a statement of the account of the executor up to the 6th of July, 1891, when the last payment seems to have been made, and ascertained the balance then due by the executor to be the sum of $262.70, upon which he calculated interest from that date up to the date of the decree, and renders judgment for the aggregate sum so ascertained, to wit, the sum of $405.82. From this judgment the plaintiff appealed to the circuit court upon the several exceptions set out in the "case," which appeal was heard by his honor, Judge Ernest Gary, who rendered judgment dismissing said appeal, and affirming the judgment of the court of probate. The plaintiff now appeals from the judgment of the circuit court upon the several exceptions set out in the record, which exceptions, together with the decree of Judge Ernest Gary, should be incorporated by the reporter in his report of the case.

The first exception, imputing error to the circuit judge in holding that plaintiff was concluded from claiming interest on the agreed balance of $4,671.73 from the 1st of January, 1888, by the agreement herein above set out, is based upon a misconception of the decree of the circuit judge, and must, therefore, be overruled. We do not understand that Judge Gary based his conclusions upon any such ground. He simply stated that the parties had agreed "that the account should begin with a fixed amount 1st January, 1888," and that was unquestionably a correct construction of the agreement; but he does not say, nor does he intimate, that the plaintiff was concluded by such agreement from claiming interest on the amount so agreed upon from the 1st of January, 1888. On the contrary, he proceeds to say that "no error is shown in the mode of calculation, or in the calculation of the interest as allowed by the court of probate." In other words, the circuit judge based his conclusion not upon the ground that the plaintiff was precluded from claiming interest on the whole amount of the sum agreed upon as the balance on the 1st of January, 1888, by the agreement, but upon the ground that the judge of probate had adopted the correct mode of calculating interest.

The second and third exceptions present the real question in the case, and that is whether there was error in the mode adopted of calculating interest upon the annual balances; or, to state the question more precisely, is there any inflexible rule which requires that in taking the account of an administrator or other trustee interest shall be calculated on the annual balance found on the 1st of January in any given year in the hands of the administrator, for the whole of such year, without regard to the disbursements made during such year? If there is any such inflexible rule, then it is manifest that the judge of probate erred in the mode which he adopted for calculating the interest on annual balances, and the circuit judge was likewise in error in approving the mode of calculation adopted by the judge of probate, for the judge of probate, in ascertaining the sum which was entitled to bear interest from the 1st of January, 1888, added to the balance of $4,671.73, agreed upon by the parties the amount of all receipts during that year, and from the sum so ascertained he deducted all the disbursements made during said year, and upon the balance thus ascertained he calculated interest from the 1st of January, 1888, to the 1st of January, 1889, and so on from year to year. But we do not think that there is, or ought to be, any such inflexible rule, and, on the contrary, that the mode of calculating interest in a case like the present depends largely upon the circumstances of each particular case. This view is fully supported by at least two well-considered cases—Dixon v. Hunter's Distributees, 3 Hill, 204, and Baker v. Lafitte, 4 Rich. Eq. 392,—where Johnston, Ch., in delivering the opinion of the court, collects the cases on the subject in a note to his opinion. In the case of Dixon v. Hunter, supra, the law upon the subject is thus laid down: "The general rule as laid down in all the cases in reference to the accountability of trustees is that they shall use such diligence in the preservation and improvement of the trust fund as a prudent man would do in relation to his own affairs. The corollaries to this proposition are: First, that he shall not make profit out of his trust; and, second, that he shall be charged with no loss except for neglect of duty. All rules on the accountability of trustees must be made in subordination to these principles; and whenever a case occurs in which the application of a general rule violates these principles, the case should constitute an exception to the rule, and be decided with reference to the great principles which I have just stated." The learned judge then goes on to show that

in many cases to charge an administrator with interest on whatever sum was in his hands on the 1st of January in a given year as an invariable rule would work most flagrant injustice to the administrator. In referring to the previous cases of Jones v. West and Davis v. Wright, 2 Hill, 560, it was held that the general rule laid down in those cases of charging interest on annual balances may be just in its operation when the receipts exceed the expenditures of the current year, but, where the payments exceed the receipts, the receipts should be added to the annual balance on hand, and from the aggregate the payments of that year be deducted, and on this balance only should interest be charged. So, in Baker v. Lafitte, supra, Johnston, Ch., in delivering the opinion of the court, uses the following language: "The general principles applicable to the subject are that a trustee is not to make profit out of the trust funds in his hands, and that he shall exercise that degree of diligence in relation to the trust estate which men of ordinary prudence exercise with respect to their own estates; and, if any loss results from his failure in this respect, he, and not his cestui que trust, must bear it. These principles must guide in the decision of all cases, and the application of any universal and inflexible rule is impossible, because such rule would, under some circumstances, serve rather to sacrifice than to advance the general principles which it is its intention and purpose to carry out." The learned chancellor then proceeds to suggest various instances in which it would be necessary, in order to preserve the general principles above stated, to vary the rule, and uses the following language: "Though the general rule is to deduct from the last annual balance and the sums received during the current year all sums expended during the same year, reserving the balance thus left as that upon which interest should be computed from the beginning of that year, yet there may be special circumstances attending particular cases which should defeat the rule." Again, in speaking of the annual balance, he says: "The balance, however, may be reduced (and, of course, the computation of interest varied) by the receipts and expenditures of the year following that in which it is established; as, for instance, if in that succeeding year the trustee expends more than he receives, he should be presumed to have held so much of the last annual balance as was necessary to make up the difference, in which case interest should be computed only on the residue of the balance not thus employed." These two cases establish conclusively two propositions: (1) That in an accounting by a trustee there is no inflexible rule as to the mode of computing the interest on annual balances; (2) that where, in taking such accounting, it appears that the disbursements during any given year exceed the receipts of such year, the whole amount of the balance found to be in the hands of the trustee on the 1st day of January of that year does not bear interest for 12 months, but the interest-bearing balance must be ascertained by adding to the annual balance found to be in the hands of the trustee on the 1st day of January in any given year, and, deducting from the sum thus ascertained the whole amount of the payment made during such year, the residue only will constitute the interest-bearing fund for that year. This is exactly the mode of computing the interest which was adopted by the judge of probate in this case; and as it is manifest from the account filed, with the decree of the judge of probate, that the amounts of the payments made in each of the years 1888, 1889, 1890, and 1891 exceeded the receipts for those years, there was no error. Exceptions 2 and 3 to the judgment of the circuit court must therefore be overruled.

Exception 4 imputes error to the circuit judge in sustaining the action of the judge of probate in resting the accounting of the executor on the 6th of July, 1891, instead of on the 31st of December following. The account shows that on the 1st day of January, 1891, the balance appearing to be in the hands of the executor amounted to $1,533.85, and that there was nothing received during that year by the executor, but that during the year payments were made up to the 6th of July, amounting to $1,280.10, which, on the principle above stated, being deducted from the balance in the hands of the executor on the 1st of January, 1891, left as the true interest-bearing fund the sum of $253.75, upon which interest was computed from the 1st of January, 1891, up to the 6th of July, 1891, when, as it seems, the last payment was made, and then the final balance was struck, upon which interest was computed from that day up to the date of the decree of the judge of probate. In this we see no error, and therefore the fourth exception must be overruled.

The fifth exception is disposed of by what has already been said as to the proper mode of computing the interest. The judgment of this court is that the judgment of the circuit court be affirmed.

FOSTER et al. v. CRAWFORD. SAME v. HEATH et al. SAME v. CUNNINGHAM. SAME v. POOVEY. SAME v. LANCASTER COTTON MILLS. SAME v. SPRINGS (two cases). SAME v. PORTER. SAME v. McMANUS. SAME v. JONES. SAME v. CULP.

(Supreme Court of South Carolina. April 30, 1900.)

SUMMONS—SERVICE ON INFANTS—ACKNOWLEDGMENT BY MOTHER—RECORD—AMENDING OFFICER'S RETURN.

1. In an action settling the estate of a decedent, the surviving wife,—administratrix,—as plaintiff, named her infant children as defendants. In making service, the officer's indorsement on the writ stated that he had served defendants by delivering process to them person-

ally, and leaving copies at their residence; and the mother, with whom they resided, acknowledged service on her of a copy of the summons for the infants. The indorsement of service on a summons in a supplemental complaint stated personal service on defendants, with an acknowledgment of service by the mother for the infants. A guardian ad litem was appointed at the petition of the mother, who appeared and answered for the infants. No fraud was claimed. *Held*, that the infant defendants had been duly served.

2. Where an officer's return on the summons is defective as to the time and place of acceptance, the return can be amended so as to state the facts.

Appeal from common pleas circuit court of Lancaster county; O. W. Buchanan, Judge.

Actions by Gertrude Foster and others against R. L. Crawford, Heath, Springs & Co., W. J. Cunningham, G. W. Poovey, the Lancaster Cotton Mills, Leroy Springs, Grace W. Springs, W. S. Lee Porter, R. C. McManus, Ira B. Jones, and Abram T. Culp. The cases were heard together. Judgment for defendants, and plaintiffs appeal in each case. Affirmed.

The order of Judge Buchanan, and his reasons for passing the same, are substantially as follows:

"There is no dispute as to the facts in their case, the only question in the case submitted to the court being a question of law. It is conceded that, if the decree for the sale of the lands of the Foster estate, made in the case of Charlotte R. Foster v. Eloise Foster et al., was not void, then the defendant has legal title to the land here in question. But it is claimed by plaintiffs that said decree was and is void as to plaintiffs in this action; the claim being that said plaintiffs here were never properly served with process in said former action, in which they were named as defendants. The question is whether the record in said action of C. R. Foster v. Eloise Foster et al. shows that the infant defendants there, who are plaintiffs in this action, were served with the summons, so as to give the court jurisdiction of the persons and property of said infant defendants in said former action. The claim of the plaintiffs in this action is that, in order to obtain jurisdiction over them as defendants in said former action, they being infants under fourteen years of age, it must appear from the record that the officer serving the summons therein delivered the same to said infant defendants therein, and also to C. R. Foster, the mother of said infant defendants, and the person with whom they resided; she being also the plaintiff in said action. The plaintiffs claim that no such service by formal delivery to the said C. R. Foster for the said infants was made; that her admission, acknowledgment, and acceptance of service as the mother of said infants, and the person with whom they resided, which is indorsed upon the summons and signed by her, and which is also contained in her petition for appointment of guardian ad litem, is not sufficient, and does not show service. In the first place, the court holds that the mother and only surviving parent of these infants being the plaintiff in the cause, and cognizant of the issuance of her own summons, it was not necessary that there should be any formal service whatever upon her; the object of service being to give notice, and she having notice already, and acting upon that notice in procuring the appointment of a guardian ad litem for the infants. There being no general or testamentary guardian, and the plaintiff being the mother, and the person with whom the infant defendants resided, it would be a vain and useless act to make a formal delivery to her of her own summons by the hands of an officer or other person to make such formal service. In point of fact, however, the record shows that the summons was served by delivery to the infant defendants, as appears by the proof of service indorsed on the summons, and also shows that it was served on C. R. Foster, the mother of said infants, and the person with whom they resided, as appears by the written acknowledgment signed by her, indorsed upon the summons. Besides, in her petition for the appointment of guardian ad litem for these same infants, there appears a clear acknowledgment and admission of service. The record, therefore, in the case of C. R. Foster v. Eloise Foster et al., shows affirmatively the infant plaintiffs here, all of whom were defendants there, were served with the process in that action by the delivering, not merely to the infants themselves, but also to their mother, C. R. Foster, with whom these infants resided. It shows that the said C. R. Foster thereupon applied for and procured the appointment of a guardian ad litem for said infants, who appeared and answered for and in the name of said infants. Thereafter a decree for the sale of said lands was made, the sale had, under which defendant acquired title to the land here in question, and such sale and conveyance confirmed by the court. It must be concluded that the title to the land in question passed by such sale, conveyance, and confirmation of sale."

Thereupon the presiding judge, O. W. Buchanan, signed the following order or decree in the case against R. L. Crawford:

"A jury trial of the legal issues as to the title to the land here in question having been duly waived by the parties plaintiff and defendant, and the said legal issue as to the title of the land here in question having been submitted for determination by the court, the equitable issues raised by the allegations of the answer and the counterclaim for betterments therein set up being reserved, after hearing the evidence I find that the legal title to the land here in question is in the defendant; there being no jurisdictional defect in the case of Charlotte R. Foster v. Eloise Foster et al., the facts are not disputed, and the reasons for the conclusion that there is no jurisdictional defect in the record of the judgment in the case of Char-

lotte R. Foster v. Eloise Foster et al. have been orally stated, and taken down by the stenographer. Hereupon it is ordered and adjudged that the complaint be dismissed, with costs. O. W. Buchanan, Judge Presiding. October 25, 1899."

The above is the order in the case against R. L. Crawford. In each of the other cases by same plaintiffs against the defendants severally named in the several cases stated in the title it was conceded by plaintiffs in open court that said decision of the question submitted to and decided by the court by the decree in the above-stated case against R. L. Crawford was conclusive of the issue submitted in the said other cases; the facts in said other cases upon this particular issue being admitted by plaintiffs to be substantially the same as in the Crawford case; the defendants in said other cases holding under deeds executed by the clerk of the court in pursuance of sales made as in the Crawford case; all other issues in said other cases being reserved. Accordingly the following decree in each of the other cases stated in the title was made:

"The issue as to the legal title in this action being the same as in the action by the same plaintiffs against R. L. Crawford, defendant, in which a decree was made at this term dismissing the complaint, and it being conceded by plaintiffs that the decision in the case just mentioned is conclusive of the question of title raised by the pleadings in this case, and said issue as to legal title in this case having been herein submitted by agreement for determination by the court, and it being conceded that the decision in this case depends upon the same facts as in the case against R. L. Crawford above mentioned: Hereupon it is ordered and adjudged, for the reasons stated in the decree in the said case against R. L. Crawford, above mentioned, that the complaint herein be dismissed, with costs. O. W. Buchanan, Judge Presiding."

J. T. Hay and J. Harry Foster, for appellants. Chas. D. Jones, R. E. & R. B. Allison, Ernest Moore, and T. Y. Williams, for respondents.

WATTS, Acting Associate Justice. These cases were heard together on appeal from a decree of his honor, Judge Buchanan. Judge Buchanan heard the case of plaintiffs (appellants) against R. L. Crawford, defendant (respondent), by consent, without a jury, at Lancaster, at October term of circuit court, 1899, and it was agreed, as the facts were the same, substantially, in the other cases on the issue involved, that whatever decree was entered in this case should be entered in each of the other cases stated in the title. When the cause was heard by Judge Buchanan there was no dispute as to the facts of the case, and the determination of the case turned solely upon the point as to whether or not these plaintiffs (appellants) had been properly served, and made parties to a suit instituted by their mother, Charlotte R. Foster, as administratrix of the personal estate of J. H. Foster, deceased, plaintiff, against Eloise Foster et al., defendants, to pay debts, partition lands, etc. It was conceded that these plaintiffs (appellants) were named in said suit as parties defendant, but it was denied that such service had been made as would make them parties to said suit, and bind them by an order or decree passed therein. His honor, Judge Buchanan, held that these plaintiffs (appellants) had been made parties to that suit, and were bound by orders and decrees therein made, and found that the legal title to the lands in question was in defendants. He found that the appellants here, who were minors and defendants in that case, were personally served by delivery of process in that case; and their mother, and the person with whom they reside, admitted in writing that she had been served with summons in that case, and this acknowledgment was indorsed on the summons therein. He further held and decided that as the mother, with whom the minors lived, had knowledge of the suit (it having been instituted by her, and she being the plaintiff therein), it was unnecessary for her to be served, in order to properly bring the infants before the court, and that service upon them was sufficient, inasmuch as she petitioned the court, and had a guardian ad litem appointed to represent them. The order of Judge Buchanan, and his reasons given for passing the same, should be incorporated in the report of this case. From this decree of Judge Buchanan the plaintiffs appeal, alleging error: "First. That his honor erred in holding, in the case where the mother and sole parent is plaintiff in action against her minor children, defendants, it is not necessary that the summons in action should be served upon the parent; there being no general or testamentary guardian of said defendants. Second. That his honor erred in holding that it appeared upon the record that the summons in the action of Foster v. Foster et al. was served upon the mother and only surviving parent of minor defendants."

From my view of the case, it is not necessary to consider the first ground of appeal. The record in the case of Charlotte R. Foster, as administratrix, etc., plaintiff, against Eloise Foster et al., shows, by sworn return of W. McD. Brown, made on 21st of January, 1889, that he personally served the defendants in that suit, "by delivering to them personally, and leaving with them, copies of the same, at their residence, at Lancaster, S. C.," on the 19th of January, 1889; and he proceeds to name the parties served, and among those named as so served are the appellants here. On the back of said summons is the indorsement: "As the only surviving parent and protector of these infant children herein named, I do hereby acknowledge service of a copy

of this summons on me for them, who were also personally served on the 19th day of January, 1889. They all reside with me. C. R. Foster." Later on a summons was issued to a supplemental complaint in said case, and upon the back of which we find a return of W. M. Crawford, under oath, that he served the defendants in that case "personally, and leaving with each of them a copy of the same at their home, at Lancaster, S. C., on the 28th day of May, 1891"; and then he goes on to name the parties served,—the parties named as so served being the appellants herein. On the back of said summons to said supplemental complaint in said record is indorsed: "On the 28th day of May, 1891, as well as before and since that date, my children, the defendants, were all living with me, as their mother; and, as their mother and only protector, I acknowledge service of this summons on me, as the mother of all who were under the age of fourteen years of age as of that date, to wit, 28th day of May, 1891. C. R. Foster." After that, Mrs. Foster petitioned, on July 10, 1891, for C. T. Conners, Esq., to be appointed guardian ad litem to represent the infant defendants; and he was appointed, and made answer on July 13, 1891, by T. S. Carter, also, as their attorney. There is no suggestion here that any fraud has been practiced, any unfair advantage taken, or that the property sold under proceedings in the case of Foster, administratrix, etc., v. Foster, brought less than its full value, at which sale it appears that Mrs. Foster, the mother of appellants, purchased the property; but the sole contention is that Mrs. Foster was not served, and return made, in strict accord with the terms of the statute regulating how infant defendants are to be served and made parties to suits. The acknowledgment of Mrs. Foster shows that she was served with copies of summons on the same day that her children were served by the officer with summons. The acknowledgment shows that the infant defendants lived with her. The officer's affidavit shows that their residence was Lancaster, S. C. Suppose she did not give a written acceptance of service the day she was served with the summons; what was there more wrong in her acknowledging later that she had been served on that day, than there is in a person serving a summons on one day, and later on, and on a different day, making an affidavit that on a particular day named he served the summons? Mrs. Foster could not deny service on the day set out in her acknowledgment, if she attempted to do so. Then, again, if it were necessary, the court could allow the return to be amended so as to comply with the very strict construction asked for in this case, as to what acceptance should contain, as to time, place, etc.; and it would most certainly do so, rather than upset sales, and deprive purchasers of land paid for, when it is not even suggested that there was any fraud, wrongdoing, or unfairness in the sale had under the proceedings in this case. But we think the record shows affirmatively that the infants and their mother were both served with summons, and that the judgment of the circuit court should be, and it is, affirmed. It is also ordered that the clerk of this court do, at the proper time, send down the remittitur in each of the cases stated in the title, in accordance with the judgment herein announced.

JONES, J., not sitting.

HEROLD et al. v. BARLOW.

(Supreme Court of Appeals of West Virginia. April 7, 1900.)

FRAUDULENT CONVEYANCE—PREFERENCE—CONSIDERATION.

1. A conveyance, in consideration of an antecedent debt, from an insolvent to his creditor, without fraudulent intent in the creditor, though the creditor know of his debtor's insolvency, does not, alone, stamp the conveyance as one fraudulent in fact and utterly void; but it stands for the benefit of all creditors, including the one thus preferred.

2. A conveyance by an insolvent debtor to a bona fide grantee, for valuable consideration, not a debt, is valid, and not subject to be held a preference under Code 1891, c. 74, § 2; and if the consideration is part cash, and part an antecedent debt due from the insolvent to the purchaser, the conveyance will be held as a preference inuring to the benefit of all creditors of the insolvent, beyond the cash payment; but the purchaser will be preferred, to the extent of such cash payment, over general creditors.

3. In a conveyance by an insolvent debtor, operating, under Code 1891, c. 74, § 2, as a preference, and standing for the benefit of all creditors, if the purchaser discharge prior liens on the property, he will be substituted to such liens, and accorded their priority.

4. In a conveyance by an insolvent debtor, operating, under Code 1891, c. 74, § 2, as a preference, and standing for the benefit of all creditors, if the purchaser pays off debts of the insolvent, at his request, as part of the consideration, though such debts are not liens, they will be treated as if cash paid by the purchaser, and he will have preference therefor over other general creditors.

5. A suit to overthrow a conveyance made prior to February 20, 1895, as a preference prohibited by Code 1891, c. 74, § 2, will be barred by laches, unless excused. In this instance, the conveyance being on record, a delay of four years and four months was held to bar such suit. If such a conveyance since that date, suit must be brought within one year from its date, and, if recorded within eight months after its date, the suit must be within four months after such recordation, under chapter 4, Acts 1895.

(Syllabus by the Court.)

Appeal from circuit court, Pocahontas county; J. M. McWhorter, Judge.

Bill by Andrew Herold and others against Amos Barlow and others. Decree for plaintiffs, and defendant Amos Barlow appeals. Reversed.

Brown, Jackson & Knight, for appellant. H. S. Rucker, for appellees.

BRANNON, J. On the 19th of September, 1891, and for a considerable time prior thereto, Horace M. Lockridge was engaged in the business of a real-estate agent, and buying and selling lots, at a town called "Buena Vista," in Virginia. Buena Vista is what is known as a "boom town," where lots at one time sold at fabulous prices, and then collapsed and fell to nominal prices, or became wholly unsalable. Lockridge had been raised in Pocahontas county, in this state, and went from there to Buena Vista, where he resided, and engaged in the business just stated. He dealt largely in lots at that place; bought and sold a great many; carrying on transactions quite large; handling a great deal of property. In addition to the real-estate business, he carried on a retail store. He became largely indebted to wholesale merchants for goods purchased for that store, and for purchase money on lots in Buena Vista. He owed bank notes in West Virginia. He owed divers people in the county of Pocahontas. He was very largely indebted on the 19th of September, 1891. Prior to that date judgments had been rendered against him in Pocahontas, which he could not pay. One of these judgment creditors (Sharp), if not others, was pressing him for payment; threatening him with chancery proceedings in Pocahontas to sell a valuable tract of land owned by him in that county. He owed also in that county a good many other debts, not yet carried into judgment. He owned two other parcels of real estate of smaller value, in Pocahontas; having liens resting thereon for purchase money. He owned the store in Buena Vista, worth about $3,000. He owned a very considerable number of lots in Buena Vista, bought at high prices. Lots in that boom town had been, up to 1891, commanding high prices; but at some time prior to September 19, 1891, the boom or inflated prices of those lots suffered serious decline, and finally collapsed. Just when this decline began, the evidence does not distinctly say; but it is fair to say that it began prior to September 19, 1891, and that on that date lots had already suffered very serious decline, and were then of slow sale at prices greatly reduced from their cost,—practically unsalable at that date. Lockridge states that he had in his various transactions in real estate prior thereto made a great deal of money, but that he had reinvested it in numerous lots, and that the collapse in prices caught him with them on hand, and thus ruined him, and the lots were sold from him for unpaid purchase money. He then owed a large indebtedness to parties in West Virginia, Virginia, and considerable in Baltimore. The evidence makes it clear that on the 19th of September, 1891, he was greatly distressed for money; judgments against him threatening his land in Pocahontas county; his Buena Vista lots under liens for unpaid purchase money, which he could not pay; and thus the lots were in certain and imminent danger of being sold under trust deeds made to secure the purchase money. He was already sued in Virginia for debts, and was in imminent danger of further suits there. His creditors were clamorous and uneasy. He was surely insolvent on the 19th of September, 1891. It is useless to detail evidence under this head. It would be a mere detail of mere evidence, illustrating no legal principle, and I will not detail the volume of circumstances touching his insolvency. He states under oath that he was then insolvent, but it does not need his admission to show such to be the fact. The great number and volume of his debts, and the transparent fact that his property would not pay them, as so much was unsalable and unavailable, and soon came to nothing, as he states, coupled with the fact that he soon transferred his store to his wife, and that his lots were sold away from him for purchase money,—these facts and many other circumstances tell too plainly of his financial collapse. His insolvency is not a probability, but a strong probability,—a certainty. When he sold his farm in Pocahontas, the debts appeared large,—those in West Virginia,—and the Virginia and Baltimore debts were large; and his Virginia lots were utterly inadequate to pay them, and those debts remain yet unpaid. All these circumstances existing on the 19th of September, 1891, and revealed by subsequent events given in evidence, show beyond question that Lockridge was insolvent, in a legal sense, on that date; that is, all his property was not then adequate to pay all his debts. He was not only insolvent in the sense of the bankrupt law, on account of his failure and utter inability to meet his obligations in due course of maturity, but he was insolvent within the meaning of our statute against preferences; that is, all his property would not pay all his debts. Weigand v. Supply Co., 44 W. Va. 133, 28 S. E. 803. By deed dated September 19, 1891, Lockridge conveyed to Amos Barlow and Henry Barlow the said valuable tract of land in Pocahontas county for the consideration of $12,000, as stated in the deed, but which was in fact $11,000, as all admit. This consideration was paid partly in antecedent debts due from Lockridge to the Barlows. It was partly paid by the transfer to Lockridge's wife of $3,500 of stock of a corporation doing a real-estate business at Buena Vista, called the Pocahontas & Greenbrier Investment Company, of which Amos Barlow and his wife owned $2,500, and C. R. Moore, a son-in-law of Amos Barlow, owned $1,000. As further payment, the Barlows discharged various liens recorded and binding the said land, and they also paid a very considerable amount of other debts against Lockridge, at his request, and they paid him cash $201, and some taxes on the land; and for the balance, of $1,129.29, Amos Barlow gave to the wife of Lockridge a check on a bank. The said deed from Lockridge to the Barlows named Lockridge and his wife and his mother (the last

owning a dower right in the land) as grantors. It was acknowledged and executed by Lockridge and his mother on its date, and recorded September 21, 1891. That deed was not executed by the wife of Lockridge, but this was cured by another deed, dated September 22, 1891, executed and acknowledged in Virginia; she being there, and not in Pocahontas county, where the former deed was executed. On the 6th of January, 1896, Andrew Herold attacked this conveyance by a bill in equity in the circuit court of Pocahontas county, claiming that the said conveyance from Lockridge to the Barlows was made with the purpose and intent to hinder, delay, and defraud the creditors of Lockridge, and, if not made with such purpose and intent in the mind, it was made when Lockridge was insolvent, and that said conveyance should, under that provision of Code 1891, c. 74, § 2, forbidding a preference of creditors, be held to be for the common benefit of all the creditors of Lockridge. Herold's bill states that he was Lockridge's indorser on certain notes, and that Mathews, as their holder, had obtained judgments on the same for upward of $900, and that on another note, on which Herold was Lockridge's indorser, a decree had been obtained by Dennis for $1,461.50, which debts antedated the said deed. In this suit a decree was entered holding that, when the said conveyance from Lockridge to the Barlows was made, Lockridge was an insolvent debtor, and that the said deed was an attempt to give preferences to certain creditors to the exclusion and prejudice of others, and that the said conveyance was void, and that the said conveyance should be held as made for the benefit of all the creditors of Lockridge. From this decree Amos Barlow, to whom Henry Barlow had conveyed his interest in said land, took an appeal.

1. Is the conveyance from Lockridge to the Barlows fraudulent in fact? This is an important question, because, if fraudulent in fact, it would be utterly void, and the Barlows would save nothing from the wreck. At the threshold of this question, we must remember a very material fact, of controlling effect in law. The Barlows had honest debts against Lockridge. By the common law it is perfectly lawful in a creditor to obtain, and in a debtor to give a creditor, preference over other creditors, if the intent is merely to prefer a creditor, and not to hinder or defraud other creditors. Such preference may injure, but it does not defraud, other creditors. It makes no difference how zealous, how urgent, that creditor may be to save himself by securing such preference. It makes no difference that such preference even absorbs or exhausts the property of the debtor, leaving nothing for other creditors. It makes no difference about the secret motives of the creditor, as the law takes no cognizance of such motives, and cannot assign a bad motive to an act not wrong either in itself or in its consequences, because, in law, a motive having a lawful end in view, and resulting in proper action, not condemned by law, cannot be called a bad motive. Here self-preservation is regarded as the law of nature. It makes no difference that the creditor knows that the party is insolvent when he gets his preference. It makes no difference that the creditor apprehends attachment or other legal proceedings by other creditors, and is therefore moved to diligence and astuteness in getting ahead of other creditors, and obtaining a preference before other creditors attach, and thus defeat their attachment. He defeats other creditors lawfully to save his own honest debt. He simply uses diligence to save himself, and the law rewards that diligence by giving him its fruits. Harden v. Wagner, 22 W. Va. 356; Skipwith's Ex'r v. Cunningham, 8 Leigh, 271; Bump, Fraud. Conv. §§ 165, 167, 168, 170, 171, 183; Wait, Fraud. Conv. § 390. For a collection of cases to sustain these principles, I would cite that very valuable late work, 1 Am. & Eng. Dec. Eq. 148, 149. It is immaterial how such lawful preference is accomplished,—whether by absolute conveyance of the fee, or by mere mortgage or judgment. Under these principles of law, we cannot convict the Barlows of intentional fraud from the fact, alone, that they by that deed obtained preference for their debts over other creditors. I say "intentional fraud"; for though, under the Code provision forbidding preferences by an insolvent, a deed may be held to be a conveyance for the benefit of all creditors, because it is a preference forbidden, yet this is not because it is fraudulent in fact,—intentionally fraudulent as against other creditors,—but only fraudulent in law, or, rather, not fraudulent at all, but simply a conveyance operating as a trust for the benefit of all creditors. The mere fact that it is a preference does not make it corrupt. As the law before the statute allowed such preference without attributing fraud to it, such is still the nature of the act, so far as fraud in fact is concerned. The statute does not stamp it as fraudulent in fact. But for this consideration, there are facts and circumstances in this case which would stamp the transaction with fraud. For instance, a letter from Amos Barlow to Lockridge, August 24, 1891, saying: "Bro. Henry came here to-day, and asked me to write to you privately, and wanted me to go in with him and sell out to you all that we had at Buena Vista,—include the bond vs. you and I. B. M., lift the liens vs. your land, and take a deed of trust on said farm; he or us to raise you as much money as possible to help you out there. Now, if there is any way to make things better, so as not to hurt either you or us, let us know, as he says he will raise the money to suit you as soon as possible, but would have to have time to collect and borrow. He says he is tormented by somebody near home, and is going to close out at Buena Vista some way; he is nearly wore

out by the harangue. I agreed to join him in anything he and you do. So, if there is any way you can buy us out and be safe yourself, let us know at once. Private." This letter is appealed to as strong evidence of fraud, but, in the light of the law principles above stated, it is not.

Amos Barlow and wife and a son-in-law, Moore, owned $3,500 stock in the Pocahontas & Greenbrier Investment Company, operating at Buena Vista, of which company Lockridge was president and a large stockholder. The Barlows clearly felt unsafe about its solvency (I mean, the worth of the stock), and they were anxious to dispose of it, so as to save it. Henry Barlow had invested, through Lockridge, in a lot at Buena Vista, which he later sold to Lockridge & Adams, partners, for which the purchasers were to assume the purchase-money debt, of $600, due from Barlow, and thereafter pay him $1,160. Henry Barlow felt anxious about this matter. The Barlows, as appears from the letter above, wanted to sell Lockridge this stock, and secure its price by a deed of trust on the farm in Pocahontas, and also secure the debt due to Henry Barlow on the Buena Vista lot, in a trust on said farm, and also secure in like manner a bond of $1,000 due Henry Barlow from Lockridge. To accomplish these things, they were willing to advance some money for Lockridge's relief. They had the right to do all this. They could sell the stock to Lockridge, and secure its price on the farm. The fact that they wanted it kept private does not brand fraud upon the transaction, as they had the right to act in privacy in a lawful business transaction. And it is explained in the evidence that such privacy was desirable on the part of one of the Barlows, because his wife was very much dissatisfied about his investments at Buena Vista through Lockridge. This letter unquestionably shows that the Barlows knew of Lockridge's financial embarrassment, but the law says that knowledge of even insolvency of a debtor will not vitiate a preference. Evidence shows that one of the Barlows asked a lawyer whether judgments in the federal court against Lockridge would be liens on the Pocahontas land. He also apprehended that there might be an attachment for Virginia debts. But authorities cited above will show that a creditor may take a preference to save himself, even though he is sure that the next day an attachment will be levied. If he does no hurt to other creditors, beyond taking a preference, his preference stands good and unstained with fraud. The consideration stated in the deed is $12,000, whereas the actual consideration was $11,000; but it is fairly shown that this circumstance was accidental, not intentional. The price demanded by Lockridge was $12,000, and the attorney who drew the deed, when told that the parties had consummated their deal, assuming that that was the consideration, so stated it in the deed. The mistake was observed by one of the Barlows, and he wanted it changed, but Lockridge persuaded him that it would make no difference; remarking that, if anything should come against the land, it would be better to have the larger consideration stated. This is a circumstance against Barlow, but only a circumstance, and is not conclusive of fraudulent intent, as Barlow showed a desire to have the true amount stated; showing that he had no bad intent. It is urged that great haste in recording the deed was shown. It was executed Saturday evening, late, and had to be taken into the country four miles, to be executed by Lockridge's mother, and was to be returned and recorded that night, but came too late. The deed was to be delivered to Baxter, a young man, nephew of the Barlows, and a clerk in the store of one of them; he having made up the complicated account of items entering into the consideration. He was to receive this deed when it should be returned, for the Barlows, and put it on record. The lawyer who drew the deed and was to pass on its sufficiency, and who was the notary who went to the country to take the acknowledgment of Mrs. Lockridge, handed it to Baxter on Sunday morning, with the cautionary remark that the deed should be recorded at an early date, as it would be necessary to do so if Baxter knew the parties to the deed as well as other people did; referring, as Baxter thought, to Lockridge. Baxter says this moved him to record the deed promptly, and he procured the clerk to admit it to record between 3 and 4 o'clock Monday morning. It seems that Baxter was up very early, mailing some letters, as the mail left very early. Now, all this was in the absence of the Barlows. One of them had merely said to Baxter, if the deed was returned in time Saturday night, to see if it had been acknowledged; giving him no directions as to recording it. But what if the Barlows had themselves directed this prompt recordation? Under the law above stated, they had the right to do so. May not a purchaser promptly record his deed? As we have above seen, a man may obtain a preference, if he fears an attachment by another creditor to be imminent; and surely he can record his deed at once, to save himself from such attachment. If the deed is valid, its hasty recordation cannot invalidate it.

There is a circumstance which tends pretty strongly against the Barlows under this head of actual fraud. It is the only circumstance that has any appreciable weight with me towards branding the transaction with actual fraud on the part of the Barlows. While the law allows a man to purchase, bona fide, property from an insolvent, or to take any steps necessary to save himself by preference, he must do so without intent further to harm others than his mere purchase or preference. "A transfer may be fraudulent, although it is made in consideration of an honest debt, for

an honest claim may be used as a cover to a covinous transaction. The distinction is between a transfer made solely by way of preference of one creditor over others, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, or to delay creditors in the collection of their debts." Bump, Fraud. Conv. § 172. A balance of the consideration of the conveyance going to Lockridge after the abatement of the stock in said company, liens and debts paid by Barlows, and payment of debts due them from Lockridge, and the sum of $201 paid him in cash, which balance was $1,129.25, was paid by the check of one of the Barlows to Lockridge's wife, and $1,700 of said corporate stock was some time afterwards transferred to his wife; and a lot in Buena Vista, which had been sold in June, 1891, by Henry Barlow to Adams & Lockridge was also conveyed October 8, 1891, to the wife of Lockridge. It seems that the transfer of the stock to Mrs. Lockridge was not agreed upon at the date of the transfer of the farm by Lockridge to the Barlows, but was an afterthought of Lockridge; and the Buena Vista lot had been sold by Henry Barlow to Adams & Lockridge long before, and the debt therefor due Henry Barlow was a part of the consideration for the farm, and the lot was, by after request of Lockridge, conveyed to his wife. These things do shade the transaction with the look of bad intent on the part of the Barlows, because they tend to show that they not only wished to convert their stock and debts against Lockridge into this farm, and thus save themselves, which they lawfully might do, but were aiding Lockridge in screening the balance of the purchase money and some of the stock and the Buena Vista lot from others creditors, by conveying them to Lockridge's wife. But are these circumstances sufficient to overthrow the deed? They verge upon it, but the law says that fraud in fact must be clearly and fully proved. If these circumstances stood alone, they might be sufficient to invalidate the transaction, but they lose force when connected with the fact that the Barlows were doing only a lawful act in securing themselves. These circumstances are not sufficient to overthrow the transaction. I have no doubt that Lockridge intended to sell that farm, prefer his Pocahontas friends, get some money from it, and screen it from his creditors, as well as any other property he could likewise save to his wife; but his intent, though fraudulent, will not destroy the Barlows, unless we can fix upon them, by such full proof as the law requires to establish fraud, notice of Lockridge's fraudulent intent. And just here there occurs to me a proposition of law which goes far to sustain this action of Lockridge in having the check and transfers made to his wife, and considerably relieves this apparent badge of fraud. In the case of Glascock v. Brandon, 35 W. Va. 84, 12 S. E. 1102, it is held that, if a married woman relinquishes her contingent dower under a promise at or about the time by her husband that other property shall be settled on her in compensation for such relinquishment, the settlement will be good against creditors having no specific lien, up to the value of the dower right relinquished. It may be that in this case the property transferred to the wife is in excess of her contingent dower. That would be a matter in a suit between the creditors and Mrs. Lockridge. The transfer would be good to the extent of her dower, and for the excess it would stand for creditors. I use this view in this case to show that, in a legal point of view, it detracts from the force of such transfer to the wife as evidence to sustain the charge of fraud in fact. It goes far to relieve the tinge upon the transaction which at first blush is caused by the transfer of the stock and Buena Vista lot and check to Mrs. Lockridge. Lockridge swears that the check for the balance of purchase money was made to his wife in consideration of her expectant dower, and I do not see that that would be excessive as a compensation for her expectant, contingent dower. As for the transfer of the stock and lot to Mrs. Lockridge, I think that was not arranged at the date of the deed, but a subsequent arrangement; and, if so, it could not retroact, and make the deed, if valid at its date, invalid. So I have concluded that the deed from Lockridge to the Barlows cannot be overthrown for fraud in fact. I will not say that this conclusion is absolutely clear to my mind, but it is more satisfactory than would be an opposite decision. I have detailed circumstances too much. Though practiced, it is wrong to incumber opinions with details of evidence or circumstances. A judge, however, often does so, feeling that counsel expect it. It is, in my opinion, very objectionable practice. An opinion full of mere facts is no precedent in other cases. An opinion should merely state results or conclusions from the evidence, and state the legal propositions; for it is the purpose of opinions to state law, that it may be used in future cases, and not detail mere evidence.

2. The conveyance from Lockridge to the Barlows, though not fraudulent in fact, is partially a preference by an insolvent debtor, and in law would inure to the benefit of all creditors, under Code 1891, c. 74, § 2, because, when made, Lockridge was clearly insolvent. The Barlows were fully apprised of Lockridge's financial embarrassment, if not of his total insolvency; but that is immaterial, as his mere insolvency brings the deed under said Code provision, whether the Barlows knew of it or not. Wolf v. McGugin, 37 W. Va. 552, 16 S. E. 797. I think, therefore, that so far as regards all the debts due from Lockridge to the Barlows, including the debt on the lot in Buena Vista, the said deed was simply a preference. I think that as to the cash paid, and the transfer of the stock in the Pocahontas & Greenbrier Investment

Company, it is not a preference, under the statute, but is to be regarded a sale, and that, if the court were in the situation to declare the deed a preference, the Barlows would be given preference out of the proceeds of a sale of the farm, if one could be ordered. And why? Because the said statute does not at all prohibit a sale by even an insolvent, but only a preference. It innovates upon the common law only so far as to forbid an insolvent from preferring particular creditors. If a man purchase of an insolvent a farm at $1,000 cash, bona fide, the deed is good. If he pays $900 of it in cash, and $100 in an antecedent debt due from grantor to grantee, reason and justice require that so far as the transaction is a cash purchase, valid under the law, it should stand good, and, so far as it is a purchase with an antecedent debt, it is a preference under the statute, and, if the farm be sold by the court, the purchaser should get his $900 back first, and the residue should go to all creditors, including the purchaser, for his $100. This carries out the statute,—goes as far as it intended to go,—and adjusts the equities between the parties conformably to the intent of that statute. So we have held in Carr v. Summerfield, 34 S. E. 804. Those debts which were liens on the land at the date of said deed would go to the benefit of the Barlows, by subrogation. They stood good against other creditors of Lockridge, and the Barlows, having paid them off, would occupy the shoes of the owners of such liens. That would do no wrong to other creditors, as they were already subject to such liens. I think, too, that as the Barlows paid to Hevner and others, who were general creditors of Lockridge, valid debts, the Barlows would get the benefit of them over other creditors even. Why? Because those creditors could lawfully receive cash in payment of their debts, and also because the Barlows furnished cash to pay them; and this is just the same as it would be if paid to Lockridge.

8. Under the principles above stated, Herold and other creditors of Lockridge would be entitled to part of the relief they seek, by having the court sell the farm conveyed by Lockridge to Barlows, but for the bar of laches. Section 2, c. 74, as found in the edition of the Code of 1891, gives no limitation to a suit to set aside a preference. I know of no statute that does, operative at the date of the conveyance in question. This statute I consider eminently just, because it gives all just creditors, except lienors, an equal share, ratably, in the property of an insolvent debtor. Still, it is an innovation upon the antecedent law in the Virginias, and generally in this country, which allowed preference even by an insolvent. This statute is somewhat dangerous for business men. It will overturn many instances of transfer made in good faith in the everyday transaction of honest business, where the transferee had no idea of insolvency. It overturns honest transactions. These considerations call loudly upon a court to say that those who would assail such a conveyance must not sleep upon their rights, but act promptly. Where actual fraud exists, the grantee may justly suffer the penalty of making amends after a long time; and even there I think there should be a statute of reasonable limitations, though the case be one of fraud, as things should sometimes have an end. But in the case of a deed not fraudulent, but void simply because it is a preference of an honest debt, where the common law gave entire freedom of preference, I think parties should act with great promptness. They ought not to be allowed to delay in their assault upon a transaction free from moral taint. They ought not to be allowed to revolutionize things honestly done, and so bring disaster on others, after a long time, when the parties had gone on to make improvements and taken other steps on the faith of the validity of the transaction. There being no statute of limitations, it is simply a question of laches, in equity. What time shall be given? That depends on the circumstances of each case. The deed was put on record at once,—open to the world. Presumably, the parties interested lived in Pocahontas, and had knowledge or means of knowledge of the transaction. It will not do for the plaintiffs to say that the facts were peculiarly within the knowledge of the Barlows and Lockridge, because the plaintiffs are called on to glean information touching their rights by diligent inquiry and the adoption of means proper to that purpose, as all business people are. They could sue and call upon their adversaries for a discovery under oath. As said in Lafferty v. Lafferty, 42 W. Va. 792, 26 S. E. 265: "And the law is, where one has means of knowledge of a fraud, or sufficient notice to put him on inquiry, it is enough to count time against him. Kerr, Fraud. & M. 310. Where he has means of knowing or ascertaining, where he is put on inquiry, where ordinary prudence for his interests suggests that he inquire, he must do so, or else time runs. Opinion in Thompson v. Iron Co., 41 W. Va. 574, 23 S. E. 795, and cases there cited. * * * The United States supreme court said: 'The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, hard to disprove; and hence the tendency of the courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts. Especially is this the case where the party complaining is a resident of the neighborhood in which the fraud is alleged to have taken place.' Foster v. Railroad Co., 146 U. S. 99, 13 Sup. Ct. 32, 36 L. Ed. 903. In the case of Broderick's Will, 21 Wall. 519, 22 L. Ed. 605, the same court said: 'They do not pretend that

the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard. * * * Parties cannot thus, by their seclusion from means of information, claim exemption from the laws that control human affairs, and set up a right to open all transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with a knowledge of their status and condition, and of the vicissitudes to which they are subject.'" If such is the rule in cases of fraud in contracts, is there not more reason in calling for prompt action to overthrow a deed deemed honest in law, and only objectionable because of its preferential character? On this subject of laches, see Pusey v. Gardner, 21 W. Va. 470; Trader v. Jarvis, 23 W. Va. 100; Newcomb v. Brooks, 16 W. Va. 32 (Syl., point 10). In Williams v. Maxwell, 45 W. Va. 297, 31 S. E. 909,—a case to set aside a sale for fraud,—Judge McWhorter discusses the subject of laches quite elaborately; citing many authorities that enforce the duty of diligence upon him who would set aside a deed for fraud. But I repeat that the case of a mere preference, free from actual fraud, calls still more loudly for the requirement of a suit within a short time. This suit was delayed too long,—four years and four months. The Williams-Maxwell Case said three years was too long. The public policy demanding, under this statute, speedy suit, is very plain; but I am the more inclined to come to the conclusion that this suit was delayed too long from the fact that the legislature, in chapter 4, Acts 1895, enforces this policy, by demanding that a suit to set aside a preference be brought within the short time of one year, and, if the deed be admitted to record within eight months, the suit must be brought within four months after such recordation. That statute does not retroact and apply to this case. State v. Mines, 38 W. Va. 125, 18 S. E. 470. But it calls upon us to enforce such policy by saying that this suit was too long delayed. Our conclusion is to reverse the decree and dismiss the bill. Costs against Andrew Herold, Witz, Beidler & Co., Gugenheimer & Co., and Armstrong, Cator & Co.

CARTER et al. v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina. May 1, 1900.)

CARRIERS—FREIGHT—REFUSAL TO SHIP—PENALTIES — SEPARATE OFFENSES — PARTIES—CAUSES OF ACTION—JOINDER.

1. Under Code, § 1964, providing a penalty for a transportation company's refusal to ship freight tendered it, and that each article refused shall constitute a separate offense, where a railroad company refused to transport a lot of cattle a separate penalty could be recovered for each head thereof, since each head was an article, within the statute.

2. Under Code, § 1964, providing a penalty for a transportation company's refusal to transport freight, the penalty may be recovered by any one, since Code, § 1212, provides that, where an act imposing a penalty shall not designate to whom the penalty is given, it may be recovered by any one who will sue for it, and for his own use.

3. The joining of improper parties with plaintiff is harmless error, and hence, where the state was improperly joined as plaintiff in an action to recover a statutory penalty, the proceeding was not thereby vitiated.

4. Penalties claimed against the same defendant under the same statute may be properly joined.

Faircloth, C. J., dissenting.

Appeal from superior court, Columbus county; Timberlake, Judge.

Action by L. W. Carter and others against the Wilmington & Weldon Railroad Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Junius Davis, for appellant. J. B. Schulken, for appellees.

DOUGLAS, J. This is an action brought under section 1964 of the Code, to recover penalties amounting to $3,000. The plaintiffs allege that on two consecutive days they offered for shipment to the agent of the defendant company 30 head of cattle, all of which the said agent refused to receive. The defendant demurred on several grounds, as follows: (1) That the cause of action, if any, did not accrue to the plaintiffs, but only to the state of North Carolina, for the benefit of the school fund, under article 9, § 5, of the constitution of this state; (2) that the action can be maintained only in the name of the state alone, and not on the relation of the plaintiffs; (3) that, if the plaintiffs have any right of action, they must sue in their own names, and not in the name of the state, as relators; (4) that the plaintiffs are improperly joined as relators; (5) that the superior court has no jurisdiction, the amount of the penalty being within the jurisdiction of a justice of the peace; (6) that the act prescribes only one penalty for the entire shipment offered, and not separate penalties for each head of cattle; (7) that several causes of action are improperly joined. The demurrer was overruled, and we think properly so. The Code (section 1964) provides as follows: "Agents or other officers of railroads and other transportation companies, whose duty it is to receive freights, shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot station, wharf or boat landing, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company, represented by any person refusing to receive such freight, shall be liable to a penalty of $50, and each article refused shall constitute a separate offence." This section is tak

en from section 1 of chapter 182 of the Laws of 1879. Section 1212 of the Code (Rev. Code, c. 35, § 47) is as follows: "Where a penalty may be imposed by any law passed or hereafter to be passed, and it shall not be provided to what person the penalty is given, it may be recovered by any one who will sue for the same, and for his own use." The defendant contends, in effect, that the plaintiffs have no cause of action, that they cannot sue jointly or in their own names, and that but one penalty attaches for the refusal of the entire shipment offered. We will reverse the order of consideration.

The statute provides in express terms that each article refused shall constitute a separate offense; that is, a distinct violation of the law. The penalty attaches for such violation, and for each and every violation thereof; otherwise, a party might violate the law once, pay the penalty, and thereafter be free from further prosecution. The law never intended to create a criminal immune by any such process of legal vaccination. This is, of course, a reductio ad absurdum; but is it any more so than the contention of the defendant that a contrary view would force us to hold that a separate penalty would attach to each nail in a keg, and to every lump of coal in a car load? All laws must be reasonably construed, and in such a manner as to give effect to all parts thereof, if practicable. As this court has said in Chappell v. Ellis, 128 N. C. 259, 263, 31 S. E. 711, "We feel compelled to carry out a principle only to its necessary and logical results, and not to its furthest theoretical limit, in disregard of other essential principles." To say that "each article" meant simply the entire shipment offered would be equivalent to saying that it meant nothing, because it would add nothing to the previous part of the section. To say further that, even if each article constituted a separate offense, the statute did not intend a separate penalty, would impose upon the statute a construction utterly foreign both to its letter and spirit. The object in providing a penalty is clearly to compel the common carrier to perform its duty to the public,—not simply to the abstract public, but to each individual. Penalties are made cumulative, so as to make it, under all circumstances, as far as practicable, to the interest of the carrier to perform its duty. Punishment and compensation are essentially different. The one aims merely to repair the injury done; the other, to prevent its recurrence. Compensation should, under all circumstances, exactly equal the injury; while punishment, to be effective, must exceed the injury, or at least be greater than any possible benefit which can accrue to the offender from a violation of the law. Suppose a large number of cattle were offered for shipment; it might be cheaper for the carrier to pay a penalty of $50 than to go to any extra expense or trouble to obtain the necessary cars. Moreover, the usual and primary meaning of the word "article" is opposed to the idea that it means the entire shipment. The Century Dictionary defines it as derived from "articulus," a joint, and as meaning a joint connecting two parts of the body; one of the parts thus connected; a separate member or portion of anything. Worcester says: "A single clause in any writing; a particular item of several that make up an account; a portion of a complex whole." Webster says: "A distinct portion of an instrument; a distinct part." In Hopkins v. Westcott, 6 Blatchf. 64, 12 Fed. Cas. p. 495, where the contract limited the liability of the carrier to an amount not exceeding $100 upon "any article," it was held that the words "any article," in such paper, do not mean a trunk or piece of baggage, and its entire contents, in gross, but mean any article contained in a piece of baggage. On page 68, 6 Blatchf., and page 495, 12 Fed. Cas., the court says: "This strict construction is in harmony with the policy of the law, and essential to the protection of the community, in view of the constant devices of carriers to escape the responsibilities of their calling, while their eagerness to obtain the patronage of the public remains unabated." In Wetzell v. Dinsmore, 4 Daly, 193, where three cases of pills were bound together so as to make one package, the court of common pleas, in general term, held that each one of the boxes constituted a separate article. On appeal this judgment was reversed by the commission of appeals (54 N. Y. 496), where the court said: "We think the 'article' valued at $50 was the single package received, in its entirety. * * * If it had turned out that each of the three boxes had contained a different sort of drug, and that the defendant had knowledge of the fact, the case might have presented a different question." The distinction here does not seem to us to be very clearly drawn, but we suppose it was intended to meet the line of cases represented by Earle v. Cadmus, 2 Daly, 237, where it was held that the limitation applied to the articles in a trunk, and not to the trunk collectively, as one article. Under any of these cases, as the cattle were not and could not be bound together into one package, each head would constitute a separate article.

As we are of the opinion that each head of cattle was a separate article, in contemplation of the statute, the refusal of which was a separate offense, it follows that a separate penalty attached thereto. As there were 30 head of cattle refused, 30 separate penalties were incurred by the defendant. Who, then, may recover these penalties? We think that all penalties imposed by section 1964 of the Code may, under the provisions of section 1212, be recovered by any one who will sue for the same. While section 1967 is not involved in the case at bar, yet, before its amendment by chapter 520, Laws 1891, it is so similar in its nature and purposes to section 1964 that the same general rules of

construction apply to both, and cases construing either may be cited by analogy in the interpretation of the other. In fact, the latter section, originally enacted in 1879, was evidently intended to supplement the former, which was passed in 1875, and which provided a penalty only when common carriers allowed freight received by them to remain unshipped for more than five days. Under this section alone, when it was not convenient for the carrier to ship the freight within the five days, it could avoid the penalty by simply refusing to receive the freight. The principles underlying these sections are fully discussed in Branch v. Railroad Co., 77 N. C. 347,—apparently the first case upon the subject,—in which they are held constitutional. There the recovery was by a private citizen, suing in his own name, for three separate penalties, in the same action. That case seems to settle several of the questions in the case at bar, and, as it has so long stood the test of uniform approval, we are not inclined to overrule it now. It is cited and approved on different points in Katzenstein v. Railroad Co., 84 N. C. 688; Keeter v. Railroad Co., 86 N. C. 346; Branch v. Railroad Co., 88 N. C. 570; Id. 573; Middleton v. Railroad Co., 95 N. C. 167; McGowan v. Railroad Co., Id. 417; Alsop v. Express Co., 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271; State v. Moore, 104 N. C. 749, 10 S. E. 183; Purcell v. Railroad Co., 108 N. C. 414, 12 S. E. 954, 956, 12 L. R. A. 113; Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968; Glanton v. Jacobs, 117 N. C. 427, 23 S. E. 335. These citations show that it has been repeatedly cited with approval since the constitutional convention of 1875 as well as before. In the well-considered opinion in Katzenstein v. Railroad Co., supra, this court expressly held that the penalty against a railroad company for failure to forward freight is not given by article 9, § 5, of the constitution to the county school fund. It also held that an action to recover the penalty under the statute is an action ex contractu, and was properly brought in the name of the real plaintiff. This case is cited with approval on these points in McDonald v. Dickson, 87 N. C. 404, Middleton v. Railroad Co., and McGowan v. Railroad Co., supra; Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890, and Sutton v. Phillips, supra. The defendant lays great stress upon the case of Hodge v. Railroad Co., 108 N. C. 24, 12 S. E. 1041, but we think that case can be clearly distinguished from the one at bar. The court expressly states that its opinion does not conflict with Katzenstein's Case, and bases its judgment upon the distinguishing ground that section 1960 of the Code requires the penalty "to be sued for in the name of the state of North Carolina in the superior court of Wake county." Hodges v. Railroad Co. (the present defendant) 105 N. C. 170, 10 S. E. 917, also relied upon by the defendant, seems to us to be in favor of the plaintiff. In that case the headnote by Justice Clark is as follows: "The plaintiff's complaint contained two causes of action,—one, to recover damages alleged to have been caused by the roadbed erected by defendant ponding water back on plaintiff's land; the other, to recover damages for an alleged breach of duty on the part of defendant in not putting up sufficient cattle guards, as required by section 1975 of the Code, whereby cattle trespassed upon plaintiff's inclosed lands and crops. On demurrer, held an improper joinder of causes of action, the first being for injury to property, a tort, while the second arose upon contract, for the breach of an implied contract to perform a statutory duty, and the action should be divided." The defendant can scarcely now be heard to complain at our following a precedent laid down in its favor, and upon its suggestion. In Middleton v. Railroad Co., 95 N. C. 167, the court expressly held that actions for penalties should properly be brought in the name of the person suing; citing the cases of Branch v. Railroad Co., Katzenstein v. Railroad Co., Keeter v. Railroad Co., Branch v. Railroad Co. (second case), supra, and Whitehead v. Railroad Co., 87 N. C. 255. The same principle is held in Maggett v. Roberts, supra, Burrell v. Hughes, 116 N. C. 430, 21 S. E. 971, and Goodwin v. Fertilizer Works, 119 N. C. 120, 25 S. E. 795; in all of which cases Middleton's Case is cited with approval.

It is contended that the plaintiffs cannot maintain their action, even if they are proper parties, because they have improperly joined the state as a plaintiff. This point is expressly decided in Warrenton v. Arrington, 101 N. C. 109, 113, 7 S. E. 654, where the court says: "The state is not a proper party to the suit, and it has been decided, contrary to the former practice, that under the code system the joining improper parties with the plaintiff is a harmless error, as judgment may be rendered in favor of such as are entitled, and therefore the proceeding is not vitiated."—citing Green v. Green, 69 N. C. 294, and Burns v. Ashworth, 72 N. C. 496. The different causes of action in the case at bar, being all of the same nature, and in contract, may be joined, thus bringing the aggregate sum within the jurisdiction of the superior court, as has been repeatedly held by this court. Moore v. Nowell, 94 N. C. 265; Martin v. Goode, 111 N. C. 288, 16 S. E. 232; Maggett v. Roberts and Burrell v. Hughes, supra.

The only question remaining to be considered is whether the plaintiffs can sue jointly. We see no reason why they cannot, and the learned counsel for the defendant frankly admits that he can find no case in this state holding against such right. If the defendant is liable for the penalty, it makes no difference who gets it, as long as its liability is in no way increased. While the penalty ac-

crues to any one who may sue for it, it seems peculiarly appropriate that it should go to those who have suffered from the offense. We find in 88 N. C. 570, 573, two cases brought for penalties against the present defendant by Branch & Pope, suing in their firm name. While both cases were decided against the plaintiffs on other grounds, no question was made as to their right to sue jointly. Some of the above cases are worthy of more than passing notice. In the celebrated case of McGowan v. Railroad Co., supra, known as the "Rice Case," the plaintiff recovered, under section 1967 of the Code, 115 separate penalties, of $25 each, amounting in the aggregate to $2,875, for the unlawful detention of 27 bags of rice for 115 days. In the well-considered case of Sutton v. Phillips, supra, many of the questions now before us were elaborately discussed, with ample citation of authority. In Burrell v. Hughes, supra, Chief Justice Faircloth, speaking for a unanimous court, says: "The person suing for a penalty is the proper party plaintiff, and not the state, unless so expressed in the statute;" citing Middleton v. Railroad Co., and Sutton v. Phillips, supra. And again, on page 437, 116 N. C., and page 973, 21 S. E.: "A party suing for penalties against the same defendant may unite several such causes of action in the same complaint, and if they exceed $200 the superior court will have jurisdiction." In Goodwin v. Fertilizer Works, supra, Furches, J., speaking for a unanimous court, says: "The party suing is a proper plaintiff, unless the statute creating the penalty provides otherwise. [Citing Burrell v. Hughes, supra.] The second assignment cannot be sustained, as the party claiming the penalty is the proper plaintiff, and not the state. [Citing Middleton v. Railroad Co., supra.] The third assignment cannot be sustained, as this question has been decided, and has been expressly held to be constitutional, in Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968, and a number of other cases there cited."

We are of the opinion that all the grounds of demurrer were properly overruled; that the plaintiffs are entitled to sue jointly for their joint benefit, and may recover a separate penalty of $50 for each head of cattle refused and for each day on which they were refused; that the plaintiffs were the proper parties to sue, and that the misjoinder of the state, being surplusage, does not affect their right to recover; that penalties lie in contract, and may therefore be joined in the same action, which, if the aggregate sum therein demanded in good faith exceeds $200, comes within the jurisdiction of the superior court; and that section 5 of article 9 of the constitution, providing that the clear proceeds of all penalties and forfeitures shall be appropriated for establishing and maintaining free schools, applies only to such penalties as are given by law to the state or some department thereof. The judgment is affirmed.

FAIRCLOTH, C. J., dissents.

FLEMING et al. v. BARDEN.

(Supreme Court of North Carolina. April 1, 1900.)

MORTGAGES — EXTENSION — TIME — USURIOUS INTEREST — DISCHARGE — FORECLOSURE — TRUSTS—APPEAL—TRUSTEE — INFANCY — ESTOPPEL.

1. Where a creditor agreed to extend the payment of a debt on the debtor's paying $50 instead of $40 interest, and the debtor paid the interest to the creditor's agent, the creditor was bound by the agreement, though based on the payment of usurious interest.

2. Where a wife executed a mortgage on trust property in which she had a life estate with remainder to her children to secure her husband's antecedent debt, and after her death the husband procured an extension of time without his children's consent, such extension discharged the mortgage by operation of law, though no administrator of the wife's estate or guardian of the children had been appointed, and there was no one to pay the debt.

3. A husband and wife conveyed land in trust for the wife for life, remainder to their children, by a deed authorizing the grantor to convey the land, and to require the trustee to join in the conveyance. The grantors and trustee executed an absolute deed, which was in effect a mortgage on the land to secure the husband's indebtedness, and after the death of both the wife and the trustee the mortgage was discharged by the extension of the time of payment of the husband's debt, and the remaindermen sued to recover the land from one who thereafter purchased it on foreclosure of the mortgage. *Held*, that the trustee had a bare legal title, which passed to the mortgagee on the execution of the mortgage, and hence the fact that one of his children had been 21 years of age more than 3 years before the action was brought to recover the land constituted no bar to the action.

4. Where a wife executed a mortgage on her property to secure the husband's antecedent debt, and the mortgage was discharged by the husband's obtaining an extension of time from the creditor after the wife's death, the fact that the husband was present at a subsequent sale of the land on foreclosure of the mortgage, and failed to disclose such extension, did not estop the wife's heirs from maintaining a suit to recover the land from the purchaser.

Appeal from superior court, Beaufort county; Starbuck, Judge.

Action by W. S. Fleming and others against Maggie Barden. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

A. O. Gaylord, for appellant. W. B. Rodman, for appellees.

FURCHES, J. This is an action for the possession of land, in which the defendant denies title in the plaintiffs, alleges title in herself by mesne conveyances from plaintiffs' ancestors, and also by color of title ripened by adverse possession, and the statute of limitations. The facts presented are as follows: That in June, 1881, John L. Brown and wife, M. L. Brown, conveyed the land in controversy

to Ashley Congleton, in trust for M. L. Brown for life, then for the issue of John L. and M. L. Brown, and, if the said M. L. Brown should die without leaving issue, then for the said John L. Brown. But this deed expressly provided that the said John L. Brown and M. L. Brown shall have full power and authority, by and with the consent of each other, to convey the same at any time, "and said trustee shall join in the said conveyance, whether the same be in fee simple or otherwise;" that on the 9th day of February, 1881, the said John L. borrowed $500 from J. B. Stickney, giving his bond due three years after date at 8 per cent., payable annually, and secured the same by a mortgage on this land executed by John L. and M. L. Brown and the trustee, Congleton. This mortgage was in the usual form, conveying the fee simple, with the condition that it should become void upon the payment of said bond. On the 3d of March, 1882, the trustee, Congleton, died, leaving three minor children, two of whom were minors at the commencement of this action. The other had been of age for three years and five months when the action was commenced. In August, 1884, the said M. L. Brown died, leaving, her surviving, her husband, John L., and the plaintiffs Mollie L. Fleming, Dora L., John L., and Lena M. Brown; the last three named being minors under 21 years of age, except Mrs. Fleming, who was under coverture when this action was commenced, and is still. The plaintiffs allege that this was their mother's land, that the debt was that of their father, and that the mortgage was only a security for the debt; and they further allege that the security, the mortgage lien on the land, was discharged by a contract made and entered into by Stickney, the mortgagee, and John L. Brown, the principal debtor, for an extension of time on the debt so secured by the mortgage; that this agreement was in the fall of 1884, to extend for one year for $50; that in January, 1888, Stickney sold under the mortgage, when Arthur Barden bought, and took deed to W. C. Ayers, who, on March 3, 1888, conveyed the same to the defendant, Maggie Barden, and that she has been in possession of the same ever since the date of her deed, in March, 1888. Upon the admitted facts and the evidence in the case the court submitted the following issues: "(1) Did Stickney agree with John L. Brown to extend time of payment of the mortgage debt from February 9, 1885, to February 9, 1886, in consideration of the payment by Brown of ten per cent. interest on the debt for the year ending February 9, 1885, to wit, $50? Ans. Yes. (2) Was said consideration paid by Brown, and, if so, when? Ans. Yes, April, 1885. (3) Did R. T. Hodges have knowledge of his alleged appointment as trustee in the proceeding entitled 'John L. Brown and others ex parte'? Ans. No. (4) Are the plaintiffs the owners of and entitled to recover possession of the land described in the complaint? Ans. Yes. (5) What is the rental value of the land for the period beginning July 4, 1894, up to the present time? Ans. $300." Thereupon the court rendered judgment that the plaintiffs are the owners of and entitled to the possession of the land, etc.

Upon the close of the evidence the defendant moved to nonsuit the plaintiffs for the reason that the evidence, all taken to be true, did not make out a case for the plaintiffs. This was refused, and we see no error in its refusal. It seems to us that it could hardly be disputed but what there was evidence tending to prove all the facts alleged by the plaintiffs, and sufficient to authorize the jury to find the issues submitted to them as they did. But, taking the issues as found, and the facts as admitted, the case presents some very interesting questions of law, upon the solution of which the rights of the parties depend. The evidence with regard to the contract and consideration for the extension of time was that the mortgagee, Stickney, proposed to Brown, the principal debtor, that if Brown would pay him $50 interest, instead of $40, he would extend the time 12 months. This offer was accepted by Brown, and the money paid to Stickney's attorney or agent. The defendant asked the court to charge the jury that this did not constitute a contract to extend the time of payment, first, for the reason that the plaintiffs did not receive the money. But the court held that, if the agent received it under the contract and agreement of Stickney with Brown, this was the same as if Stickney had received it himself. And we think this must be so. The defendant further contended that, if he did receive it, it was usurious interest; that a contract to extend time must be upon a good consideration; that the usurious payment of interest was not a good consideration, and did not support the contract; and cited Bank v. Lineberger, 83 N. C. 454, as authority for this contention; and it is so held in that case. But in Carter v. Duncan, 84 N. C. 676 (the next term after the case of Bank v. Lineberger had been decided), the case of Bank v. Lineberger was overruled; and Carter v. Duncan has been held to be the law ever since, and has been cited with approval in several cases, among them Forbes v. Sheppard, 98 N. C. 111, 3 S. E. 817; Hollingsworth v. Tomlinson, 108 N. C. 245, 12 S. E. 989. And, as was said in Bank v. Sumner, 119 N. C. 591, 26 S. E. 129, we think this doctrine has been carried far enough. But it seems to us that these cases ought to be considered as settling the doctrine in this state, and the court below properly refused to give this instruction. This covers the defendant's prayers down to the fifth.

The fifth prayer asks the court to instruct the jury that, as Mrs. Brown was dead when this agreement for extension of time was made, it did not have the effect to discharge the mortgage, as it was not shown that she had an administrator, or that her children had a guardian, and there was no one to pay the debt. The court refused this prayer, and the defendant excepted. We cannot sustain

the exception. The discharge is by operation of law, and we cannot say that it shall apply in some cases, and not in others. We have not been furnished with any authority for making such exception.

The sixth prayer is that the original trustee, Congleton, was dead, and that his interest descended to his heirs at law; that one of them had been above the age of 21 for more than three years when this action was commenced; that where the trustee is barred, the cestui que trust is also barred; and that, as one of the trustees was barred, they were all barred, and the plaintiffs, though infants and femes covert, were also barred. This is a correct proposition of law, as applied to some trusts. But, taking the view of the case we do, it is not necessary for us to decide this question. The deed of trust to Congleton expressly authorizes John L. and M. L. Brown to convey in fee simple or any less estate, and that it shall be the duty of the trustee, Congleton, to join them in making such deed. They exercised this power in making this mortgage to Stickney, and the trustee, Congleton, joined them in making it. Congleton never had anything but the bare legal title to the land, and when this mortgage was made, which is a deed in fee simple, with other trusts attached, all the estate he ever had in the land passed out of him into Stickney. Congleton died before it is alleged that there was any discharge of the land from this debt on account of extension of time; and when he died he had no estate to descend to his heirs. It is true that, if Congleton had been the equitable owner as well as the legal owner, the equitable right of redemption would have descended to his heirs. But the only thing their father ever had was the naked legal title, and this was gone. He had nothing to descend to his heirs, and they had no interest to redeem. And, indeed, it does not seem to be claimed that they should have done so. But the defendants claim that the naked legal title was in them, and, as they did not bring suit for the possession of the land, the statute is a bar to plaintiffs' right to recover. But as it is seen that they had no legal title to the land, and, we think, no equitable estate, the doctrine contended for by defendants does not apply. For the purposes of this case, it is not necessary for us to decide where the legal title was after the discharge of the land from the debt, so that it was not in the heirs of Congleton. It may be that when the mortgage deed was made to Stickney the trust was thereby terminated, and that Mrs. Brown became the absolute owner subject to the mortgage incumbrance. And, if this was not so, it would seem that the legal estate was in the defendant; and, if so, she held the naked legal title in trust for the plaintiffs, and the statute could not run in her favor; and, if both the legal and equitable estates were in the plaintiffs, the statute or presumption on account of possession did not run against them on account of their infancy and coverture. The land being discharged from the payment of the debt by reason of the extension of time, the mortgagee had no right to sell under the mortgage, unless it was the naked legal title; and the purchaser at the sale got nothing more. It is like selling after the debt had been paid. Jenkins v. Daniel, 125 N. C. 161, 34 S. E. 239. It is true that John L. Brown seems to have been at the sale, made no objection to it, and did not then let it be known that he had obtained an extension of time. And, if it had been his land, it would seem that this would be an estoppel in pais. But it was no estoppel as against the plaintiffs who are infants and femes covert. It may be a hardship on the defendant, if she was an innocent purchaser without notice (which, if so, is not presented by this appeal), but such is said to be "the quicksands of the law." The judgment is affirmed.

BROWN v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. May 1, 1900.)

MASTER AND SERVANT—NEGLIGENCE—WARNING SERVANT.

The engineer and conductor of a train on which plaintiff served as a fireman were ordered to stop at a certain station to await a train having engine "No. 54." When plaintiff's train arrived there it was dark, and another train, drawn by engine "No. 64," was on the siding. Plaintiff's engineer slowed up, but did not stop. They read the figures "64" on the engine on the siding as "54," and supposing it was the train they were to meet there, and having no notice that they were to meet the train they saw on the siding, plaintiff's train passed the station, and collided with the train drawn by No. 54. *Held*, that the railroad company was not negligent because it failed to notify plaintiff's engineer that the train drawn by No. 64 would also be met at the station.

Appeal from superior court, Forsyth county; Shaw, Judge.

Action by J. T. Brown against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action brought to recover damages for personal injuries received through the alleged negligence of the defendant. At the close of the plaintiff's testimony, his honor intimated that, nothwithstanding the similarity between No. 64 and the expected train in situation, signals, and numbers, he would hold that the defendant company was not negligent in failing to notify section 3 of train No. 44 that the train with an engine No. 64 would be on the side track at Lexington. Upon this intimation the plaintiff submitted to a nonsuit and appealed.

The material facts appear to be as follows: The defendant company was running a freight train north from Salisbury, N. C., to Greensboro, N. C. The train number was 44, and running in six sections, and entitled, respectively, third, fourth, fifth, and sixth sections of train No. 44. Said trains were

under orders given to each section, and to all others running between Salisbury and Greensboro. Plaintiff was the fireman on train entitled the third section of train No. 44, having an engine, No. 37. The orders given to conductor and engineer of the second and third sections of train No. 44—the third section being the train on which plaintiff was serving—were as follows: That an extra train from Greensboro to Salisbury, having engine No. 54, had the right of track over the second and third sections of train No. 44 from Greensboro to Lexington. The trains run according to numbers, No. 1 going as first, and so on. As plaintiff's train, to wit, the third section of train No. 44, approached the siding at Lexington, the engineer and plaintiff saw a train standing on the siding to the left hand. Said train, so standing on the siding, showing white lights, denoting extra, had steam up, and headlight burning, and an engine, No. 64. That plaintiff's train slowed up, but did not stop. The engineer and plaintiff read the figures 64 on said engine as 54, and, supposing it was extra train No. 54, which they were ordered to stop for at Lexington, and having no notice that a train with engine No. 64 would be standing at Lexington, and not seeing the second section of train No. 44 standing ahead at Lexington, and supposing it had gone by, passed on by Lexington, and about two miles north of Lexington collided with the extra train having engine No. 54, which was the identical train they were ordered to stop and await the arrival of at Lexington. In this collision plaintiff was injured, and brought this action to recover damages.

Among other allegations the complaint says: "That on approaching the station at Lexington there was, as plaintiff was informed and believes, a mixed train standing on siding, attached to engine 64, of which they had no notice or orders; and, the figures 64 being so similar to the figures on engine 54, which they expected to find on said siding, that they passed on without stopping, it being in the nighttime, and the figures on the engine being read by artificial light." It appears that the plaintiff's train was a section of the regular train, and therefore, when within its schedule time, had a right of track superior to all extra trains, unless limited by special order. Among the rules of defendant company in the record we find the following train orders: "120. Conductors and engineers will be held equally responsible for the violation of any of the rules governing the safety of their trains, and they must take every precaution for the protection of their train, even if not provided for by the rules." "95. No train must leave a junction, a terminal, or other starting point, or pass from double to single track, until it has ascertained that all trains due, which have the right of track over it, have arrived or left." "522. A train, or any section of a train, must be governed strictly by the terms of the orders addressed to it, and must not assume rights not conferred by such orders. In all other respects it must be governed by the train rules and time-tables." "82. All extra trains are of inferior class to all regular trains of whatever class." "When the train of inferior right has reached the designated point, the order is fulfilled and the train must then be governed by time-table and train rules or further orders."

Watson, Buxton & Watson, for appellant. Glenn & Manly and W. M. Hendren, for appellee.

DOUGLAS, J. The injury occurred on the 2d day of November, 1896, before the fellow servant act of 1897, and therefore the negligence of the engineer, who was the fellow servant of the plaintiff, is not imputable to the defendant. The case was ably and candidly argued, and it is admitted that the negligence of the defendant, if any there be, must consist in its failure to notify the plaintiff's engineer that an extra train, drawn by engine No. 64, would be met at Lexington. Had the collision occurred with this train, which we will call "No. 64," the case would be essentially different; but its presence at Lexington did not directly cause any injury to the plaintiff, and did not contribute to his injury, except in so far as it tended to mislead the engineer by its similarity in numbers with the train which he expected to meet. It was a singular coincidence that an extra train draw by engine No. 64 should be standing on the siding at the time and place where the plaintiff's engineer was ordered to pass an extra having engine No. 54; but we do not think that it was anything more than a coincidence. It is true the defendant might have notified the plaintiff's engineer that No. 64 would be at Lexington, and have cautioned him not to mistake it for No. 54. This might have avoided the accident. But could the defendant be reasonably required to anticipate that the engineer would make such a mistake, under circumstances of such imminent danger, when he had the means of accurate information? In the light of subsequent events, we may say that it was unfortunate that the defendant did not notify the engineer of the presence of No. 64; but we must not forget the old and homely proverb that "our hindsights are always better than our foresights." The engineer could easily have ascertained the difference in numbers by the exercise of reasonable care, which he was bound to use by the express rules of the company and the inherent responsibilities of his position. He failed to obey the orders of the company, and that failure appears to have been the proximate cause of the accident. As his negligence was not then imputable to the defendant, and as we do not think the defendant was required, in the

exercise of reasonable care, to notify the plaintiff's engineer of the presence of No. 64, we fail to find any evidence whatsoever tending to prove the negligence of the defendant. The judgment is affirmed.

SLOAN v. CAROLINA CENT. RY. CO.

(Supreme Court of North Carolina. May 1, 1900.)

CARRIER—BILL OF LADING TO ORDER—INSPECTION—PRODUCTION OF BILL—DEMURRER—APPEAL—REVERSAL — RETRIAL — ANSWERING OVER—JURISDICTION.

1. A complaint averred that one who had a contract with certain mills for the purchase of cotton took a bill of lading therefor from defendant "to order, notify S. B. Tanner, Treasurer," who was treasurer of the mills; that a draft was drawn on the treasurer, and attached to the bill, and both assigned to plaintiff; and that the defendant wrongfully permitted the mills to examine the cotton without production of the bill of lading, in consequence whereof the mills refused to accept the cotton and pay the draft, as they otherwise would. *Held*, that the complaint was demurrable, since the request to "notify" conferred on the mills as full right to inspect as if it had been the consignee, and, if the cotton was wrongfully rejected, plaintiff's cause of action was against the mills.

2. A complaint alleged that defendant wrongfully allowed one who had agreed to purchase cotton of plaintiff to examine the cotton without a production of the bill of lading, which was "to order, notify S. B. Tanner, Treasurer," with draft attached, Tanner being treasurer of the purchaser; and alleged that thereby the mills refused to accept the cotton, as they otherwise would, and that defendant negligently retained part of the cotton unloaded, in cars, without notifying plaintiff, and wrongfully required plaintiff to pay demurrage therefor, and defendant demurred that allowing the examination showed no cause of action, and that it did not sufficiently appear from the complaint how the requirement of payment of demurrage was wrongful. *Held* that, as the demurrer admitted the allegations as to the detention of the cotton in cars, and the wrongful compelling of payment of demurrage, it was error to sustain the demurrer to that part of the complaint.

3. Under Clark's Code (3d Ed.) 267, note 1, providing that a plaintiff may unite in the same complaint several causes of action where they all arise out of a transaction connected with the same subject of action, the complaint was not demurrable for misjoinder of causes of action, since both matters of complaint arose out of transactions connected with the same subject of action.

4. Sustaining a demurrer to a portion of plaintiff's complaint, which has the effect of reducing the damages below $200, does not oust the superior court of jurisdiction where the sum originally demanded is not so palpably in bad faith as to be a fraud on jurisdiction.

5. Where a complaint containing a prayer for an injunction showed on its face that the court had no jurisdiction over the subject-matter as to the injunction, the prayer was properly dismissed.

6. Where, on appeal from an order sustaining a demurrer, the demurrer is overruled as to one of the causes of action alleged, the defendant on the remand of the case may answer over under Code, § 272, providing that after the decision of a demurrer the judge shall, if it appear that the demurrer was interposed in good faith, allow the party to plead over.

Appeal from superior court, Mecklenburg county; Allen, Judge.

Action by J. H. Sloan against the Carolina Central Railway Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

Osborne, Maxwell & Keerans, for appellant. Burwell, Walker & Cansler, for appellee.

CLARK, J. The complaint avers that one Warlick had a contract with the Henrietta Cotton Mills for the purchase of cotton, under which he bought a lot of cotton; that he took a bill of lading therefor, "to order, notify S. B. Tanner, Treasurer" (who was treasurer of the Henrietta Mills); that he drew a draft on said Tanner, treasurer, for the price of the cotton, which he indorsed, with the bill of lading attached, for value, to the plaintiff. It is further alleged that the defendant company wrongfully and carelessly permitted the Henrietta Mills to examine the cotton without production of the bill of lading, in consequence whereof the said Henrietta Mills refused to accept the cotton and pay the draft, as they otherwise would have done; and also that for many days after the said mills refused to accept the cotton the defendant carelessly and negligently retained part of the cotton unloaded, in the cars, without notifying the plaintiff, and wrongfully required the plaintiff to pay $90 demurrage therefor, which he paid under protest; and alleges that by reason of the above negligence and wrongful acts he has sustained altogether $842.30 damages. The defendant demurs, in substance, because it was not a wrongful act to permit the Henrietta Mills to examine the cotton, and that, if it were, it does not sufficiently appear from the complaint how any legal or actionable injury was done to the plaintiff, and that it does not sufficiently appear from the complaint how the requirement of payment of demurrage was wrongful. The court below sustained the demurrer, and dismissed the action.

The plaintiff does not contend that, if the cotton had been consigned to the Henrietta Mills, it would have been wrongful to have permitted it to examine the cotton, but says that the bill of lading, being "to order, notify S. B. Tanner, Treasurer," was notice that the plaintiff retained ownership till the production of the bill of lading by said Tanner, treasurer of the Henrietta Mills. This point might be well taken if the action were for wrongful delivery to the cotton mills without the production of the bill of lading indorsed to the mills or its treasurer, but the request to "notify" certainly conferred upon the cotton mills as full right to inspect the cotton as if it had been the consignee. No injury to the cotton from the inspection is averred. Construing the complaint liberally, as is now required (Code, § 260), it means, if it legally means anything, that by reason of permitting the Henrietta Mills and its agents

to inspect the cotton they were made dissatisfied, and refused payment, whereas, if they had been compelled to "buy a pig in a poke," the cotton would have been accepted, and the draft paid. If the cotton was wrongfully rejected, the plaintiff's cause of action is against the Henrietta Mills, for, as assignee of Warlick, he stood in Warlick's shoes. If it was rightfully rejected, it cannot be contended that there was a cause of action, for, even if the Henrietta Mills had taken the cotton without opportunity of inspection, it could have immediately recovered back from the plaintiff, assignee of the bill of lading, for any deficiency in the quality or weight of the cotton or otherwise. Finch v. Gregg (at this term) 35 S. E. 251.

The allegation as to the detention of the cotton in cars at place of destination without notice to the plaintiff, and wrongfully compelling him to pay $90 for demurrage, which was paid under protest, is admitted by the demurrer. It may be denied by an answer, and a different state of facts may be found on the trial, but it was error to sustain the demurrer in that regard.

There was no demurrer for misjoinder of causes of action, and there was no ground therefor, for both matters of complaint (even if treated as separate causes of action) were transactions "connected with the same subject of action." Clark's Code (3d Ed.) 267, note 1; Hamlin v. Tucker, 72 N. C. 502; Cook v. Smith, 119 N. C. 350, 25 S. E. 958; Benton v. Collins, 118 N. C. 196, 24 S. E. 122, and other cases there cited. Nor does it make any difference that by sustaining the demurrer as to damages alleged for wrongful inspection of the cotton the other damages alleged are reduced below $200. It is the "sum demanded in good faith" which confers jurisdiction, even though each of the several distinct causes of action are under $200. Burrell v. Hughes, 116 N. C. 430, 21 S. E. 971; Martin v. Goode, 111 N. C. 288, 16 S. E. 232; Maggett v. Roberts, 108 N. C. 174, 12 S. E. 890; Moore v. Nowell, 94 N. C. 265; Carter v. Railroad Co. (at this term) 36 S. E. 14. Under the former system of practice, a party might be turned out of equity, and told to bring his action at law, or be dismissed by one door of the court room because he had sued in debt or covenant, when he might come back through another door with an action of trespass on the case, or replevin, or detinue. But now these refinements have been abolished, because not conducive to the administration of justice; and, if a party gets into court legally, he will not be turned out to come into court some other way. It would put additional costs on the plaintiff, and be additional trouble to both plaintiff and defendant, with no benefit to either. Except when the coming into the superior court is a fraud upon the jurisdiction, the jurisdiction in that court will not be ousted by the failure of a plaintiff to sustain part of his causes of action. The present law is thus stated in Martin v. Goode, supra: "Should the sum demanded be reduced under $200 by failure of proof, or by sustaining a demurrer to any part thereof, or to some of the causes of action, the jurisdiction would not thereby be ousted, except when the sum demanded is so palpably in bad faith as to amount to a fraud on the jurisdiction." The case of Howard v. Association, 125 N. C. 49, 34 S. E. 199, does not overrule this settled practice. The headnote is: "The superior court has no original jurisdiction when, in no event, the plaintiff can recover as much as $200." There was, it is true, also a prayer for an injunction, but the court dismissed that, because on the face of the complaint the courts of this state had no jurisdiction of the subject-matter, and as to the injunction the action was, as it were, coram non judice. When the case goes back the defendant will have the right to answer over. Code, § 272. Error.

STATE v. SAVERY.

(Supreme Court of North Carolina. April 1, 1900.)

CRIMINAL LAW — APPEAL OF STATE — WHEN ALLOWABLE—APPEAL FROM GENERAL VERDICT.

Code, § 1237, provides that an appeal may be taken by the state in criminal cases when judgment has been given for defendant on a special verdict or a demurrer, or on motion to quash or in arrest of judgment, and in no other cases. *Held*, that where a defendant pleaded, "Not guilty," and the jury was impaneled, and, it appearing that the warrant had been issued without any affidavit, the court refused to withdraw a juror or dismiss the action, and directed the clerk to enter a verdict of not guilty, and defendant was discharged, the state could not appeal from the judgment on the general verdict.

Montgomery and Clark, JJ., dissenting.

Appeal from superior court, Forsyth county; Robinson, Judge.

A. Savery was indicted, but discharged on a verdict of not guilty entered by direction of the court, and the state appeals. Appeal dismissed.

Glenn & Manly and J. M. Terrell, Atty. Gen., for the State. Jones & Patterson, for appellee.

DOUGLAS, J. This is a criminal action brought here on the appeal of the state from a judgment discharging the defendant after a general verdict of not guilty. The material facts are as follows: The cause came on to be heard before the superior court on a warrant issued by the mayor of the city of Winston against the defendant. There was no defect appearing on the face of the warrant, though no affidavit was attached. The defendant pleaded, "Not guilty," and the jury was impaneled. The state introduced a witness who swore that the warrant was issued without any affidavit, he being the witness referred to in the warrant as having made the affidavit. Upon its appearing that no affidavit

was made, defendant contended that he was entitled to a verdict of not guilty. The state first contended that, the warrant being regular, the absence of an affidavit made no difference, and that the most the court could do, in case it refused to hear the cause, was to withdraw a juror and dismiss the warrant. The court, in exercise of its discretion, refused to withdraw a juror or dismiss the action, and directed the clerk to enter a verdict of not guilty, which was done, and the defendant discharged. Upon the state of fact, the state and the city of Winston moved the court to strike out the verdict of not guilty, as the defendant had never been in jeopardy, and to reinstate the case for trial, or, at most, to treat the entry of not guilty as a dismissal of the action, to the end that the state might proceed as it thought best. The court denied the motion, and the state and the city of Winston appeal.

No motion was made to quash. On the contrary, the defendant pleaded to the indictment. The state insisted that the most the court could do was to withdraw a juror. It does not appear that the state made any such motion, but, on the contrary, it does appear that the state insisted that the case should be heard on its merits. No one asked that the indictment be quashed, and no one moved that a juror be withdrawn. The court below announced that, "in the exercise of its discretion, it refused to withdraw a juror or dismiss the action, but directed the clerk to enter a verdict of not guilty, which was done, and the defendant discharged." We are thus brought face to face with a general verdict of not guilty, which we are asked to set aside on the appeal of the state. Look at it as we may, there it stands, and we can proceed no further unless we set it aside. We may reverse as many supposed judgments as we please, quashing the indictment, but that of itself will not do away with the verdict. We cannot reverse the verdict, and hence, if we entertain the appeal, we are forced to establish for the first time in this state the dangerous precedent of granting the state a new trial in a criminal action. We borrow the words of an eminent lawyer, and say that in our opinion such action would be "not simply error, but a misarrangement of the whole idea of jurisprudence." Where is there any element of quashing? His honor did not quash, and did not intend to quash, the indictment. We do not understand the state as maintaining that that would have been the proper action. At best, it seems to us to say that his honor should have permitted the case to proceed, but that, if he was determined to end it erroneously, he should have committed the error of quashing the bill, because then we could have reversed him on appeal. It is true, his honor may have committed error, but would that justify us in exercising a quasi equitable jurisdiction in criminal matters? But it is urged that, unless we adopt some such construction, the defendant may go unwhipped of justice. How does that concern us at present? What right have we to find him guilty, or to assume his guilt, for the purpose of invoking a strained construction upon a pure question of law? We are well answered in the case of In re Spier, 12 N. C. 491, 493, where this court says: "In this case the guilt or innocence of the prisoner is as little the subject of inquiry as the merits of any case can be, when it is brought before this court on a collateral question of law. Although the prisoner, if unfortunately guilty, may escape punishment in consequence of the decision this day made in his favor, yet it should be remembered that the same decision may be a bulwark of safety to those who, more innocent, may become the subjects of persecution, and whose conviction, if not procured on one trial, might be secured on a second or third, whether they were guilty or not." The opinion of the court, delivered by Judge Hall, and the concurring opinion of Chief Justice Taylor, are both exceedingly interesting and instructive. It should be noted that this case does not decide that the doctrine "once in jeopardy" applies only to capital felonies, although that may be inferred from its reasoning, if the phrase is taken in its strictest sense. But there is certainly not the slightest intimation that a general verdict of not guilty can ever be set aside, and that is the question now before us. That opinion quotes Lord Coke as saying that "the life of a man shall not be twice put in jeopardy upon the same charge, for a capital offense"; but it also quotes Lord Coke as laying down the rule in still broader terms, and so as to render the discharge of the jury in treason, felony, or larceny illegal, even with the consent of the prisoner. 3 Minor, Inst. 110. We do not understand the distinction between felony and larceny, but so great a judge must have had something in his mind. The doctrine of "once in jeopardy" goes far beyond that of former acquittal, and applies where the jury have never rendered any verdict. Thus, it is held that, where a jury has once been impaneled in a capital case, they cannot be discharged before verdict, except for causes beyond human control. A conscientious inability to agree after every reasonable effort, is now deemed a cause beyond control, even in capital cases, but it should clearly appear that there is no reasonable possibility of agreement.

Let us briefly review the history of appeals by the state, as shown in our Reports. The cases of State v. McLelland, 1 N. C. 569 (*523), in the superior court, and State v. Hadcock, 3 N. C. 348 (*162), decided by the old court of conference, recognize the right of the state to appeal from the county court to the superior court on a verdict of acquittal; the court, however, in the latter case, doubting the principle. In fact, the opinion distinctly says that, if it were res integer, their opinion would be to the contrary. These cases were overruled by State v. Jones, 5 N.

C. 257, and we can find no subsequent case in our Reports where the state has ever claimed the right of appeal from a general verdict of acquittal. In the last-named case the headnote says, "The state is not entitled to an appeal in a criminal prosecution," while the case is briefly disposed of by a per curiam opinion, as follows: "The state, in a criminal prosecution, is not entitled to an appeal, under any of the provisions of the act of assembly regulating appeals. This appeal must therefore be dismissed." In State v. Taylor, 8 N. C. 462, this court says: "It would be to no purpose for this court to decide whether the paper writings offered in evidence were properly rejected by the circuit judge or not; for, upon the supposition that they were not, we could not grant a new trial after the acquittal of the defendant." This case, so clearly enunciating the principle, and so repeatedly affirmed, has apparently never been questioned. In State v. Martin, 10 N. C. 381, the entire case is as follows: "The defendant was indicted below for an assault and battery, and, being acquitted, was discharged, whereupon the state appealed. On the reading of the record in this court, Mr. Attorney General gave up the cause, on the authority of State v. Taylor, 8 N. C. 462." This example appears to have been faithfully followed for 48 years, as the state does not appear even to have attempted an appeal until 1869, in State v. Credle, 63 N. C. 506. Taylor's Case was promptly and emphatically reaffirmed, whereupon the state again subsided. In 1872 the state again tried it, but with no better result. State v. Phillips, 66 N. C. 646; State v. Freeman, Id. 647; State v. West, 71 N. C. 263; State v. Armstrong, 72 N. C. 193; State v. Lane, 78 N. C. 547; State v. Swepson, 82 N. C. 541; State v. Moore, 84 N. C. 724; State v. Tyler, 85 N. C. 569, 572; State v. Powell, 86 N. C. 640; State v. Railroad Co., 89 N. C. 584; State v. Ostwalt, 118 N. C. 1208, 24 S. E. 660; State v. Ballard, 122 N. C. 1024, 29 S. E. 899; State v. Hinson, 123 N. C. 755, 31 S. E. 854, 32 L. R. A. 396; State v. Davidson, 124 N. C. 839, 32 S. E. 957; State v. Southern Ry. Co. (two cases; at this term) 35 S. E. 620. In this case the court says: "The case at bar comes within none of these classes [those mentioned in section 1237 of the Code]. * * * Hence we must dismiss the appeal. This action on our part is not an affirmation in any degree, express or implied, of the judgment of the court below. As we cannot entertain the appeal, the principles therein decided are not before us; and therefore we are powerless to correct any error in the judgment, if error there be, no matter how serious or patent it may appear to us." In the celebrated case of State v. Swepson, 79 N. C. 632, this court, while stating in unequivocal terms that the verdict was obtained by fraud, declined to entertain the appeal of the state.

It is equally interesting to note the origin and growth of the right of the state to appeal under any circumstances. This right, even in its most limited form, is purely the offspring of judicial construction. Apparently the first allusion to it in our Reports since we have had a supreme court is in State v. Credle, 63 N. C. 506, where this court, dismissing the appeal of the state on a verdict of not guilty (citing Taylor's Case, supra), briefly says, "While the humanity of our law gives the right of appeal to the accused in all cases, the class of cases in which the state has that right is very small." What they are, is not stated. In State v. Lane, supra, this court, in dismissing the appeal, says: "Until lately no case could be found in the English Reports where a writ of error was allowed on behalf of the crown in a criminal prosecution, and it has not yet been decided that such a writ may lawfully issue, as, in the cases in which it did issue, the question was not made. No reference is found to it in the older books on criminal law. * * * It will be seen that in many of the states it is held that the state has no appeal in a criminal case under any circumstances. In all, or nearly all, it seems to be held that, where the right of appeal exists, it is given by statute, and that, if it exists at all independently of a statute, it is confined to two cases only, —one where the inferior court has given judgment for the defendant upon a special verdict, and the other where it has given a like judgment upon a demurrer to an indictment or upon a motion to quash, which is considered as substantially similar. In this state it has been recognized as existing in those two cases, but I am not aware that it has been in any others." In State v. Moore, 84 N. C. 724, this court says: "The state has no right to appeal in a case like this. Its right of appeal in a criminal action is not derived from the common law or any statute of this state, but has obtained under the sanction of the courts by a long practice, and has been recognized in but four cases, to wit, where judgment has been given for the defendant upon a special verdict, upon a demurrer, a motion to quash, and arrest of judgment." By this time it became apparent that the courts, acting upon the "quo minus" and "ac etiam" principle, had enlarged their jurisdiction of state appeals to the verge of public safety; and hence section 1237 of the Code was passed, not as an enabling, but as a restrictive, statute. This section provides that "an appeal to the supreme court may be taken by the state in the following cases, and no other: Where judgment has been given for the defendant (1) upon a special verdict, (2) upon a demurrer, (3) upon a motion to quash, (4) upon arrest of judgment." The statute is emphatic and unequivocal, and yet are we not asked to add another case; that is, where, in our opinion, a general verdict of not guilty is equivalent to quashing? If we can do this in one case, why can we not do so in all cases where the erroneous instructions upon the trial appear to us equivalent to any one of

the above cases? Can we not thus reach every erroneous instruction upon a question of law? In the recent cases of State v. Southern Ry. Co. the facts were practically undisputed. There was a verdict of guilty in the criminal court, and the judgment of the superior court was equivalent to sustaining a plea to the jurisdiction. Were we wrong in refusing to entertain the state's appeal? If this court was right then, it seems to us we must dismiss the present appeal.

In conclusion we can do no better than quote the concluding words of Justice Ashe in delivering the opinion of a unanimous court in State v. McGimsey, 80 N. C. 377, 383, as follows: "We think the ancient rule of the common law has been sufficiently relaxed by our predecessors, and we are unwilling to move a step further in the direction of discretion. * * * In coming to this conclusion, we are aware that its effect may possibly be to turn loose a bad man upon society, but it is better, in the administration of the law, there should be an occasional instance of violence, even to the sense of public justice, than that a principle should be established which, in times of civil commotion that may occur in the history of every country, would serve as an engine of oppression in the hands of corrupt time-servers and irresponsible judges, to crush the liberties of the citizen." Under our view of the law, the appeal must be dismissed.

MONTGOMERY, J. (dissenting). The term "appeal," as it is understood to mean the removal of a cause for final judgment from an inferior to a superior court, to be tried de novo upon its merits, is of civil-law origin, and was unknown to the common law. A writ of error upon matter of law was the remedy in criminal as well as in civil cases at the common law, but the writ was not allowable to the prosecution in criminal cases. In modern practice, appeals cannot be had by the state in criminal cases, except as provided by statute. The decisions in our court upon this subject are interesting. In State v. Jones, 5 N. C. 257, it was held that in a criminal prosecution the state was not entitled to an appeal under any of the provisions of the act of assembly regulating appeals. In State v. Credle, 63 N. C. 506, it is said, "The class of cases in which the state has that right [appeal] is very small." In State v. Lane, 78 N. C. 547, it was held that the state could appeal upon a special verdict, upon a demurrer, and upon a motion to quash. In State v. Moore, 84 N. C. 724, it was said: "Its [the state's] right of appeal in a criminal action is not derived from the common law or any statute of this state, but has obtained under the sanction of the courts by a long practice, and has been recognized in but four cases, to wit: Where judgment has been given for defendant upon a special verdict, upon a demurrer, a motion to quash, and arrest of judgment." After the decision in the last-mentioned case, section 1237 of the Code was enacted, and embraces the four cases mentioned in that decision, in which the state can appeal. In the case before us the defendant was tried in the court of the mayor of Winston, was convicted and fined, and appealed to the superior court. In that court the defendant was tried on the warrant which was issued by the mayor, and upon which there was no apparent defect, though in fact no affidavit of a complainant was attached. A witness (the person upon whose alleged affidavit the warrant was issued) testified that it was issued without affidavit. The subsequent proceedings, material for the purposes of this appeal, were, in the language of the "case on appeal," as follows: "It appearing that no affidavit was made, the defendant contended he was entitled to a verdict of not guilty. The state contended that, the warrant being regular on its face, the absence of an affidavit made no difference, and that the case should be heard on its merits, and that the most that the court could do, in case it refused to hear the case, was to withdraw a juror and dismiss the warrant. The court announced that, in the exercise of its discretion, it refused to withdraw a juror or dismiss the action, but directed the clerk to enter a verdict of not guilty, which was done, and the defendant discharged." The case before us is here on the appeal of the state, and, if the appeal can be sustained, it must be on the ground that the course of his honor in instructing the jury to return a verdict of not guilty was in legal effect the quashing of the bill of indictment (the justice's warrant). I am of the opinion that the action of his honor was equivalent to a quashing of the indictment, from which the state had the right to appeal. I know it is said in State v. Powell, 86 N. C. 640, that, "when a party charged with an offense before a tribunal of competent jurisdiction has been tried and acquitted, the result is final and conclusive, and no appeal is allowed the state to correct any error committed by the court." But I feel satisfied that in this case the verdict of the jury returned by direction of his honor was not such an acquittal as is contemplated in State v. Powell, supra. An acquittal, to be final and conclusive, as is contemplated in the last-mentioned case, must be had upon a trial upon the merits of the case. The ruling of his honor in this case was in legal effect exactly as if he had quashed the bill of indictment for defect in substance. The state was anxious to have the case proceeded with on its merits, and insisted on such a trial; but his honor, upon discovering that the warrant was issued without an affidavit, stopped the trial, and, because of that defect (the issuing of the warrant without affidavit), directed the jury to return a verdict of acquittal. It is true that the third subdivision of section 1237 of the Code is in the words "upon a motion to quash," and it is also true that in the regular course of procedure the motion to quash

should be made before the defendant pleads to the indictment; but, in point of legal effect, his honor, without a motion on the part of the defendant, made before or after pleading, after the defendant had pleaded and the jury had been impaneled, quashed the indictment because the warrant was not issued on affidavit. He did not enter a formal judgment that the indictment (warrant) be quashed, but what he did was in legal effect just as if he had done so. The defendant was not tried for the offense with which he was charged,—the warrant itself being sufficient in substance, and regular in form,—but he was discharged by an order to the jury to acquit him of the charge because the warrant was not issued on affidavit. The doctrine of "once in jeopardy" applies only to trials where the indictment is for a capital felony. Whart. Cr. Law, p. 577; In re Spier, 12 N. C. 491.

CLARK, J. I concur in the dissenting opinion.

DOGGETT et al. v. UNITED ORDER OF GOLDEN CROSS.

(Supreme Court of North Carolina. May 1, 1900.)

BENEFICIAL ASSOCIATIONS—PROOF OF DEATH —SUIT ON CERTIFICATE—PRIMA FACIE CASE — LOCAL COMMANDERY — DISSOLUTION — PROOF — SUSPENSION OF MEMBER — NOTICE OF ASSESSMENT—PROOF OF NOTICE.

1. Neither the benefit certificate issued by a beneficial association, nor the laws or constitution of the association, required proofs of death to be made by the beneficiary, and the laws of the order required two officers of each subordinate lodge to forward proofs to the supreme keeper of records on the decease of any member of such lodge. *Held*, that where, on death of a member, the lodge made no proofs of death, the beneficiary was not prejudiced thereby, since she was not bound to take any steps, save to demand the sum due under the certificate, and a showing of such demand, and proof of the certificate, made a prima facie case against the society.

2. The laws of a beneficial society (section 9) provided that, whenever the amount due from a subordinate commandery on an assessment should not be received by the supreme keeper of records within 20 days from the date of call, the supreme keeper should record such commandery as dissolved, and forward notice to certain officers and the treasurer of the commandery dissolved. Section 11 declared that a dissolved commandery should have the right to be reinstated on payment of the assessment for nonpayment of which it was dissolved within 30 days. *Held*, that as by section 11 a dissolved commandery should have notice of its dissolution, in order that it might have the benefit of the 30 days, section 9 could not be regarded as self-executing; and hence it was no defense to an action on a benefit certificate that insured's commandery had been dissolved, when there was no record of such dissolution, and no notice thereof had been sent.

3. Where, in a suit on a benefit certificate, defendant's answer denied that the certificate was in force, on the ground that assured had failed to pay an assessment made on her, defendant ought not to have been allowed, on trial, to prove that the certificate was not in force on the ground that local commandery of which insured was a member had been dissolved for nonpayment of an assessment.

4. Where the laws of a beneficial association provided that notices to members of assessments should be on a prescribed form, with the seal of the local commandery, or the financier's stamp, and that each member not paying an assessment for 30 days after the date of the notice should, ipso facto, stand suspended, and on a suit on a benefit certificate a record of the local commandery was shown, suspending insured for nonpayment of an assessment, such evidence and law of the society did not show a forfeiture of the certificate, in the absence of a showing that the notice required was given insured.

Appeal from superior court, Mecklenburg county; Allen, Judge.

Action by Lucile Doggett and others against the United Order of the Golden Cross. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Osborne, Maxwell & Keerans, for appellant. Jones & Tillett, for appellees.

MONTGOMERY, J. The defendant (appellant) is a benevolent association incorporated under the laws of Tennessee in the name of The Supreme Commandery, United Order of the Golden Cross of the World. It embraces, within its organization of the supreme commandery, grand commanderies and subordinate commanderies. The chief officer of the society is called, "Supreme Commander;" the second, "Grand Commander;" and the third, "Noble Commander." All of the subordinate officers have titles equally as high-sounding as those we have named. The motto of the society is, "Fraternity, Beneficence, and Protection," and its avowed objects are (1) to unite fraternally persons of every honorable profession, business, or occupation, of good moral character, and socially acceptable, and, in the case of beneficiary members, of sound bodily health, and between the ages of 16 and 55; (2) to give all the moral and material aid in its power to its members, by holding instructive and scientific lectures, encouraging each other in business, and assisting each other in obtaining employment; (3) to establish a benefit fund, from which, on satisfactory evidence of the death of a beneficiary member of the order who has complied with all its lawful requirements, a sum not exceeding $2,000 shall be paid, as he or she may have directed while living, and as contained in the benefit certificate; (4) to establish a fund for the relief of sick and distressed members; and (5) to pledge its members that they will not, so long as connected with the order, use as a beverage any spirituous, malt, or fermented liquors that will intoxicate. Certainly no insurance company could have nobler aims. The charter and laws of the order provide for the issuing of benefit certificates to members; the beneficiaries to be entitled to the amount named in the certificates from the benefit fund, if the insured have complied with the laws of the society and are in good standing at the time

of death. This fund is to consist of assessments levied by the supreme commandery upon, and paid by the several members of, the subordinate lodges. On the 19th of December, 1895, the appellant issued a certificate to Leonora C. Doggett, who died on the 1st day of May, 1897; and this action is brought by the plaintiff beneficiaries to recover the sum of $1,000, the amount named in the certificate. The defendant contests the payment of the same on the grounds: First, that the plaintiffs failed to give notice of the death of Mrs. Doggett in the manner required by the laws and regulations of the order; and, second, that at the time of her death she was not a member of the society in good standing, but, on the other hand, had failed to pay assessments levied upon her, and had thereby ceased to be a member of the order. The plaintiffs on the trial introduced the benefit certificate, and proved the death of the assured. The defendant, in its answer, did not deny the allegation of the plaintiffs that they had made demand of the defendant for the amount of the policy. Demand having been made, the certificate shown, and the death of the assured proved, a prima facie case was made out for the plaintiffs. Kendrick v. Insurance Co., 124 N. C. 315, 32 S. E. 728; Kumle v. Grand Lodge, 110 Cal. 204, 42 Pac. 634; High Court, I. O. F. v. Zak, 136 Ill. 185, 26 N. E. 593; Tobin v. Society, 72 Iowa, 261, 33 N. W. 663.

As to the first alleged defense of the defendant, it appears from an inspection of the certificate and the constitution and laws of the society that notice and proofs of death are not required to be made by the beneficiaries. That duty is devolved upon the noble commander and keeper of the records of the subordinate lodges, by section 4 of the laws of the order. The supreme commandery chose those two officers of the subordinate commanderies to perform that duty. They made them their agents for that purpose. On the death of a member those two officers were to immediately forward to the supreme keeper of records a notice of such death, in which they were required to state the name, age at the date on which the first degree was conferred, the number of the benefit certificate, the date and cause of death, and the amount paid into the benefit fund. Certificates, also under oath, from the last attending physician, and officiating clergyman and undertaker, were to accompany the notice. It being evident, therefore, that the notice and proofs of death were to be furnished the supreme commandery by the two officers named, of the subordinate commandery of which the deceased was a member, the question as to whether the plaintiffs did or did not furnish such proof to the defendant is immaterial. Millard v. Supreme Council (Cal.) 22 Pac. 864. No proofs of Mrs. Doggett's death were furnished by the officers of the subordinate commandery of which she was a member, but that failure on their part cannot prejudice the plaintiffs' right to recover. In Supreme Council v. Boyle (Ind. App.) 37 N. E. 1105, the court said: "There is nothing in the by-laws that required the appellee to make proof of the death of her husband either to the subordinate or supreme council. When the subordinate council received information of the death of one of its members, it was its duty to make the necessary proof to the supreme council. St. Julian [the subordinate] Council was an agency or instrumentality created by the appellant. If its own instrumentalities failed to act, it cannot be heard to interpose their delinquencies to defeat this action. The appellant had ample time in which to ascertain the fact of the death." In Anderson v. Supreme Council, 135 N. Y. 107, 31 N. E. 1092, it appeared by article 8, § 2, of the relief fund laws of the society, that it was made the duty of the secretary of the subordinate council, on the death of a member, to notify the supreme recorder thereof, according to a form prescribed by the supreme council,—a provision similar to the one on this point in the laws of the defendant in the case before us,—and the court of New York said: "No duty is cast upon a claimant to furnish proofs of death, as a prerequisite to maintaining an action on the certificate, and the plaintiff was not required to do more than to notify the officers of the subordinate council of her husband's death. The duty was thereby cast upon the council to make investigations and proofs for the information of the supreme council." It would seem that the last-mentioned court held that it might be necessary that the beneficiary was compelled to give notice to the subordinate lodge of the death of the assured, as a prerequisite to the commencement of the action against the supreme council for the recovery of the amount of the policy. But that was not the point in the case, and it was not said that a failure to give such notice would have been fatal to the case. That announcement is different from the decision in the cases of Millard v. Supreme Council, and Supreme Council v. Boyle, supra. We are of the opinion that as the constitution and by-laws of the defendant society in the case before us placed no duty upon the plaintiffs (the beneficiaries) to give any notice of any kind to either the supreme commandery, or to the subordinate commandery of which she was a member, nothing was required of the plaintiffs, before suit brought, except to demand of the supreme commandery the amount of the policy, which was done in this case, as appears from an allegation to that effect in the complaint, and not denied in the answer. Especially should that be the rule in this case, for the assured lived and died in the same town in which the officers of the subordinate lodge lived, and where its meetings were held.

The plaintiffs contended that, as the defendant denied its liability, it would not, therefore, be allowed to plead and insist

upon a failure by the plaintiffs to give notice and proofs of the death of the assured, even if notice and proofs had been necessary under the terms of the policy and by-laws. The consideration of that proposition is not necessary to the decision of this case, but it may be useful to state what we think is the law on that question: If an insurance company should refuse to pay the amount of the policy, or deny its liability upon an independent ground, or put its refusal exclusively on other grounds, before proofs of loss are made, and before the expiration of the time within which such proofs are, by the terms of the policy, to be made, such denial and refusal would constitute a waiver of the condition requiring notice and proofs of loss. Such a denial and refusal would be just the same as a declaration and notice to the beneficiary that payment would not be made in any event. The law does not require a vain thing to be done, and such a refusal and denial would make it unnecessary to give notice and proofs of death, since the company had refused absolutely to pay, for such reasons. Gerling v. Insurance Co. (W. Va.) 20 S. E. 691. If, after the time during which notice and proofs of death are required to be given, such notice and proofs should be given, or if, during the time when such notice and proofs are to be given, defective notice and proofs are made, and the insurance company, in such cases, without making objection to such notice and proofs of death, should deny liability or refuse to pay on other distinct and independent grounds, then such denial and refusal would be regarded as a waiver of such notice and proofs. Insurance Co. v. Schneider, 25 L. Ed. 694; Nibl. Ben. Soc. & Acc. Ins. p. 804; Brink v. Insurance Co., 80 N. Y. 108; Insurance Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314, 28 L. Ed. 866.

The defendant, under its second alleged defense (that is, that the assured had forfeited her interest in the certificate by a failure to pay assessments, and failure to comply with the rules and regulations of the order), undertook to show, first, that the subordinate commandery, in the lifetime of the assured, had been dissolved by the supreme commandery, and in consequence thereof all the members, including Mrs. Doggett, had lost their rights under the benefit policies; and, in the second place, to show that Mrs. Doggett had forfeited her rights by a failure to pay assessments,—especially assessment No. 247. To prove that the subordinate commandery had been dissolved, the defendant introduced as a witness John N. Moore, formerly the financial keeper of the records of the subordinate commandery, who testified that before Mrs. Doggett's death numerous assessments had been sent out by the supreme commandery to the subordinate commanderies, that none of them had been paid, and that no report concerning them had been made to the supreme commandery. There was no direct evidence that for that default the supreme commandery had dissolved the subordinate commandery. But the defendant contended that, under section 9 of the general laws of the defendant, the subordinate lodge stood dissolved for that default. That section reads as follows: "Whenever the amount due from a subordinate commandery upon an assessment is not received by the supreme treasurer within twenty days from the date it is called, the supreme keeper of records shall thereupon record such commandery as dissolved, and forward notice of its dissolution immediately to the supreme commander, to the grand commander, and to the grand keeper of records of the jurisdiction in which such commandery is located, and to the noble commander, noble keeper of records, financial keeper of records, and treasurer of the commandery so dissolved, each separately, giving the cause and date of dissolution in such notices." The defendant insisted that the failure of the supreme keeper of records to make entry on his books of the dissolution of the subordinate commandery, and his failure to forward notices of its dissolution to the financial keeper of the records and treasurer of the commandery so dissolved, were not necessary to effect the dissolution of the subordinate commandery, because, as it alleged, the law is self-acting, and the subordinate commandery was dissolved, although that officer neglected to perform his duty. If that had been the end of the matter, there might be something in the contention of the defendant; but, by section 11 of the defendant's general laws, the commandery so dissolved had the right to be reinstated on receipt by the supreme treasurer within 30 days of the assessment, for the nonpayment of which the record of its dissolution was made; and, that being so, it necessarily follows that notice of the dissolution of the subordinate commandery should have been received, in order that it might have the benefit of the 30 days within which to send forward the assessment for the nonpayment of which it was dissolved. Besides, we think that by the defendant's answer, although it denied that the certificate was in force, yet, as it specifically put that denial on the ground that the assured had failed to pay the assessment made on her, and had thereby ceased to be a member of the order, the defendant ought not, in strict law, to have been allowed to prove the dissolution of the subordinate commandery.

The witness Moore was shown a book, and a page taken therefrom, which contained the entry and statement that, for failure to pay an assessment of 54 cents (assessment No. 247), Mrs. Doggett had been disconnected. Section 13 of the general laws of the supreme commandery makes it the duty of the financial keeper of records of a subordinate commandery, upon notification that an

assessment has been made, to notify every member liable to the assessment. The assessment notices to the members are required to bear the official stamp of the financial keeper of records, or the seal of the commandery, and its form is prescribed by the supreme commandery. Each member is required to pay the amount due as stated in the notice within 30 days of the date of the notice, and any member failing to pay the assessment within 30 days shall, ipso facto, stand disconnected from the commandery, without sentence by the commandery. The defendant contends that under said section 13, and upon the evidence of Moore, and the entry in the book of the disconnection of the assured, the forfeiture of the rights of the assured in the benefit certificate was worked, notwithstanding the fact that the defendant failed to show on the trial that notice, in form and substance as required by section 13, was given to the assured. We are of the contrary opinion. In the case of Supreme Lodge Knights of Honor v. Dalberg, 138 Ill. 508, 28 N. E. 785, it appears that the assured, Isaac Dalberg, became a member of one of the subordinate lodges, and that he was suspended for failure to pay an assessment; no notice having been served on him of the assessment. The court held that: "The evidence failed to show that Dalberg, the deceased, was notified of either of the assessments, for the nonpayment of which the appellant claimed he stood suspended at the time of his death. That he could not legally be deprived of his membership in the order without such notice is well settled, and not here questioned." The exceptions to the rejection of the evidence of the defendant were not well taken, and cannot be sustained. There is no error.

ROBINSON et al. v. LAMB.

(Supreme Court of North Carolina. May 8, 1900.)

CONSTITUTIONAL LAW—FERRIES—FRANCHISES—RESTRICTION—TOLLS—ESTABLISHMENT.

1. By Priv. Laws 1784, c. 66, S. was granted the right to maintain a public ferry for 25 years, in consideration of his building a road and keeping the same in repair. Priv. Laws 1810, c. 33, provided that all rights which had attached to S. as keeper of such ferry were transferred to him as keeper of a public bridge at the same place, extended the same for 50 years, and declared that no other bridge should be established within three miles thereof during the continuance of the act. Priv. Laws 1848–49, c. 128, extended such franchise for 50 years, and granted the same to L., as assignee of S., authorizing him to use boats for transportation whenever the bridge was removed, but required its restoration. Priv. Laws 1873–74, c. 27, amended the previous acts, authorized the heirs of L. to establish a boat ferry instead of the bridge, extended the franchise for 30 years from the expiration of the extension granted by the act of 1849, and declared that no other bridge, boat, or ferry should be established within three miles of the one allowed by the act, which distance was reduced by Priv. Laws, 1897, c. 103, to two miles. *Held* that, the franchise granted to S., based on the consideration of the maintenance of the road, having expired, the rights acquired by defendant by virtue of the act of 1873–74, was not a contract, but a mere gratuity or license, and hence the legislature was not precluded from reducing the distance within which another bridge or ferry might be located, as provided by the act of 1897.

2. The supreme court, being a court of appellate jurisdiction, will pass only upon exceptions taken on proceedings at the trial, or on defects apparent on the face of the record, and will not pass on mere propositions of law submitted to it on motion.

3. Code, § 2046, authorizes the county commissioners to establish ferries and public roads and the rate of tolls for ferries, in their discretion. *Held*, that it was error for the superior court to fix tolls to be charged in the first instance, on an appeal in proceedings before county commissioners to establish a ferry, since such tolls should be fixed by the county commissioners, subject only to the superior court's power of review.

Appeal from superior court, Pasquotank county; Starbuck, Judge.

Action by C. H. Robinson and another against E. F. Lamb for the establishment of a ferry. From an order of the county commissioners in favor of plaintiffs, affirmed by the superior court, defendant appeals. Modified.

Busbee & Busbee and Shepherd & Shepherd, for appellant. P. H. Williams, E. F. Aydlett, and G. W. Ward, for appellees.

CLARK, J. In 1784 (Priv. Laws, c. 66) the legislature, in consideration of Enoch Sawyer making a road through the swamp opposite Sawyer's Ferry, 20 feet wide and 1 foot above high tide, conferred on him the right to charge certain tolls, therein specified, for persons, vehicles, and animals "who should pass through the same and across his ferry," said rates to be allowed "during the term of twenty-five years, and no longer." There was another provision imposing a penalty of 20 shillings upon any other person transporting persons, horses, carriages, and effects across said ferry, "one-half to be paid the informer, the other half to said Enoch Sawyer, his heirs and assigns." It seems the ferry was already existing, and the franchise was in consideration of making the road, and keeping it in repair, and was remunerated by tolls for the use of the road and ferry which were not conferred beyond 1809. In 1790 (Priv. Laws, c. 42) the legislature reduced the required width of the road to 16 feet on account of "the expense of making" a 20-foot road, and recouped the public by prescribing that the rate for ferriage should be fixed by the county court of Camden by a majority of all the justices of the peace of the county. In 1810 (Priv. Laws, c. 33) all the rights which had been attached to Enoch Sawyer as keeper of a public ferry across Pasquotank river were transferred to him as keeper of a public bridge at the same place, and were extended for 50 years,—i. e. to 1860,—with an addition that "no other bridge shall be established

within three miles, or on the plantation of said Enoch Sawyer," during the continuance of that act. This was after the expiration of the franchise for levying tolls for traveling over a road, granted in 1784 for 25 years, in consideration of building such road; and, being granted without any consideration, was a mere gratuity or privilege. In 1848–49 (Priv. Laws, c. 128) the "privileges and immunities" granted in the last act were extended 50 years from the expiration of the time mentioned therein, and granted to "Samuel D. Lamb, his heirs and assigns, claiming under Enoch Sawyer." Said Lamb was required to keep the bridge and road in good condition, and the maximum tolls "for passing said bridge and road" were specified in the act, and he is granted permission to use boats for the transportation of passengers "whenever the bridge is removed by winds, tides, or the contact of vessels," provided the bridge is restored within four days after its removal. In 1865 (Priv. Laws, c. 3) the last-named act was amended to authorize Dorsey Sanderlin to construct and use a ferryboat in the place of the bridge required by the previous act. This grant of a ferry was also gratuitous, and was to expire in 1875. In 1873–74 (Priv. Laws, c. 27) the two last-named acts were amended to authorize the heirs of Samuel D. Lamb to establish a ferry with a boat, such as that prescribed in the act of 1865, "instead and in place of the bridge required by the charter ratified on the 29th January, 1849," and its duration was "extended to the heirs of Samuel D. Lamb for thirty years from the expiration of the extension allowed in the act ratified on the 29th January, 1849," and the act of 1810 was "amended to declare that no other bridge, boat, or ferry shall be established within three miles of the one allowed by said act." The defendant contends that this extended the prohibition to erect a bridge or ferry within three miles either way over Pasquotank river till 1940, and that he has a contract right in such prohibition till that date. In 1897 (Priv. Laws, c. 103) the general assembly amended the last act by striking out "3" and inserting "2" miles. The plaintiffs filed a petition with the commissioners of Pasquotank county to establish a ferry over the Pasquotank river from Elizabeth City to Goat Island, in Camden county, at a spot designated, and at which the county commissioners of Camden had authorized such ferry, alleging that the proposed ferry was not within two miles of any other, and that it was necessary for the public good and convenience. The defendant filed a counter petition, and alleged that the proposed ferry was not required by the public good and convenience, and that it was within two miles of his ferry. The county commissioners sustained the defendant's contention, and the plaintiffs appealed to the superior court. In that court, doubtless, the defendant's pleading was amended to aver that the proposed ferry would be within three miles of the defendant's ferry, for the following issues were submitted without exception: "(1) Is the proposed ferry necessary for the public good and convenience? Ans. Yes. (2) Is it within two miles of another ferry? Ans. No. (3) Is it within three miles of defendant's ferry? Ans. Yes." Thereupon it was adjudged that the county should lay out and establish the ferry as prayed, that the petitioners be allowed to build and operate the ferry at their own expense, and be allowed to charge for passing over said ferry the sum of 10 cents, and no more, for a cart, buggy, carriage, or wagon. The defendant appealed.

It is clear that all the above-recited legislation was without consideration, and lacks this essential element of a contract, save the act of 1784, which, by its terms, expired in 1809. Further, that all rights conferred by the act of 1810 expired by its terms in 1860, and that the "privileges and immunities" conferred by the act of 1848–49 had lapsed, and were so treated by the act of 1865, which authorized Dorsey Sanderlin to establish and operate a ferry at that point for 10 years. Whatever rights the defendant has acquired are by virtue of the act of 1873–74. This act was not only a mere gratuity, but a franchise or license of this nature is an attribute of sovereignty, and it would be beyond the power of the legislature to forbid a future legislature (if it had been attempted) from conferring the right to establish other bridges and ferries across streams whenever, in its judgment, the growth of population and trade demanded it. In 1784 the town of Elizabeth City was a very small village. To-day it has a population of many thousands, and is rapidly growing. To restrict its population from crossing the river in front of it, and the transportation of freight across it for the distance of six miles, —three miles on either side,—save at the defendant's ferry, would be a monopoly forbidden by Const. art. 1, § 31. Washington Toll-Bridge Co. v. Commissioners of Beaufort, 81 N. C. 498; McRee v. Railroad Co., 47 N. C. 186; Carrow v. Toll-Bridge Co., 61 N. C. 118. From the earliest times the legislation of this state as now repeated and summed up in Code, § 2014, recognized that the right to operate ferries was a public franchise, and under supervision of public authority. The above-recited legislation was, therefore, simply a license, revocable at will of the general assembly. Whether the defendant acquired any property right to maintain a ferry at the place at which he operates it we are not called upon to decide, though it is intimated in Greenleaf v. Board, 123 N. C., at page 35, 31 S. E. 264, that the commissioners "may discontinue his ferry." There is no attempt to revoke his license in this case, or to interfere with his operations in any way. But the provision of the legislature of 1873–74 that other ferries or bridges would not be authorized within three miles thereof until 1940 was simply legislation re-

stricting the general power of the county commissioners given by Code, § 2014 (and previous legislation there summed up), to authorize public ferries wherever they saw fit; and the general assembly of 1897 had the power to remove such restriction from the county commissioners of Pasquotank and Camden, and to reduce the distance to two miles, as it did. Just so any legislature might change the two-mile restriction in the general act. Code, § 2038. There was no contract with the defendant that this should not be done, and the contract would have been invalid if made, for it would be "an alienation of sovereign powers, and a violation of public duty." Greenleaf, cited by Smith, C. J., 81 N. C. 499, and Cooley, Const. Lim. 125, cited Id. If the defendant's claim were well founded, it would equally render illegal the railroad bridge which has been built within three miles of the defendant's ferry.

The defendant files in this court a motion reciting certain propositions of law which he desires the court to pass upon. This is an irregular practice, which we cannot recognize. This is an appellate court, and we pass only upon exceptions taken to proceedings in the trial below, or upon defects apparent upon the face of the record proper.

The discretionary power of the county commissioners to establish ferries and public roads is subject to review by the superior court on appeal, and, of course, to reversal. The case of Ashcraft v. Lee, 79 N. C. 34, relied upon in the brief of defendant's counsel, was reversed on rehearing. 81 N. C. 135; Code, § 2039. The matter of tolls is left to the discretion of the county commissioners (Code, § 2046), but doubtless could be reviewed if exorbitant. While we do not see that the defendant has any right to complain whatever of the rates of toll allowed to the plaintiffs, it was error in the superior court, appearing on the face of the record, for that court to fix the tolls in the first instance. It should have contented itself with directing the county commissioners to grant the petition to establish the ferry, and the matter of tolls should be fixed by the county commissioners, subject to review on appeal, if excepted to for proper and sufficient cause by any one interested. Modified and affirmed.

STATE v. KINSAULS.

(Supreme Court of North Carolina. May 8, 1900.)

HOMICIDE—APPEAL — JURY — FINDING OF INDIFFERENCE—FAILURE TO EXHAUST CHALLENGES—EVIDENCE—CHARGES—EXCEPTIONS —FAILURE TO REQUEST INSTRUCTIONS—RECAPITULATION OF EVIDENCE—PRESUMPTION —REQUEST — REMARKS OF COUNSEL — VERDICT—MOTION FOR NEW TRIAL—MISCONDUCT OF JURY.

1. The finding of fact by the judge, on the trial of a criminal case, that a juror is indifferent, is not reviewable on appeal.

2. Where, on the trial of a criminal case, the prisoner fails to exhaust his peremptory challenges, his exceptions to jurors will not be reviewed on appeal.

3. Evidence for the state in a murder trial that the defendant had weapons in his possession is competent to show preparation for the crime.

4. An exception to the judge's charge to the jury in a criminal case "as given" is too broad to be available on appeal, under Code, § 550, authorizing the settling of bills of exception which shall embody exceptions to instructions, and providing that written exceptions shall be deemed conclusive of what they were on such settlement.

5. In a capital case, where the defendant only excepts to the charge "as given," specific exceptions may be inserted nunc pro tunc on appeal, with the assent of the attorney general.

6. Failure of a prisoner's counsel to ask for fuller instructions precludes the objection on appeal that fuller instructions were not given.

7. Where the record does not purport to contain the entire charge given on a criminal trial, and hence does not affirmatively show that the judge in charging the jury did not recapitulate the evidence, it will be presumed on appeal, in favor of the regularity of the trial, that the judge did recapitulate the evidence.

8. It is not error not to recapitulate the evidence in a charge given on a criminal trial, unless such a charge is requested and refused.

9. Where, on objection to the remarks of counsel for the state in a criminal trial, the judge promptly stops him, and cautions the jury not to consider his remarks, the court has done all in its power, and no error is committed.

10. A verdict, on a trial for murder, of "guilty of the felony of murder in the first degree," is substantially proper, and the addition afterwards by order of the court of the words, "in manner and form as charged in the bill of indictment," is a mere formality, which does not prejudice the prisoner.

11. A motion for a new trial, after the close of a term, for misconduct of the jury, which was known at the time of trial, is too late to be available.

12. Where a jury attended church during a murder trial, with the prisoner's consent, and the preacher, in his sermon, cautions them to be careful, and, if the prisoner is guilty, to say so, and, if not, to say so, and exhorts them to do their duty before God and their country, and in his prayer prays for a fair and impartial trial for the prisoner, such circumstance does not constitute misconduct of the jury prejudicial to the prisoner.

Appeal from superior court, Sampson county; Bryan, Judge.

Archie Kinsauls was convicted of murder in the first degree, and appeals. Affirmed.

John D. Kerr, for appellant. The Attorney General, for the State.

CLARK, J. The exceptions to jurors were properly abandoned in this court. The finding of fact by the judge that a juror is indifferent is not reviewable. State v. Potts, 100 N. C. 457, 9 S. E. 657; State v. Fuller, 114 N. C. 891, 19 S. E. 797. Besides, other exceptions to jurors, if made, could not be reviewed, since the prisoner did not exhaust his peremptory challenges. State v. Hensley, 94 N. C. 1021; State v. McDowell, 123 N. C. 764, 31 S. E. 839; Wals. Dig. 281.

The only exception to evidence was that

which showed weapons in possession of the prisoner, which was competent to show preparation.

The sole exception to the charge was the "broadside" exception "to the charge as given," which the unbroken decisions of this court, in accordance with the provision of the statute governing appeals (Code, § 550), hold inadmissible. State v. Moore, 120 N. C. 570, 26 S. E. 697; Wals. Dig. 149, 249. But in a capital case the attorney general will readily assent to the insertion of proper exceptions nunc pro tunc. State v. Huggins (at this term) 35 S. E. 606; State v. Wilcox, 118 N. C. 1131, 23 S. E. 928. The prisoner's counsel insists that the charge is defective, because it did not array the evidence, and present the contentions of the parties. The strict rule laid down in State v. Boyle, 104 N. C. 800, 10 S. E. 696, 1023, has since been overruled, and we find the charge a reasonable compliance with the statute. If the prisoner's counsel had desired fuller instructions he should have asked for them. State v. Edwards (at this term) 35 S. E. 540.

The prisoner further objects that the judge did not recapitulate the evidence. The regularity of the proceedings below are presumed, and the appellant must show error. The charge does not purport to be in full, and merely states, "The judge charged, among other things." All that is required is that the judge send up the parts of the charge excepted to. It does not affirmatively appear that the judge did not recapitulate the evidence. The prisoner had 10 days after court to make out his exceptions to the charge, and if in them he had excepted that the judge had not recapitulated the evidence, his honor would have been put on notice to state how the fact was. Besides, ordinarily, it is not error not to recapitulate the evidence, unless it is requested. Boon v. Murphy, 108 N. C. 187, 12 S. E. 1032, and cases there cited; Clark's Code (3d Ed.) § 412, note 3; State v. Ussery, 118 N. C. 1177, 24 S. E. 414.

When the remarks of counsel were objected to, the judge promptly stopped him, and cautioned the jury not to consider them, which was all the court could do. State v. Rivers, 90 N. C. 738. Besides, there were no exceptions taken.

The verdict, "Guilty of the felony of murder in the first degree," is a substantial compliance with the statute, and the meaning of the jury could not be misunderstood. The addition, next day, by order of the court, of the words, "in manner and form as charged in the bill of indictment," was a mere formality, which in no wise prejudiced the prisoner.

A month after the trial, the prisoner's counsel moved for a new trial because of misconduct of the jury. The court was then functus officio. State v. Sanders, 111 N. C. 700, 16 S. E. 320; State v. Bennett, 93 N. C. 503; State v. Warren, 92 N. C. 825. If the motion had been made during the term, the judge should have found the facts, and the verdict should have been set aside as a right, only when there was misconduct affecting the verdict of the jury, and not when there was merely opportunity. State v. Tilghman, 33 N. C. 513. Here the alleged misconduct was the remarks of a preacher at a church which the jury were allowed to attend with the consent of the prisoner. If the remarks had been prejudicial, the sermon was a matter of public notoriety, and the prisoner's counsel should have been able to have presented the matter to the court before adjournment; and, as he did not do so, it is a matter (if there were anything to complain of) to be presented to the executive. The matter complained of is, as stated in ex parte affidavits for the defense, that the minister said: "There are men here who have in their hands the life of a poor man now on trial. You ought to be careful, and, if he is guilty, say so; and, if he is not guilty, say so. Do your duty before God and your country;" and in his prayer he said, "Now, Lord, we are going to offer a special petition to Thee that this jury may give him a fair and impartial trial, and, if guilty, say so; and, if not guilty, say so," and made a special appeal to God in behalf of said prisoner, praying for a "fair trial to him." It would have been, of course, propriety for the man of God to have made no reference to a matter which the laws of his country had intrusted to the unbiased decision of a jury, but it is impossible to find in the above anything which was prejudicial to the prisoner. In view of the occurrence, it would be well, however, for trial judges hereafter to avoid giving similar opportunity for complaint. The counsel for the prisoner, with commendable zeal, has presented every possible objection which might vitiate the trial below, but, so far as the record appears, the minister's appeal has been answered, and the prisoner has had the fair trial which the laws of his country guaranteed him. No error.

CAPITAL PRINTING CO. v. CITY OF RALEIGH.

(Supreme Court of North Carolina. May 15, 1900.)

CITIES—LIABILITY FOR OVERFLOW OF WATER—QUESTION FOR JURY.

A city had provided a culvert for carrying water from a street having entrance gratings flush with the street. The gratings were stopped at times by débris, and to remedy that defect the gratings were raised, but were later replaced in the old position. An engineer testified that the culvert and gratings were ample protection against any ordinary rainfall. Plaintiff's building was flooded by an unusually severe rain, in which an inch of water fell in 10 minutes, by overflow from the street. The area ways to plaintiff's building were in bad repair. *Held*, that it was error to order a nonsuit, in an action against the city for such injury, as there was a sufficient conflict in the evidence to warrant the submission of the cause to the jury.

Appeal from superior court, Wake county; Brown, Judge.

Action by the Capital Printing Company against the city of Raleigh for damage caused by an overflow of water from a street. From a judgment in favor of defendant, plaintiff appeals. Reversed.

R. O. Burton and A. J. Feild, for appellant. W. L. Watson, for appellee.

FAIRCLOTH, C. J. The plaintiff alleges that its property was damaged by the negligence of the defendant. At the close of the plaintiff's evidence the defendant moved to dismiss the action, as in case of nonsuit. His honor held that there was no evidence of negligence by the defendant to go to the jury, and rendered judgment of nonsuit. The plaintiff excepted, and assigned said holding and judgment as error. In the argument in this court the merits of the controversy were discussed at length, but the only question we can consider is whether the plaintiff's evidence was sufficient to authorize and require his honor to submit an issue to the jury on the question of the defendant's negligence.

G. V. Barnes, president of the plaintiff printing corporation, testified that the plaintiff's printing house fronted on Martin street, in Raleigh, and the paper, stock, books, forms, etc., were damaged in the basement several feet below the level of the street; that the water overflowed the street and sidewalk, and entered the basement through windows fronting the street, which windows extended below the level of the street, and were protected by area ways. The stock was on shelving and tables in the basement, and the overflow and damage occurred at night, on the 15th of May, 1898.

G. Norwood, the bookbinder, after describing the extent of the loss, said that nearly all of the articles ruined were damaged by water coming through the Martin street window.

C. B. Edwards testified: "Remember rain of May 15, 1898. I saw high water line on my fence. I live on Martin street, adjoining printing shop. I think water rose high enough to flow over area ways, and into plaintiff's windows, on Martin street. On Martin street culvert runs under street. There are two openings to culvert on each side of street, which are covered with iron gratings. (It is admitted that there is a stone culvert crossing Martin street three by four feet, which empties into a terra-cotta pipe two feet in diameter. The length of pipe is 175 feet, and has a fall of 10 feet from top of street to the end of pipe. The openings into the culvert are 3 feet 3 inches long by 18 inches wide, and 4 feet 10 inches long by 2 feet 2 inches wide, respectively. These openings are covered with gridiron gratings, the open spaces between the bars being 2½ and 2¾ inches, respectively. The street is paved with Belgin block, with stone curbing from 6 to 8 inches in height.) Saw openings to culvert morning after storm. They were covered with trash. As water flows over the bars to gratings, leaves and paper catch on bars, and gradually lap over one another, and finally cross to the next bar, and prevent the water from flowing through into the culvert. Then the sidewalk would become flooded. I saw the trash taken off the next morning after the storm. It consisted of green leaves, green twigs, branches of trees, pieces of wood, and a few strips of paper. It was not ordinary trash. Was mostly leaves and twigs beaten off of trees by the storm. The reason that the sidewalk was overflowed was because the openings to the culvert became stopped up. If it had not been for the obstruction to the openings, I think the culvert could have easily carried off any amount of water that might have fallen on the street. Remember the rain storm of May 18, 1894, when the sidewalk was overflowed. The arrangement of the gratings was the same on the night of May 15, 1898; that is, they were flush with the surface of the street. That when the gratings were flush with the street the openings were liable to become stopped up, as already described. I have been out in the rain on two occasions, and taken the trash off of the gratings with a rake, to prevent the sidewalk from overflowing. After the storm of May 18, 1894, I complained to Mr. Blake, the street commissioner and city engineer, about the gratings, and the city had them raised about four inches on iron legs, so that the trash would pass under the bars to the gratings instead of over them. They remained in that condition for some time, and were less liable to become obstructed than they were when flush with the street. The legs to the gratings were broken off by wagons or the street sweeper of the city some time before the storm of May 15, 1898, and were flush with the street on the night of the storm. I never knew the sidewalk to overflow but on two occasions,—May 18, 1894, and May 15, 1898,—when the storm was excessive and unusual. On every other occa-

sion the culvert has been ample to carry off the water. I think it would have carried off the water on May 15th, if the openings had not become obstructed. The street had not been swept for several days just before the storm. It was closed on account of my daughter, who was very sick. There was no need of sweeping the street. It was clean."

C. F. Von Herman, who has been in the United States weather service for many years, and is now chief of the weather bureau at Raleigh, deposed that "the rain storm of May 15, 1898, was most unusual for this section. It was excessive, extraordinary, and abnormal. Never knew of one inch to fall in ten minutes before. Such an abnormal rain is popularly denominated a 'cloud burst.'" After a more particular account of the precipitation at short intervals, he said: "The rain storm of May 18, 1894, was also an abnormal storm. These two exceeded by far any others which we have recorded." To the question, "Although the storms of May 18, 1894, and May 15, 1898, were unusual, excessive, and abnormal, may they not reasonably be expected to occur occasionally?" and the witness said that "they might be expected to occur again."

A. W. Shaffer was examined, and testified: "Reside in Raleigh, and am a civil engineer by profession. Made a survey and map of locality of plaintiff's shop. Examined the locality on the morning of May 16, 1898, after the storm, and examined the gratings over the openings to the culvert. The accumulations on the gratings were not the ordinary street refuse, but leaves and green branches and other extraordinary accumulations. That he fixed the high-water line by evidences on the buildings and fences. That the water rose high enough, as shown by the high-water line he found, to flow into plaintiff's windows. The water was surface water only. That the culvert and terra-cotta pipe leading south under the adjacent lots are of ample capacity to carry off any storm or rainfall that we reasonably expect to happen in this climate. That it can carry off such extraordinary rainfalls as usually occur, but that he did not think that the terra-cotta pipe was sufficient to carry off the rainfall of May 18, 1894, or May 15, 1898. That if the pipe had the same capacity as the culvert it could carry off any rainfall that might happen. The street paving and the curbing and the grading of the street were properly done, and that the gratings over the openings to the culvert were such as are usual in cities and towns where the streets are kept clean. That the gratings were constructed skillfully, and were placed in the usual position. That he has seen some gratings that were raised on legs above the surface of the street, but they always had flaps or inclined sides to them, and were more likely to become obstructed than if the gratings were flush with the surface of the street. He has never seen any gratings on legs without the side gratings anywhere but at this particular locality. The universal method is to put them flush with the street. If the gratings were raised on legs, as these gratings had once been and are now, the liability to become obstructed would be much less than if flush with the street. That the area ways to the Martin street windows were sunken and broken away from the wall and in bad condition. That they had since been built higher. That, if they had been at their present height on the night of May 15th, the water would not have flowed over them."

These were the only witnesses examined. The defendant's motion to dismiss the action was equivalent to a demurrer to the evidence, and the plaintiff's evidence will be considered as true, and taken in the most favorable light for it. Gibbs v. Lyon, 95 N. C. 146; Springs v. Schenck, 99 N. C. 551, 6 S. E. 405. An appellate court, reviewing a judgment of nonsuit, will assume every fact proved, necessary to be proved, when the evidence tends to prove it. Howell v. Railroad Co., 124 N. C. 24, 32 S. E. 317. It is easy to lay down the general rule, but the difficulty lies in applying the rule to the facts in individual cases as they arise. When the facts are not conflicting, and only one inference can be drawn from them by a reasonable mind, it becomes a question for the judge alone. When the facts are not clear to the mind of prudent and reasonable men, or if the evidence is not so plain that reasonable men might not reach different conclusions on the subject, it is a question for the jury to consider, under proper instructions by the court, whether there was or was not negligence, which is a mixed question. It is not necessary to refer to the numerous authorities and decided cases on this subject. The principle is recognized and stated in Tillett v. Railroad Co., 118 N. C. 1031, 24 S. E. 111, and Russell v. Railroad Co., 118 N. C. 1098, 24 S. E. 512.

In the case at bar, the defendant relies on evidence that it had skillfully prepared every reasonable protection against damage, and that the storm on the night of May 15, 1898, was so extraordinary and abnormal that it should not be held liable for the result, because it was not produced by its negligence. On the other hand, the plaintiff relies on evidence showing that the lower end of the drain way was smaller than the upper end, and that the defendant had the knowledge and the experience of a similar rainfall in 1894, against which it provided, but allowed the improved protection to become worthless before May 15, 1898, which improved condition would have prevented the overflow. The plaintiff insists that these facts tend to show negligence and culpable liability. From this condensed statement of the evidence, at present admitted to be true, we think there is room for different conclusions to be drawn by reasonable men. We intimate no opinion on the weight of the evidence either way, nor on the ultimate liability of the defendant.

either in its quasi judicial or ministerial character. Such questions, to which the argument before us was mainly addressed, were not considered in the superior court, and are not before this court. Reversed.

DOUGLAS, J., concurs in result only.

MERRELL et al. v. McHONE.

(Supreme Court of North Carolina. May 15, 1900.)

APPEAL AND ERROR—APPEALABLE ORDER—RECORDARI—DISMISSAL.

1. An appeal does not lie from an order denying a motion to dismiss the return of a justice of the peace to a writ of recordari.

2. Code, § 876, provides that if a judgment is rendered on process not personally served on defendant, and defendant does not appear and answer, he shall have 15 days after personal notice of the rendition of judgment to serve a notice of appeal. A judgment was rendered against defendant in an action wherein his real estate was attached, on the ground that he was a nonresident, while he was temporarily absent from the state. On his return to the state, and immediately on learning of the judgment, he applied to the justice for a rehearing or for the allowance of an appeal. The application was denied on the ground that the record had been filed with the clerk of the superior court, as is required in cases of attachment of real estate from a justice's court. Defendant thereupon, at the next term of the superior court, filed an affidavit and petition for a writ of recordari. He alleged that he was not a nonresident, and that he had a good defense to the action. Plaintiff moved to dismiss the return, on the ground that defendant was not entitled to an appeal, not having served notice within 15 days, and on the further ground that the cause had not been brought before the court in the proper manner. *Held* that, since it would have been useless to give notice of appeal after the justice had refused to allow an appeal, the case was properly before the superior court for retrial.

Appeal from superior court, Madison county; Starbuck, Judge.

Action by H. F. Merrell and another against C. A. McHone before a justice of the peace. There was a judgment in favor of plaintiffs, and defendant, after a denial by the justice of an appeal, applied to the superior court for a writ of recordari. From an order denying a motion to dismiss the return, plaintiffs appeal. Affirmed.

W. W. Zackary and J. M. Gudger, Jr., for appellants.

CLARK, J. The Code (section 876) provides: "If the judgment is rendered upon process not personally served, and the defendant did not appear and answer, he shall have 15 days after personal notice of the rendition of the judgment to serve the notice of appeal herein provided for." Judgment was rendered, in an action based upon an attachment, by a justice of the peace against the defendant, who was absent at work in another state. Within a short time he returned to the state, and as soon as he had information of the judgment he applied to the justice for a rehearing (Code, § 845) or an appeal, both of which were refused on the ground that the papers in the cause had already been sent up to the clerk of the superior court, as is required in attachments upon realty (Code, § 354). It is not contended that any personal notice of the judgment was ever given the defendant. At the first term of the superior court, an affidavit and petition for recordari were filed, and an order for the recordari issued. Not being obeyed, an alias issued, and on its return the plaintiff moved to dismiss, which was refused. No appeal lay from such refusal (Perry v. Whitaker, 77 N. C. 102), and it was properly entered as an exception. The final judgment being against the plaintiff, it now comes up for review. Had the final judgment been in favor of the plaintiff, the exception would then have become immaterial, and an appeal unnecessary. There was no laches on the part of the defendant. He was entitled to an appeal upon learning of the judgment. He applied immediately to the justice of the peace, and, he having refused to make a return of an appeal to be docketed in the superior court, it would have been useless to give notice to the plaintiff of an appeal which was not allowed to be taken. Besides, if, as the defendant avers, he was not a nonresident, he could have applied to the court for a writ of recordari, without applying to the justice of the peace for an appeal at all. McKee v. Angel, 90 N. C. 60; Caldwell v. Beatty, 69 N. C. 365; Clark v. Manufacturing Co., 110 N. C. 111, 14 S. E. 518. The defendant applied at the first succeeding term of the superior court for a writ of recordari. Notice was given of its issue to the plaintiff, as well as to the justice of the peace. The defendant averred merits, as required in such application, and the result of the trial has shown he was right therein also. No error.

PERSON et al. v. LEARY et al.

(Supreme Court of North Carolina. May 15, 1900.)

RECEIVERS—APPOINTMENT—PLEADING AND PROOF—ACTION—APPEAL.

1. Persons suing as receivers should, on their appointment being denied, prove the same by a certified copy of the decree dissolving the corporation and appointing them.

2. Defect in proof in making out a prima facie case, in that plaintiffs, suing as receivers, did not prove their appointment, cannot be cured by evidence offered for the first time on appeal, after argument.

3. Foreign receivers to sue in the state should obtain leave of the court, but the better rule is to have local receivers appointed.

4. Failure of foreign receivers to obtain leave of court to sue is waived by not insisting on it in the trial court.

5. Though a decree for persons suing as receivers will be reversed, they not having proved their appointment, the action will not be dismissed; they having pleaded to their appointment, so that the defect is only one of proof.

Appeal from superior court, Tyrrell county; Starbuck, Judge.

Action by one Person and another, as receivers, against S. S. Leary and others. From an order, defendants appeal. Reversed.

F. H. Busbee, for appellants. Busbee & Busbee and Shepherd & Shepherd, for appellees.

CLARK, J. The defendants except to the continuance of the restraining order to the hearing upon several grounds,—among them: "(2) The plaintiffs have failed to make out a prima facie case, in that they have failed to show any title; having failed to show that they are receivers of the Bank of Commerce in Buffalo, New York, by any proper evidence. (3) That, if they are receivers, it is a matter of record, and should be shown by the record." "(8) That the receivers, even if their appointment had been shown, have no permission to prosecute this action in the courts of North Carolina; that they have never qualified as receivers in North Carolina, and have no interest in the property in controversy." These same plaintiffs attempted to prevent a judgment being taken in Kruger v. Bank, 123 N. C. 16, 31 S. E. 270, and the court then said that their affidavit averring their appointment as receivers by the court in New York was "entitled to no consideration," as they were not parties to the action, and "the affidavit is not even accompanied by a certified copy of the alleged judgment of dissolution, and appointment of receivers." That they are plaintiffs now does not give them rights as receivers of the bank unless, as a matter of law, they are authorized to bring this action as such receivers. Their alleged appointment as receivers is denied by the answer. The only proof that could be made is a certified copy of the order of dissolution and appointment of receivers. That not having been filed, the court could not recognize their authority to bring this action and invoke the equitable jurisdiction of the court. Upon the record, the bank in Buffalo is the party in interest, and, in the absence of a certified copy of the decree dissolving the corporation and appointing Person and Hazell receivers, they have no standing in court, and have not made out a prima facie case entitling them to any relief. After the decision of this court above cited, it is singular that the plaintiff should not have produced a certified copy of the decree of the court under which they claim to be receivers; for, in the absence of it, they are simply individuals suing in their own names, and as such showing no equity to a restraining order against the defendants.

After argument here, the plaintiffs offered a certified record of their appointment as receivers, and asked to amend under Code, § 965. In its discretion, this court can, in proper cases, permit amendments; but this is a defect of proof in making out a prima facie case, and cannot be cured by offering, after appeal, and argument thereon in this court, the omitted evidence which might have entitled the plaintiffs to maintain the action. If offered below, there would be opportunity to controvert it by denying its genuineness, its purport, or showing a later decree. None of these things can be done here, as this is an appellate court. When the case goes back, they can again move for a restraining order, if so advised, upon proper evidence to justify it.

This renders it unnecessary to pass upon the eighth exception, as well as the other exceptions in the record not recited above. But an administrator appointed in another state cannot maintain an action in this state. Administration must be taken out here. If there are any reasons why receivers should not in like manner be appointed in this state to take charge of property in this state belonging to a deceased corporation, at most the authority of such foreign receivers to proceed to enforce their claims in our courts is a matter of comity, as was said in Kruger v. Bank, supra, and hence should probably not be exercised without leave of the court. The better rule is to have receivers appointed here. The plaintiffs having pleaded their appointment as receivers, it is not a case for dismissal of the action, but a defect in the proof which would entitle them to the relief sought, and the absence of leave to sue was waived by not insisting on it below. The restraining order was improvidently granted. Error.

CLINE et al. v. RUDISILL.

(Supreme Court of North Carolina. May 15, 1900.)

JUSTICE COURTS—ACCEPTANCE OF DEPOSIT AFTER JUDGMENT.

Where, in an action in a justice court, the defendant tendered and deposited with the justice, before judgment, a sum in full of all indebtedness to plaintiff and costs, and after judgment was rendered against him for a greater sum, and an appeal was taken therefrom, the plaintiff withdrew such sum, and receipted for it "as applying on the judgment," still claiming a balance, such acceptance constituted a full settlement of the judgment; since plaintiff could not accept the money, except on the terms of the deposit, without defendant's consent.

Appeal from superior court, Lincoln county; McNeill, Judge.

Action of debt by Cline & Wilkie against Mrs. Alice Rudisill. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

L. B. Wetmore, for appellants. D. W. Robinson, for appellee.

FAIRCLOTH, C. J. This action was commenced before a justice of the peace on March 4, 1899, for work and labor and materials for building a dwelling house. On March 13, 1899, the defendant tendered and deposited with the justice of the peace $18.93 and accrued costs for the use of the plain-

tiffs, "in full tender of all indebtedness of defendant to plaintiffs." On March 14th the justice rendered judgment in favor of the plaintiffs for $32.95 ($18.93 of which has been paid into court, as above stated) against the defendant, who then and there appealed to the superior court. On April 15th following, the plaintiffs' attorney filed this receipt (the appeal then pending in the superior court): "Received of S. P. Sherrill, J. P., the $18.93 paid into court, and the fees, to use of plaintiffs. This money is taken out, and receipt given after judgment; the plaintiffs claiming still the balance due." At the trial his honor adjudged that the defendant go without day, and recover costs accruing since the appeal. The facts were agreed to by counsel. When the plaintiffs accepted and received the amount of the tender and deposit, they did so with the condition and terms annexed, to wit, "in full tender of all indebtedness of defendant to plaintiffs." They could not inject other terms into the contract without the defendant's consent. The question presented is sufficiently discussed in Kerr v. Sanders, 122 N. C. 635, 29 S. E. 943. Code, § 574.

Affirmed.

AUSTIN v. STEWART.

(Supreme Court of North Carolina. May 15, 1900.)

REFERENCE—APPEAL AND ERROR—APPEALABLE ORDER—DISMISSAL—JURISDICTION OF REFEREE — MORTGAGES — FORECLOSURE — PURCHASE BY MORTGAGEE—VACATION OF SALE—APPLICATION OF PROCEEDS.

1. Where, in an action, defendant sets up a plea in bar, it is erroneous for the court to refer the cause, contrary to defendant's objection, before such plea is passed on.

2. In an action wherein defendant pleads a plea in bar, an order referring the cause, made contrary to defendant's objection, prior to the disposition of the plea in bar, is appealable.

3. In an action wherein defendant set up a plea in bar, the court, contrary to defendant's objection, referred the cause before disposing of the plea. The referee dismissed the case on the ground that the court had no jurisdiction. The court reversed the action of the referee in dismissing the cause, and re-referred the case. *Held* that, though an appeal from the second order of reference was premature, the defendant having excepted to the making of the first order, the appeal would not be dismissed.

4. A referee has no jurisdiction to dismiss an action, which has been referred to him, on the ground that the court appointing him had no jurisdiction of the cause.

5. Where a mortgagee sells mortgaged land on foreclosure under the power of sale in the mortgage, and himself becomes the real purchaser thereof, through the intervention of a third person, the mortgagor may disaffirm the sale and have a new sale ordered.

6. A mortgagor brought an action against a mortgagee who, through the intervention of a third person, had bought the mortgaged premises on foreclosure under the power in the mortgage, and affirmed the sale, and sought to charge the mortgagee with the full value of the land. *Held* that, having affirmed the sale, the mortgagor was bound thereby, and could only recover the amount realized after deducting the mortgage debt and the costs of the foreclosure.

Appeal from superior court, Union county; Allen, Judge.

Action by J. W. Austin against Coleman Stewart to recover the value of mortgaged lands alleged to have been purchased by defendant at his own sale. From an order directing a second reference of the cause, defendant appeals. Reversed.

Adams & Jerome, for appellant. Redwine & Stack and Burwell, Walker & Cansler, for appellee.

CLARK, J. The complaint alleges that the defendant (mortgagee) sold the land of the plaintiff (mortgagor), and bought the same through an intermediary, who afterwards conveyed to a son of the defendant, but that the real purchaser was the defendant. Wherefore the plaintiff alleges that he "has the right to disaffirm said sale, as a nullity, or to affirm the same and hold the defendant to an account for the full value of said land, which he holds to be $565, which he now elects to do." The answer denies that the defendant was interested in any wise in the purchase at the mortgage sale, and denies that the land is worth what the plaintiff alleges, and avers that it brought full value, and that the plaintiff was present and made no objection at the sale; and the defendant sets up a counterclaim for sundry amounts due upon bonds executed by the plaintiff, wherefore he demands judgment for the difference. The court referred the cause, and the defendant excepted. The referee dismissed the action because the complaint did not state a cause of action within the jurisdiction of the superior court,—on the ground, as we understand, that the plaintiff having, in his complaint, affirmed the sale, the difference between the amount the land brought and the mortgage debt was within the jurisdiction of a justice of the peace. The court reversed this action and re-referred the case, and the defendant appealed.

The plaintiff moves in this court to dismiss the appeal as premature. An appeal from an order of re-reference is premature. Clark's Code (3d Ed.) p. 750, § 548, and cases there cited. But that is where the original reference is not called in question. Here the original reference was erroneous, because there was a plea in bar, and a reference before such plea is passed upon is appealable at once. Smith v. City of Goldsboro, 121 N. C. 350, 28 S. E. 479, and cases cited. It is true, the defendant, instead of appealing then, as he could have done, noted an exception, but that now comes up, and makes this appeal valid.

The referee had no jurisdiction to dismiss the action, which power belongs to the court alone; but, taking his action as substantially a ruling that the complaint did not state a cause of action within the jurisdiction of the superior court, it was erroneous. The jurisdiction depends upon the sum demanded in good faith, which here exceed-

ed $200, and was not ousted by reason of the plaintiff being mistaken in his right under the law to recover the sum he claimed. Sloan v. Railway Co. (at this term) 36 S. E. 21; Martin v. Goode, 111 N. C. 288, 16 S. E. 232. The plaintiff could have disaffirmed the sale, and procured an order of resale, upon proof of his allegation that the defendant was the real purchaser. Gibson v. Barbour, 100 N. C. 192, 6 S. E. 766. But, having elected to affirm the sale, such election, once made, is binding (Syme v. Badger, 92 N. C. 706; Horton v. Lee, 99 N. C. 227, 5 S. E. 404); and he is entitled only to the sum the land brought, after deducting the mortgage debt, and the legitimate costs entailed by the sale,—subject, of course, to any sum proved upon the counterclaim which is pleaded. He cannot affirm in part and disaffirm in part. The plaintiff relies upon Froneberger v. Lewis, 79 N. C. 426, which is a case where an administrator bought at his own sale, and was held liable for the value of the property. But there the sale was not affirmed, but disaffirmed, and it was held that in such case the heirs at law could elect to treat the sale as a nullity; i. e. recover the land, or hold the administrator liable for its value. If they had affirmed the sale, as the plaintiff has done, they could only have recovered the sum the land brought. The reference was probably made under the authority of Brothers v. Brothers, 42 N. C. 150, which was followed by Froneberger v. Lewis, supra, though in the latter case the re-reference was upon an original reference by consent, without adverting to the fact that the first was a case under the old procedure in equity. A failure to note this distinction has not infrequently caused new trials. Ferrall v. Broadway, 95 N. C. 551. The superior court had jurisdiction, but the order of reference was erroneous. Error.

STATE v. JONES.

(Supreme Court of North Carolina. May 15, 1900.)

HOMICIDE—MENTAL CAPACITY.

Whether defendant in a murder case had mental capacity to meditate and deliberate is a question for the jury, on conflicting evidence.

Appeal from superior court, Wake county; Hoke, Judge.

Thomas Jones was convicted of murder, and appeals. Affirmed.

B. C. Beckwith, for appellant. The Attorney General, for the State.

FURCHES, J. The prisoner was indicted for the murder of Ella Jones, and pleaded not guilty. While the killing was not formally admitted, it was not denied. The jury found the prisoner guilty of murder in the first degree. There are no exceptions to evidence, nor to the conduct of the trial, nor to the charge of the court, except as appears upon the court's refusing to give the following special prayers for instruction: "(1) That in no aspect of the testimony, and under no reasonable inference that can be drawn from it, is the prisoner guilty of murder in the first degree; (2) that, at most, the jurors can convict of murder in the second degree; (3) there is no evidence of deliberation and premeditation." As these are the only exceptions contained in the record, we must take it that the charge of the court in all other respects was correct. And as the court could not weigh the evidence, and say what parts should be believed and what should not be believed, if there was any evidence that showed or tended to show deliberation and premeditation, if believed, it ought to have been submitted to the jury. When we say "any evidence," we mean any such evidence as reasonably tends to prove the fact, and authorize a finding of the jury. It is sometimes difficult for the court to determine whether there is such evidence as should be submitted to the jury; and, without undertaking to lay down a rule for the government of courts, we think we may safely say that it should be more than a scintilla, more than a conjecture, more than to create a suspicion. But we do not think this case lies on the border line. There is evidence: That the prisoner had been too intimate with the deceased. That he had gotten a child upon her. That they had trouble about this. That he said to Johnson, a justice of the peace, the night before the homicide, that "Ella laid her last child" to him, which was then about one month old, and that they had trouble about it; that he wanted to bring her to his house the next night and have it fixed up; that he was willing to pay her two dollars per month. That the next night (the night he proposed to bring the deceased to Johnson's) he went to the house of the deceased, and went in, sat down, and talked to the deceased,—but how long does not appear; but it must have been for some considerable time, as the child witness, Laura, testified that his coming in awoke her, but she went to sleep again, and was awakened by the scream of her mother, when she saw the prisoner strike her mother with an ax four times; that he then struck her eldest sister with the ax, and the blood flew on her and her younger sister; and that he then struck a match and set the bed on fire, and left. To corroborate this testimony, tracks were found that had been made by the shoes the prisoner wore. Blood was found on the two children, who escaped from the burning house, fresh, undried. Soon after the house was found to be on fire, from the alarm given by these two children, and they had related the terrible tragedy and had stated that the prisoner was the author of the crime, some of the persons present went to the prisoner's house for the purpose of arresting him. Upon reaching the house they

knocked at the door, and had trouble in arousing the prisoner. But after so long a time he let them in, when they found a pair of overalls with fresh blood on them, and when this was shown the prisoner he tried to explain it by saying that it was "chicken blood"; that he had killed a chicken for Mr. ——— that evening. He also had blood on his hands. After they arrested him and started to the scene of the tragedy, he showed them a paper, so badly written as to be almost unintelligible, purporting to be an account of moneys he had given the deceased, and said that he had kept it so that, if anything happened, he could show that he had treated Ella right. He was identified on the night of the tragedy as the author of the crime by the child, Laura, and again recognized and pointed out by her on the trial. The defense was not put upon the ground that the prisoner did not commit the crime, but upon the ground of mental incapacity which relieved him from criminal guilt, and, if not to entirely relieve him, that it rendered him incapable of exercising "deliberation and premeditation." The prayers for instruction were intended to present this question, and the prisoner produced evidence tending to establish this contention. But the state produced the evidence of a number of witnesses tending to show that he did have sufficient capacity to commit the crime,—to meditate and deliberate. In addition to the evidence already stated, the state produced a number of witnesses whose testimony was to the effect that the prisoner had mind sufficient to read, and that he was a local negro preacher. Some of the witnesses testified that his mind was as good as ordinary negroes, and some of them testified that he had good "sense,"—as good as they had. Then, admitting that the prisoner produced some witnesses who testified to the want of sufficient capacity to enable the prisoner to reflect,—to meditate and deliberate,—still, when the state had produced evidence showing that he had deliberated and meditated about fixing up the trouble with Ella, by what he said to the witness Johnson; that he had tried to explain away the evidence of blood on his hands and clothing, and produced what purported to be an account with Ella, which he had kept to show that he had treated Ella right, enforced by the evidence of a number of witnesses who testified that his mind was good, it made an issue of fact for the jury, which the judge could not try, and the prisoner's exceptions were properly refused. The jury, with all the evidence before them, under proper instructions from the court (as we must take them to have been proper, as they are not given or excepted to), have said that the prisoner is guilty of murder in the first degree; and, in saying this, they have said the prisoner did have sufficient mind and capacity to premeditate and to deliberate. The facts of this tragedy are shocking, when we think of the prisoner's going to the house, in the nighttime, of a woman with whom he had been having illicit intercourse, and upon whom he had gotten a child, taking an ax and killing her and one of her children, and setting the house on fire and burning up her and five children, one of them his own offspring,—shocking to the utmost degree. If he had capacity to commit this shocking crime, it would seem that he should suffer the extreme penalty of the law. The jury have said he had such capacity, and we have no right to review or reverse their verdict. There is no error.

BATTERY PARK BANK et al. v. WESTERN CAROLINA BANK.

(Supreme Court of North Carolina. May 15, 1900.)

APPEALABLE ORDER—RECEIVERS—PAYMENT—CHARGES AND COMMISSIONS—DISCRETION OF TRIAL COURT—REVIEW.

1. An appeal may be taken from an order allowing a receiver of an insolvent bank, before final settlement, commissions and charges objected to by the creditors, as it is a final judgment as to the matter decided, appropriating, as it does, a part of the assets, and affecting a substantial right of the parties, and the appeal will neither delay nor hinder the receiver in discharging his duties, nor delay the final settlement.

2. Under Code, § 379 (4), allowing receivers commissions "not exceeding five per cent. on the amount received and disbursed by them," a receiver's allowance of commission does not rest exclusively in the discretion of the trial court below the per cent. stated, but its exercise may be reviewed when the allowance is made on a wrong principle, or appears clearly inadequate or excessive.

3. A receiver may be paid at stated intervals during the continuance of his functions, and need not wait until the termination of his trust.

4. Under Code, § 379 (4), allowing receivers commissions "not exceeding five per cent. on the amount received and disbursed by them," a receiver may be allowed commissions on both receipts and disbursements to the extent of 5 per cent. on each.

Appeal from superior court, Buncombe county; Hoke, Judge.

Suit by the Battery Park Bank and others against the Western Carolina Bank. From an order allowing to George H. Smathers, receiver of defendant, and to his former co-receiver, L. P. McLoud, commissions and charges, plaintiffs appeal. Reversed.

Davidson & Jones, Merrimon & Merrimon, and Bourne & Parker, for appellants. T. H. Cobb, for appellee.

MONTGOMERY, J. A report (not final) was returned on the 27th of August, 1898, by George H. Smathers, receiver of defendant bank, to the superior court of Buncombe county, and the same was confirmed by his honor, Judge Bowman. Numerous exceptions were filed by the plaintiffs, who are creditors of defendant bank, to the commissions and charges allowed to the receiver, Smathers, and to his former co-receiver, L. P. McLoud.

The exceptions were overruled, and the plaintiffs appealed.

Our first impression in respect to the appeal was that it was fragmentary, and therefore premature, regarding, as we did, the order of Judge Bowman allowing the commissions and charges as interlocutory; but, upon further consideration and examination, we have concluded that the order was a final judgment in respect to the matter decided, and that the appeal is properly before us. The action was originally begun in the name of the Battery Park Bank, in its own behalf and all other creditors, against the Western Carolina Bank. The insolvency of the defendant was alleged, and temporary receivers appointed. Afterwards, George H. Smathers and L. P. McLoud were appointed permanent receivers, and they at once filed their bond and took possession of the assets of the bank. The purpose of the action then was the collection of the assets of the bank by a receiver appointed by the court, and the proper distribution of the assets among the creditors of the defendant bank. Hundreds of claims have been proved by creditors of the bank, and, so far as the record discloses, there have been no exceptions filed to the admission of any of them as just claims against defendant bank. There is nothing then at issue in the action, and the only matter, as we have said before, involved in the case is the reduction of the assets of the bank into money, and the distribution of the same by the receiver among the creditors according to law. The allowances and charges therefor made by the court in favor of the receivers affect a substantial right of the plaintiffs, in that it disposes of a part of the assets of the bank, and is a reduction to that extent of the amounts to which the creditors are entitled under their claims against it. The order of the judge was a final one, because it appropriated a part of the assets, affecting thereby a substantial right of the plaintiffs. The appeal does not have the effect either to delay or hinder the receiver from the discharge of his duties, nor can it delay the final settlement. If the order of the judge allowing the commissions could be regarded as interlocutory, under the practice exceptions would have been entered, and the appeal brought up upon the final order distributing the assets. Therefore, in point of economy of time, if that were alone involved, no harm can come to any one interested in the result of the suit, by regarding the order as final.

We are supported in this view by the decision in Trustees v. Greenhough, 105 U. S. 527, 26 L. Ed. 1157. In that case the principal suit was commenced in the nature of a creditors' bill by the holder of bonds of the Florida Railroad Company against the trustees of the internal improvement fund of Florida and against the board itself as a corporation. The fund consisted of millions of acres of land belonging to the state of Florida, and was pledged for the payment of the interest accruing on the bonds and installments of the sinking fund for meeting the principal, which were in arrear. The charge of the bill was that the trustees were wasting the fund, making fraudulent sales of the land, and refusing to provide for the payment of the bonds and interest. There was a prayer that the fraudulent conveyances be set aside, the trustees enjoined from selling any more land, and that a receiver be appointed to take charge of the fund. The management of the fund was taken out of the hands of the trustees, the court appointed agents to sell the land, and they made large sales, realizing a considerable amount of money therefrom, and dividends were made among the bondholders, most of whom came in and took the benefit of the litigation. The litigation, which was very expensive and vigorously conducted, resulted in securing and saving a large amount of the trust fund. The complainant, Vose, a creditor, bore the whole burden of this litigation, and advanced most of the expenses for conducting the action. While the proceedings were being had, Vose filed a petition setting forth his efforts, and the advances made by him, and prayed for an allowance out of the fund for his expenses and services. A large amount was allowed him by the court, from which order the other creditors appealed. The court said: "The first question, however, is whether these orders do or do not amount to a final decree upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of a receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but, under all the circumstances, we think that the proceedings may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal."

In Williams v. Morgan, 111 U. S. 684, 4 Sup. Ct. 638, 28 L. Ed. 559, where, in a suit for the foreclosure of a mortgage made by the New Orleans, Mobile & Chattanooga Railroad Company upon its railroad and franchises, in the order of sale compensation was fixed by the court as to what was to be paid to the trustees making the sale from the fund to be realized from the sale, it was held that such a decree was final as to that matter, and the supreme court had jurisdiction on appeal from the circuit court.

In Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. 136, 27 L. Ed. 888, an appeal was allowed to be brought against a receiver from an order made in his favor.

The appeal, then, being properly before us, we will examine the matters complained of by the creditors (appellants). In the first order made by his honor, Judge Norwood, in regard to the receivership, three temporary receivers were appointed, L. P. McLoud, John A. Nichols, and George H. Smathers. In his order appointing permanent receivers, Nichols was left out, and Smathers and McLoud retained. The necessity of the appointment of more than one receiver we cannot see; and, while we do not intend to criticise harshly the action of the judges who made these appointments, it may be well for us to call attention to the almost universal habit throughout the whole country to make use of receiverships as ordinary remedies, to appoint more than one receiver, and to allow them for their services, not a proper compensation for their services, but large and excessive commissions and charges; and that unless the judges, who have these appointments and allowances to make, exercise cautious scrutiny and diligent care, great injustice to creditors must result. It does seem to us, speaking generally, that these matters of receivership are not conducted with such a view to economy and dispatch of the business in hand as characterizes the conduct of prudent business men in their ordinary business transactions. In the main report of the receiver, the receipts were stated to be $118,367.71, and the disbursements $116,076.73. That report embraced many entries which could not be called receipts and disbursements, upon which commissions could be allowed. Most of those entries were concerning transactions which were connected with the settlement of the affairs of the bank, and which were proper to be considered by his honor in estimating the value of the work and labor performed by the receiver; but they were not alone such receipts and disbursements as are in contemplation of the statute. Code, § 379 (4). And this view seems to have been adopted by the receiver in his amended report, wherein the receipts are stated to be $34,205.49, and the disbursements $31,914.51. His honor allowed to McLoud for his services as joint receiver with Smathers, for 5 months and 20 days' service from the 13th of October, 1897, to the 2d of April, 1898, $850. McLoud put in a bill for $200 a month. He was the former cashier of the defendant bank while it was a going concern, and his salary then was $150 per month. The amount applied for by Smathers as receiver for 10½ months was $1,825. His honor allowed him $1,500. The amount allowed to both receivers then was $2,350, and much business connected with the settlement of the defendant's affairs remained to be done before a final order in the cause could be hoped for. The receiver was also allowed quite $1,000 for legal advice and services rendered to him by other attorneys at law, and $1,066.13 for the wages of a clerk and stenographer. Rankin was the clerk, and he had been for a number of years in the employment of the defendant bank, first as bookkeeper, and for the last two years of the bank's existence as its teller. It appears he was a most competent man for the work.

But the receivers contend that, as the amount of commissions allowed to them did not exceed 5 per cent. on the amount received and disbursed by them, this court has no supervisory power over the allowance, and that the action of the court below rests in the discretion of that court, and is not reviewable by this court. We are not of that opinion. Code, § 1524, concerning the compensation to be allowed to executors and administrators, is in almost the identical language as section 379 (4) concerning the commissions allowed to receivers. In the first-mentioned section, commissions are allowed "not exceeding five per cent. on the amount of receipts and expenditures," and under section 379 (4) commissions are to be allowed "not exceeding five per cent. on the amount received and disbursed by them." Section 29 of chapter 46 of the Revised Statutes provided that clerks of the courts of pleas and quarter sessions should make allowance of commissions to executors and administrators "not exceeding five per centum for the amount of receipts and expenditures."

In Shepard v. Parker, 85 N. C. 103 (the Revised Statutes being in force), it was contended by the administrator, Parker, that, while this court could review the decision of the superior court on the question of his commissions, if those commissions had been allowed through a mistake and contrary to law it could go no further than to correct such error. The argument there was that "this court has jurisdiction when commissions are allowed upon a wrong principle, but not where it is suggested that the commissions are excessive; for the amount of commissions is a matter of discretion, restrained by statute to 5 per cent., and this court has no right to review the exercise of this discretion." The court said: "We admit the distinction, but do not concede to it the effect contended for, except to this extent: When the objection is put on the ground of inadequacy or of excess, this court is not disposed to interpose unless the amount is clearly inadequate or clearly excessive, for the reason that it most usually happens a more minute investigation of the entire subject of the account takes place in the court below than it becomes necessary to give to it in this court, and it is therefore proper to presume that the rate adopted in the court below is correct." And the court in the same opinion, as a reason for its decision, said: "But it is asked, upon what principle can this court review a matter of discretion which has been acted on in the court below? The distinction is this: When the exercise of discretion is in reference to a matter arising collaterally, and which does not present itself as a question in the cause, the decision of the court below is conclusive, as in cases of amendment; but when the dis-

cretion is used in reference to a question in the cause the decision is subject to review; for although, in one sense, it is a matter of discretion, still, being a question in the cause, the appeal which brings up the whole case necessarily brings it up." This court, then, can review the matter of commissions allowed an executor or administrator when they have been given on a wrong principle, or when the allowance appears to be clearly inadequate or excessive.

Upon a review of all the facts in this case, including the report of the referee, when we consider the amount allowed to the receivers for the wages of a clerk and stenographer, and the amount allowed him for the aid and counsel and advice of attorneys at law, we are of the opinion that the amount allowed to the receivers is clearly excessive. We cannot see from the report of Receiver Smathers that Receiver McLoud rendered any service whatever. We think, all things considered, that $150 per month, for the 10½ months specified in the receiver's report,—the time for which compensation was asked,—would be sufficient to be allowed as commissions to the receiver; and the matter must be remanded to the court below, that that amount may be apportioned between the two receivers, Smathers and McLoud, according to the services rendered by each.

The counsel for the plaintiffs contended in this court that the receivers were not entitled to any commissions whatever until the closing up of the business in their hands and the final order for the distribution of the fund. We have no precedents in this state on the subject, but we find it stated in Beach on Receivers (section 758) "that as a general rule the receiver may be paid at stated intervals during the continuance of his functions, and so need not wait until the termination of the receivership." The same rule we find, in substance, in High, Rec. § 789, and we are disposed to adopt that as the rule here.

The counsel of the plaintiffs also contended that the statute,—Code, § 379 (4), fixing the compensation of receivers "not to exceed five per cent." on the amount received and disbursed, should be construed to mean that full commissions are allowable only for the performance of the two acts of receiving and disbursing, one-half for doing either act; and Beach, Rec. § 766, was cited as authority for the position. The citation bears him out in his contention. We have no decision on this point as to receivers, but we have decisions on this point in reference to the commissions of executors and administrators; and the language, as we have seen, as to the allowance of commissions to executors and administrators and to receivers being identical, the same principle would apply to both.

It has been held by this court that commissions can be allowed to executors and administrators on both receipts and disbursements, to the extent of 5 per cent. on receipts and 5 per cent. on disbursements. In Peyton v. Smith, 22 N. C. 349, the court said: "It is so difficult for this court to ascertain, by any means in its power, what is the reasonable rate of commissions called for in any case by the nature of the services, labor, and responsibility of the trustee, that it is much disposed, in general, to rely in this respect on the judgment of the master. In this case, however, the court perceives a safer guide for the exercise of its discretion, and will follow that guide. It appears that on one occasion, when the accounts of the executor were audited in the county court of Warren, and when the auditors recommended that there should be allowed to the executor a commission of 5 per cent. on his receipts and 5 per cent. on his disbursements, the court nevertheless ordered that his commissions should be limited to 4 per cent. on each. The court, therefore, overrules the allowance of 5 per cent. as made by the master, and sanctions the rate established by the county court." The same manner of allowing commissions to administrators is laid down in Potter v. Stone, 9 N. C. 30. There are no later decisions of the court on that point, but allowances to executors and administrators are, we believe, universally in this state allowed upon both receipts and disbursements, as separate acts.

There was error in that part of his honor's order allowing commissions to the amount of $2,350, because they were clearly excessive. The commissions will be adjusted according to this opinion, and the costs of this appeal will be taxed against the funds in the hands of the receiver. Error.

CONKEY v. JOHN L. ROPER LUMBER CO.

(Supreme Court of North Carolina. May 15, 1900.)

TENANTS IN COMMON—POSSESSION—ADVERSE POSSESSION—BURDEN OF PROOF—STATUTE OF LIMITATIONS.

1. Possession of premises by one of two tenants in common thereof, not having been adverse for 20 years, is deemed the possession of both tenants.

2. Under Code, § 143, providing that no action for the recovery of real property or the possession thereof shall be maintained unless plaintiff, or those under whom he claims, had been seised or possessed within 20 years next before action brought, and section 146, providing that the owner of the legal title shall be presumed to have had possession within the time required by law, and that the occupancy thereof by any other person will be deemed to have been in subordination to the legal title unless it appears that the premises have been possessed adversely for 20 years, the pleading by defendant in ejectment that plaintiff had not been in possession for 20 years does not throw on him the burden of showing that he has been in possession within 20 years, where he shows title, since the presumption created by section 146 can only be rebutted by proof on the part of defendant that he has been in adverse possession for 20 years.

Appeal from superior court, Gates county; Starbuck, Judge.

Action by Helen Conkey, as executrix, against the John L. Roper Lumber Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. L. Smith and Shepherd & Shepherd, for appellant. W. M. Bond and Battle & Mordecai, for appellee.

MONTGOMERY, J. This action was before this court at February term, 1899, on appeal of the plaintiff, and is reported in 124 N. C. 42, 32 S. E. 389; the plaintiff at that time being Jane E. Roscoe. Since that time she has died, and in the court below Helen Conkey was made the present plaintiff, as sole devisee of all of the lands of Jane E. Roscoe. By leave of the court, when the case was called for trial the plaintiff was allowed to strike out of sections 3 and 4 of the complaint all the lands described therein, except the Hill tract and the Mills Riddick tract. It was agreed by both sides that the damages which the plaintiff might be entitled to recover should be assessed after the issue of title had been settled. There was no change in the pleadings on the part of the newly-made plaintiff, and she adopted those which had been filed by the original plaintiff. The claim of the plaintiff is that she is the owner, as tenant in common with the defendants, of a one undivided half interest in the Hill tract and the Mills Riddick tract. In support of her claim she introduced in evidence a properly certified copy, from the book of wills of Gates county superior court, of the will of H. E. Roscoe, in which was devised to his widow, Jane E. Roscoe (the former plaintiff) all of his property, personal, real, and mixed; also, from the same book of wills, a certified copy of the will of Jane E. Roscoe, in which was devised all of her real estate in fee simple to her sister Helen Conkey, the plaintiff. The plaintiff then introduced sections 3 and 5 of the complaint, in which the plaintiff alleged that on the 1st day of January, 1853, J. R. Riddick conveyed by deed in fee simple to H. E. Roscoe and S. W. Worrell, as tenants in common, the said Hill tract and Mills Riddick tract of land, and that under deeds from Worrell and others the defendants have become, and are now, the owners of an undivided one-half interest in the lands described in the complaint; and she also introduced sections 5 and 8 of defendants' answer, in which they admitted the executions of the deeds specified; but they averred that in those deeds the whole estate and interest in and to the lands were conveyed to them, and not one-half only, and that the defendants are the owners of all the lands, and have entered upon the lands conveyed to them in the aforementioned deed, and have cut, and are cutting, timber from them. The plaintiff further introduced the deed from Riddick to H. E. Roscoe and S. W. Worrell as tenants in common; then the deed from S. W. Worrell purporting to convey the entire estate in the lands to Brady, Bond, Roberts, and Willey, in fee simple; and then subsequent conveyances to the defendant company. The plaintiff then introduced testimony going to show that the lands embraced in the deeds included within its boundaries the Hill tract and the Mills Riddick tract. The defendants in the answer had made an averment that many years before the commencement of this action H. E. Roscoe had conveyed the land described in the complaint to S. W. Worrell, and that the deed, after its execution and delivery, had been lost, and never registered. The defendants tendered no issue as to the execution of such a deed by H. E. Roscoe, nor of its loss, and did not offer any evidence to sustain such a contention. The defendants offered some evidence intended to show adverse possession of the land for such a length of time as in law would presume a grant, and also to give a title under color of the deed from Worrell. But the evidence was not sufficient to be submitted to the jury for that purpose, and on the argument here it was not contended that it was sufficient. The exception to the evidence of the probate of the will of H. E. Roscoe was abandoned here.

When the case was formerly before us, the pleadings were the same, and the evidence the same; and we held that the plaintiff and the defendants were tenants in common, each owning a one undivided half interest in the lands, and for the reasons given in the opinion in that case we are of the same opinion still. The evidence showed no evidence of an adverse possession by the defendants for 20 years, by which an ouster of the plaintiff was had. In truth, this appeal is but a rehearing of the first case; and the only marked feature of the new argument of counsel was an insistence that section 143 of the Code was a plea of the statute of limitations, and that, the same having been pleaded in the case, the burden of showing that the plaintiff had been in possession of the land within 20 years next preceding the commencement of the action was devolved on the plaintiff. The construction of that statute is not called for in this case, for the reason, as we have said, that the plaintiff and defendants were tenants in common, and the possession of the defendants, not having been adverse for 20 years, was the possession of the plaintiff. But, in cases where there is no tenancy in common, section 143 of the Code must be construed with section 146. While section 143 declares that no action for the recovery of real property or the possession thereof shall be maintained unless it appear that the plaintiff or those under whom he claims had been seised or possessed of the premises in question

within 20 years before the commencement of the action, yet that is explained in section 146, by the further declaration that the person who establishes a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of the action. The pleading, then, by a defendant in suits for real estate, of section 143, does not shift upon the plaintiff the burden of showing that he has been in the possession of the property within 20 years before the commencement of the action, but the presumption created by section 146 can only be rebutted by proof on the part of the defendant that the defendant has been in possession adversely of the premises for 20 years. In Johnston v. Pate, 83 N. C. 110, the defendant demurred to the complaint,—one of the grounds being a failure on the part of the plaintiff to assert a possession in himself, or in those under whom he claimed, within 20 years before the action was instituted; and the court held that the demurrer could not be sustained, "for it is not necessary that a plaintiff in an action to recover land should allege in his complaint that he had possession within twenty years before action brought; for, if he establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action." Affirmed.

MERRIMON et al. LYMAN et al.

(Supreme Court of North Carolina. May 15, 1900.)

APPEAL AND ERROR—AFFIRMANCE OF JUDGMENT—REMITTITUR—ENTRY OF JUDGMENT IN TRIAL COURT.

In an action to regain possession of land and to quiet title thereto defendant claimed under a tax deed. Judgment was rendered in favor of plaintiff, adjudging that the taxes for which defendant claimed to have purchased the land at tax sale were paid before the defendant procured his tax deed. When the remittitur of the supreme court affirming the judgment was returned to the trial court, and plaintiff moved for the entry of judgment, defendant moved for leave to set up a lien against the premises for the amount paid by him for the tax deed. The superior court denied the application, but allowed defendant a stay of the execution awarding plaintiff possession of the premises pending an appeal from the order denying his application. *Held*, that the application was properly denied, since it sought to raise an issue which had been or should have been adjudicated, but that the latter order staying the execution was erroneous.

Appeal from superior court, Buncombe county; Coble, Judge.

Action by J. H. Merrimon and others against A. H. Lyman and others to quiet title to, and regain possession of, land claimed by defendants under a tax deed. There was a judgment in favor of plaintiffs, adjudging that the land had been redeemed, and the said judgment was affirmed on appeal. On the certificate of affirmance being returned to the superior court, the defendants sought to have the amount paid by them for the tax deed under which they claimed declared a lien on the premises. The application was denied, but the superior court stayed the execution of the judgment in favor of plaintiffs on defendants filing an appeal bond. Order denying the application affirmed. Order staying the execution reversed.

Davidson & Jones, for appellants. Merrimon & Merrimon and G. A. Shuford, for appellees.

MONTGOMERY, J. At July special term, 1898, of Buncombe superior court, a judgment was rendered in favor of the plaintiffs to the effect that they were the owners of the land in dispute; that the alleged tax title under which the defendant Lyman claimed, and the proceedings and sale, were null and void; and that the possession of the defendants was wrongful and unlawful; and that the plaintiffs recover of the defendants possession of the land and their costs. On appeal by defendants, the judgment of the superior court was affirmed by this court at February term, 1899 (32 S. E. 732), and the certificate sent down. At August term, 1899, of the superior court, the plaintiffs moved for judgment according to the certificate of the supreme court, when the defendant Lyman made an application to be allowed to set up a lien on the land for the taxes of 1892, which the defendant in his answer averred that he had paid when he bought the land at the tax sale. The judgment was rendered, and the application of the defendant was denied, and he appealed. A bond to stay the execution of the judgment was allowed by the court below to be filed by the defendant, notwithstanding the refusal of the court to grant the defendant's application to set up a lien on the land for the taxes alleged to have been paid by him. The application of the defendant was, in effect, a motion to be allowed to amend his answer, and to raise an issue upon a matter which had been decided against him by the jury in the former trial, viz. that the land had been redeemed from tax sale at the time the defendant bought and took his deed. Certainly, such a proceeding would have been an unheard of one in North Carolina. In Calvert v. Peebles, 82 N. C. 334, it is declared that, when the supreme court announces by its decision that there is no error in the judgment of the court below, that court has no right or power to modify that judgment in any respect, and that this can be done only

by a direct proceeding alleging fraud, mistake, imposition, etc. Dobson v. Simonton, 100 N. C. 56, 6 S. E. 369; Banking Co. v. Morehead (at this term) 35 S. E. 593. It seems that the defendant's claim to be reimbursed for the amount which he paid for the land at the tax sale is based on the case of Huss v. Craig, 124 N. C. 743, 32 S. E. 974. But this case is not like that. Here the jury found that the land was redeemed at the time the defendant got his deed for the same, and we are to presume that it was redeemed by the payment of the taxes of 1892 by the party entitled under the law to redeem. The facts in Huss v. Craig were just the other way. The decision of this court affirming the judgment below was properly entered in the superior court of Buncombe county, and the application of the defendant was properly refused. The stay of the execution ought not to have been allowed, and that was the only error in the proceedings. With that exception, they are affirmed.

LADD et al. v. TEAGUE, Sheriff.

(Supreme Court of North Carolina. May 15, 1900.)

ATTORNEYS—REPRESENTING DEFENDANT—APPEAL—RECORD.

Notwithstanding the finding of the lower court, on motion to set aside a judgment, that defendant T. did not employ any attorney to represent him prior to judgment, it will be held on appeal that he was represented by counsel, so that the agreement, recited in the finding of facts to have been made by both parties, that a judgment might be rendered in a county other than that of trial, was binding on him; the record entries showing that T. was originally the only defendant; that, "on motion of counsel for defendant," other persons were made parties; that thereafter defendants filed an answer, verified by T., and indorsed, "B. & B. and F., Attorneys for Defendants"; and that defendant T., as sheriff, served a notice in the action on B., "attorney for defendants."

Douglas, J., dissenting.

Appeal from superior court, Swain county; Coble, Judge.

Action by W. W. Ladd, Jr., and others, against J. F. Teague and others. On motion of defendant Teague, judgment for plaintiffs was set aside, and plaintiffs appeal. Reversed.

Merrimon & Merrimon and T. H. Cobb, for appellants.

FAIRCLOTH, C. J. The plaintiffs instituted this action on September 9, 1896, in the superior court of Buncombe county, against the defendant Teague alone, sheriff of Swain county, returnable to December term, 1896, for certain property and for damages, which property was held by the defendant by levy under certain executions in his hands. At the return term, to wit, December 8, 1896, the defendant signed and filed an affidavit for the removal of said action to Swain county for trial; suggesting that the execution and attaching creditors ought to be made parties. The action at that term was removed to Swain county. At spring term, 1897, of court in Swain county, on motion of counsel for the defendant several other persons were made parties, and time was allowed to file an answer. On July 8, 1897, the defendant Teague filed a verified answer, on the back whereof was indorsed, "Bryson & Black and F. C. Fisher, Attorneys for Defendants." At August special term, 1897, "Defendants allowed to answer," was entered, and "Bryson & Black, for defendants." A notice by plaintiff, addressed to Fred Fisher and T. D. Bryson, to take depositions, was served by defendant Teague, and an agreement to open said depositions without prejudice was signed by plaintiffs' attorney and by Bryson & Black and F. C. Fisher, "attorneys for defendants." At fall term, 1897, on the docket, this entry appears: "Counsel for both parties waive trial by jury, and consent that the court may try the case, and find the facts and adjudge the law." Norwood, J., who tried the case, says in his finding of facts that both parties agreed in open court that the judge who tried the cause "might take the records and testimony, and may find the facts and sign the judgment in Haywood county after the circuit closes, and that said action of said judge, and said judgment so rendered, may be entered upon the records of Swain county as of this fall term, 1897, of the superior court of Swain county." Judge Norwood accordingly tried the case at chambers, and filed his judgment against defendants December 21, 1897. Notice of appeal was given, but at November term, 1898, of the court in Swain county, the judge presiding entered this judgment: "That said appeal has been abandoned, and the same is hereby dismissed." At said spring term, 1897, 41 additional persons were made parties defendant. His honor finds as a fact that Bryson & Black were never employed by defendant Teague, and that Fisher was never employed by any of the parties except Sumers and Conley, and that Teague did not employ any attorney to represent him in said action; also, that Fisher was employed by Bryson to go to Asheville to make a motion on said affidavit of Teague for removal of said cause from Buncombe to Swain county. After Teague's appeal was dismissed, he made a motion at fall term, 1899, to set aside the judgment of Norwood, J., on the ground that he had never consented that judgment might be rendered at chambers outside of Swain county. His honor, Judge Coble, at fall term, 1899, after finding the above facts, set aside the judgment as to said Teague, and no further, and the plaintiffs appealed to this court.

On the trial in Swain county, before Norwood, J., the defendant Teague was examined as a witness. In reviewing this judgment, we do not assume to review the finding of the facts. Such finding by the judge below is final. The judgment applying the

law to those facts is reviewable. Johnson v. Duckworth, 72 N. C. 244; Emery v. Hardee, 94 N. C. 787; Clegg v. Soapstone Co., 66 N. C. 391. The defendant's contention is that the attorneys were never by him employed (and the judge so finds), and that the agreement that Judge Norwood could render judgment in another county was not by his consent, and therefore the judgment is void as to him. Looking through the record, we find that when the motion for removal was made, and at spring term, 1897, of Swain superior court, on motion "of counsel for the defendant" to make new parties, the defendant Teague was the only defendant. On July 8, 1897, the defendants filed an answer, verified by Teague, and indorsed by Bryson & Black and F. C. Fisher, "attorneys for defendants." On November 9th, following, the defendant Teague, as sheriff, served a notice on Bryson, "attorney for the defendants." Such entries were continued at the term when a jury trial was waived, and until final judgment entered on the 21st of December, 1897. The legal inference from these parts of the record is that said attorneys represented all the defendants, and this presumption cannot be rebutted, two or three years after final judgment, by an averment of the principal defendant that he had never employed counsel. He was cognizant of the course of the case, including the trial, and had all the advantage and benefit of representation by counsel. Any other rule would not only disturb orderly procedure, but would be disastrous to the rights of third parties, as the assignee of the judgment in this case. We have referred with some particularity to the record proper, in order to call the attention of attorneys to their duties in their close relations to the court. It is an easy matter for an attorney appearing only for some of the parties to so inform the court, or to indicate it on the record. An attorney, once appearing, continues to appear for all purposes until the judgment is satisfied, unless he retires in the meantime by leave of the court. On this subject Chief Justice Taney said in U. S. v. Curry, 6 How. 106, 12 L. Ed. 363: "No attorney or solicitor can withdraw his name after he has once entered it on the record, without the leave of the court. And while his name continues there the adverse party has the right to treat him as the authorized attorney or solicitor, and the service of notice on him is as valid as if served on the party himself. And we presume that no court would permit an attorney who had appeared at the trial with the sanction of the party, expressed or implied, to withdraw his name after the case was finally decided. * * * And so far from permitting an attorney to embarrass and impede the administration of justice by withdrawing his name after trial and final decree, we think the court should regard any attempt to do so as open to just rebuke." The same principle is declared by this court in Branch v. Walker, 92 N. C. 87; Walton v. Sugg, 61 N. C. 98. Where an order of the court recites that it was made by consent of all the parties ("the plaintiff and defendants in this case"), this court is bound by the statement, and neither party will be heard to say that his attorney was unauthorized to consent to the order. Henry V. Hilliard, 120 N. C. 479, 27 S. E. 130. When the record proper differs from the statement of the case on appeal, the former must control. Threadgill v. Com'rs, 116 N. C. 616, 21 S. E. 425. From this review, we are led to the conclusion that there was error in setting aside the judgment rendered by Norwood, J. Reversed.

DOUGLAS, J. (dissenting). I cannot concur in the opinion of the court, because, in my opinion, it is not only erroneous in law, but inconsistent in itself. The court says: "In reviewing this judgment, we do not assume to review the finding of the facts. Such finding by the judge below is final." And yet the judge below has found as a fact that Teague did not employ any attorney to represent him in said action, and that therefore he is not liable. This court reverses that judgment. Does it reverse the finding of facts? If it does not,—and it says it does not,—then it must hold that a man perhaps a thousand miles away may be bound by a judgment in a case of which he has never heard, because some attorney may have entered an appearance for him without any authority whatever. In fact, it would seem that the attorney need not specifically appear for the party, and need not have any intention of appearing for him, or have any idea that he is doing so. He may unconsciously do some act from which the court may "infer" an appearance for the particular individual in question; but why this inference of fact (for it is nothing else) should outweigh the finding of fact by the court below, which this court, in its opinion, says is final, I cannot understand. Where there are a large number of defendants, having different counsel, it is quite common for the counsel to sign their names collectively for the defendants; each supposing that some one of the other attorneys represents each of the other defendants. The court says that "it is an easy matter for an attorney appearing only for some of the parties to so inform the court, or to indicate it on the record." Of course it is, but is a party who never employed the attorney responsible for his failure to do so? It is urged that Teague had already appeared in the case, and was presumed to know all that was done in the orderly procedure of the trial. Of course he was, but he was not presumed to take notice of all irregular proceedings, such as rendering judgment outside the county, which could not be done without his actual consent.

We have already carried the doctrine of waivers, implications, and presumptions to

its furthest reasonable extent, and I hope that questions of jurisdiction may not be made to depend upon implied assent to unusual and irregular methods of procedure in cases where the defendant may have had no actual knowledge of the facts. There is a great difference between a waiver of the right to object to some regular proceeding in the course of the trial, and an actual consent to some unusual course of procedure, which without such consent would be utterly invalid. It should be borne in mind that nowhere in the record does any one sign as attorney for Teague. That fact is assumed by this court merely as a legal inference from the fact that different attorneys sign at different times as "attorneys for the defendants." Admitting, for the sake of the argument, that Fisher had appeared for Teague at some previous stage of the trial, his name does not appear to the written assent, and neither he nor his supposed client was required to take notice that the court would take the case outside the county. It is just as easy to presume an original appearance as it is to presume assent to a removal of the case. Suppose that Teague had been in the Philippines,—or dead, for that matter; would the mere fact that the name of some attorney appeared on the back of some paper as "attorney for the defendants" bind him, his heirs, executors, and administrators? I am afraid so, under the opinion of the court. In my view of the case, the citations by the court have no bearing. This is not a question as to whether an attorney can withdraw from the case without leave of the court, because he has never been in the case as attorney for Teague. Again, it is said, "When the record proper differs from the statement of the case on appeal, the former must control." Certainly. But this rule applies only where the case on appeal misstates some part of the record, and not to findings of fact based upon merely evidential facts appearing in the record. In fact, such findings of fact are an essential part of the record. Great stress is laid upon the principle that third parties should not be made to suffer. Have third parties any greater claims to protection than the original parties, where both are innocent? The assignee of a judgment takes it subject to existing equities. He is a willing purchaser. Has he any greater equities than an unwilling and perhaps unconscious defendant? I am well aware of the danger of lightly impugning court records, but the public at large are entitled to some measure of protection. The plaintiff can always protect himself by seeing that every proper step is taken to secure the validity of the judgment which he is seeking to procure. He is the actor. He can require all attorneys to state specifically for whom they appear, and can demand the production of their authority, if he so desires. The courts themselves can protect the sanctity of their own records. The federal courts generally require counsel to enter a written appearance, stating specifically for whom they appear. Why cannot our courts do the same? I will readily admit that there are facts in the case tending to prove the essential fact that Teague was represented by counsel, but the court below has found to the contrary, and that finding is final and irreviewable. We are thus placed in the position of saying that we legally infer that Teague had counsel, while we admit as a fact that he had no counsel. This is too much for me. I must respectfully dissent from the opinion as well as the judgment of the court.

LASSITER v. NORFOLK & C. R. CO.

(Supreme Court of North Carolina. May 15, 1900.)

CHANGE OF VENUE — REMOVAL TO COUNTY OUTSIDE THE JUDICIAL DISTRICT.

1. Code, § 195, provides that an action brought in the wrong county may be removed to the proper county, on the demand of the defendant, made before answer; and also that the court, in its discretion, may change the place of trial, when the convenience of witnesses and the ends of justice would be promoted thereby. *Held*, that the court, for such latter reason, even after the defendant had answered, could order a case commenced in the proper county to be removed for trial to another county.

2. Under Code, § 195, authorizing the court to remove actions to another county for trial, it is not error to order a cause to be removed to a county outside the judicial district.

Appeal from superior court, Bertie county; Allen, Judge.

Suit by William Lassiter against the Norfolk & Carolina Railroad Company. From an order removing the case to another county, the plaintiff appeals. Affirmed.

Francis D. Winston, for appellant. George Cowper, for appellee.

CLARK, J. The Code (section 195) provides that, if an action is not brought "in the proper county, the action may, notwithstanding, be tried therein unless the defendant, before the time of answering expires, demands in writing that the trial be had in the proper county." This gives the defendant a right to remove in such cases upon written motion in apt time (Manufacturing Co. v. Brower, 105 N. C. 440, 11 S. E. 313); otherwise, the objection is waived. But the same section further on gives the court the discretion: "It may change the place of trial" in three cases named in as many subsections; the second of which is "when the convenience of witnesses and the ends of justice would be promoted by the change." The court in its discretion granted the removal upon that ground in this case, and such action is not reviewable. The discretion of the court to remove is not restricted to the expiration of the time of answering,

nor to cases in which the action is brought in the wrong county, as is the right of the defendant to remove.

The further objection, that the cause was removed to a county in another judicial district, is without ground in the statute or decisions to support it. The appeal was not premature (Roberts v. Connor, 125 N. C. 45, 34 S. E. 107); but there was no error.

LASSITER v. NORFOLK & C. R. CO.

(Supreme Court of North Carolina. May 15, 1900.)

DIVERSION OF WATERS — RAILROAD COMPANIES—PAST AND PERMANENT DAMAGE—LIMITATION OF ACTION — REVIEW — SEPARATE FINDINGS.

1. Where a special instruction given at the request of a defendant does not injure the plaintiff, and his exception thereto is in conflict with his prayer for judgment, the judgment will not be reversed therefor.

2. In an action against a railroad company for past damages to crops, caused by the diversion of waters, and for permanent damages therefor, it is proper to require the jury to make a separate finding on each issue.

3. An action for a diversion of water by a railroad company is not barred by Acts 1895, c. 224, requiring action for damages caused by the construction or repair of any railroad to be commenced within five years after the cause of action occurs, till five years after the damage is done.

4. In an action against a railroad company for the diversion of water on the lands of the plaintiff, where a recovery was sought for the damages to crops for the three preceding years, the parties to the action agreed to the awarding of permanent damages. The jury found, on special issues submitted to them, that the plaintiff had received permanent damages in the sum of $90, and the injury to the crops for the three preceding years in the sum of $60. *Held*, that it was error for the court to limit the judgment in favor of plaintiff to the permanent damages, as the verdict for permanent damages did not revert back, and include the injuries to the crops.

Appeal from superior court, Bertie county; Allen, Judge.

Action by Wiley J. Lassiter against the Norfolk & Carolina Railroad Company for damages caused by the diversion of waters. From a judgment in favor of plaintiff, he appeals. Modified and affirmed.

Francis D. Winston, for appellant. Geo. Cowper, for appellee.

DOUGLAS, J. This is an action brought to recover damages for the unlawful diversion of water on to the lands of the plaintiff, who claimed damages for his yearly injury for three years next preceding the bringing of the action, and consented "that all of the damage done to said land, past, present, and future, may be estimated and recovered in this action." The defendant denied the diversion and damage, and pleaded the usual statutes of limitation. It does not, however, appear to have relied upon any of these statutes, as it tendered no issue as to any of them. There are only two exceptions appearing in the record,—one to a special instruction given at the request of the defendant, and the other to the judgment. The former does not appear to have hurt the plaintiff, and his exception is inconsistent with his prayer for judgment on the third issue. The judgment is as follows: "This cause coming on at this term of the court to be heard by the court and a jury duly sworn and impaneled, all the parties being before the court, and the following issues submitted to the jury having been answered by them as set forth at the end of each: '(1) Did the defendant wrongfully and unlawfully pond and divert water on and upon the lands of plaintiff, as alleged in the complaint, causing injury to the plaintiff thereby?' answered, 'Yes.' '(2) What amount of permanent damage was done said land by reason of such wrong and injury?' answered, '$90.00.' (3) 'What amount of damage, if any, was done to the crops thereby for the three years next preceding the bringing of this action?' answered, '$60,' —now, it is adjudged that the plaintiff recover of the defendant the sum of ninety dollars, with interest thereon from November 6, 1899, till paid, and the cost of this action to be taxed by the clerk." The plaintiff excepted to the refusal of the court to give judgment for the yearly damages found by the jury in the third issue. In such refusal we think there was error. There was no objection to the submission of the issue, which we think was entirely proper, and the court did not pretend to set aside the finding thereon. Indeed, it does not appear that any motion was made to set aside the verdict in any particular. The defendant seemed willing to take its chances upon the third issue, as it requested the following special instruction, which was given by the court over the objection of the plaintiff, to wit: "That there is no evidence to be considered by the jury of any damage to the crops on the land during the three years before bringing this action, except such as was caused by the diminished productiveness of the land caused by the permanent damage, and the jury shall assess no damage in answer to the third issue, except such as come from such diminished productiveness." The plaintiff is content with the finding, and the defendant has neither excepted nor appealed.

We presume that the court refused to render judgment for the $60 yearly damage on the supposition that when permanent damages were awarded the easement thereby acquired dated back to the time of the original injury. For this ruling we see no warrant in law. This court has repeatedly held that there is appurtenant to all lands a natural easement, entitling the owner to discharge surface water in its natural course, regardless of the ownership of the lower lands; but this does not include diverted waters, which in their natural flow would find a different outlet. Such diversion would be a trespass which would entitle the injured party to compensation for all resulting damage, and, un-

der certain circumstances, to an abatement of the nuisance. It is true that the works of certain quasi public corporations are not liable to abatement on the theory that to interfere with such works might seriously affect the proper performance of their public duties, but this does not exempt them from liability for any unlawful damage. Any attempt to do so would be unconstitutional, and therefore all laws tending to that result must be reasonably construed. The settled rule of this court is that "neither a corporation nor an individual can divert water from its natural course so as to damage another. They may increase and accelerate, but not divert." Hocutt v. Railroad Co., 124 N. C. 214, 219, 32 S. E. 681; Mizzell v. McGowan, 125 N. C. 439, 444, 34 S. E. 538. When the defendant diverted unlawfully—that is, without having acquired the right to do so—the waters of Heart's Delight pocoson to the lands of the plaintiff, it committed a trespass. This trespass continues as long as the defendant continues to discharge upon the lands of the plaintiff diverted water in greater quantities than can be carried off by the natural outlet, or until the defendant acquires the right to discharge such waters. This right is simply an easement, which may be acquired by grant, prescription, or condemnation. Beach v. Railroad Co., 120 N. C. 498, 26 S. E. 703. Act 1893, c. 152, was merely a statute of limitation. Act 1895, c. 224, professedly an amendment to the act of 1893, provides that all actions for damages caused by the construction or repair of any railroad shall be commenced within five years after the cause of action accrues, and that "the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his property." As in actions on the case the damage is the real cause of action, it is clear that the statute does not begin to run until the damage is done.

Railroads are quasi public corporations, charged with important public duties, which in their very nature necessarily invoke the power of eminent domain, and therefore the courts, with practical unanimity, have created a species of legal condemnation by the allowance of so-called "permanent damages." Our leading case upon this subject is Ridley v. Railroad Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, where apparently for the first time in this state the rule is distinctly enunciated and defined. It is further developed and affirmed in Parker v. Railroad Co., 119 N. C. 684, 25 S. E. 722; Beach v. Railroad Co., supra; Nichols v. Railroad Co., 120 N. C. 496, 26 S. E. 643; Hocutt v. Railroad Co., supra. The provision in the act of 1895, incidentally providing for a statutory easement, rather by implication than direct terms, seems to us to be, in effect, but little more than a legislative affirmation of the rule already enunciated in other jurisdictions, and adopted in Ridley's Case, which was decided a year after the act was passed. It is true the act uses the words "shall assess," but they are expressly applied to the damages to which the plaintiff is entitled. This act does not profess to restrict the right of the plaintiff to compensation for the injury suffered. If the plaintiff is otherwise entitled to yearly damages, he can recover them in addition to the just compensation to which he is entitled for the value of the easement, if it is conveyed to the defendant. It is true that, if entitled thereto, he must recover them in the same action, but not necessarily in the same issue. In fact it is better to submit them in different issues, as they are distinct in principle. The one is compensation for a wrong, while the other is the conveyance of a right, as the allowance of permanent damages under this act is, in effect, the condemnation of land to the use of a statutory easement.

But suppose the damage is not permanent, and the defendant does not wish to acquire the easement; can he be made to do so, regardless of the cost to himself or damage to the plaintiff? We think not. The confusion liable to arise from the word "permanent," as applied to damages, is pointed out in Beach's Case, on page 502, 120 N. C., and page 704, 26 S. E., where the nature of such an easement is discussed. Whether the damage is permanent or not must appear from the pleadings. If the damage is in itself irreparable, or if it will probably recur from a given state of things which the defendant refuses to change, and which the court, from motives of public policy, will not make him change, permanent damages are allowed as the only way of doing justice to the plaintiff, and at the same time preventing interminable litigation. As far as the plaintiff is concerned, permanent and recurring damages are the same to him, if they equally result in the destruction of his property. The latter are in some respects worse than the former, as they merely prolong his agony, and may cause even greater loss. For instance, if a farmer knows that the railroad has acquired a right to flood his land, he will not plant it; whereas, if he relies upon their subsequent forbearance from unlawful injury, he may suffer, not only the damage to his land, but also the loss of his labor, seed, and fertilizer. In other words, the loss of the crop means the loss of everything that has been put into the crop. In Ridley's Case, supra, it appeared that the damage was caused by the construction of the roadbed and bridge of the defendant, which were clearly permanent structures, the removal of which would involve, not only great expense to the defendant, but also great inconvenience to the traveling public. Therefore the defendant tendered the issue of permanent damage, to which it was clearly entitled. But can mere ditches, which may be run in one direction one day and changed the next, or opened in the morning and filled up at night, be considered perma-

nent structures? Their continuance may not be necessary, and the defendant may well prefer to close them up rather than pay a large sum for an easement that it does not need. Suppose that a section master should carelessly dig a ditch that flooded a large brick building in such a manner that its continuance would probably eventually undermine its walls and cause its destruction; could not the railroad fulfill its obligations by abating the nuisance, and fully repairing the present damage, or would it be compelled to pay the full value of the building? Surely, the statute never contemplated such injustice as the latter alternative. And yet, if it takes the easement, it must pay for it, and, in any event, must pay for the injury already done. Ditches may be made permanent, as far as the plaintiff is concerned, by the refusal of the defendant to change them; and in that event, if the court refuses to compel the abatement, it must award permanent damages. Such permanent damages represent the damage done to the estate of the plaintiff by the appropriation to the easement of so much of his land, or such use thereof, as may be necessary to the easement. As this, being the value of a right, is essentially distinct from damages for the perpetration of a wrong, they are cumulative, and may both be recovered in the same action, as clearly intended by the statute.

In the case at bar both parties have agreed to the awarding of permanent damages, but the defendant insists that its acquisition of the easement condones the trespass. This contention cannot be sustained upon any principle of law. Of course, if one issue were made to include all damages, past, present, and prospective, the plaintiff would recover all to which he was entitled. But we think the better plan is to submit two issues, and clearly instruct the jury as to the nature of each. In this way, there will be less chance of confusion, and greater ease of review. The judgment will be amended in the court below, so as to allow the plaintiff the sum awarded by the verdict for damage to crops in addition to that found for permanent damage. The judgment is therefore modified and affirmed.

BARBER v. EAST & WEST R. CO.

(Supreme Court of Georgia. May 16, 1900.)

CONTRIBUTORY NEGLIGENCE—NONSUIT.

Inasmuch as it was apparent from the evidence of the plaintiff that he could, by the exercise of ordinary care, have avoided, not only the injury, but the consequences to himself of the negligence of the defendant, even if such negligence was shown, he was not entitled to recover, and the nonsuit was properly awarded. Civ. Code, § 3830; Perry v. Railroad Co., 29 S. E. 304, 101 Ga. 400.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Action by J. H. Barber, as next friend, against the East & West Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

L. J. Spinks, Jr., and Sanders & Davis, for plaintiff in error. F. A. Irwin, for defendant in error.

PER CURIAM. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

COMMISSIONERS OF ROADS AND REVENUES OF POLK COUNTY v. MAYOR, ETC., OF CEDARTOWN.

(Supreme Court of Georgia. May 14, 1900.)

MUNICIPAL CORPORATIONS—BRIDGES—DUTY TO REPAIR.

When the corporate limits of a city are so extended as to embrace therein a portion of a public highway, and a bridge over a stream crossing the same, the municipal authorities at once acquire the right to exercise jurisdiction over the bridge, and are chargeable with the duty of keeping it in repair after the county authorities have expressly relinquished such jurisdiction, which they may do with or without the assent of the municipal authorities.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Application by the mayor and council of the city of Cedartown for a writ of mandamus against the commissioners of roads and revenues of Polk county. From a judgment granting the writ, defendants bring error. Reversed.

Blance, Irwin & Wright, for plaintiffs in error. John K. Davis and Sanders & Davis, for defendants in error.

COBB, J. The mayor and council of the city of Cedartown filed their petition, praying that the writ of mandamus might issue to require the county commissioners of Polk county to repair, and, if necessary, rebuild, a bridge which had been constructed under the direction of the county authorities. The petition set forth, in substance, the following: In 1889 the county commissioners ordered that a named person should proceed as early as practicable to purchase material to build a bridge across a named stream. In pursuance of this order the bridge was built at the county's expense, and was kept in repair by the county authorities for a number of years. At this time the road of which the bridge formed a part was not within the corporate limits of the city of Cedartown. After the building of the bridge, the limits of the city were extended so as to embrace within the same the bridge in question. On September 19, 1898, the county commissioners passed the following order: "Ordered, that the authorities of Polk county relinquish all jurisdiction or control of all the bridges or causeways inside the incorporate limits of Cedar-

town and Rockmart, and will not be responsible for any damages to the public caused by any bridges or causeways inside of said incorporate limits." In 1899, the bridge being out of repair, the city authorities requested the county authorities to repair the same, and notified them that the city did not claim the right to exercise any jurisdiction over the bridge. The county authorities declined to repair the bridge, giving as a reason that the same was within the corporate limits of the city of Cedartown. The answer of the respondents was substantially as follows: They admitted that the bridge had been built by the county authorities, but alleged that, since the same had been taken within the limits of the city, the county authorities had neither made, nor authorized to be made, any repairs on the bridge; recognizing that, after the limits of the city had been extended so as to embrace the bridge, the same passed under the jurisdiction and control of the city. The order referred to in the petition was passed at a regular meeting of the county commissioners. The case came on to be heard, and a judgment was rendered making the mandamus absolute, and requiring the respondents to keep the bridge in repair, and, when necessary, to rebuild the same; the judgment reciting that there was no issue of fact involved in the case. To this judgment the respondents excepted.

The moment that the charter of the city of Cedartown was so amended as to embrace within the limits of that corporation that portion of the public road of which the bridge in question formed a part, the jurisdiction of the county over this part of the highway ceased, and the same became subject to the control and jurisdiction of the municipal authorities. See Almand v. Railway Co. (Ga.) 34 S. E. 10, and authorities there cited. Consequently the duty of the municipal authorities to keep in repair the bridge in question arose as soon as it became a part of one of the streets of the city, and the county was no longer under any duty in respect thereof. Such being the case, no order or proceeding of any character was necessary in order to relieve the county authorities of the obligation to keep the bridge in repair. Especially would the county authorities no longer be under any obligation to keep the bridge in repair when it affirmatively appears that, since the same has become a part of one of the streets of the city, they have never undertaken to repair the bridge, but, on the other hand, by order duly passed, have expressly relinquished all jurisdiction and control over it. Even if the law in regard to the abolition of a public road is applicable to bridges, it is not necessary that such law should be followed in a case like the present, where the former county bridge becomes by legislative enactment a part of one of the streets of the city embraced within the county, and the county authorities from the date of the act acquiesced in such change by declining to make repairs upon the same as a county bridge. We do not mean to hold that the county authorities may not, if they see proper to do so, build bridges within the corporate limits of cities and towns, or improve the streets of towns and cities embraced within the limits of the county. What is now held is that, where a road or bridge which is a part of a county road has by an amendment to a city charter been brought within the corporate limits of the city, the obligation on the part of the county to keep such road or bridge in repair immediately ceases. This case differs from Daniels v. City of Athens, 54 Ga. 79; Id., 55 Ga. 609. In that case the county authorities, with the consent of the municipal authorities, built a bridge within the city limits, which was treated both by the county and the municipal authorities as a county bridge. It was held that under such circumstances the city was under no duty to keep the same in repair, notwithstanding the fact that it had at one time contributed a portion of the money necessary to rebuild the bridge. It was not held in the Daniels Case that the county was under any obligation to build the bridge, but simply that, having voluntarily built the bridge with the consent of the municipal authorities, it was under a duty to keep the same in repair, and that this duty did not rest upon the municipal authorities. There was nothing in that case indicating that the county had relinquished control over the bridge thus built by it. On the contrary, it distinctly appeared that it had exercised jurisdiction and control over the bridge, and that the repairs made by the city on the bridge were permissive and entirely gratuitous on its part. The ruling made in the Daniels Case would certainly authorize the county authorities to have retained control over the bridge involved in the present case, if they had seen proper to do so, but nothing therein ruled required that they should.

The judge erred in making the mandamus absolute. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

SHIELDS v. MILLS.

(Supreme Court of Georgia. May 12, 1900.)

CERTIORARI TO JUSTICE—REVIEW—APPEAL FOR DELAY.

No question of law is involved in the present case. The determination of the rights of the parties was dependent entirely upon a question of fact, which was settled by the jury in the justice's court, and there was ample evidence to sustain the verdict. It follows that there was no error in overruling the certiorari, and the writ of error is so palpably without merit that it must have been sued out for delay only. Accordingly the judgment of the court below is affirmed, and damages are awarded against the plaintiff in error. See Collins v. Trading Co. (Ga.) 32 S. E. 667.

(Syllabus by the Court.)

Error from superior court, Butts county; H. J. Reagan, Judge.

Action between W. J. Shields and M. M. Mills. From a judgment before a justice, Mills brings certiorari, and from a judgment overruling the same he brings error. Affirmed.

Ray & Ray and Chas. L. Redman, for plaintiff in error. M. P. Hare, for defendant in error.

PER CURIAM. Judgment affirmed, with damages. All the justices concurring, except FISH, J., absent on account of sickness.

AUSTIN v. STATE.

(Supreme Court of Georgia. April 10, 1900.)

MURDER—MANSLAUGHTER—NEGLIGENCE.

1. If one intentionally and recklessly discharges a gun at another, or in like manner fires a gun under such circumstances that the act would naturally tend to destroy human life, and death results therefrom, he is guilty of murder.

2. When death results to one from the discharge of a gun in the hands of another, who had no intention to kill, nor any intention of discharging the gun, the discharge being caused by the reckless manner in which the gun was handled, the slayer is guilty of involuntary manslaughter only; and the particular grade of that crime would be dependent upon whether at the time and place of the killing it was lawful for the slayer to be in possession of a deadly weapon.

3. The charges complained of were not in accord with the rules above announced.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

James Austin was convicted of murder, and brings error. Reversed.

Blalock & Cobb, for plaintiff in error. F. A. Hooper, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

COBB, J. The accused was convicted of murder. The evidence introduced in behalf of the state authorized a finding that the accused deliberately killed the deceased by shooting her with a gun. The evidence for the defense, taken most strongly against the accused, would not have authorized a finding that he was guilty of a higher grade of homicide than involuntary manslaughter in the commission of "a lawful act without due caution and circumspection," and rather tended to show that the killing was accidental. The theory of the defense was that the killing was accidental. From the statement of the accused and testimony introduced in his behalf it appeared that the accused and deceased, with others, were playing together in a house, and that a gun was being handled by different members of the party; that the deceased went out of the house, and the accused followed her with the gun in his hand; than when in the yard they began again to play, and the deceased attempted to take the gun from the hands of the accused, the latter having his hand upon the stock of the gun, and the deceased having her hand upon the barrel; that while thus engaged in a playful struggle, the gun was accidentally discharged, killing the deceased. The judge charged the jury as follows: "If a person handles a gun or pistol in a careless and reckless manner, and thereby shoots and kills another, the law declares such killing to be murder, and will imply malice from the wanton and reckless disregard of human life; and such killing would be murder although there may not exist any ill will or express malice on the part of the slayer towards the person killed." Also that: "If you should believe from the evidence in this case beyond a reasonable doubt that the defendant was carelessly and recklessly handling a gun, that it was in a wanton and reckless disregard of human life, and thereby shot and killed the deceased, the law would imply the intention to kill, and the homicide would be murder. But if you should believe from the evidence beyond a reasonable doubt that the defendant negligently handled the gun in such a negligent manner that you believe it was criminal or culpable negligence, and that by reason thereof he shot and killed the deceased, but that he did not intend to kill her, he would not be guilty of the offense of murder, but would be guilty, under such circumstances, of involuntary manslaughter in the commission of a lawful act without due caution and circumspection." These charges were erroneous, and were harmful in the present case. The mere fact that a person handles a gun in a careless and reckless manner, and death results to another therefrom, does not necessarily make the person handling the gun guilty of murder. In order to make such person guilty of murder, it must appear that there was an intention on the part of the slayer to discharge the gun, and that the circumstances were such that an act of that character naturally tended to destroy human life. If a person recklessly discharges a gun at another, and death results therefrom, or recklessly discharges a gun into a crowd, although at no particular person, and death results to some one, it is, of course, settled law that such killing is murder. Studstill v. State, 7 Ga. 2; Collier v. State, 39 Ga. 31; Cook v. State, 93 Ga. 200, 18 S. E. 823. Where death results to one from the discharge of a gun in the hands of another, and there was no intention to kill, nor an intention to discharge the gun, the person in whose hands the gun was held would not be guilty of murder, although the gun may have been handled in a careless and negligent, even reckless, manner. In such a case the slayer would be guilty of involuntary manslaughter only, and the particular grade of that crime would depend upon whether it was lawful or unlawful for the slayer to be in possession of a deadly weapon at the time and place of the killing. See, in this connection, Pool v. State, 87 Ga. 526, 13 S. E. 556; Burton v. State, 92 Ga. 449, 17 S. E. 99; 1 McClain, Cr.

Law, § 325. Applying these principles to the charges above quoted, the first and the first paragraph of the second do not contain correct abstract propositions of law; nor do we think that, even if the propositions therein contained are sound, they were applicable to the facts of the present case. If the evidence for the accused was worthy of credit, he was either not guilty of any offense, or at most guilty of the lowest grade of manslaughter. If the testimony in behalf of the state was true, the accused was guilty of willful and deliberate murder. Judgment reversed. All the justices concurring.

BRAND v. POWER.

(Supreme Court of Georgia. April 9, 1900.)

DEED—CANCELLATION—PLEADING—AMENDING.

1. An absolute deed of conveyance will not, at the instance of the grantor, be canceled merely because of a breach by the grantee of a promise made by him, in consideration of which the deed was executed.

2. An equitable petition for the cancellation of a deed, based solely upon a ground of the nature above indicated, is not amendable, so as to make a case for cancellation either on the ground that the grantor was mentally incapable of contracting, or was induced by fraud to execute the conveyance.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Bill by Eliza Brand against J. T. M. Brand. On the death of plaintiff, W. R. Power, administrator, was substituted. Judgment for plaintiff, and defendant brings error. Reversed.

Geo. D. Anderson and R. N. Holland, for plaintiff in error. W. R. Power, for defendant in error.

LUMPKIN, P. J. Mrs. Eliza Brand brought an equitable petition against her son, J. T. M. Brand, for the cancellation of a deed whereby she conveyed to him two lots of land. Pending the action she died. W. R. Power, her administrator, was made a party plaintiff, and the case proceeded in his name. The petition alleged that "at the time of making said deed it was understood and agreed between the parties thereto that the said J. T. M. Brand would take care of, provide for, and support petitioner on account of making said deed," but that he had entirely failed and refused to comply with this undertaking. The defendant demurred to the petition generally, and also specifically on the ground that a common-law suit for a breach of contract was the plaintiff's proper remedy. The demurrer was overruled, and the defendant excepted. Over his objection, the court allowed an amendment to the petition, which, in substance, alleged that at the time of executing the deed Mrs. Brand was mentally incapable of contracting, and that she had been induced to sign the deed by various acts and sayings on the part of the defendant, which constituted a fraud upon her. The objections to this amendment were that there was nothing in the original petition to amend by, and that the amendment set forth a new and distinct cause of action. The case proceeded to trial, and resulted in a verdict for the plaintiff. A motion for a new trial was duly filed by the defendant, and the same was overruled. His bill of exceptions assigns error upon all of the above-mentioned rulings. We shall not, however, undertake to deal with the questions made in the motion for a new trial; for, in our judgment, the judge erred in not sustaining the demurrer to the petition, and also in allowing the amendment thereto, and a correction of the errors thus committed will, of course, put an end to the case.

1. Even if we treat the petition as sufficiently alleging that the undertaking of the defendant to provide a support for his mother was the sole consideration of the deed, which is by no means made clear, his failure to do as he promised amounts to nothing more than a mere breach of contract, for which the plaintiff had an adequate remedy by a proper action for damages. The deed passed the title to him without condition or qualification, as it contained no language making his title in any way dependent upon compliance with his contract to support his mother. This being so, she had no more right to cancel the deed for a breach of this contract than she would have had if she had sold her son the land for a specified amount of purchase money, and he had failed or refused to make payment thereof. Clearly, then, the plaintiff had no standing in court on the original petition.

2. We are equally confident that the amendment was improperly allowed. Both the objections urged against it were well taken. As has been shown, the petition, as originally framed, set forth no cause of action, and there was nothing in it to amend by. Moreover, even were this otherwise, the amendment ought to have been disallowed, for it made a case entirely foreign to that declared upon in the first instance. The initial effort of the plaintiff was to cancel the deed solely on the ground that the defendant had made a breach of his contract. The amendment, though it seeks to accomplish the same end, introduces grounds of an altogether different nature, viz. mental incapacity to contract, and fraud in inducing the grantor to execute the conveyance. In other words, the petition, as originally filed, distinctly recognized the deed as having been, in its inception, a valid instrument, while, according to the amendment, the conveyance sought to be canceled was, for the reasons just stated, void ab initio. We are unable to perceive any connection between causes of action so widely dissimilar. Judgment reversed. All the justices concurring.

CARLISLE et al. v. WILSON et al.

(Supreme Court of Georgia. May 16, 1900.)

HIGHWAY BY PRESCRIPTION—OBSTRUCTION.

A passageway connecting a city lot with a public street, although originally laid out as a private way, became a public street by the continuous use thereof by the public as such for 30 years, and by having been kept in repair and free from obstructions by the municipal authorities. Consequently, the governing body of such municipality had jurisdiction to entertain a petition filed by an abutting property owner to have removed from across such street a fence which obstructed the passage.

(Syllabus by the Court.)

Error from superior court, Troup county; S. W. Harris, Judge.

Action by H. Wilson and others against N. Carlisle and others. Judgment for plaintiffs was affirmed on certiorari to superior court, and defendants bring error. Affirmed.

E. T. Moon and J. H. Cotter, for plaintiffs in error. Frank Harwell, for defendants in error.

COBB, J. Complaint was made to the city authorities of La Grange that certain persons had caused an obstruction to be placed in one of its public streets, and after a hearing the mayor and council decided that the way obstructed was a public street of the city, declared the obstruction a nuisance, and ordered the same abated. The case was carried by certiorari to the superior court, where the judgment of the mayor and council was affirmed. To this judgment the respondents in the proceeding before the mayor and council excepted. The evidence, though conflicting, authorized a finding that the way in question, although in all probability originally laid out as a private way, had become, by continuous user for a number of years, dedicated to the public, and that the city authorities had from time to time, by having repairs made and removing obstructions, recognized the same as one of the streets of the city. Such being the case, the mayor and council had undoubted jurisdiction to entertain an application to abate a nuisance caused by the obstruction of the street. The judge did not err in overruling the certiorari. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

SAVAGE v. OLIVER.

(Supreme Court of Georgia. May 11, 1900.)

JUSTICE OF THE PEACE—DISQUALIFICATION—ISSUE OF EXECUTION.

A justice of the peace is by law prohibited from sitting in any cause when he is related to either party within the fourth degree of consanguinity or affinity, and, while such relationship may not render void the issuance of an execution to foreclose a landlord's lien in favor of the party to whom the justice is related, yet, where such disqualification exists, any other justice of the peace of the county may also issue the execution, and preside on the trial of an issue formed by a counter affidavit interposed on the levy of such execution.

(Syllabus by the Court.)

Error from superior court, Hall county; J. B. Estes, Judge.

Action by A. D. Oliver against G. W. Savage. Judgment for plaintiff before a justice, and defendant brought certiorari. Judgment modified and affirmed, and defendant brings error. Affirmed.

Isaac L. Oakes and J. W. H. Underwood, for plaintiff in error. C. A. Faulkner and G. H. Prior, for defendant in error.

LITTLE, J. Oliver sought to foreclose a landlord's lien for supplies furnished to make a crop on the property of Savage. Both Oliver and Savage resided in the 810th district, G. M., of Hall county, and the property against which the lien was sought to be enforced was situated in said district. The justice of the peace of the 810th district was a brother-in-law of Oliver, and the notary public of that district was his brother. Under these circumstances Oliver made an affidavit to foreclose his lien before Herrin, notary public and justice of the peace of the 410th district, G. M., of said county. Herrin assumed jurisdiction, and, on the affidavit being filed, issued an execution against Savage, which was levied upon certain property, being cotton, corn, and fodder raised on the land of Oliver by Savage. The defendant in execution filed a counter affidavit, in which he denied the existence of a lien, and set up the want of jurisdiction in Herrin, the notary public and justice of the peace of the 410th district, to foreclose said lien. Herrin, having returned the papers to the 810th district, presided at the trial of the issue formed by the counter affidavit. The result of the trial was a judgment in favor of the plaintiff. The defendant entered an appeal to a jury, which also returned a verdict for the plaintiff. The defendant then filed his petition for certiorari, which was sanctioned. It appears that on the trial before the justice of the peace, as well as on the trial before the jury, the defendant moved to quash the execution issued by Herrin, because of the want of jurisdiction in that officer to issue the same. Much evidence was had as to the merits of the case and the amount of the indebtedness of the defendant to the plaintiff. On hearing the certiorari, the judge of the superior court ordered that the judgment of the court below be reversed and set aside, and the case remanded, unless the defendant should write off from said judgment within a given time the value of six sacks of guano, but, if such amount should be written off from the judgment, then the judgment rendered in the justice's court should be affirmed. Under this ruling the defendant, within the time named, wrote off from the amount of the judgment the value of the six sacks of guano, the effect of which was that the verdict rendered

by the jury was sustained. To this ruling the defendant excepted. The order which required the defendant in certiorari to write off from the amount of the verdict the value of six sacks of guano was based on certain evidence which appeared in the record that the guano was not furnished to be applied to the crops for the year in which they were raised. In so ruling we find there was no error. The evidence for the plaintiff authorized the verdict which was rendered, and we do not think the writ of certiorari should have been sustained because of the refusal of the justice to continue the case on the application of the defendant. There then remains for our consideration but one question, and that is whether or not Herrin, the justice of the peace of the 410th district, had jurisdiction to issue execution on the foreclosure of the landlord's lien when both the plaintiff and defendant resided in the 810th district, and the property sought to be made subject was located in said district. Under the provisions of our Civil Code (section 4045) no justice of the peace can sit in any cause when he is related to either party within the fourth degree of consanguinity or affinity. Both the justice of the peace and the notary public being related in this degree to the plaintiff, they were disqualified from sitting in the cause, and, as the law provides for only one justice of the peace and one notary public, who is ex officio justice of the peace, for each militia district, there was, consequently, no officer of this class in the district of the residence of the plaintiff and defendant who had jurisdiction to preside in the case. For the purpose of meeting a contingency of this character, the Civil Code (section 4072) provides that, when any justice of the peace is disqualified from presiding, and there is no other justice of the peace in his district who is qualified, any justice of the peace of the county is qualified to issue all process and preside in his district. It would seem, under this provision, that Herrin, the justice of the peace of the 410th district, was given jurisdiction to entertain the affidavit made by Oliver, as well as to preside on the trial of the issue formed by the counter affidavit. It is said, however, that administering the oath to foreclose a lien and issuing the execution thereon is a ministerial act, which an officer is authorized to do notwithstanding he may be related to the plaintiff. We do not controvert this position. In the case of Thornton v. Wilson, 55 Ga. 607, this court held that a distress warrant issued by a magistrate who was the son of the plaintiff was not void. In delivering the opinion in that case, Warner, C. J., said that the issuing of a distress warrant was a ministerial act on the part of the justice, and the warrant so issued was not void, which ruling has been approvingly cited in a number of subsequent cases. See King v. Thompson, 59 Ga. 384; Newson v. Carlton, Id. 519; Walden v. Lee Co., 60 Ga. 298; Baker v. Gladden, 72 Ga. 471; Beall v. Singuefield Co., 73 Ga. 50; Drawdy v. Littlefield, 75 Ga. 217. We cannot, therefore, rule that, if either the justice of the peace or the notary public and ex officio justice of the peace of the 810th district had administered the affidavit tendered by Oliver to foreclose his lien, and issued an execution on the same, the execution so issued would have been void. If we assume that it would have been valid and regular, it is nevertheless true that under the provisions of section 4072, referred to above, any other justice of the peace in Hall county was invested with jurisdiction to administer the affidavit and issue the warrant; so that, even if the execution would not have been void if issued by either of the officers related to Oliver, yet, when issued by another justice of the peace in the county because of the disqualification of such officers, it must be held to be regular and valid. The words of the statute are that such justice is qualified to issue all process, as well as to preside. The word "process," as a legal term, has a very comprehensive signification. One of its definitions is that it is a writ, warrant, subpœna, or other formal writing issued by authority of law; and it cannot be questioned but that the execution issued on the foreclosure of a landlord's lien is embraced in the general definition of process. So that our conclusion is that, while the execution, if it had been issued by a disqualified officer in the district in which the defendant resided, would not have been void, the fact of disqualification of the two justices of the district gave to any justice of the peace of the county jurisdiction to issue it; and the fact that it was issued in this case by the justice of the peace of an adjoining militia district in the county of the residence of both the plaintiff and defendant affords no reason why the levy entered upon it should have been dismissed, and the execution quashed. In refusing to grant the motion of defendant there was no error. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

HENRY v. STATE.

(Supreme Court of Georgia. May 11, 1900.)

PLEDGE—RIGHTS OF PLEDGEE—LARCENY.

1. Where, by special contract, a chattel is pledged by one as security for his debt, the pledgee has a special property in the thing pledged; and when the pledgor takes the property from the pledgee's control and possession with a fraudulent intent of depriving the pledgee of the security, he may be convicted of larceny under a charge of stealing property belonging to the pledgee.

2. There was sufficient evidence in the present case to show such a delivery of the property as to constitute a valid pledge in law, and to authorize a conviction of the accused for stealing the same.

(Syllabus by the Court.)

Error from city court of Albany; R. Hobbs, Judge.

Sherman Henry was convicted of larceny, and brings error. Affirmed.

D. F. Crosland, for plaintiff in error. John D. Pope, Sol. Gen., for the State.

LEWIS, J. Sherman Henry was placed upon trial in the city court of Albany, Ga., upon an accusation charging him with entering the dwelling house of one Temple Mack with intent to steal, and with wrongfully, fraudulently, and privately taking and carrying away therefrom, with intent to steal the same, one suit of clothes, and one bicycle of the value of $15, the personal property of said Mack. To this accusation he pleaded not guilty. Briefly stated, the following is the substance of the testimony introduced on the trial: Temple Mack, the prosecutrix, testified that the accused came to her to engage board. She replied to him that he would have to pay her in advance, as she had lost so much by boarders. Accused replied that he had a trunk full of clothes and a bicycle, and that he would deliver them to her as security for the board. This conversation took place during the day, and that night the accused came back to the home of prosecutrix, bringing with him his trunk and bicycle, and said, "Here is a suit of clothes that cost me $8.00, and a bicycle, that I turn over to you as security for my board." She accordingly received these chattels, and had them placed in a room in her house occupied by her son. The accused also was assigned to this room, where he lodged as a boarder. He kept the key to his trunk, wore the clothes, and rode the bicycle occasionally. In the trunk was a new suit of clothes. He agreed to pay two dollars per week for board, and he remained in the house as a boarder a little over three weeks, for which he was due seven dollars. A demand was made on him for the money. He left the house, leaving the bicycle and trunk therein. Two or three days afterwards the landlady missed the bicycle. She then examined his trunk, and found the new suit of clothes had also been taken away. It further appeared from the testimony that the accused had sold the bicycle, and was wearing the new suit of clothes in another place, where he was engaged in work. The accused introduced no evidence, but made a statement in which he admitted that he told the landlady his trunk and clothes would be responsible for his board, but denied delivering them to her, stating he kept the key to his trunk, wore his clothes, and rode his bicycle whenever he wished; said he did not intend to steal anything, but he put on the new suit of clothes to attend to a job in Arlington, where he was working when arrested, and simply desired to make some money so that he could pay his board. The judge of the city court, before whom the case was tried without a jury, after hearing the evidence, found the accused guilty, whereupon he made a motion for a new trial on the general ground that the verdict was contrary to law and evidence. To the judgment of the court overruling this motion the accused excepts.

There can be no question about the soundness of the proposition that property stolen from a bailee may be charged in an indictment to be his property, and authorities have even gone to the extent of holding that property stolen from one who had himself stolen it could be alleged as his. It is equally true that property in the hands of a bailee may be stolen by the general owner. Clark, Cr. Law, pp. 246, 247; 18 Am. & Eng. Enc. Law, pp. 598, 599. In the case of Wimbish v. State, 89 Ga. 294, 15 S. E. 325, it was decided by this court that "the ownership of personal property, in an indictment for larceny, may be laid in a bailee having possession of the property when it was stolen, though the bailment was gratuitous." In Davis v. State, 76 Ga. 721, it appears that the accused was indicted for obstructing an officer in the execution of legal process. It seems that after a levy of a fi. fa. by the sheriff, the defendant in fi. fa. privately took and carried the property levied upon to an adjoining county. It was held by a majority of this court that this did not constitute the offense with which he was charged, and on page 722 Justice Blanford says: "In this case that which the plaintiffs in error did was not to oppose the officer, but it was to defeat the execution of the process by committing the crime of simple larceny. * * * The plaintiffs in error should have been indicted for simple larceny, and not for the offense for which they were indicted." From these principles it necessarily follows that when property has been delivered by the owner to one as a pledge to secure a debt, the pledgee has sufficient interest in the same to maintain a prosecution against any one, even the general owner, by charging that the property belonged to him, the pledgee. We do not understand, however, that this principle is denied. Counsel for plaintiff in error seek a reversal in this case upon the idea that the testimony does not show such a delivery of the property in question as would constitute a valid pledge in law. We think there is sufficient testimony for the judge to infer an actual delivery by the accused of this property as security for the payment of his board. The fact that he was permitted to use it does not deprive the pledgee in this case of the right to its custody and control. Nothing can be gathered from the evidence in the record to indicate that she ever consented to such a use or disposition of the same as to absolutely deprive her of such possession. A portion of the property pledged was actually sold to another party by the pledgor without her knowledge and consent, and the circumstances developed by the evidence touching the manner of its disposition by the pledgor were amply sufficient for the judge to infer that he had a fraudulent purpose of depriving his creditor of this security. This identical question

was made and passed upon by the supreme court of Iowa in the case of Bruley v. Rose, 11 N. W. 629. It was there decided: "A pledgee has a special property in the thing pledged, and a pledgor, who takes the property from the pledgee's possession with the felonious design of depriving such pledgee of his security, may be guilty of larceny." In that case it appeared that Bruley had been charged with larceny of a span of horses which he had bought from Rose. For these horses Bruley was indebted to Rose in the sum of $45.60, and to secure the payment of this balance it was claimed that Bruley delivered the horses to Rose as a pledge, and afterwards gained possession of them under false pretenses, and with the felonious design of depriving him of his security. It appeared that Rose did give him permission to take the horses for a particular purpose. It was accordingly held that, if he took them for a fraudulent purpose, he was guilty of the offense of larceny. Applying these principles to the facts in this case, and we think the court did right in overruling the motion for a new trial. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

FUNKHOUSER v. MALE et al.

(Supreme Court of Georgia. May 11, 1900.)

TAX FI. FA.—TRANSFER—LIEN—LEVY OF EXECUTION.

1. A tax fi. fa. transferred to a person other than the defendant loses its lien as to third persons unless the transfer be recorded as prescribed by the law in force at the time.
2. When such fi. fa., issued and transferred prior to the adoption of the Code of 1895, was levied at the instance of the transferee, and a claim was filed by a third person, the levy should have been dismissed.
3. In such case it was error to direct a verdict for the claimant.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Samuel Funkhouser levied an execution under a tax fi. fa., and W. H. Male and others interpose a claim. Verdict for claimants, and Funkhouser brings error. Reversed.

Fielder & Mundy, for plaintiff in error. H. H. Dean, W. C. Bunn, Hoke Smith, and H. C. Peeples, for defendants in error.

SIMMONS, C. J. An execution for state and county taxes was issued against W. M. and J. H. West, in January, 1892. It was transferred, in April, 1892, to Mrs. Adams, and the transfer recorded the next day on the general execution docket. In August, 1893, Mrs. Adams transferred the fi. fa. to Funkhouser, and this transfer was recorded on the same day on the general execution docket. Funkhouser had the execution levied upon certain lots of land as the property of the defendants in fi. fa. A claim was filed by Male and others, and at the trial of the claim case Funkhouser, the transferee, offered the execution in evidence. It was objected to by the claimants upon the ground that it had never been recorded upon the proper execution docket, and had, therefore, lost its lien as against them. This objection was sustained, and the execution ruled out. The court thereupon directed the jury to find a verdict in favor of the claimants; that is, that the property was not subject. Funkhouser filed his bill of exceptions, alleging error in the exclusion of the fi. fa. from evidence and in the direction of the verdict.

1, 2. It was admitted here that the transfers of the tax execution were not recorded on the docket prescribed by the law in force at the time of the transfer, but it was insisted that, inasmuch as they were recorded upon the general execution docket, there was sufficient notice to the claimants, and the lien of the fi. fa. was preserved. The law in force at the time of the transfers of this fi. fa. was that they should be recorded on the execution docket of the clerk of the superior court. The act of 1889 (Acts 1889, p. 106), now section 2788 et seq. of the Civil Code, directed the clerk of the superior court to keep another docket, styled the "general execution docket," in which certain liens were to be recorded. By the act of 1894 (Pol. Code, § 888) transfers of tax fi. fas. were required to be recorded on this general execution docket. The act of 1879 (Acts 1879, p. 181) applied only to executions issued prior to February 20, 1875, requiring transfers of such executions to be recorded, within six months after the passage of the act, on the execution docket of the superior court, and providing that "in default thereof such executions shall lose their lien upon any property which had been transferred bona fide and for a valuable consideration before the record, and without notice of the existence of such execution or executions." This latter clause of the act was embodied in the Code of 1895 along with the Acts of 1872, 1875, and 1894, and is now made applicable to all transfers made since the adoption of the Code of 1895. As the original act applied to those executions only which were issued prior to February 20, 1875, this clause did not apply to executions issued subsequently to that date, and transferred prior to the adoption of the Code of 1895. Wilson v. Herrington, 86 Ga. 778, 13 S. E. 129. Thus there was no law of force in the years 1892 and 1893 which required the claimants to show that they acquired the property bona fide, and without notice of an execution issued and transferred in those years. The act of 1875 (Acts 1875, p. 119), which was the law in force at the time of the issuance and of the transfers of the execution now under consideration, required transfers of tax executions to be recorded on the execution docket of the superior court. That docket will be found described in section 4360(4) of the Civil Code.

and was the particular docket upon which these transfers should have been recorded. The record of the transfers upon any other docket or upon any other book in the clerk's office would be no notice to any one, and would not serve to preserve the lien of the execution as against third persons. As before remarked, it was not until the act of 1894 that transfers of this character were required to be recorded upon the general execution docket. A record upon any other docket or book than that prescribed by law is no record at all. It being admitted that these transfers were not recorded upon the docket prescribed by law, it follows, under numerous decisions of this court, that the transferee lost his lien as against these claimants. In the case of Hoyt v. Byron, 66 Ga. 351, the transferee of a tax execution had it levied upon certain land which was claimed by Byron and others. It was held that, the transfer not being recorded, the lien of the fi. fa. was lost as against the claimants. It is true that in the headnote to that case, made by the reporter, it is declared that the lien was lost on the property of the defendant; but in Fuller v. Dowdell, 85 Ga. 466, 11 S. E. 773, where it was ruled, following Denning v. Danforth, 80 Ga. 56, 7 S. E. 546, that a tax execution, a transfer of which had not been properly recorded, was still good as against the defendant, it was said that this ruling was not in conflict with Hoyt v. Byron, as the latter case ruled only that the lien was lost as against a claimant. In the case of Denning v. Danforth it was squarely decided for the first time by this court that the transferee did not lose his lien as against the defendant in fi. fa. by reason of a failure to record the transfer. This case has been followed in Fuller v. Dowdell, supra; Clarke v. Douglass, 86 Ga. 125, 12 S. E. 209; and Wilson v. Herrington, 86 Ga. 778, 13 S. E. 129. In the opinion in the last-mentioned case, Bleckley, C. J., cited Hoyt v. Byron as sustaining the ruling made. In Murray v. Bridges, 69 Ga. 644, the ruling was the same as in Hoyt v. Byron. For these reasons we hold that, the transfers not having been properly recorded, the execution lost its lien as against the claimants, and there was no error in excluding it from evidence.

3. As to the ruling made in the third headnote of this case, see Baker v. Shepherd, 37 Ga. 12; Hackenhull v. Westbrook, 53 Ga. 285; Solomon v. Newell, 67 Ga. 572. Judgment reversed. All the justices concurring, except FISH, J., absent.

UNITED GLASS CO. v. McCONNELL, Sheriff.

(Supreme Court of Georgia. April 11, 1900.)

APPEAL—JURISDICTION—FINAL JUDGMENT.

1. Inasmuch as this court has no jurisdiction of a case as long as the same is pending in the court below, unless the judgment excepted to, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the case, it is manifest that it has no jurisdiction of a writ of error when the bill of exceptions merely complains of the overruling of a demurrer to a sheriff's answer to a money rule, and there has been no final judgment on the rule.

2. When, in a given case, it should have been obvious that the writ of error was premature, this court will refuse an application to allow the bill of exceptions to be withdrawn and filed in the court below as exceptions pendente lite.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Application by the United Glass Company for a rule against J. P. McConnell, sheriff. Demurrer to the answer was overruled, and the glass company brings error. Dismissed.

Henry Walker, for plaintiff in error. W. S. McHenry, for defendant in error.

COBB, J. 1. When this case was called in this court, a motion was made to dismiss the writ of error on the ground that it was premature, as it appeared from the record that the case was still pending in the court below. An examination of the record discloses that a rule against the sheriff was issued, to which he filed an answer. To this answer the movant in the application for the rule demurred, and the demurrer was overruled, and this is the judgment excepted to. It does not appear that there has been any final judgment against the sheriff. On the contrary, it would seem that there has not been, as the order overruling the demurrer recites that a traverse to the answer had been filed, and there is nothing disclosing what disposition has been made of this traverse. Counsel for plaintiff in error was duly notified of the motion to dismiss, and did not suggest a diminution of the record, but resisted the motion upon the ground that the case was properly here, even conceding the facts to be as contended by the defendant in error. Under this state of facts it is clear that the writ of error was prematurely sued out. This court has no jurisdiction of a case as long as it is pending in the court below, unless the judgment excepted to, if it had been rendered as claimed by the plaintiff in error, would have resulted in a final disposition of the case. Civ. Code, § 5526. If the demurrer to the sheriff's answer had been sustained, this would not have been a final disposition of the case. In order to finally dispose of the same, it would have been necessary that a judgment on the rule should have been entered up. Until this was done, the case would still have been pending notwithstanding the answer had been stricken. That the striking of an answer or a plea or similar pleading made by a defendant in a case or a respondent in a rule does not finally dispose of the case is too clear to admit of doubt.

2. During the argument of the case a request was made that, in the event this court should come to the conclusion that the writ

of error was premature, leave might be granted to the plaintiff in error to withdraw his bill of exceptions, and file the same in the court below as exceptions pendente lite. Such applications are addressed to the discretion of this court. Where the question as to whether the writ of error is premature is close and doubtful, this has been allowed. In other cases, where some satisfactory reason was given for pursuing the wrong course, this privilege has also been allowed. But in a case like the present, where it should have been manifest to the plaintiff in error that the writ of error was premature, and where no excuse whatever is given for pursuing such a course, this court will not allow the withdrawal of the bill of exceptions in order that it may be filed in the court below as exceptions pendente lite. Writ of error dismissed. All the justices concurring.

WEATHERLY v. SOUTHERN CO-OPERATIVE FOUNDRY CO.

(Supreme Court of Georgia. April 11, 1900.)

PLEADING—JURISDICTION—DISMISSAL.

A petition against a single defendant, which does not allege that he is of the county in which the suit is brought, should, unless duly amended, be dismissed upon a special demurrer setting up that the petition fails to show that the court has jurisdiction of the person of the defendant. Coney v. Horne, 20 S. E. 213, 93 Ga. 723.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by the Southern Co-operative Foundry Company against B. P. Weatherly. Judgment for plaintiff, and defendant brings error. Reversed.

Nat Harris, for plaintiff in error. O. Rowell, for defendant in error.

PER CURIAM. Judgment reversed.

O'NEILL MFG. CO. v. PRUITT.

(Supreme Court of Georgia. April 10, 1900.)

INJURY TO EMPLOYÉ—NEGLIGENCE OF MASTER—MISCONDUCT OF COUNSEL—DAMAGES.

There was no error in any of the rulings or charges complained of; there was evidence to authorize the verdict, and, the trial judge being satisfied therewith, this court will not interfere with his discretion in refusing a new trial.

(Syllabus by the Court.)

Error from city court of Floyd county; George A. H. Harris, Judge.

Action by E. J. Pruitt, by his next friend, against the O'Neill Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Reece & Denny, for plaintiff in error. Wright & Ewing, for defendant in error.

SIMMONS, C. J. Pruitt, a child 13 years of age, had his hand injured in the shop of the defendant company. He sued for damages. On the trial he exhibited his hand to the jury. The four fingers and part of the thumb had been cut off. He had been working in the defendant's shop for about three years when the injury occurred. He testified that it was necessary for him to have a certain kind of board in order to do the work assigned to him. He mentioned this to the foreman, and the latter instructed him to make one. The only machine on which he could make it was a very dangerous machine, called a "jointer." In attempting to make the board, his hand slipped, and he was injured. He had never received any warning from the foreman, or any one else, as to the dangerous character of this machine. Several other witnesses testified that shortly after the accident the foreman told them that he regretted having sent the boy to that machine. It was also shown that the boy's capacity to labor at the kind of employment in which he had been engaged was entirely gone. There was also proof of what he had been earning before his injury. The foreman testified that he did not send the boy to the machine to make the board, and, indeed, denied telling him to make the board at all. Other witnesses testified that the boy had been warned as to the dangerous character of the machinery in the shop, and instructed not to go near the machines; and that the boy, after he had been hurt, said it was all his fault. The jury returned a verdict for the plaintiff for $1,800. The defendant company made a motion for a new trial, which was overruled. The defendant excepted.

In the examination of a witness the counsel for the plaintiff undertook to show that, if the defendant was held liable for the injury, an insurance company would pay the verdict. This was objected to by defendant's counsel, and was withdrawn by counsel for the plaintiff. No ruling was made by the judge. In the concluding address of plaintiff's counsel to the jury he stated that an insurance company would have to pay for the injury if the jury found in favor of the plaintiff. This was objected to by defendant's counsel, and the court promptly called to order the plaintiff's counsel, informing him that there was no evidence to support such statements, and that it was improper to make such an argument. The court then instructed the jury to disregard what plaintiff's counsel had said, and told them there was no such evidence before them. All this was made one of the grounds of the motion for new trial. We see no error on the part of the judge with regard to this matter. As to the first part of it, relating to the offering of the illegal evidence, no ruling was made by the judge. The plaintiff's counsel withdrew the objectionable question, and there was nothing to rule upon. While the remarks made by counsel to the jury were improper for the reason that there was no evidence to base them on, the judge promptly corrected

this as far as he could by censuring counsel, and instructing the jury to disregard the remarks. Counsel for the defendant seems to have been satisfied with this until after the verdict. He made no motion for a mistrial, but took his chances of obtaining a verdict in his favor. After the trial it was too late to complain of the matter. Had he made a motion for a mistrial, and the judge refused to grant it, his ruling would then have been a matter for review by this court. Speaking for myself, I think that in such a case the motion for a mistrial should have been granted. It is highly improper for counsel, in addressing the jury, to comment on matters not in evidence. These particular remarks by plaintiff's counsel were calculated to impress the minds of the jury with the idea that the defendant company would not have to pay the verdict and judgment, if against it, for the reason that it had an arrangement with an insurance company to pay all such verdicts for injuries to its employés. While the court did all that could be done to disabuse them of this impression, it must still have lingered in their minds. The most effectual way to stop such conduct on the part of counsel is for the trial judge to grant a mistrial whenever it occurs, and a motion for mistrial is made. No such motion was made in the present case, and there was no error in what was done by the trial judge.

Complaint is also made in the motion for new trial of the instructions of the court to the jury as to the manner of using the mortality and annuity tables which had been introduced in evidence. It is contended that while the charge, abstractly considered, was correct, there was no evidence upon which to predicate it; that there was no evidence that the plaintiff's earning capacity had been diminished in whole or in part. There was evidence to show that he was totally incapacitated to continue his work on the machines in the defendant's shop, or to work on similar machines. Further than this, the plaintiff exhibited his hand to the jury, showing the loss of the four fingers and a portion of the thumb. The jury saw his injured hand, and could, in our opinion, have inferred a partial loss of capacity from its condition, and determined for themselves the extent to which the boy's capacity to labor, then or in the future, was diminished. Had a witness been examined upon this subject, and given his opinion, this opinion must necessarily have been based upon the loss of the hand; and we see no reason why the jury could not form an opinion upon the same fact. The injury was not latent or concealed, but was patent; and, as shown above, the hand of the plaintiff was in evidence before the jury.

Complaint was also made that the verdict was contrary to the evidence. If the jury believed the testimony of the plaintiff's mother and her sister, which showed that the foreman admitted sending the boy to the dangerous machine by which he was injured, and the evidence of the plaintiff himself, which showed that the foreman told him to make the board on that machine, there was, in our opinion, sufficient evidence to authorize the verdict. It is true all this was denied by the defendant's witnesses, but the jury passed upon the issues, and the judge, after having given a charge very favorable to the defendant, was satisfied with the verdict. We will, therefore, not interfere with his discretion in refusing a new trial. Judgment affirmed. All the justices concurring.

McNAMARA v. COX et al.

(Supreme Court of Georgia. April 11, 1900.)

APPEAL—REVIEW—NEW TRIAL.

This was the first grant of a new trial, and under the facts appearing in the record the case falls within the provisions of section 5585 of the Civil Code.

(Syllabus by the Court.)

Error from superior court, Cherokee county; George F. Gober, Judge.

Action by George G. McNamara against Fannie S. Cox and others. Verdict for plaintiff. From an order granting a new trial he brings error. Affirmed.

S. Holderness and P. P. Du Pre, for plaintiff in error. J. J. Northcutt and G. I. Teasley, for defendants in error.

PER CURIAM. Judgment affirmed.

HUGO v. STATE.

(Supreme Court of Georgia. May 12, 1900.)

LARCENY FROM PERSON—INDICTMENT.

An indictment which alleges that the accused wrongfully and fraudulently took from the person of another, therein named, an article of designated value, privately, without his knowledge, and with intent to steal the same, sufficiently charges the offense of larceny from the person, as defined in section 175 of the Penal Code, although there be no allegation that such article was the property of him from whose possession it was so taken, or of some one else than the accused.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Barney Hugo was convicted of larceny, and brings error. Affirmed.

A. E. Thornton and G. Y. Tigner, for plaintiff in error. S. P. Gilbert, Sol. Gen., for the State.

LEWIS, J. The grand jury of Muscogee county indicted Hugo for the offense of larceny from the person; the indictment charging that the defendant "on the 8th day of November in the year 1899, in the county aforesaid, did then and there, unlawfully, wrongfully, and fraudulently, take one solitaire diamond shirt stud, of the value of $200, from the person of Joseph Kyle, privately and without the knowledge of said Joseph Kyle,

with intent to steal the same, contrary to the laws of said state, the good order, peace, and dignity thereof." It appears from the record that, after both parties had announced ready for trial, the defendant waived arraignment and entered a plea of not guilty, whereupon a jury was impaneled to try the case, who, after the close of the evidence, argument of counsel, and charge of the court, returned a verdict of guilty, with recommendation to the mercy of the court. During the same term of the court, after the return of the verdict, the accused, through his counsel, filed a motion to arrest the judgment on the following grounds: Because there is no record upon which a conviction could be had against this defendant for the crime of larceny from the person. Because this defendant is charged with larceny from the person, and the property alleged to have been stolen is one solitaire diamond shirt stud, of the value of $200, from the person of one Joseph Kyle, and there is no allegation or averment in said indictment that said solitaire diamond stud was the property of Joseph Kyle, or the property of any other person. This motion the judge overruled, to which judgment the accused excepts.

Section 929 of the Penal Code declares, "Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury." Section 175 declares, "Theft or larceny from the person, as distinguished from robbery, is the wrongful and fraudulent taking of money, goods, chattels or effects, or any article of value, from the person of another, privately, without his knowledge, in any place whatever, with intent to steal the same." Comparing the allegations in this indictment with these sections of the Code, and it will be seen that the indictment charges the offense clearly in the terms and language of the Code, as required by the statute. It will be noted that the section of the Code defining larceny from the person simply says it shall consist of "the wrongful and fraudulent taking of money, goods, chattels, or effects, or any article of value, from the person of another, privately, without his knowledge, with intent to steal the same." It does not specify that the subject-matter of this kind of larceny shall be the property of another, and there is nothing in the designation of the offense which implies the necessity of specifically alleging the ownership of the property stolen. In a charge of simple larceny such an allegation is essential in an indictment, for the reason that section 155 of the Penal Code, defining simple larceny, refers to it as "the wrongful and fraudulent taking and carrying away, by any person, of the personal goods of another, with intent to steal the same." Hence the decisions of this court declaring that a failure to charge ownership in cases of simple larceny makes the indictment fatally defective, and therefore can have no application to an indictment for larceny from the person. Any personal property, to be the subject-matter of simple larceny, must be shown to belong to another. The mere fact that one has seized and taken away personalty not belonging to him does not raise the presumption of larceny; for such property may not belong to any one, and, if so, its seizure constitutes no crime in law. But the offense of larceny from the person consists simply in the wrongful and fraudulent taking of any article of value from the person of another, and when it is done privately, without his knowledge, and with intent to steal the same, the crime becomes complete. The presumption, of course, is that the party from whose person it was taken is the owner; and the charge in the indictment that the defendant took it fraudulently, and with intent to steal the same, necessarily implies that he is not the owner, and that he is taking property he knows does not belong to him. Proof of such possession and of such a taking, in the absence of anything to the contrary, would make out a conclusive case of ownership in the possessor, and of larceny by the taker. We think, therefore, that had there been a demurrer to the indictment, before pleading, on the ground of its failure to allege specifically ownership of the property stolen, it would not have been good in law. Certainly, where one has pleaded that he is not guilty of the charge alleged, and has been found guilty on the issue of fact thus presented, he cannot sustain a motion in arrest of a judgment on account of such an omission in the charge in the indictment, which, at most, under the law, could amount only to a mere irregularity. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

JOSEPH v. STATE.

(Supreme Court of Georgia. May 12, 1900.)

LARCENY—POSSESSION OF STOLEN GOODS.

The charge to the effect that the presumption ordinarily arising from the recent possession of goods alleged to have been stolen was not applicable to this case did not injure the accused, but was to his advantage; the charges as to reasonable doubt and the effect of circumstantial evidence were full and fair to the accused; and there was sufficient evidence to warrant the verdict.

(Syllabus by the Court.)

Error from superior court, Morgan county; John C. Hart, Judge.

Floyd Joseph was convicted of larceny, and brings error. Affirmed.

George & George, for plaintiff in error. H. G. Lewis, Sol. Gen., and F. C. Foster, for the State.

LEWIS, J. The accused was tried in the county court of Morgan county under an in-

dictment charging him with the offense of simple larceny, for that on the 12th day of November, 1897, in the county aforesaid, he took and carried away, with intent to steal the same, four buggy wheels, of the value of $15, being the personal goods of one William Hampton. To this indictment the defendant pleaded not guilty, but, upon trial before a jury in the county court, was found guilty; whereupon he brought before the Morgan superior court his petition for certiorari, complaining of errors on the trial of the case. The judge overruled his petition for certiorari, upon which judgment error is assigned in the bill of exceptions.

It appears from the evidence in the record that Hampton, the prosecutor, was the owner of the property mentioned in the indictment; the wheels being on his buggy under his shed upon premises in Morgan county. At night some one had detached them from the buggy and carried them off. The next day he traced tracks from the shed by the residence of the accused, and beyond that residence, when he lost sight of the tracks. He afterwards offered a reward for the wheels. It seems from the testimony that one of his neighbors was approached by the accused some time after the larceny to sell him four wheels, and that it was agreed they should be brought to the house of this neighbor on a certain night. He thereupon informed the prosecutor he thought he could get his wheels, and invited him to his house at the time appointed for the accused to bring the wheels. The prosecutor and this neighbor both testified that the defendant came to the latter's premises at the time appointed with two wheels, which the neighbor received from him. These wheels were identified as two of those which had been stolen. Accused promised to bring the other two later. In a few days after that he came to the house of the neighbor, and told him he had left the remaining two in a gully, and requested him not to get them until after night. These other two wheels were likewise identified as the remaining two which were stolen. The neighbor received possession of them, and delivered them to the prosecutor. The finding of these wheels occurred a little over three months after the larceny. The defendant did not seek to make any explanation of his possession, but, on the contrary, denied that he ever had possession of the wheels, or knew anything about them, and denied that he was the man who carried the wheels to the neighbor's premises. He sought to prove that he was not at his house, but somewhere else, during the time these wheels were said to have been delivered. Upon this there was a conflict of testimony, the evidence in behalf of the prosecution positively identifying the man from whose possession the wheels were obtained as the defendant in this case. It further appeared that the defendant had no buggy, was not a dealer in such articles for sale, and stated himself that he had no use then for buggy wheels.

Besides the general grounds in the petition for certiorari, it is complained that the county judge, after charging the jury that the law presumed the defendant to be innocent, and that the burden was on the state to establish his guilt beyond a reasonable doubt, erred in charging the jury as follows: "But there is a class of cases in which this burden is shifted; it is that class in which the state shows recent possession of goods proved to have been stolen, but that principle does not apply to this case." We are inclined to think that, under the facts and circumstances in this case, this was error. The law does not specify what particular time would constitute recent possession of stolen goods. It is true that over three months had elapsed before this property was found in the possession of the accused, but then there was no effort upon the part of the accused to explain such possession. On the contrary, he denied ever having been in possession, and his sole defense was based upon this issue. Besides, it appears he had no use for buggy wheels. In the light of these circumstances, notwithstanding the lapse of time that had intervened after the larceny, we think the court erred in the instruction given. But this error was manifestly in favor of the accused, and, of course, can constitute no ground for granting him a new trial.

Another ground of exception in the petition for certiorari was that the court should have instructed the jury that the possession of the stolen goods in this case was not of such recent date as to constitute any proof of guilt, but was only a circumstance which they might consider, with other circumstances, if any, in reaching a conclusion. Upon examining the charge of the judge, he seems to have gone upon this theory in his charge to the jury, and treated that fact in the case only as a circumstance for their consideration, and not as a presumption of guilt. His charge upon the subject of reasonable doubt and the effect of circumstantial evidence, we think, was full, and entirely fair to the accused. The evidence in behalf of the state was evidently believed by the jury, and was amply sufficient to sustain their verdict. In the light of the record, therefore, we think the court did right in overruling the petition for certiorari. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

LINDSEY v. STATE.

(Supreme Court of Georgia. May 12, 1900.)

CRIMINAL LAW—NEW TRIAL—OBJECTIONS TO JURY—EVIDENCE.

1. It is too late, after verdict, to complain that the proper questions were not propounded to jurors while they were being examined on

their voir dire. See Smith v. State, 68 Ga. 168, 169. And, were it otherwise, a new trial should not be granted for such a cause when the questions actually propounded were, in substance, the same as those prescribed by the statute, and did not vary therefrom save in immaterial respects as to phraseology.

2. The evidence in this case, though entirely circumstantial, was sufficiently strong and conclusive to warrant a finding that the accused was guilty, and to exclude every other reasonable hypothesis.

(Syllabus by the Court.)

Error from superior court, Spalding county; E. J. Reagan, Judge.

Louisa Lindsey was convicted of crime, and brings error. Affirmed.

Thos. W. Thurman, for plaintiff in error. O. H. B. Bloodworth, Sol. Gen., and J. M. Terrell, Sol. Gen., for the State.

PER CURIAM. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

CALLOWAY v. STATE.

(Supreme Court of Georgia. May 12, 1900.)

LARCENY—POSSESSION OF STOLEN GOODS.

While recent possession of stolen goods, unexplained, will justify a conviction for larceny, the mere possession of goods several months subsequent to the time they were alleged to have been stolen, and a failure to satisfactorily account for such possession, will not alone authorize a conviction.

(Syllabus by the Court.)

Error from city court of Dawson county; James G. Parks, Judge.

Ertha Calloway was convicted of larceny, and brings error. Reversed.

Frank L. Parks and L. C. Hoyl, for plaintiff in error. M. J. Yeomans, Sol. Gen., for the State.

PER CURIAM. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

ROME GROCERY CO. v. GREENWICH INS. CO. OF NEW YORK.

(Supreme Court of Georgia. April 11, 1900.)

INSURANCE—RECOVERY OF MONEY PAID ON POLICY—EVIDENCE.

1. In order to entitle an insurance company to recover back money paid upon a policy of insurance, it is, under section 2113 of the Civil Code, incumbent upon the company to show affirmatively that after making payment it discovered evidence showing itself not liable on the policy.

2. Such evidence must consist of proof showing that, because of the fraud of the insured, the policy was, ab initio, void, or that after it issued he was guilty of conduct either vitiating the policy, or rendering it unconscionable for him to receive money thereon, and fraudulently concealed from the company, at the time of receiving payment, the fact that he had been guilty of such conduct.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by the Greenwich Insurance Company of New York against the Rome Grocery Company. Judgment for plaintiff, and defendant brings error. Reversed.

Fouché & Fouché, for plaintiff in error. Reece & Denny and W. S. McHenry, for defendant in error.

LEWIS, J. The Greenwich Insurance Company of New York brought suit in Floyd superior court for the purpose of recovering back money paid on an insurance policy issued by the plaintiff to the defendant in consequence of the destruction by fire of the property insured. The ground for the action was that the insured, in its application for a policy, had warranted that the entire title (not only to the property insured, but also to the land upon which the same was located) was absolute and in fee simple in the applicant, and that the applicant was the sole and undisputed owner of the whole of said property proposed for insurance, including the land on which it stood. Proof of loss was made out by the applicant, in which it was reaffirmed that the representations made in its application were true. Upon the faith of these representations, the company sent an adjuster to Rome, Ga., where the property was located, and they finally settled the loss, by the company paying the insured the sum of $534.50. Since said payment, the petition alleges, plaintiff ascertained that the representations of the insured as to the ownership of the land and buildings were false, and that the title thereto was not in defendant, but that it claimed title under a certain deed from Simpson to said defendant, and petitioner had an accurate survey of the property made in accordance with the description in said deed. This survey discloses the fact that the gin-house property that was insured was not embraced within the same. Plaintiff thereupon made demand upon defendant for the refunding and repayment to it of said sum, which defendant refused to entertain, and declined to refund the money to petitioner. Petitioner further avers, in effect, that it was entirely ignorant of any defect in the title to the property until after the settlement was made, and, if it had had knowledge of the condition of the title, it would not have paid any loss, and would not have insured the property at the beginning. It appears from the record that there was introduced on the trial the policy of insurance, and the application therefor, and that the insurance extended from September 22, 1894, to March 22, 1895, to the amount of $1,000, upon the following property, set forth and itemized in the policy as follows:

	Sum insured.	Valuation.
One steam power 1 & 2 story gin house, built of frame and covered with shingles	$ 150	$ 500
On one gin stands of saws, $—— each	75	150
On one condensers " " "	35	50
On beaters and cleaners " "		
On one feeders and breakers " "	35	60
On engine and boilers	250	600
On press & fixtures belonging thereto	55	—
On fan, elevator, and appurtenances	55	100
On flues, leveler, and distributer	—	—
On belting	—	—
On running gear and appurtenances	—	—
On assured's cotton, ginned and unginned, packed and unpacked, in said gin house	250	400
On cotton held in trust or on commission, for which assured may be liable, therein	—	—
On cotton seed therein	150	250
On cotton grist mill	—	—
Total	$1,000	$2,120

It also appeared that the insured, in its application, guarantied absolute title to this property, and to the land on which it was located.

To this petition the defendant answered, denying it had made any specific warranty; admitting the amount paid, but denying that it was the agreed amount of damages to the insured property. Defendant averred that the insured property was totally destroyed, and defendant's loss by the fire was $2,000 and that the amount paid was much less than the amount for which the property was insured, and it was accepted because the plaintiff would not pay the full loss, or what was justly due on the policy, without suit, and defendant took this sum to avoid a suit at law. The answer further denied the allegation that the title to the property insured, as well as the land upon which the same was located, was not absolutely in it, and averred that the charge contained in the petition with reference to this title was not the truth.

It appeared from the evidence that the deed under which the Rome Grocery Company claimed title to the property in question conveys lot 135, and 60 acres off the south side of lot 154, in the Twenty-Second district and Third section of Floyd county. It also conveys the crops and personal property on said land; also, one 8 horse power engine, one 60-saw gin, feeder, and condenser attached; also, one cotton press,—all in the gin house on said place, and the crop, lands, etc., described in the deed, warranted free from incumbrance. It further appears that plaintiff procured a surveyor to survey the land in question, and under his testimony, who identified the plat he had made to the land, it appeared that in the lot 135, and in the 60 acres cut off of the south side of lot 154, the gin house was not included; that a part of the line, which included the line described in the deed, did take in a portion of the personalty,—for instance, the engine, or a portion thereof, which was off a few yards from the house. The house, however, was in a few feet outside of the lines run by the surveyor. The evidence seems undisputed that all this property, which had been insured, had been fully paid for by the defendant, and that the personalty, which embraced by far the largest amount of insurance, was entirely unincumbered. After a discovery of this condition in the title, correspondence ensued between Livingston Mims, of Atlanta, Ga., the general manager for plaintiff in this state, and the Rome Grocery Company, in which Mims gave information about discovering that the title to the property was not in the defendant, and made demand upon the Rome Grocery Company to repay the money that had been paid. To these letters the latter responded, among other things, that it did own the property in question. Mims admitted, in a communication to the defendant, that the representation it made about the property was unintentional on its part, and clearly indicated in his letters that he thought the defendant was honest in the guaranty and warranties made in its application for insurance, and was laboring under an honest mistake about the title then, and when the loss was adjusted. At the conclusion of the testimony the court directed a verdict against the Rome Grocery Company for the sum of $534.50 principal and $157.45 interest, whereupon it made a motion for a new trial, and excepts to the judgment of the court below in overruling that motion.

1. It is very clear that, under section 2113 of the Civil Code, in order to entitle an insurance company to recover back money paid upon a policy of insurance, the burden of proof is on it to show affirmatively that after making payment it discovered evidence showing itself not liable on the policy. Upon this point all the evidence of the plaintiff below indicated that those of its agents who were sworn as witnesses, including Mr. Mims, and maybe one or two others, did not know of the defect in the defendant's title, complained of in the action, until after the adjustment of the loss was made. Mims, it seems, was located in Atlanta, and it does not appear that he ever made any investigation of this matter before the payment. It does not appear that the agent who received the application, and who testified in the case, made such an investigation; but it does not follow from this that the plaintiff was not, through some other agent, apprised of the defect in this title. The agent who would be presumed to have investigated or looked into such matters, or at least would have been more apt to have knowledge upon the subject of any breach of a warranty by the insured which it made in the application for the policy, would be the agent who was sent to adjust the loss after the destruction of the property by fire. It appears from the testimony that there was evidently some compromise made between the insured and this agent. The testimony is uncontradicted that the insured sustained a loss far exceeding the total amount embraced in its

policy, and yet a compromise was finally agreed upon, by which it accepted in satisfaction an amount of a little over one-half of what the policy called for. This witness was not introduced on the trial of the case, or accounted for; and we think, therefore, that for this reason, even if the court was right in its conclusions on the law that the defect of title shown by the evidence was of such a nature as to entitle the plaintiff to a recovery, he erred in assuming that the testimony conclusively showed that the company did not discover until after the adjustment of the loss evidence showing itself not liable on the policy. The insurance company is a corporation, and, when the burden is upon such a party to show want of knowledge of a fact, it should at least produce such agents as are most likely to be chargeable with such knowledge, because notice can be brought home to a corporation only through the instrumentality of agents.

2. Section 2113 of the Civil Code declares, "If, after payment of loss, the insurer discovers evidence to show himself not liable on the policy, he may recover back the money in an action for money had and received." It is contended by counsel for defendant in error that this evidence clearly shows a breach of warranty on the part of the insured in reference to this title to the land upon which the insured property was situated, and that this rendered void the policy, notwithstanding the breach may not have inured to the injury of the insurer. The section of the Code above cited appears in the Code of 1863, and in all the Codes since that date. The object of the codifiers in compiling the first Code was to embody, not only the statute law, but the common law of force in this state. As there was no effort to codify any statute upon that subject by the codifiers, we think it clearly proper, in determining the meaning of this section, to ascertain what was the general law of force in this country at the time of the adoption of the Code. It is therefore an open question as to what kind of evidence, after payment of loss, will show the company not liable on the policy. It does not necessarily follow that simply because the company, when it paid the loss, was ignorant of a fact which might have enabled it to successfully defend an action upon the policy, it can recover back the money it has paid thereon. It does not follow that, because the insurance company could have successfully defended a suit upon this policy on account of a defect in the title of the insured to the property in question, it can maintain this action for money had and received, after the payment of the loss. The authorities which seem to be relied upon by counsel for defendant in error are not at all in point. For instance, the case of Williamson v. Insurance Co., 100 Ga. 791, 28 S. E. 914, was a suit by the insured against an insurance company on his policy of fire insurance, which contained a stipulation that the policy was to be void if the interest of the insured were other than unconditional and sole ownership; and it appeared in that case that, before the policy was issued, the insured had executed a deed conveying to another the title to the building insured. Unquestionably, that was a good defense to an action on the policy. It was not there decided that it would have been a good cause of action to recover back money paid in ignorance of the defense, for that question was not involved in the case. Under the facts in that case, however, even if the court had decided that money could have been recovered back by the company when paid in ignorance of the defense, we think the decision would have had no application to the case at bar, because in that case it appeared that the insured himself had executed a deed to another, conveying title to the property insured, before he made his application. There might, therefore, have been ground for allowing a recovery in that case on account of the actual fraud perpetrated by the insured upon the insurer. The same thing is true of the case of Morris v. Insurance Co., 106 Ga. 461, 32 S. E. 595. That was a defense to an action upon a policy, where it was held that an absolute and unconditional covenant of warranty by the insured of the truth of certain representations made by him in a written application for insurance is binding upon him, irrespective of the question whether such representations were made in good faith or otherwise. Counsel also cite us to 1 May, Ins. § 156, in which the author treats the subject of express warranty, and declares the general principle that: "Whether the fact stated or the act stipulated for be material to the risk or not is of no consequence, the contract being that the matter is as represented, or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, or the intervention of the law or the act of God, the insured can have no claim." It is manifest, however, from the context, that the author was not considering the question with reference to an action brought by an insurance company to recover back money that had been paid upon the policy. This question is discussed in 2 May, Ins. § 575. There the author says: "Fraud in obtaining the policy, or fraudulent representations made to obtain the money, will base a claim of the company to a return of the money, if they did not know of the fraud at the time they paid it. But by paying the loss the company waive or settle all questions of law or fact as to the validity of the original contract, except fraud, which they had the means of raising when they paid the loss." Evidently the author means in that connection actual fraud, for in the very next sentence he declares: "Even ignorance of a fact which might have enabled the company to defend an action upon the policy on account of a breach of warranty is not such a mistake

of fact as will enable it to recover the money. It will be presumed that the company either knew the fact, or intended to waive any such defense, and voluntarily paid the money. Otherwise, there would be no end to controversy and litigation, and the insured would hold the money subject to a lawsuit until the statute of limitations intervened." This question was directly made, and passed upon by the New York court of appeals, in the case of Insurance Co. v. Minch, 53 N. Y. 144, where it was held: "Mere ignorance of a fact which would have enabled an insurance company to defend on account of a breach of warranty is not such a mistake of fact as will enable it to recover back money paid upon the policy. In order to maintain such an action, fraud in obtaining the policy, which was unknown to the plaintiff at the time the money was paid, or fraudulent representations made to obtain the money, which were designed to, and did, have the effect of preventing inquiry, must be proved. Where the evidence is conflicting, fraud is a question of fact." Accompanying the opinion in that case are citations of a number of authorities from decisions of courts of last resort in several states. This same doctrine has been applied to an insured as well as to the insurer. In the case of Insurance Co. v. Crawford, 89 Ill. 62, it was decided: "A settlement by one insured against loss by fire with the agent of the insurance company, if fairly and honestly made, is conclusive, although nothing is paid for a portion of the property destroyed, but, if it was the result of falsehood and fraud on the part of the adjusting agent, then it is not binding or conclusive on any one; and this is a question of fact for the jury." Manifestly, there is no reason, then, why the same doctrine should not be applied to the insurance company when it undertakes to rescind a settlement, and recover back money voluntarily paid by it to the insured on his policy. Authorities might be multiplied sustaining this doctrine,—that there will have to be some actual fraud on the part of the insured in procuring the policy, or that after it issued he must have been guilty of conduct rendering it unconscionable in him to receive the money thereon, and fraudulently concealed the same from the company, before a right of action can be maintained by the company for money had and received. There are authorities recognizing the right of an insurance company to recover back money, under certain circumstances, paid the insured in the settlement of a claim of loss on his policy; but, so far as our investigation has extended, in all these cases it appeared that the company acted, in adjusting the loss, upon some misrepresentation made by the insured, of a nature tending to show that he knew of its falsehood or incorrectness at the time he made such misrepresentations, and received the money with knowledge of the actual fraud which he had perpetrated. Those cases, of course, have no application to the controlling question involved in the present case. In this case there was no such pretense of any fraudulent conduct on the part of the plaintiff in error either before or at the time of receiving compensation from the company's adjuster for the loss. On the contrary, while demand was being made on it by letter from the general agent of the insurance company, it was conceded that it acted with perfect honesty. It cannot be denied that it really owned the property that was insured. The record simply presents the question as to whether he had ever acquired title to the land upon which that property was located. Speaking for myself alone, I am not prepared to say, under the facts of this case, where the full purchase money has been paid for property, and where the deed covers this house and personalty which was insured, that the insured does not, to say the least of it, have a complete equity to the little scrap of a few feet in area upon which the property was located. There is certainly nothing in the record to indicate that the retention of this money by the insured would, under the facts disclosed, be taking an unconscionable advantage by it over the insurer. We therefore think the court erred in directing a verdict for the plaintiff, but that the issues should have been submitted to the jury under instructions from the court given in accordance with the principles of law herein announced. Judgment reversed. All the justices concurring.

O'NEILL MFG. CO. v. AHRENS & OTT MFG. CO.

(Supreme Court of Georgia. May 14, 1900.)

GARNISHMENT—RETURN—TRAVERSE—PROCEDURE—DEFAULT.

1. When a plaintiff sues out a garnishment proceeding, and the proper officer returns that he has served the garnishee with a summons of garnishment, the return means that the summons served directed the garnishee to file his answer in the court in which the garnishment proceeding was pending.

2. Where, in response to a motion to enter judgment against a garnishee alleged to be in default as to the matter of answering, the latter set up that the summons served upon him had actually directed him to make answer in another court, this was, in effect, a traverse of the truth of the officer's return of service; and where, in such case, the garnishee not only failed, but expressly declined, to make the officer a party, there was no error in striking the answer to the plaintiff's motion to enter judgment, or in entering a judgment in the plaintiff's favor against the garnishee.

3. Where a garnishee was in default in making answer at the term at which he was directed so to do, and also at the next term thereafter, there was no error, after the lapse of several other terms, in refusing to allow the garnishee to then answer the garnishment.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Petition by the Ahrens & Ott Manufactur-

ing Company against the O'Neill Manufacturing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Reece & Denny, for plaintiff in error. Henry Walker, for defendant in error.

LEWIS, J. Ahrens & Ott Manufacturing Company filed a petition in Floyd superior court against O'Neill Manufacturing Company, alleging that petitioner obtained a general judgment against one Patton at the July term, 1895, of Floyd superior court, and a fi. fa. issued thereon, upon which there is now an unpaid balance owing to plaintiff. Upon this judgment it sued out and had served a summons of garnishment on December 4, 1896, returnable to the January term, 1897, calling upon garnishee to answer what it was indebted to, or what property and effects it had in its possession belonging to, the defendant Patton. It was further alleged that no answer had been filed in response to said summons, and that in respect to the process served December 4, 1896, the case now pending in court is even now and has been in default since the July term, 1897, of that court. Plaintiff moved that the court issue an order, and that the garnishee show cause on the 10th of April, 1899, during the call of the motion docket, why plaintiff should not have judgment against O'Neill Manufacturing Company for the balance of its debt and costs. At the time designated the garnishee appeared, and answered the motion. In its answer it admitted that the original garnishment proceeding and bond had entered upon it a service of garnishment upon it on December 4, 1896; but alleged that it had answered every garnishment that had been served upon it in this proceeding, and had filed such answers at the time directed by the summonses served; that on or about December 4, 1896, it was served with a summons of garnishment, which, according to its best recollection and belief, was in this case, and said summons directed it to make answer at the next succeeding term of the city court of Floyd county, and it made answer thereto accordingly to the city court of Floyd county. It further traverses the return of the officer dated December 4, 1896, and says that the summons of garnishment was not in fact served upon O'Neill Manufacturing Company, as appears by the return of the officer; and by way of amendment to its answer tendered an answer to the garnishment, denying any indebtedness to the defendant, and prayed that it be allowed to file the same nunc pro tunc. It appears from a recital in the bill of exceptions that the garnishee at the hearing expressly declined to make the officer who made the return of service of summons of garnishment, dated December 4, 1896, a party to the traverse and proceedings in the case. The court, after hearing the case, rendered the following judgment: "Ahrens & Ott Manufacturing Company. v. William A. Patton, Defendant, and O'Neill Manufacturing Company, as Garnishee. Judgment and Fi. Fa. Garnishment. Answer and Issue. At January Term, 1897. In Floyd Superior Court. Principal, $458.08; interest, $206.35; cost on fi. fa., $11.85. It appearing to the court from an inspection of the record that the plaintiff has obtained a judgment against defendant; that execution has issued thereon for the sums of money so recovered; that, after allowing all payments, there is now due upon said judgment the several sums of principal, interest, and costs above set out opposite the case stated; it further appearing that the above-named garnishee was on December 4, 1896, at 9:50 o'clock a. m., served by a constable with a summons of garnishment returnable to the third Monday in January, 1897; that no answer has been made and filed thereto, either at the first term of this court next after, or at any subsequent term of this court, but that the garnishee in the above-entitled case is even now in default,—on motion of counsel for plaintiff the case is entered in default, and judgment upon said default is now rendered by the court in favor of the plaintiff and against the garnishee, the O'Neill Manufacturing Company, for the sum of four hundred and fifty-eight and $^{08}/_{100}$ dollars, principal debt; the sum of two hundred and six and $^{35}/_{100}$ dollars, interest to January 19, 1899; eleven and $^{35}/_{100}$ dollars, the sum due for costs on said fi. fa.; and the further sum of —— dollars, for costs in this behalf laid out and expended. April 12, 1899. W. M. Henry, Judge Superior Courts Rome Circuit." Upon this judgment the garnishee assigns error in its bill of exceptions. The bill of exceptions also alleges error in sustaining the oral motion of counsel for plaintiff in fi. fa. to strike the answer and amended answer of the garnishee to the motion to enter up judgment against it as a defaulting garnishee, and in holding that the garnishee was in default as to answer to said garnishment, as charged and alleged in the motion to enter up judgment, and in entering up said judgment against the O'Neill Manufacturing Company as a defaulting garnishee.

1, 2. The return of the officer in this case clearly meant that the summons was served directing the garnishee to file its answer in the court in which the proceeding was pending. There was really no contest about this construction placed by the court upon the return of the officer. In response to this motion to enter up a judgment by default against the garnishee it answered that the summons served upon it actually directed it to make answer in another court. This was, in effect, a traverse of the truth of the officer's return of service. In such a case, in order to have the issue of this traverse passed upon by the court, it is necessary to make the officer a party thereto. This the record shows the garnishee expressly declin-

ed to do. It follows, therefore, that there was no error in striking the answer to the plaintiff's motion to enter the judgment, or in entering a judgment in the plaintiff's favor against the garnishee.

3. It appears from the record that this garnishee had been in default for several terms. It is insisted by counsel for plaintiff in error that it should have been allowed to file its answer nunc pro tunc at the term of the court at which this case was tried. No sufficient reason appearing in the record for allowing the garnishee to file its answer after it was in default, the court was clearly right in rejecting the same. This does not seem to be a matter even in the discretion of the court. In the case of Bearden v. Railroad Co., 82 Ga. 605, 9 S. E. 603, it appeared that the garnishee was in default, and that no reason was assigned for his failure to answer. This court held that it was error in the judge below to allow counsel for the garnishee further time to look into the matter, and to refuse to strike the answer of the garnishee subsequently filed, and to enter up judgment against it as in cases of default. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

BROWN v. STATE.

(Supreme Court of Georgia. May 12, 1900.)

CARRIERS—REMAINING IN WRONG CAR.

Though the only purpose of a passenger upon a railroad train, in entering a car which had been set apart for passengers of another race, may have been to pass through the same in order to reach a car to which he had been assigned, and in which he had been previously riding, yet if, upon being requested by the conductor to leave the car so entered, he refused to do so, declared he would ride where he pleased, and that the conductor had no right to put him out, and was thereupon ejected from that car, such passenger was guilty of the forbidden act of "remaining" in a car other than that to which he had been assigned, and therefore liable to prosecution under section 528 of the Penal Code. (Syllabus by the Court.)

Error from superior court, Washington county; B. D. Evans, Judge.

Julius Brown was convicted of remaining in a car other than that to which he had been assigned, and brings error. Affirmed.

Evans & Evans and M. G. Bayne, for plaintiff in error. B. T. Rawlings, Sol. Gen., for the State.

LUMPKIN, P. J. Section 526 of the Penal Code requires railroad companies doing business in this state to furnish equal accommodations, in separate cars, or compartments of cars, for white and colored passengers. Section 527 makes it the duty of conductors or other employés in charge of such cars to assign passengers to their respective cars or compartments, and confers upon the servants of railroad companies the necessary police powers to carry out the provisions of these two sections. Section 528 declares that "any passenger remaining in any car or compartment or seat, other than that to which he may have been assigned, shall be guilty of a misdemeanor," and empowers conductors and other railroad employés to eject from a train or car any passenger who refuses to remain "in such car or compartment or seat as may be assigned to him." The plaintiff in error was convicted in the county court of Washington county of violating the provisions of the section last mentioned, and thereupon sued out a certiorari to the superior court, to the overruling of which he excepted. The only question presented for determination by this court is whether or not the evidence warranted the judgment of guilty rendered by the county judge, who tried the case without a jury. At the trial it appeared that an excursion train, upon which both white and colored people were transported, was run from Savannah to Macon. Before leaving Savannah, the colored passengers were assigned to two of the cars composing the train, and the white passengers to another of them. The train was so arranged that the car for the white people was placed between the two cars provided for the colored people. At a point in Washington county, Brown left the rear car, in which colored people were riding, and entered the car in which the white passengers were seated. The conductor, with the aid of a passenger whom he called to his assistance, forcibly ejected Brown from the car thus entered by him, and the grand jury subsequently indicted him for "remaining" in that car after having been assigned to another. As to the facts above recited there was practically no controversy. It is inferable from the testimony of the conductor that Brown had been assigned in Savannah to the rear car set apart for colored people. According to his statement, however, he had been assigned to the front car provided for people of his race. His contention was that, having at some point on the journey left the front car and gone into the rear car, he was proceeding to go from the latter to the former, and had for this purpose only entered the intermediate car occupied by white people, when he was accosted by the conductor and requested to leave the same. There was, however, evidence for the state to the effect that, when this request was made, Brown, with an oath, refused to leave the car, declaring that he had paid his fare and had a right to ride where he pleased, and that he was thereupon ejected from the car. It makes no difference whether, in point of fact, Brown's proper place was in the front or in the rear car set apart for colored people. In neither event was it lawful for him to "remain" in the car provided for white people, after being requested by the conductor to leave the same. Giving the accused the full benefit of the theory that he entered the white people's car with no intention except to pass through the same,

and would have done so if he had not been interrupted, the above-recited evidence as to what actually occurred when the conductor accosted him warranted the conclusion that he committed the misdemeanor forbidden by section 528 of the Penal Code. He, it is true, denied the correctness of that version of the matter; but we must deal with the case upon the assumption that the jury, as it was their right to do, believed the state's witnesses. If, when requested by the conductor to leave the white people's car, the accused had promptly proceeded to do so, as required, we are not prepared to say he would have been a criminal merely because of the fact that he had unlawfully entered this car. The gist of the offense is remaining in a car other than the one to which a passenger may have been assigned, and the state's evidence warranted a finding that the plaintiff in error did remain in a car other than that to which he had been assigned. His refusal to leave the car, accompanied by the positive assertion of a right to ride therein, and resistance to the conductor's effort to evict him, certainly was remaining, and the length of time he remained was, of course, immaterial. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

JAMES et al. v. CHEROKEE LODGE, NO. 66, F. & A. M.

(Supreme Court of Georgia. April 11, 1900.)

ESTOPPEL BY DEED—DIRECTING VERDICT.

1. That a deed which made no mention of, or reference to, any will, and which purported to convey a designated fractional interest in specified realty located in this state, also purported to convey all the grantor's interest therein by inheritance from a named deceased person or otherwise, does not estop the grantee from setting up, as against persons claiming exclusively under an alleged will of such decedent, undertaking to devise such realty, that the instrument was void as a will because not attested according to the laws of this state, although, upon the theory that it was void, the grantor, at the time of executing the deed, had no interest in, or title to, the realty in question.

2. It being conceded that, unless the defendant in this case was estopped from disputing the validity of the alleged will under which the plaintiffs claimed, they had no right to recover, the court did not err in directing a verdict in favor of the defendant.

(Syllabus by the Court.)

Error from superior court, Floyd county; E. J. Reagan, Judge.

Action by Mary J. James and others against Cherokee Lodge, No. 66, Free and Accepted Masons. Judgment for defendant, Plaintiffs bring error. Affirmed.

Wright & Ewing, Fielder & Mundy, and Dean & Dean, for plaintiffs in error. Max Meyerhardt, for defendant in error.

COBB, J. Mary J. James and others brought an action against the defendant, a Masonic lodge, to recover a city lot located in Rome, Ga. Upon the trial the following facts appeared: The will of Ambrose Mills was executed in 1845. It was probated and admitted to record in the state of North Carolina in 1849, and contained an item which devised to his daughter Jane A. King the property in controversy, to be held by her "during her natural life, for the use and support of herself and children, and at her death said property * * * to be equally divided among the heirs of her body." To this will there were only two witnesses. Jane A. King caused a certified copy of this will to be recorded in the office of the ordinary of Floyd county, where the property was located. She died in 1890, having had born to her eight children, three of whom died before she did leaving children. The plaintiffs in the present case are the children of these three children, viz.: Rebecca Hill, who was born in 1838, and died in 1879; Eva Gibson, who was born in 1836, and died in 1885; and Mary L. Rose, who was born in 1830, and died in 1884. In 1869 the eight children of Jane A. King conveyed all of their interest in the property in controversy to Turner A. Cleaves, and in the record are deeds showing that the defendant is the successor in title of Cleaves. The deed from Rebecca Hill conveyed a one-eighth interest in the property, and also "all the rights which said Rebecca A. Hill has by inheritance from her grandfather Ambrose Mills or in any other way." The deed from Eva Gibson conveyed a one-eighth undivided interest in the property. The deed from Mary L. Rose conveyed a one-eighth interest in the property, the grantor describing her interest as being "all the interest I have by inheritance from my grandfather, or by deed of gift or otherwise from my mother, or in any other way, and also all the interest of my children in said property." The judge directed a verdict in favor of the defendant, and to this the plaintiffs excepted.

1. The will of Ambrose Mills not having been executed according to the laws of Georgia, title to realty situated in this state would not pass thereunder. Knight v. Wheedon, 104 Ga. 309, 30 S. E. 794. It was not contended that the will was operative in this state, but the position of counsel for plaintiff in error was that as Mrs. King had recognized the will as valid, and as it appeared from the language used in the deeds from her children to Cleaves that they had also treated the property as passing under the will, they, and those claiming under them, would be estopped to deny the validity of the will, and that the defendant, who claims under Cleaves, would be likewise estopped. Let it be conceded that the law is that one who expressly recognizes as valid a will which is not valid, and who in terms conveys an interest in property as having been acquired under such will, would be estopped from denying the validity of the will, and that his grantees would be likewise estopped; there is not a word in the deeds from the parents

of the plaintiffs in the present case to Cleaves which refers to the will of Ambrose Mills, and the only statement in any of the deeds which would connect the conveyance in any way with the will is that a one-eighth interest is conveyed in each one, which might, in a certain contingency, have been the interest which they would have acquired under the will of Ambrose Mills. Construing the language used in the deeds most favorably to the plaintiffs, it would give rise to a mere conjecture that the parties were dealing with the property as if their title had been derived through the will. An estoppel must have more than this for its foundation. What was done by Jane A. King and her children, other than the parents of the plaintiffs, would not have the effect of estopping Cleaves or his successor in title, the defendant, from setting up against the plaintiffs the invalidity of the will. Neither the parents of the plaintiffs nor their grantees would be bound in any way by what the other children of Jane A. King did, nor would any of the children of Jane A. King be bound by her voluntary act in having a certified copy of the will recorded in this state. There being no law authorizing the record of a certified copy of such a will in this state, its presence in the office of the ordinary of Floyd county would not be notice to any one, and its being so recorded, if it had any effect at all, would certainly not affect the rights of any one save those directly connected with or concerned in having the record made. Even if it be conceded that Jane A. King would be estopped from setting up title to the property except as the will provided, there is nothing in the deeds of any of the children which would amount to an election to claim under the will, and therefore the grantee in these deeds acquired whatever interest the grantors had, no matter from what source it may have been derived.

2. The plaintiffs in the present case depended entirely for a recovery upon the will of their great-grandfather, and consequently what their rights may be as heirs at law is not determined in the present case. The court did not err in directing a verdict in favor of the defendant. Judgment affirmed. All the justices concurring.

WEBB et al. v. PARKS.

(Supreme Court of Georgia. May 12, 1900.)

SALE BY ADMINISTRATOR—CONFLICTING TITLES—ADJUDICATION.

Persons whose alleged interests in lands advertised for sale by an administrator are antagonistic, and who file separate and independent claims thereto, cannot, merely because they are insolvent, be properly joined as co-defendants to an equitable petition brought by the administrator, praying that the prosecution of the claims be enjoined, that a receiver be appointed to take charge of the lands pendente lite, and that the conflicting claims of title be adjudicated and settled by the judgment to be rendered upon such petition.

(Syllabus by the Court.)

Error from superior court, Gilmer county; George F. Gober, Judge.

Petition by R. P. Parks, administrator, against Mary E. Webb and M. M. Barnes. Judgment for petitioner, and defendants bring error. Reversed.

Clay & Blair and J. P. Perry, for plaintiffs in error. Teasley & Hutcheson, for defendant in error.

LUMPKIN, P. J. This was a petition by R. P. Parks, as administrator of the estate of M. M. Parks, deceased, against Mary E. Webb and M. M. Barnes. The petition made, in brief, the following case: The administrator had obtained from the court of ordinary an order authorizing him to sell several lots of land belonging to the estate of the intestate. These lands were duly advertised for sale on the first Tuesday in December, 1899. Mary E. Webb, one of the defendants, filed a claim to several of the lots. M. M. Barnes, the other defendant, filed a claim to all of the lots. Each claimed separately and independently of the other. Both claims were returnable to the May term, 1900, of the superior court. Defendants are insolvent. The prayers of the petition were that a receiver be appointed to take charge of the lands and hold the same under the direction of the court, that the defendants be enjoined from prosecuting the claim cases, and that their rights in the premises be determined by the judgment to be rendered upon this petition. The defendants filed separate demurrers, in which they set up that the petition was not maintainable, because it showed on its face that the claims filed by them were separate and distinct; that they were different persons, claiming independently of each other; that their interests in the lands were several; and that for these reasons they could not be joined in the same action. At the hearing before the judge the demurrers were considered in connection with the application for an injunction and the appointment of a receiver. His honor, being of the opinion that the demurrers were not well taken, and acting upon the case as presented by the evidence, appointed a receiver and granted an injunction as prayed in the petition. To this the defendants excepted.

We have no hesitation in reaching the conclusion that there was a misjoinder of parties defendant. There is no allegation that the defendants have any common interest in the lands in dispute, or that there was any collusion between them. Nor does the petition set forth any fact showing a necessity for joining these defendants in the same action. Indeed, it distinctly appears that there is no bond of union between them, save the fact that both are poor. So far as can be gathered from the petition, their interests in

the subject-matter in controversy are directly antagonistic, and it does not appear that the issue or issues involved in the dispute between either claimant and the plaintiff is or are identical with the issue or issues to be determined in the controversy between the plaintiff and the other claimant. On the contrary, the petition itself strongly indicates that the questions to be adjudicated in one of the claim cases would necessarily be different from those to be disposed of in the other. Evidently the two claimants do not stand on the same ground, or plant their respective contentions upon propositions of law or fact which they have a common interest in maintaining against the plaintiff. This case differs widely from that of Smith v. Dobbins, 87 Ga. 303, 13 S. E. 496. There several executions, in favor of different creditors of a common debtor, were levied on land as his property. A third person claimed as against them all, and it appeared that the several claim cases all involved "the same question," and that it was one "upon the decision of which the subjection or nonsubjection of the property to all the executions" depended. Accordingly it was held, and we think properly, that the claimant could, by filing an equitable petition, "bring to trial all of the claim together." He had identically the same contention to make against each and every plaintiff in execution, and they were jointly interested in defeating that contention. The decision in that case, and the authorities cited in the opinion, rest upon the principle that when there is "one common right in controversy," which several persons have a joint interest in establishing against one person, or which one person has the right to assert against several, equity may intervene and have the whole matter determined in one action, notwithstanding there may be no privity of law or estate between the several persons thus jointly interested in the subject-matter of the controversy. When, however, a number of persons are at variance among themselves as to their alleged rights with respect to particular property, each claiming antagonistically to all the others, and there is no "community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief" which they, respectively, and each for himself, demand, equity will not compel them to consolidate and engage in a pellmell struggle. In other words, if we may borrow a warlike illustration, it would not be just or fair to constrain soldiers at enmity with each other to fight side by side against a common foe, nor to allow the latter the advantage of having the attention of his adversaries diverted from attacks they might successfully make upon him by pressing distractions and causes of quarrel among themselves. We are clear that each of the claimants in this case has a right to have his individual and independent claim of title against the plaintiff tried separately, without being burdened with the trial of any other issue; and it follows that the court erred in not holding that the demurrers were well taken, and consequently in not denying the prayers for the appointment of a receiver and the granting of an injunction. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

COCHRAN et al. v. HUDSON, Ordinary.

(Supreme Court of Georgia. May 11, 1900.)

WILL—CONSTRUCTION—NATURE OF ESTATE—PAROL EVIDENCE—FRIVOLOUS APPEAL.

1. A will declared the testamentary intention as follows: "I give, devise, and bequeath to my beloved wife * * * all my property, both real, mineral, and personal, wherever it may be. I also give to her my dwelling house, and the use of all improvements; also [certain described lots of land]; to have and to hold the same her natural life, and after her decease I devise and bequeath * * * the above" to four named daughters. *Held*, that the wife took an estate for life in all of the property of the testator, both real and personal, with remainder to his daughters.

2. The language of this will was unambiguous, and parol evidence was inadmissible to show the testator's intention, but, inasmuch as the parol evidence introduced tended to support the construction given above, its admission was harmless.

3. It clearly appearing that the defendant in error has brought to this court superfluous and immaterial portions of the record, it is adjudged that the costs thus incurred be paid by him.

(Syllabus by the Court.)

Error from superior court, Paulding county; C. G. Janes, Judge.

Action by F. P. Hudson, ordinary, for the use of the heirs of A. M. Wood, deceased, against W. L. Cochran, executor, and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

A. J. Camp, A. L. Bartlett, and L. M. Washington, for plaintiffs in error. J. J. Northcutt, for defendants in error.

SIMMONS, C. J. In the year 1888 Jerry Wood died, leaving a will, the portion of which necessary to the present discussion was as follows: "I give, devise, and bequeath to my beloved wife, A. M. Wood, all my property, both real, mineral, and personal, wherever it may be. I also give to her my dwelling house, and the use of all improvements; also [certain described lots of land]; to have and to hold the same her natural life, and after her decease I devise, bequeath, and therefore in the following manner I desire and direct the above be equally divided between my four daughters as follows," etc. The wife and one Cochran were appointed executrix and executor of the will. It seems that Cochran alone qualified. The wife lived until 1897. After her death the four daughters mentioned in the will filed their equitable petition against Cochran, the executor, for an account and settlement, claiming that their mother (Mrs.

Wood) had been given only a life estate in any of the testator's property. The executor claimed that these daughters were not entitled to recover, as legatees under the will, any of the personal property of the testator; that the will gave to the widow of the testator an absolute fee in the personal property and a life estate in the described realty. The case was referred to an auditor to report on the accounts of the executor. The auditor was given power to decide questions both of law and of fact which arose in the litigation. In his report on the law of the case he held that the contentions of the executor were sound, and that the will gave to the widow a life estate in the real property only, and an absolute estate in the personalty. So far as we can understand the auditor's report and the exceptions thereto, he seems to have refused, in the hearing before him, to admit parol evidence as to the intention of the testator in regard to the personalty and as to the value of the personalty which went into the hands of the executor. The plaintiffs filed two exceptions of law to these rulings of the auditor: First, that he had erroneously construed the will in holding that it gave the widow a life estate in the land only and an absolute estate in the personalty; and, second, that it was erroneous to exclude the evidence above mentioned. When the case came on for a hearing in the superior court, the judge sustained these two exceptions, and ruled that the will gave the widow a life estate only in all of the property of the testator, both real and personal, and that the daughters took the remainder in all; and also that the auditor erred in excluding the evidence above mentioned. The auditor, while he excluded the evidence as to the intention of the testator and as to the value of the personalty which went into the hands of the executor, made a calculation as to the liability of the executor in case the evidence should have been admitted. On this calculation he found that the executor was liable, in the event the widow was entitled to a life estate only in the real and personal property of the testator, in a certain amount. No exceptions of fact having been filed, the judge, having ruled on the questions of law as above detailed, directed a verdict for the plaintiffs for the amount so found by the auditor. The only questions argued here were as to the alleged error of the judge in sustaining the two exceptions to the auditor's report; that is, as to the construction of the will and the admissibility of the evidence.

1. We think that the will is unambiguous as to both the real and the personal property of the testator. In our opinion, it was clearly the testator's intention to give his wife only a life estate in each. The fact that he described the realty more particularly, after a general devise of all of his property, does not show that he intended the limitation to the life of the wife to apply to that property only. The will was evidently written by a person unskilled in writing such instruments, and he may have thought it was necessary to describe the land in order to pass the title. At any rate, the estate of the wife is limited to her life in all the property, for the will declares that she is "to have and to hold the same" for her life only. The words "the same" apply to all the property devised and bequeathed in this portion of the will. In disposing of the remainder interests in this property, the will uses the words "the above." It will be observed that the testator first gave everything he owned to his wife, and the subsequent language seems clearly to limit her estate therein to her life. When the words "the same" and "the above" were used, they evidently referred to all the property just above described, and applied to all of it. We think it clear that it was the intention of the testator to give to his wife a life estate only in all of his property, both real and personal, with remainder in all to his four daughters. It was contended that the first clause or sentence of this part of the will gives the wife the absolute fee in the entire property, real and personal; and the succeeding clause, which undertakes to limit her estate to her life, is repugnant to the first, and is therefore void. This position, even if the clauses be conceded to be separate, is answered by the decision in the case of Sheftall v. Roberts, 80 Ga. 453, where it was held that, "if a testator gives, in one part of his will, an absolute estate, and in a subsequent clause cuts down such estate to a less interest, the prior gift is restricted accordingly."

2. The judge's construction of the will having been correct, he did not err in sustaining so much of the second exception to the auditor's report as complained of his ruling out evidence of the value of the personal property which went into the executor's hands. The daughters had the remainder interest in the personalty, and were, of course, entitled to an accounting for it. There being no ambiguity in the will, it was erroneous to sustain that part of the exceptions which complained of the ruling out of evidence of the testator's intention as to the personal property. Inasmuch, however, as the evidence was in consonance with what we think the will meant, it was harmless, and will, therefore, not work a reversal of the case.

3. This case was brought here purely on questions of law,—the construction of the will, and the admissibility of the evidence to which objection had been made. The plaintiff in error specified, as necessary to be brought to this court, only such parts of the record as were necessary to a clear understanding of the errors complained of. The defendant in error was not satisfied with this specification of record, but applied to the judge, under section 5536 of the Civil Code, to order all of

the evidence sent up. The judge granted the order, and in compliance therewith the clerk sent up 110 additional pages of written evidence, taken before the auditor, and consisting mainly of an inventory and appraisement of the testator's personal property, list of notes and accounts, sale bill of personal property, returns of the executor, and things of that sort, not one of which throws the least light upon the questions made by the bill of exceptions. It was wholly unnecessary to burden this court with the task of looking over this mass of immaterial matter, and we therefore direct, under the second paragraph of section 5536 of the Civil Code, that the defendant in error pay the clerk's costs in the court below for bringing up this immaterial and superfluous matter. Judgment affirmed, with direction. All the justices concurring, except FISH, J., absent on account of sickness.

PARKS v. STATE.

(Supreme Court of Georgia. May 11, 1900.)

CRIMINAL LAW—APPEAL IN FORMA PAUPERIS —CONSTITUTIONAL LAW—CODE —PROFANITY.

1. An affidavit filed for the purpose of bringing a case to this court in forma pauperis must be "intituled in the cause," or otherwise on its face affirmatively show its relation thereto, or it will not be treated as sufficient to relieve the plaintiff in error, or his attorney, from paying the costs accruing in this court.

2. Though an act passed prior to the adoption of the Code of 1895, and which was incorporated therein, be subject to the constitutional objection that it contains matter different from what is expressed in its title, or that it attempts to amend a section of the Code by a mere reference to its number, these defects would not render invalid the section of the Code embodying the act.

3. The evidence was not sufficient to warrant the verdict, and the judge erred in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Joe Parks was convicted of using profane language in the presence of a female. From a judgment of the superior court affirming conviction, he brings error. Reversed.

Bialock & Cobb, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

COBB, J. The accused was tried in the county court upon an accusation charging him with a violation of that part of section 396 of the Penal Code which makes criminal the use of profane language in the presence of a female. Upon conviction he applied to the judge of the superior court for a writ of certiorari, upon the hearing of which the judgment of the county court was affirmed, and the accused excepted.

1. The affidavit filed by the accused for the purpose of relieving himself from the payment of the costs accruing in this court in the present case is as follows:

"Georgia, Sumter County. Personally comes Joe Parks, who on oath says that he is unable, from his poverty, to pay the costs or give the security for the eventual condemnation money, and that his counsel has advised him that he has good cause for a writ of error.

his
"Joe X Parks.
mark.

"Sworn to & subscribed before me this March 24th, 1900.

"H. E. Allen, Deputy Clk., S. C."

It will be noticed that the name of the case to which the affidavit is claimed to relate does not appear anywhere in the affidavit. The general rule is that affidavits to be used in judicial proceedings should be "intituled in the cause." Warren v. Monnish, 97 Ga. 399, 23 S. E. 823; 1 Enc. Pl. & Prac. pp. 311 (1), "a," 374 (5). The reason for the rule is that, when the affidavit is thus identified as being connected with the case to which it relates, the affiant may be indicted for perjury in the event the statements made in the affidavit are false. If the affidavit is not entitled in the cause, or if the name of the case does not appear in some part of the affidavit, or the statements made therein be not sufficient to indicate to what case the affidavit relates, it could not be used as a foundation for a prosecution for perjury, and for this reason it should not be received as evidence in any court in any proceeding whatever. Applying this rule to the present case, the affidavit upon which the plaintiff in error relies to relieve him from paying the costs accruing in this court cannot be considered. It is neither entitled in the cause, nor is there anything in the affidavit to indicate to what cause it relates. The defect in the affidavit cannot be cured by a certificate from the clerk of the superior court that after the affidavit was filed in his court he indorsed upon the back thereof the title of this case. The clerk had no authority to do this.

2. The accused moved to quash the accusation on the ground that the act making penal the use of profane language in the presence of a female was unconstitutional, for the reason that it contained matter different from what was expressed in its title, and was an effort to amend a section of the Code by a mere reference to the number of the section. We will not inquire whether or not these attacks upon the act are well founded, because the act was incorporated into the Code of 1895, and these defects, if they exist, would not render invalid the section of the Code embodying the act. Railway Co. v. State, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518 (Syl., point 5).

3. While the evidence in this case amply supported a finding that the accused used the language charged in the accusation, it was not sufficient to authorize a finding that when he used the same he knew that a female was within hearing, or that he used the same under circumstances that he must have known this fact. It is true, the language was used on a public road near a dwelling house, and

a female was in the house and heard the language, but it does not appear that the accused knew who constituted the members of the household of the man who owned the house. Taking the evidence as a whole, it did not warrant the conviction of the accused of the offense charged in the accusation. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

SORRELLS v. COLLINS.

(Supreme Court of Georgia. April 9, 1900.)

GIFT CAUSA MORTIS—DELIVERY—EVIDENCE —DIRECTING VERDICT.

1. In order to constitute a valid gift of personalty, made by one in view of impending dissolution, it is not necessary that there should be a delivery of the property to the donee personally; but such a delivery may be effected, and the gift rendered valid, by a delivery to a third person in trust and for the benefit of the donee.

2. If personal property be delivered by the owner to another for a third person, with the intention of making a donatio causa mortis, at a time when the donor is not in his last illness, this, without more, would not be sufficient to effectuate the gift; but if the donor, while in his last illness and conscious of the approach of death, reaffirms the gift, and requests the person receiving the property to retain possession and deliver to the intended donee after the donor's death, this would be the equivalent of a new delivery, taking effect from the time such request was made.

3. Applying the rules above laid down to the evidence disclosed by the record in the present case, the court erred in directing a verdict against the alleged donee, and ought to have submitted the case, under proper instructions, to the jury.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Petition for interpleader by Octavia H. Humphries against John S. Collins and C. C. Sorrells. Judgment for claimant Collins, and Sorrells brings error. Reversed.

Mozley & Griffin, for plaintiff in error. Morris & Green and Thos. Hutcherson, for defendant in error.

LEWIS, J. This was a petition for interpleader filed in Cobb superior court by Mrs. Octavia H. Humphries against John S. Collins and Mrs. C. C. Sorrells. The petition alleged, in substance, as follows: Petitioner is in the possession of $158.55, which is claimed by each of the defendants. The possession was obtained as follows: Mrs. Lucella Collins, wife of John S. Collins, died on July 24, 1896. Some time before she died she came to petitioner and stated that she had a package which she wanted petitioner to deliver to her mother, Mrs. C. C. Sorrells, in case of her death. Mrs. Collins delivered to petitioner the package for that purpose. She did not state its contents. Mrs. Collins was taken sick on June 24, 1896, and died in July following. During her last illness she frequently spoke to petitioner about the package, and enjoined upon petitioner, in case of her death, to deliver the package to Mrs. Sorrells. Petitioner accepted and held the package for the purpose of making the delivery in accordance with the request of Mrs. Collins. John S. Collins claimed the money after the death of Mrs. Collins, his wife, as her sole heir at law; and Mrs. Sorrells, the mother of Mrs. Collins, claimed it as a gift from her daughter. The order of interpleader was granted, and the case went to trial on the issue made by the answers of the two defendants, each claiming the money as above indicated. Mrs. Humphries, the petitioner, was sworn as a witness, and testified, in substance, that Mrs. Collins delivered the package to her after she and her husband had separated in October before she died. She came to the home of witness and asked her to take charge of the package, and, if she should die without making any disposition of it, requested witness not to tell any one where it was or what it was, but to give it to the mother of Mrs. Collins. It was discussed as to where the package should be placed, and at the suggestion of witness it was put under the carpet in witness' home. Mrs. Collins was in wretched health at the time, and had been for several years, though she was up most of the time. She never got well, but she got better. During the last illness of Mrs. Collins, witness was at her home frequently, and she would repeatedly admonish witness to do what she had told her about the package. The last conversation between witness and Mrs. Collins about the package was a short while before the latter's death, and during her last illness. In it she enjoined witness particularly to do with the package, which was then in the house of witness, where it was first deposited, just as she had previously told her to do. After the death of Mrs. Collins, Mrs. Humphries carried the package to Mrs. Sorrells, who was distressed at the time because John S. Collins, her son-in-law, had accused her daughter of stealing his wife's gold; and it appears that for this reason Mrs. Sorrells did not then wish to keep the package, and returned it to Mrs. Humphries. It appears from the record that Collins had charged Mrs. McEver, his wife's sister, and Mr. Sorrells, the husband of Mrs. Sorrells, with stealing the money, and a criminal prosecution was instituted on this account. There was further testimony introduced on the trial tending to show that, in the last interview had between Mrs. Collins and Mrs. Humphries, the former was in a dangerous condition, and apprehended that she might live but a little while. There was also some testimony showing that she was treated harshly by her husband during her last illness, he having returned to her after their separation, before her death. At the conclusion of the testimony, which is substantially set forth above, the court below, on motion of counsel for John S. Collins,

granted the following order: "This evidence makes a close case, to my mind. You have the evidence, though, and I wish you would carry it up to the supreme court, and see what they will do with it. Therefore I will direct a verdict." A verdict was accordingly directed by the court in favor of John S. Collins and against Mrs. C. C. Sorrells, whereupon the latter made a motion for a new trial, which was overruled, and in her bill of exceptions assigns error in the judgment of the court overruling her motion. Besides the general grounds, the motion for a new trial contains the further ground that the court erred in directing a verdict in favor of Collins and against movant.

1. It was contended by counsel for defendant in error that under the evidence there was not such a delivery of the property in question by the donor to the donee as was necessary, under the law, to constitute a valid gift. Section 3574 of the Civil Code declares: "A gift in contemplation of death (donatio causa mortis) must be made by a person during his last illness or in peril of death, must be intended to be absolute only in the event of death, and must be perfected by either actual or symbolical delivery. Such a gift, so evidenced, may be made of any personal property by parol, and proved by one or more witnesses." From the wording of the statute it will be readily seen that it is not absolutely necessary, in order to constitute a valid gift of this sort, that an actual delivery shall take place from the donor to the donee, but that a symbolical delivery of the personalty may as effectually convey title as an actual delivery. But we think it very clear that an actual delivery takes place whenever the owner of the property delivers the same to a third person, charging him with the trust of keeping it for the benefit of the named donee. There is nothing in the decisions of this court cited by counsel for defendant in error at all in conflict with this view of the law. For instance, in the case of McKenzie v. Downing, 25 Ga. 669, it was decided that, to complete a gift mortis causa, there must be a delivery of the thing given. On page 670, McDonald, J., delivering the opinion, says: "There was no delivery of the check to the payee, or to any one else for him. It remained in the custody of the drawer." There seems to be a clear intimation in the opinion that, had the owner of the check delivered the same to any one else for the benefit of the payee, the delivery would have been as effectual as if he himself had handed it directly to the payee. We are aware of authority to the effect that a delivery of property to a third person as the agent of the donor is not sufficient, but it does not follow from this principle that a delivery to one in trust for the donee is not a sufficient delivery. In 14 Am. & Eng. Enc. Law (2d Ed.) p. 1060, it is declared: "The delivery need not be to the donee personally. It may be made to a third person for him, and such delivery will be sufficient, though the donor dies before the donee actually receives the property." See Thornt. Gifts, § 36. There are several decisions in which this view of the law touching gifts causa mortis has been recognized by a number of courts of last resort in several of the states, but the principle is so well established that we deem it unnecessary to burden this opinion with a collection of such authorities.

2. It is true that such a gift, made by one not during his last illness, without more, would not be valid. For instance, in this case, had the owner of this money, and the person to whom it was delivered for the benefit of the owner's mother, had no transaction or understanding with reference thereto except what occurred in October or November, several months prior to her death, it would not have been an effectual donation, as it was not at that time made by a person during last illness or in peril of death. We think, however, there was sufficient evidence in this record to authorize the jury to conclude that shortly before the donor's death, and during her last illness, she apprehended approaching dissolution, and in this condition a reaffirmance of the gift, and a request that the person to whom the property had been intrusted should retain possession of it, and deliver it to the intended donee after the donor's death, would be clearly equivalent to a new delivery.

3. Applying the rules above laid down to the evidence disclosed by the record, we think the court erred in directing a verdict against the alleged donee, and ought to have submitted the case, under proper instructions, to the jury. Judgment reversed. All the justices concurring.

MORGAN v. PRIOR.

(Supreme Court of Georgia. May 12, 1900.)

APPEAL FROM JUSTICE—PLEADING.

It is too late, on the trial of an appeal in the superior court from a judgment rendered in a justice's court upon an unconditional contract in writing, for the defendant to file a plea, when it affirmatively appears that no defense whatever was made in the lower court at or before the first term of the court.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by G. S. Prior against B. F. Morgan. Judgment for plaintiff was affirmed on appeal, and defendant brings error. Affirmed.

Edwards & Ault, for plaintiff in error. W. R. Hutcheson, for defendant in error.

LITTLE, J. Prior instituted a suit in a justice's court against Morgan on a promissory note without conditions. A judgment having been rendered in favor of the plaintiff by the justice of the peace, the defendant appealed to the superior court. When the case was called there the defendant filed a written

plea, which the plaintiff moved to strike because no defense had been filed at the first term of the justice's court to which the suit was originally made returnable. The defendant traversed the truth of this ground of the motion to strike the plea, and it appears from the evidence of the defendant himself that no defense to the suit in the justice's court was made. In his evidence he said that he came to the justice's court at the March term, 1898, which was the return term, for the purpose of defending the suit, and did have a conversation with some of the parties, in which the question as to whether or not there was any consideration for the note sued on was discussed. From the docket of the justice of the peace it appears that the case was continued at the March term, and also at the April term, and that judgment was rendered at the May term of the justice's court. The evidence of another witness was that the case was continued at the request of the defendant on his promise to pay. However this may be, it is clear from the evidence of the defendant himself that he did not appear at the March term, nor at any other term, of the justice's court, before judgment was rendered, and make a defense to the action. The interviews which he had with the parties interested on the other side of the case do not, of course, amount in law to making a defense. It is provided in section 4134 of the Civil Code that, when a defendant to a suit in a justice's court on an unconditioned contract in writing shall make any defense, the same must be made at the first term. This court, in the case of McCall v. Tufts, 85 Ga. 619, 11 S. E. 869, construing the act of 1883 (Acts 1882–83, p. 103), ruled that this defense must be made by a written plea. Subsequently the general assembly amended the act of 1883 by striking the words "plea is filed," upon which the decision in the McCall Case, supra, was based; thus making it unnecessary, in order to make other defenses at a subsequent term of court, that a written plea should be filed at the first term of the justice's court. But it was provided that, in the place of filing such written plea at the first term, the defendant might appear and make a defense at the first term. See Acts 1890–91, p. 111. And this court, construing the latter act, in the case of Heyward v. Field, 95 Ga. 714, 22 S. E. 653, ruled that no formal plea need, under the act, be filed at the first term in a justice's court. Further than this, the provisions of section 4134 of the Civil Code are the same as when they were construed in the McCall Case, supra. So that, while it is not now necessary that, in making a defense to a suit on an unconditional contract in writing in a justice's court, the defendant shall appear at the first term and file a plea in writing, it is necessary that he appear at the first term and make defense thereto. In relation to this defense the court said in the Heyward Case, supra: "If the defendant, in response to the summons, appear and mark his name, or the name of his counsel, on the docket in that court, it is equivalent to filing the plea of the general issue. It is a making of his defense at the first term, and thereafter he may plead any other matter appropriate to his defense." It appears from the record that the names of counsel for the defendant were entered on the docket of the justice's court, but not until the May term, 1898. This, of course, is not a compliance with the statute, and, as it does not appear that any defense was made to this action in the justice's court prior to that time, the court did not err in striking the plea filed in the superior court after the appeal, as, in order for subsequent defenses to be urged, it was necessary that the defendant should in some legal manner have made a defense in the justice's court at the first term. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

TURNER et al. v. CAMP, Sheriff.

(Supreme Court of Georgia. April 11, 1900.)

EXECUTION — FORTHCOMING BOND — ACTION FOR BREACH—APPEAL—BILL OF EXCEPTIONS.

1. A levying officer to whom a forthcoming bond has been given may in his own name sue for a breach thereof, and it is not improper for him to designate in his petition, as usee, the plaintiff in the execution levied.

2. While a defendant in an action may before its final termination bring to this court for review a decision overruling a demurrer to the plaintiff's petition because the "judgment complained of, if it had been rendered as claimed by the plaintiff in error, would have been a final disposition of the cause," such defendant cannot, in a bill of exceptions sued out in such a case, properly except, also, to a decision striking his answer, or a portion thereof.

(Syllabus by the Court.)

Error from city court of Floyd county; George A. H. Harris, Judge.

Action by J. E. Camp, sheriff, for the use of the Merchants' National Bank of Rome, against J. D. Turner and others. Judgment for plaintiff, and defendants bring error. Affirmed.

M. B. Eubanks, for plaintiffs in error. Wright & Ewing and Nat Harris, for defendant in error.

LEWIS, J. J. E. Camp, as sheriff of Floyd county, for the use of the Merchants' National Bank of Rome, brought suit against the defendants for the breach of a forthcoming bond given by J. D. Turner, Harry Rawlins, and D. B. Hamilton, Jr., to said sheriff; reciting that the latter had levied a certain fi. fa., in favor of the Merchants' National Bank of Rome, Ga., against J. D. Turner, principal, and J. P. McConnell, security, on certain property (describing it). The bond contained an obligation to deliver the property to the sheriff at the time and place of sale. To this petition the defendants demur-

red on the ground that there was a misjoinder of parties; that the bank was not a proper party to the case; that there was no assignment of the bond to the bank; that there was no privity between the sheriff and the bank; that there was no liability to the bank on the bond, which was taken to protect the sheriff, and not for the benefit of the plaintiff in fi. fa. This demurrer was overruled by the court. To the petition the defendants filed an answer, which, under the view we take of this case, it is unnecessary to set forth, and to this answer plaintiff filed a demurrer upon several grounds. This demurrer was partially sustained by the court, striking certain paragraphs of the plea. The defendants bring the case here by bill of exceptions, complaining—First, of the judgment of the court overruling their demurrer to the petition; and, second, of the judgment of the court to the extent that it sustains the demurrer by plaintiff to their plea.

1. We think there is nothing in the demurrer to the petition. This question is settled by the case of Aycock v. Austin, 87 Ga. 566, 13 S. E. 582 (Syl., point 2), where it was decided that a suit by a sheriff on forthcoming bond, brought for the use of the plaintiff in execution, will not hinder a recovery; such recovery being allowable only for the purpose of indemnifying the sheriff.

2. We do not think this court has jurisdiction to determine the second question raised by the bill of exceptions. The first question, had it been decided as contended for by plaintiffs in error, would have been a final disposition of the case; and hence they have a right, under section 3526 of the Civil Code, to have that question determined by this court. It appears from the record that the case below is still pending, and the ruling of the court in passing upon the demurrer to the plea, and in striking a portion thereof, was not a final disposition of the cause. It does not follow that, because the bill of exceptions involves one question over which this court has jurisdiction, we can consider other questions made therein which are prematurely brought here. Judgment affirmed. All the justices concurring.

SMITH v. VAN HOOSE et al.
VAN HOOSE et al. v. SMITH.

(Supreme Court of Georgia. May 11, 1900.)

APPEAL—CROSS BILL OF EXCEPTIONS—MECHANIC'S LIEN—FORECLOSURE.

1. When the question made in a cross bill of exceptions controls the case as a whole, that question will be first considered.

2. When a suit is instituted against the owner to foreclose a lien on real estate by a subcontractor, and the petition merely alleges that the defendant is indebted to such subcontractor in a gross sum for work done and material furnished in the construction of a house erected thereon, without stating what part of such sum is due for work done and what part is for material furnished, a proper demurrer to the petition should be sustained.

(Syllabus by the Court.)

Error from superior court, Hall county; E. J. Reagan, Judge.

Action by O. A. Smith against A. W. Van Hoose and another. From a judgment, plaintiff brings error, and defendants assign cross errors. Judgment on cross bill of exceptions reversed. Main bill of exceptions dismissed.

Dean & Hobbs, for plaintiff in error. G. H. Prior, J. C. Boone, and H. H. Perry, for defendants in error.

LITTLE, J. Smith instituted an action against Van Hoose & Pearce. He averred that in the spring of 1896 Van Hoose & Pearce entered into a contract with one Foote, who was a contractor, to erect a large building, to be known as an "auditorium," on certain land belonging to the defendants in the city of Gainesville, for the sum of $14,200, and that petitioner was employed by Foote to furnish the material and put on the roof of said building, and in pursuance of such contract did furnish the material and do work for the improvement of the real estate of the defendants upon the employment of said contractor, furnishing the material and doing the work of putting on said roof of the value of $326.66, which was the contract price therefor; that he completed the contract in October, 1896, and gave written notice to the owners, and of the amount due to the petitioner; that Foote had paid him $99.01, which still leaves the sum of $227.65 due upon said contract for said work and material furnished, with interest thereon, for which amount the defendants are indebted to him. The petition alleges that plaintiff has taken no personal security for said claim, and had filed and recorded his claim of lien in the office of the clerk of the superior court of Hall county, and that he commences this suit for the recovery of his claim within 12 months from the time the same became due, and brings this action to foreclose his lien on the real estate described in his claim. By amendment petitioner set out the fact that the defendants failed to retain 25 per cent. of the contract price for the construction of the building; that Foote abandoned his contract before its completion, but that in an agreement entered into between Van Hoose & Pearce with Foote, Van Hoose & Pearce were to pay Foote for the labor and material which Foote had caused to be put on the building at the time of his abandonment, and that defendants failed to retain 25 per cent. of that amount, as well as the same per cent. on the contract price, and the defendants are therefore liable to him for the amount of his debt. The defendants demurred to the petition as amended on a number of grounds, among them: "(10) Because

plaintiff cannot claim a lien upon these defendants' property for work done and material furnished in conjunctive, and especially without showing how much is claimed on each account, and that, therefore, there is no valid claim of lien filed." We find it necessary to consider only this ground of the demurrer. The first hearing came up before Judge Kimsey in 1898, who overruled the demurrer. The defendants then excepted pendente lite to the judgment overruling the demurrer, and had their exceptions certified and entered of record. Subsequently, at the July term, 1899, of said court, his honor, Judge E. J. Reagan, presiding, the case came on to be tried, and it was agreed that the presiding judge should direct a verdict either for the plaintiff or the defendant, according to his decision of the question whether, under the evidence, the plaintiff was or not entitled to recover; and, after argument and evidence, the trial judge directed a verdict for the defendants, Van Hoose & Pearce, against the plaintiff, and a verdict for the plaintiff against Foote. The plaintiff in error then excepted to the direction of the verdict against him in favor of the defendants, Van Hoose & Pearce, and sued out a bill of exceptions alleging said direction to be error. The defendants, Van Hoose & Pearce, then filed a cross bill of exceptions, in which they assigned as error the ruling of presiding Judge Kimsey at the July term, 1898, in overruling the demurrer, to which exceptions pendente lite were taken. The main and cross bills were argued together, and are now before us for consideration, and inasmuch as, in our opinion, his honor, Judge Kimsey, erred in overruling the demurrer filed by the defendants, following the rule of practice laid down in the cases of Cheshire v. Williams, 101 Ga. 814, 29 S. E. 191, and Jordan v. Railroad Co., 105 Ga. 274, 30 S. E. 748, we find it necessary only to consider and pass on the assignment of error made by the cross bill of exceptions. The claim of the plaintiff for material furnished and work done, as it appears in the petition, is made in the following language: "Your petitioner further shows that he was employed by said G. W. Foote, contractor as aforesaid, to furnish the material and put on the roof upon said building or auditorium, and that he did furnish material and do work for the improvement of such real estate upon the employment of said contractor, furnishing the material and doing the work putting on said roof, to the value of $326.66, which was the contract price for said work." It is impossible to ascertain from this vague allegation the amount for which the plaintiff claims that he is entitled to a lien for the labor which he alleges that he performed, as well also as the amount and value of the material which he alleges he furnished, and for which he claims a lien as a material man. It was ruled by this court in the case of Carter v. Rome Construction Co., 89 Ga. 158, 15 S. E. 36, that where, by a petition to foreclose a lien, it was shown that the plaintiffs were only subcontractors, and both the claim of lien and the declaration were for a gross sum, without disclosing what part of it was for work and what part for material, there was no error in denying the foreclosure nor in dismissing the action. The ruling there controls this case, and, inasmuch as the demurrer distinctly made the point that the plaintiff was not entitled to his action because his claim of lien for work done and material furnished was set out in the conjunctive, without showing how much his claim on each account was, the demurrer should have been sustained, and the petition dismissed. The judgment overruling the demurrer was, therefore, error, and must be reversed. Judgment on the cross bill of exceptions reversed; the main bill of exceptions dismissed.

SOUTHERN RY. CO. v. WARD.

(Supreme Court of Georgia. May 12, 1900.)

FIRE SET BY LOCOMOTIVES—PLEADING—AMENDMENT—DAMAGES.

1. A petition which alleges that a railway company, "by the use and running of their engines, locomotives, or other machinery, or otherwise, by the negligence of their agents, employés, or servants, set fire to and destroyed" the plaintiff's property, is amendable by the addition of a paragraph alleging that the fire in question was caused by the negligence of a section foreman in the employment of the company, and by setting forth the particulars as to the origin of the fire.

2. Negligence causing the burning of a pasture fence does not entitle the owner to recover from the wrongdoer the value of the pasture for use and occupation for a longer period of time than would be reasonably necessary to replace the fence.

3. An allegation, in a petition for the recovery of damages alleged to have been caused by the negligent setting out of fire upon the plaintiff's premises, that he was "forced to call in his neighbors and friends to assist him in checking the fire so set out, in order to save his residence from total destruction, for which labor and service petitioner is entitled to" a specified amount, is without merit.

4. As the petition contained averments which should have been stricken on the special demurrers urged against the same, and as they were not so stricken, there should be another trial after the petition has been freed from the objectionable matter.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by W. F. Ward against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hugh M. Dorsey, for plaintiff in error. Jas. Beall and Thomas & Hutchens, for defendant in error.

COBB, J. Ward sued the railway company, alleging in his petition that the "defendant company, by the use and running of their engines, locomotives, or other machin-

ery, or otherwise, by the negligence of their agents, employés, or servants, set fire to and destroyed fifteen hundred chestnut rails, about fifteen cords of pine and oak wood, and burnt down a large number of posts which supported petitioner's wire fence; all of which rails, wood, posts, etc., was the property of petitioner." The rails were worth $30, the wood $25, and petitioner was further damaged $75, for the reason that the destruction of the fence deprived him of the use of his pasture. "Petitioner was forced to call on his neighbors and friends to assist him in checking the fire so set out, in order to save his residence from total destruction, for which labor and service petitioner is entitled to the further sum of $25." The prayer was that petitioner have judgment against defendant for $180. An amendment to the petition, which was allowed over the objection of defendant, alleged that on the day named in the petition the defendant, "by its officers and agents," to wit, "W. R. Hatfield, section foreman, and other agents and employés," negligently set fire to certain trash and other combustible matter on the right of way of defendant, and negligently allowed the fire to be communicated to the property of petitioner, which was adjacent to the right of way, whereby the damage complained of in the original petition was occasioned; that the pasture of petitioner was worth to him, "for a place to keep and sustain his stock, the sum of fifteen dollars a month, and that he was deprived of its use and benefit for five months." At the trial the jury returned a verdict in favor of plaintiff for $100. The case is here upon a bill of exceptions filed by defendant assigning error upon the overruling of a demurrer to the petition, the allowing of the amendment, and the refusal to grant a new trial.

1. The contention is that the amendment, so far as it contained allegations of acts of negligence, set forth a new cause of action. The position is not tenable. It is true, the original petition set forth no specific act of negligence, and was, therefore, vague and indefinite; but it distinctly alleged that the damage complained of was brought about by the negligence of the "agents, employés, or servants" of defendant. Negligence was sufficiently alleged as against a general demurrer, and the plaintiff had a right to amend by setting forth the name of the negligent agent, and the particular way in which the damage was caused by the act of such agent, in order to meet a special demurrer raising the objection that there was no specific act of negligence alleged.

2. Those portions of the petition and amendment which claimed damages on account of plaintiff having been deprived of the use of his pasture for five months should have been stricken. The defendant, as to this matter, would not be liable to the plaintiff for more than an amount which would represent the value of the pasture during such a period of time as would be reasonably necessary to replace the fence destroyed by the negligence of the defendant.

3. The petition alleged that plaintiff was "forced to call in his neighbors and friends to assist him in checking the fire so set out, in order to save his residence from total destruction, for which labor and service" he claims as damages the sum of $25. It is not alleged that he has paid his neighbors and friends anything for the services rendered by them, nor is it alleged that he is in any way liable to them. The allegation, taken literally, bears the construction that plaintiff claims the amount stated for the mere act of summoning his neighbors and friends to the fire. There was no merit whatever in the claim as made, and the paragraph of the petition containing the same should have been stricken on the special demurrer filed thereto.

4. As the petition contained averments which should have been stricken, and as it is impossible to ascertain whether any of the damages found by the jury were based upon the allegations which were improperly in the petition, the judgment must be reversed, and a new trial had upon the petition and amendment after all of the objectionable matter has been eliminated therefrom. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

WALTERS v. PALMER.

(Supreme Court of Georgia. May 12, 1900.)

ACTION ON NOTE—FRAUD—BONA FIDE PURCHASER.

1. Fraud or deceit in a transaction which induced one to make and deliver a negotiable promissory note cannot be set up by the maker in defense to an action against him upon the note by one who, in good faith and for value, acquired title to the paper before its maturity.

2. One who holds a negotiable promissory note as transferee thereof is in law presumed, in the absence of any proof to the contrary, to have become the bona fide holder of the instrument for value before maturity, without notice of any infirmity therein.

3. It follows from the above principles that the court did not err in overruling the petition for certiorari.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by M. A. Palmer against L. J. Walters. From a judgment overruling an application for certiorari by defendant to review judgment in justice's court, he brings error. Affirmed.

Rowell & Rowell, for plaintiff in error. W. S. McHenry, for defendant in error.

LEWIS, J. M. A. Palmer, as transferee, brought suit in a justice's court of Floyd county against L. J. Walters on a promissory note dated April 8, 1898, due on or by November 1, 1898, and payable to the order of

J. F. Maples, for $22.50, besides interest. The note was indorsed on the back: "Pay to M. A. Palmer. J. F. Maples." To this action the defendant pleaded, in substance, that it was the agreement between him and Maples, and known to the plaintiff in the case, that the note was to be paid in barter, such as sweet potatoes, at such times as defendant could spare same to be delivered at his store in West Rome; that the defendant could not write, and the note was not read to him, and he supposed it expressed what it was to be paid in; that he tendered 20 bushels of potatoes, worth 75 cents per bushel, to pay on the note, and Maples refused to accept same, and defendant carried the potatoes back home, and most of them were lost. Defendant further pleaded that the note sued on was procured by fraud and misrepresentation. After hearing the evidence, the jury in the justice's court returned a verdict for plaintiff; whereupon the defendant below petitioned the superior court of Floyd county for certiorari, alleging in his petition that the verdict was contrary to law and evidence. On the hearing of this application for certiorari, and the answer of the magistrate thereto, the court overruled the same, upon which judgment error is assigned in the bill of exceptions. The plaintiff introduced the note sued upon, and closed. The defendant, by his testimony, substantially made out his plea as to the agreement made between him and Maples, the payee, touching the means by which the note should be paid, and stated that he had tendered products as payment on the note, which were refused by the payee, this tender being made before the maturity of the note. There is no evidence, however, that the plaintiff in this case had any notice whatever of these facts, or of any contract between the maker and the payee, aside from what appeared in the note itself. The consideration recited in the note was that it was for a "double-seat buggy." The testimony showed that Maples, the payee, had removed to Texas.

1. Counsel for plaintiff in error contends that, under the undisputed evidence, the signature of the defendant was procured by a misrepresentation on the part of Maples, the payee of the note, and it was therefore void as to the maker of it, who could neither read nor write, and who supposed that the contract as to how the note should be paid had been embodied therein. This note contained negotiable words, but, notwithstanding this fact, it is contended that it is void even in the hands of a bona fide purchaser, as the defendant was an illiterate man, who could neither read nor write, and the signature to the note was fraudulently obtained from him. We presume counsel relies on the last provision of section 3694 of the Civil Code, which protects bona fide holders of negotiable instruments from any defense set up thereto by the maker, etc., with some exceptions, one of which is "fraud in its procurement." It has long since been a settled question, under the decisions of this court, that fraud in the procurement of a note, as specified in this statute, means fraud in the procurement by the holder thereof, and not fraud in its procurement as between the original parties, of which the holder for value had no notice. Robenson v. Vason, 37 Ga. 66; Bealle v. Bank, 57 Ga. 274. See, also, Grooms v. Olliff, 93 Ga. 789, 20 S. E. 655, where it was decided: "The phrase, 'fraud in its procurement,' as used in section 2785 of the Code [now Civ. Code, § 3694], has no reference to fraud in the contract out of which a negotiable security arises, or in the consideration for which it was given. Hence fraud in these respects does not affect a bona fide holder for value, who receives a negotiable promissory note before it is due, and without notice of any defect or defense." See, also, the opinion of Lumpkin, J. (now presiding justice), and authorities cited in that case, which was reaffirmed in Taylor v. Cribb, 100 Ga. 94, 26 S. E. 468.

2, 3. It is further contended by counsel for plaintiff in error that there is no evidence showing the transferee in this case had received the note before maturity, and without notice of the defense thereto against the maker. The very fact that there is no evidence she received the note with such notice or after maturity clearly entitled her to a recovery upon her suit on the note. The note by its terms was to become due several months after the date thereof. It contained upon its face negotiable words. It is a well-settled principle of law that the holder, as transferee of such negotiable paper, will be presumed to be a bona fide holder thereof without notice of any infirmity therein. Paris v. Moe, 60 Ga. 90; Perkins v. Rowland, 69 Ga. 661 (Syl., point 2); Rhodes v. Beall, 73 Ga. 641. The court, therefore, did right in overruling the petition for certiorari. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

COLVARD v. BLACK et al.

(Supreme Court of Georgia. May 12, 1900.)

LIBEL—WHAT CONSTITUTES—PLEADING—AMENDMENT.

1. To write and publish of another that he is a liar is libelous, and gives to the person thus charged a right of action.

2. Though, from the language employed in a publication, there is uncertainty both as to whether there was an intention to make a charge of a libelous nature, and also as to whether, such being the purpose, the design was to apply this charge to a particular person, yet, if the language was in fact used with such an intention and design, that person may bring an action for a libel, and maintain it by proper proof. It is not, in such a case, essential that all of the public should understand the true intent and meaning of the defamatory matter. If it is, on its face, of that character, or susceptible of being so interpreted, and if those knowing the plaintiff are aware of the intention to make

the libelous charge and apply it to the plaintiff, this is sufficient.

3. An amendment which sought to add to a petition legally setting forth a cause of action for a libel, by declaring upon another and distinct publication alleged to have been libelous, was properly rejected. If the matter sought to be set up by such an amendment was of itself actionable, it embraced a new and distinct cause of action, and was therefore not allowable; if it was not, rejecting it was, of course, proper.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Action by H. V. Colvard against John Black and others. Judgment for defendants, and plaintiff brings error. Reversed.

Wm. E. Mann, for plaintiff in error. Shumate & Maddox, for defendants in error.

LITTLE, J. Colvard instituted an action against Black, Shaver, and Bogle to recover damages for libel. The petition alleges that the defendants falsely and maliciously did publish of and concerning him in the Dalton Argus, on the 19th and 20th days of August, 1898, the following false, malicious, and insinuating language, to wit: "A Dirty Lie Nailed. Georgia, Whitfield County, Ordinary's Office, August 18th, 1898. The following is a correct statement of the articles found on the body of an unknown man killed on the Western & Atlantic Railroad about one mile north of Tilton, Ga., on March 12, 1897, and turned over to me by W. A. Black, coroner, viz.: One German Testament; two vials medicine; one box Tutt's Pills (7 pills); two spools thread; two pairs eye-glasses; one pair spectacles; one pocketknife; and twenty-one dollars and fifty cents in cash ($21.50). All the articles named above (except the money) are still in the ordinary's office. There was not the slightest clue, so far as I could discover, as to the identity or place of residence of the deceased. Therefore it was thought to be the best way to dispose of the money by using it to pay for his decent burial and for the legal cost of the inquest, as far as it would go. It was paid out by me as follows: For coffin and burial expenses to W. F. Brown, $10.00. The contract for this was very promptly made by Mr. Black in his official capacity as coroner, and I hold Mr. Brown's receipt for the money. For coroner's official and legal fee for holding inquest, $10.00, thus saving the county treasurer that amount. The remaining $1.50 was used by me to buy postage stamps for use in the public business of the county. Not one cent of the money was used or appropriated for private purposes by Mr. Black or by any one else. He turned it all over to me, and, if it was paid out improperly, then I am alone to blame. [Signed] Jos. Bogle, Ordinary. P. S. I acquainted Mr. Colvard with all the facts as stated above something like thirty days ago. [Signed] Jos. Bogle, Ordinary." It was alleged that the Dalton Argus was a newspaper published and largely circulated in Whitfield county, Ga., and that the article did, in effect, accuse petitioner of willfully lying, and was prepared and published for the purpose of exposing him to public hatred, contempt, and ridicule, to cause his defeat for the legislature, and that said article did cause such defeat. It is further alleged that the article injured his business, and left the impression that he was a willful liar, and unworthy of the confidence of the public; that defendants knew what impression the said article would make, and that it would damage petitioner; that it was false and malicious. By leave of the court, the petition was amended by adding that petitioner was at the time of the publication engaged in the business of manufacturing and sale of monuments in the city of Dalton, and dealing directly with the public. The plaintiff also offered to amend by adding the following, which the court refused to allow: "On the 26th day of August, 1898, in a card which was published in the Dalton Argus on the 3d day of September of said year, the said John Black, in seeking to exonerate and relieve his co-defendants from responsibility and liability for their co-operation in writing and publishing the card, falsely and maliciously connecting petitioner with the report therein mentioned, assumes all of the responsibility, and in assuming the responsibility says: 'So much has been said about the card from Judge Bogle which appeared in the Dalton Argus of August 20th, I desire to make a word of explanation. The statement of facts was furnished by Judge Bogle from the records of his office by request of my son W. A. Black, to refute a damaging, vile lie that was being circulated against my son. Judge Bogle furnished facts only, and did not know it was to be published until he saw it in print. Originally the statement had no postscript, and the postscript was added by my request. The report of the circulation of the lie came in too fast just on the eve of election to be contradicted by personal visits, and I decided it best to have the statement published, and I assume all responsibility. The heading "A Dirty Lie Nailed" was written for me by the editor of the Argus, submitted to and approved by me, because we all knew that report to be one of the dirtiest of all lies.'" And further in said card said Black says: "Both my son and myself had reports of the repeated circulation of the lie as it was being industriously used in Mr. Colvard's interest. I naturally presumed that it was at Mr. Colvard's instigation." The petition as amended was demurred to on the ground that it set out no cause of action; that there is nothing slanderous in the publication, and nothing to connect the plaintiff with the publication of having told a lie. The demurrer was very general in its terms, and seems to have been directed entirely to the point that, as alleged to have been made, the publication

did not charge any one with being a liar, nor refer at all to the plaintiff. While the petition seems not to have been drawn with any great degree of care, and, in charging that the words used were libelous and intended to apply to the plaintiff, was wanting in much of the force and effect which could have been supplied by a proper innuendo, and the petition might therefore have been found defective on special demurrer, yet against the general demurrer filed it must be held that the petition was sufficient to carry the case to the jury. After argument the court sustained the demurrer and dismissed the petition. To this ruling the plaintiff excepted. The errors assigned are the refusal to allow the offered amendment and to the ruling sustaining the demurrer.

A "libel" is defined by our Civ. Code, § 3822, to be a false and malicious defamation, which is expressed in print, writing, or signs, which tends to injure the reputation of an individual, and expose him to public hatred, contempt, or ridicule. It is urged, however, that the printed words which are set out in the statement of the case above do not import a crime or misdemeanor, and are not actionable per se, and to call a man a liar is not actionable. In all actions instituted to recover damages for libel, the jury are to determine whether the words declared on are libelous or not. Beazley v. Reid, 68 Ga. 380. It is gravely urged that to write and publish of a man that he is a liar is not actionable at all. It is difficult for us to imagine what words would more fully expose a man to public contempt than to publish him as being a liar. Mr. Townshend, in his treatise on Slander and Libel (section 177), declares that it is actionable to charge one in writing with being a villain, liar, rogue, rascal, or swindler, etc. See, also, Brooks v. Bemiss, 8 Johns. 456; More v. Bennett, 33 How. Prac. 180; Cooper v. Stone, 24 Wend. 434; Lindley v. Horton, 27 Conn. 58. In the case of Hake v. Brames, the supreme court of Indiana was called on to say whether a letter couched in the following language: "I was unfortunate enough to have him [plaintiff] in my employ at one time as a bookkeeper. He is a liar. I would not believe him under oath,"—was libelous. On demurrer to the complaint, it was held that each of the three sentences in the letter was libelous. 95 Ind. 161. The authorities cited, which construe a publication characterizing another as a liar to be libelous and actionable, were based on a definition of "libel" similar to that found in our Code.

2. It is, however, further urged that from the indefinite character of the publication, not stating what the lie was or who told it, that the defendants could neither justify nor deny; that they could make no defense to allegations so indefinite. Whether the publication did in fact charge the plaintiff with having told a lie, and whether there was anything libelous of Colvard, or whether anybody was branded as a liar, were questions of fact for the jury to determine, and whatever charge the publication did contain the defendants, if they desired to plead justification, could allege to be true, thus forming an issue. Park v. Insurance Co., 51 Ga. 510. Words which on their face appear to be entirely harmless may, under certain circumstances, convey a covert meaning wholly different from the ordinary and natural interpretation usually put upon them. In his petition the plaintiff says that the words published do, in effect, accuse him of willful lying, and that they were gotten up and published for the purpose of exposing him to public hatred, contempt, and ridicule; that the defendants knew the impression that said article would make; and that the words used were false and malicious, and would damage petitioner. If these allegations were true, the plaintiff was entitled to go to the jury. The rule is that he may give in evidence any of the attending circumstances; the cause and occasion of the publication, and all other extraneous matters which will tend to explain the allusion, or point out the person in question; all the surrounding circumstances; the facts connected with the transaction; and from this evidence it is for the jury to say who was meant. Newell, Defam. p. 767, and authorities cited in note 1. The same author, basing the principle enunciated on authority, says (on page 768) that it is not necessary that all the world should understand the defamatory matter. It is sufficient if those who knew the plaintiff can make out that he was the person meant. See, also, Tillman v. Willis, 61 Ga. 433; Hardy v. Williamson, 86 Ga. 551, 12 S. E. 874.

3. It is also complained that the court erred in refusing an amendment offered to the petition by the plaintiff, by which amendment the plaintiff sought to incorporate in his petition another card published in the Dalton Argus by one of the defendants. This card purported to be an assumption by one of the defendants of all the responsibility for the original publication, and was explanatory of the first. We are of the opinion that the court did not err in refusing to allow this amendment. As we have ruled, the original petition, of itself, was sufficient to carry the case to the jury. It alleged a distinct publication, which, if malicious and intended to charge the plaintiff with lying, needed no amendment. Had another publication, made at a different time, been proven and shown to be libelous, another and a distinct cause of action would have been added, and this is not allowable. The second publication, whether libelous or not, could, when proven, have been introduced in evidence on the trial of the case; and this is true whether the second publication was made before or after that for which the suit was instituted, or even after the commencement of the action, the object of the evidence being to show the animus of the defendant. But, if the second

publication did not contain words which were libelous, it could not have added anything to the original cause of action. If the words it contained were libelous, then, as they constituted another cause, they could not be ingrafted on the first.

It is our conclusion that the court erred in sustaining the demurrer and dismissing the petition. In our opinion, the plaintiff was entitled, under the allegations which he made, to have his case passed upon by a jury, who were authorized to finally determine whether or not the defendants falsely and maliciously defamed the plaintiff in writing in such a manner as tended to injure his reputation and to expose him to public hatred or contempt. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

MORRIS et al. v. DODD.

(Supreme Court of Georgia. April 11, 1900.)

BANKRUPTCY—ASSETS—LIFE INSURANCE.

A policy of insurance on the life of a bankrupt, though payable to his legal representatives, does not, if it have no cash surrender value, vest in the trustee as assets of the bankrupt's estate. (a) Accordingly, where a husband, within four months prior to the filing of his petition in bankruptcy, transferred to his wife an insurance policy on his life, which before such transfer was payable to his legal representatives, it was erroneous, on the petition of the trustee, filed upon the death of the bankrupt, pending the proceedings in bankruptcy, for the court to enjoin the widow from collecting, and the insurance company from paying to her, the amount due upon the policy; it appearing that it had no cash surrender value, either when the transfer was made or the petition in bankruptcy was filed.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Harry Dodd, trustee in bankruptcy, against V. A. Morris and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. A. Anderson, King & Anderson, Dorsey, Brewster & Howell, and Arthur Heyman, for plaintiffs in error. Mayson & Hill and O. M. & C. E. Horton, for defendant in error.

FISH, J. This was a petition filed by Harry Dodd, trustee of the estate of John F. Morris, bankrupt, against his widow, Mrs. V. A. Morris, the Mutual Reserve Fund Life Association of New York, and the Northwestern Mutual Life Insurance Company, in which it was sought to enjoin Mrs. Morris from collecting, and the two insurance companies from paying to her, the amounts of insurance policies issued by the defendant insurance companies upon the life of the bankrupt. The Northwestern Company paid the money due upon the policy issued by it into the registry of the court, to await the final decree of the court. Mrs. Morris and the other insurance company answered the petition. Upon the hearing, it appeared that each of the insurance companies had issued a policy upon the life of John F. Morris, payable to his legal representatives; that the one by the Northwestern Company was issued in 1890, the date of the issuance of the other not appearing. It further appeared that during the month of April, 1899, Morris surrendered his policy in the Mutual Reserve Fund Life Association, and the association thereupon issued a new policy, upon the same terms as the old, in which new policy Mrs. V. A. Morris, his wife, was the beneficiary, and that during the same month Morris assigned the policy which he held in the Northwestern Company to his wife, the assignment being accepted by the company. Morris' petition in voluntary bankruptcy was filed on the 29th day of the same month. He died the following October, pending the proceedings in bankruptcy, and immediately after his death Dodd, the trustee of his estate, filed this petition. The contention of the trustee was that the transfers of the policies were made with intent to hinder, delay, or defraud the creditors of the bankrupt, and, having been executed within four months prior to the filing of the petition in bankruptcy, were void, and that the policies vested in the trustee at the time of the adjudication in bankruptcy, as part of the assets of the bankrupt's estate.

Section 67e of the bankrupt act of 1898 provides "that all conveyances, transfers, assignments or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed," etc., "shall * * * be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." Section 70a of the act provides: "The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall * * * be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate or personal representatives, he may, within thirty days after the cash surrender value has been

ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets." Under the view we take of the question presented for determination, it is immaterial that the policies of insurance were transferred by the bankrupt to his wife within four months prior to the filing of his petition in bankruptcy. Upon the hearing, there was no evidence submitted for the trustee that either of the policies had any cash surrender value, either at the time of the transfer or at the time of the filing of the petition in bankruptcy, but there was much evidence in behalf of the defendants that the policies had no such value at either of the times indicated. If the policies, then, had no cash surrender value, we are of opinion that they would not vest in the trustee, as assets of the bankrupt's estate, even if no changes had been made in them, and they had, to the date of his death, remained payable to his legal representatives. The exact point was decided in Re Buelow (D. C.) 98 Fed. 86, where it was held: "A policy of insurance on the life of a bankrupt, which has no cash surrender value, and no value for any purpose except the contingency of its becoming valuable at the death of the bankrupt if the premiums are kept paid, does not vest in the trustee as assets of the estate;" and the court directed the trustee to deliver the policy to the petitioners, the bankrupt and his wife. District Judge Shiras, in Re Steele (D. C.) 98 Fed. 78, while holding that where a bankrupt held a policy payable to himself, his heirs or legal representatives, the surrender value thereof would be part of the assets of his estate in bankruptcy, very clearly intimated that this would not be so if the policy had no cash surrender value. To the same effect, see In re Lange (D. C.) 91 Fed. 361. In the case of Ætna Nat. Bank v. United States Life Ins. Co. (C. C.) 24 Fed. 770, it was held that a bill in equity could be maintained by creditors of a deceased debtor to reach premiums paid to a life insurance company in fraud of them, but that they could have no claim upon the insurance, even in such a case, beyond the amount of the premiums and the interest thereon. Under the bankruptcy act of 1867, in Re McKinney (D. C.) 15 Fed. 585, it was held: "An assignee in bankruptcy has no insurable interest in the life of a bankrupt, at least after his discharge. Upon a policy on the life of the bankrupt, payable at his death to his executors, administrators, or assigns, with an equal premium payable annually during the bankrupt's life, the only beneficial interest which passes to the assignee in bankruptcy is its surrender value or net reserve at the time of the bankruptcy. Beyond that interest the policy, so far as respects any future insurance under it, would be a burden rather than a benefit, which the assignees are not authorized to continue, and the assignee takes the legal title to the policy for the purpose of making the surrender value or net reserve available to the estate." In Holt v. Everall, an English case, decided by the court of appeal, under the British bankruptcy act of 1869, reported in 34 Law T. (N. S.) 599, it appeared that in 1870 a trader effected policies of insurance on his own life. In the following year, wishing his wife might have the benefit of the policies, under the married women's act, he surrendered them to the insurance company, and received in substitution therefor policies at the same premiums, payable on the same day, and entitled to the same privileges, as the former, and which provided that the sums assured should be paid to the wife. Within two years from the date of the substitute policies the husband liquidated, dying before the discharge. The trustee claimed the insurance. It was held that, as the policies of 1870 had no surrender value, the transaction of the following year was not a settlement of property, under the bankruptcy act of 1869, and that the widow was entitled to the policy money. In speaking of the substitution of one policy for another, James, L. J., in his opinion said: "If it could be made out that this was a device to avoid the ninety-first section of the bankruptcy act of 1869, and that there was any actual property—anything which the court could construe as of value—settled at that time, then probably the court would say: We cannot allow a device to be resorted to for the purpose of making that thing appear to be not a settlement which was in truth a settlement. * * * In that point of view, it is important to see whether there was any actual property—anything that could be called property—at the time when the husband effected the policies in question. If the husband at that time gave up anything of real value as part of the consideration for the new policies, there might be some question; but I am satisfied that that which was given up was not of the slightest value whatever, that there was nothing taken away from the creditors in point of substance, and that the transaction, as far as the creditors were concerned, was, in substance, exactly the same as if the policies in 1871 had been made without any reference whatever to the existing policies of 1870, which the husband might have given up at any moment he liked, or forfeited, or done anything he liked with. Therefore there is nothing substantial arising from the fact that the policies of 1871 were in exchange for the policies of 1870." Mellish, L. J., in his concurring opinion, used the following language: "I agree with the lord justice * * * that if the surrender policy really was in substance worth nothing, if it was a policy

which an insolvent man would naturally allow to drop, it is very difficult to see what object an insolvent trader, knowing that he is going to become a bankrupt, has in keeping up a policy on his life, and paying the premiums, knowing that the money will go for the benefit of his creditors, or perhaps not for their benefit, because, if the policy was such as this was, which had only been effected for a single year, it does no benefit to the creditors. What a trustee in bankruptcy does, if such a policy comes into his hands, is to see if he can get anything from the insurance office, and all the creditors are deprived of is the surrender value of the policy; and, if there is no surrender value, we may consider that the new policy effected instead of it comes within the protection of the act [the married women's property act]." In Bank v. Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372, this court held that the only insurable interest a creditor has in the life of his debtor is for the purpose of indemnifying himself against the loss of his debt, and that such interest cannot exceed in amount that of the indebtedness to be secured. The purpose of the bankruptcy act is to take the property owned by the bankrupt when the petition is filed, and apply it towards the payment of his then existing debts, discharging him in due course from any further liability; his after-acquired property not being subject to such debts. This being true, it is apparent that the creditors represented by the trustee, whose debts cannot continue against the bankrupt, can have no insurable interest in his life for the purpose of indemnifying themselves against loss. In view, therefore, of the authorities cited and the language of the act itself, it seems that a policy of insurance on the life of a bankrupt, though payable to his legal representatives, does not vest in the trustee, as assets of the bankrupt's estate, if the policy has no cash surrender value. It follows that, under the evidence submitted upon the hearing, the learned trial judge erred in granting the injunction. Judgment reversed. All the justices concurring.

BEHLING v. STATE.

(Supreme Court of Georgia. May 11, 1900.)

ASSAULT—JUSTIFICATION—OPPROBRIOUS LANGUAGE.

Grimaces or facial expressions of contempt do not constitute "opprobrious words or abusive language," within the meaning of section 103 of the Penal Code, which declares that "such words and language" may or may not, as shall be determined by the jury, amount to a justification of an assault or an assault and battery.

(Syllabus by the Court.)

Error from superior court, Dekalb county; John S. Candler, Judge.

A. H. Behling was convicted of assault, and brings error. Affirmed.

Green & McKinney, for plaintiff in error. W. T. Kimsey, Sol. Gen., and J. L. Travis, for the State.

LEWIS, J. The accused was tried upon an indictment by the grand jury of Dekalb county for the offense of assault and battery upon one Lively. The evidence for the prosecution shows that at the time and place alleged in the indictment the accused, while aboard a street car, without provocation, made a violent assault upon Lively, who was also a passenger upon the car, striking and wounding him in the face with an umbrella. No evidence was introduced in behalf of the accused. He made a statement in which he claimed that the difficulty originated on account of angry feelings entertained against him by Lively resulting from a suit that accused had brought against Lively to recover an attorney's fee for services. He stated that three or four times before this difficulty Lively had made grimaces and facial expressions of contempt towards him, and that he finally told him if he did not cease he would get into trouble. On the occasion of the difficulty accused stated that Lively again commenced this conduct by making grimaces, "and then it happened." The accused was found guilty, and excepts to the judgment of the court overruling his motion for a new trial.

On the trial of the case the accused offered to prove by the prosecutor, Lively, that he had, several days before this difficulty, been making towards him facial expressions of contempt for the purpose of insulting him, and exception is taken to the ruling of the court in refusing to allow answers to questions seeking such proof. Another ground of the motion for a new trial complains that the court erred in not charging section 103 of the Penal Code, it being contended by counsel for plaintiff in error that the word "language" in that section not only included words, but also making faces, grimaces, and contemptuous gestures in the presence of the accused, to hold him up to contempt and ridicule. We do not think the language in the section referred to is susceptible of any such legal construction; nor do we think that this section has any application to the facts in this case. The case of Bowie v. Maddox, 29 Ga. 285, is cited by counsel for plaintiff in error for the position that gestures, or exclamations, or bearing, which are used as voluntary vehicles of thought, are an "acted language," and that, therefore, in the light of that decision, the conduct of the prosecutor fell within the definition of the term "language" as used in the statute. By reference to the facts in the case cited, however, it will be seen that it has no application whatever to a criminal cause sought to be defended under that section. There the conduct and demeanor of a party in a civil action was sought to be introduced in his own favor as illustrative of a material fact in the case, which was being insisted upon in the defense of a suit. It ap-

pears in that case that a defense set up by one of the defendants was that he was not a member of the partnership sued, and he sought to prove this by testimony that he manifested surprise on being informed he was regarded as being such a member of the firm. The court held that even his words to that effect would have been inadmissible, and that it followed from this that his gestures or exclamations of surprise would necessarily be as inadmissible as plain words expressing the same emotion. We know of no statute rule of law which would justify an assault and battery on account of mere grimaces or facial expressions, even if the idea of contempt and insult could be inferred from such conduct; and certainly no such defense existed at common law. In fact, it took a special statute to authorize opprobrious words and abusive language used by the assailed towards the assailant to be proven in defense, and mere grimaces or contemptuous facial expressions cannot amount to such language or words in their ordinary acceptation and meaning. See, in this connection, Stevenson v. State, 90 Ga. 456, 16 S. E. 95. It does not appear from the record that the judge excluded from the jury the consideration of such conduct in passing upon the guilt or innocence of the accused, for in his order overruling the motion for a new trial he states: "The evidence in this case showed an unprovoked assault and severe beating at the time, and no provocation which would justify such a beating, even by the defendant's statement; his statement being that the prosecutor stared at him and grimaced. Mr. Lively is a very young man, and a very small one physically. Mr. Behling is much older, and much larger physically." The court further stated that, while the requests as made were not given, the charge to the jury "was, in effect, on these various questions that provocation to justify an assault and battery must be present, and must be such as, in the opinion of the jury, would be sufficient." Even if, under any circumstances, then, such conduct as herein set up as a defense could in law justify an assault, we would conclude from the record before us that the defendant has had a fair trial, and that there was no error committed which would authorize an interference by this court with the discretion of the trial judge in refusing his motion for a new trial. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

POOLE v. BAGGETT.

(Supreme Court of Georgia. May 14, 1900.)

CARE OF MARRIED DAUGHTER—LIABILITY OF HUSBAND—CONTRACT.

1. Where a mother received into her home an invalid married daughter, and nursed, waited on, and cared for her during a period of several months, until her death, the mother expressly stating to the daughter that in case of her recovery no charge would be made against her for these services, the mother could not maintain against the daughter's husband an action for the value thereof.

2. The mere fact that the son-in-law had told his wife he would pay her mother for these services (his statement not being intended as a communication to her mother, and he never having, either directly or indirectly, made to the latter any promise to pay) would not of itself create a contractual relation, either express or implied, between himself and his mother-in-law with reference to the services in question; and this is so although the mother, in informing her daughter that no charge would be made against her, may have remarked, "If you can't live, if you don't get well, of course, your husband can pay me."

3. Without regard to other questions made in the record, this case falls within the principle ruled in Hudson v. Hudson, 16 S. E. 349, 90 Ga. 581; and, the verdict for the plaintiff being contrary to law, a new trial should have been granted upon the merits.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Action by M. F. Baggett against T. J. Poole. Judgment for plaintiff, and defendant brings error. Reversed.

J. V. Edge and W. A. James, for plaintiff in error. B. G. Griggs and J. S. James, for defendant in error.

COBB, J. Mrs. Baggett brought suit against Poole upon an account for services rendered in nursing, caring for, and waiting upon the wife of the defendant, who was a daughter of the plaintiff, and for services rendered in nursing, caring for, and waiting on the defendant during his illness. At the trial it appeared from the evidence that Mrs. Poole came to her mother's house in a feeble condition, brought about by a malady which it was evident would most probably terminate fatally; that her mother nursed, cared for, and waited on her, and furnished her with the necessaries of life, until her death, which occurred several months after she came to the house. It was clear from the evidence that there was no express undertaking on the part of Mrs. Poole to pay her mother for the services rendered to her, nor was there anything to indicate that it was the intention of the parties that Mrs. Poole was to be liable to her mother for these services. There was no evidence of any express contract on the part of Poole to pay Mrs. Baggett for the services rendered to his wife, though it might be inferred from the evidence that it was the intention of Mrs. Baggett to charge Poole for them. It appeared that Mrs. Poole told her mother that her husband promised her he would pay Mrs. Baggett for the services, and that the latter said to Mrs. Poole, "If you can't live, if you don't get well, of course, your husband can pay me." Upon this state of facts the jury returned a verdict for the plaintiff in a named sum, and the defendant's motion for a new trial having been overruled, he excepted.

Even if Mrs. Baggett was a competent witness to testify to the terms of the contract

alleged to have been entered into between herself and Mrs. Poole as the agent of her husband, the facts testified to by Mrs. Baggett are not sufficient to show that any such contract was entered into. Mrs. Baggett's testimony in reference to this matter consisted merely of statements by Mrs. Poole to the effect that her husband had assured her that he would compensate her mother for the services rendered to her. There is nothing whatever in the evidence to indicate that it was the intention of Mrs. Poole, as the agent of her husband, to make a binding agreement between herself and her mother whereby her husband was to pay for the services, but she merely repeated to her mother declarations made by the husband evidencing a disposition on his part to compensate Mrs. Baggett for the services rendered to his wife. As the evidence does not disclose any express contract on the part of Poole to pay for the services to his wife, and as the surrounding circumstances do not plainly indicate that it was the intention of both Mrs. Baggett and Poole that the services should be paid for by him, the case falls clearly within the principle ruled in the case of Hudson v. Hudson, 90 Ga. 581, 16 S. E. 349; and the finding of the jury, so far as it related to the services rendered by Mrs. Baggett to Mrs. Poole, was contrary to law, and the verdict should have been set aside. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

HENRY v. PERRY.

(Supreme Court of Georgia. April 11, 1900.)

OPTION TO PURCHASER—TENANT BY SUFFERANCE—POSSESSORY WARRANT.

1. One who obtains from the owner of land an option to purchase the same at a specified price within a time limited, and who, with the owner's permission, enters upon the land for the purpose of prospecting for minerals during the continuance of the option, does not become, after its expiration, a tenant of the owner, and, if he remains in possession without right, is a mere trespasser.

2. In such a case neither the owner nor his successor in title can, by dispossessory warrant, eject as a tenant at sufferance either the purchaser of the option or one holding under him. Without regard to other questions, this case is, upon its facts, taken most favorably for the plaintiff, controlled by the law above announced. In any view of the pleadings and evidence, a verdict for the defendant was demanded, and the court ought to have granted his motion for a new trial.

(Syllabus by the Court.)

Error from city court of Floyd county; George A. H. Harris, Judge.

Action by R. S. Perry against John Henry. Judgment for plaintiff, and defendant brings error. Reversed.

Dean & Dean, for plaintiff in error. Fouché & Fouché, for defendant in error.

COBB, J. This was a proceeding instituted for the purpose of evicting in a summary way the defendant as a tenant at sufferance of the plaintiff. It is indispensable to the maintenance of such a proceeding that the relation of landlord and tenant should exist between the plaintiff and the defendant. Civ. Code, § 4813; Watson v. Tolliver, 108 Ga. 126, 29 S. E. 614; Story v. Epps, 105 Ga. 504, 31 S. E. 109. The evidence in the present case did not show that the relation of landlord and tenant had ever existed between the plaintiff and the defendant. On the contrary, it appeared that the defendant had entered into possession under one who had obtained from the owner an option to purchase the land, and who, with his permission, entered upon the land for the purpose of prospecting for minerals during the continuance of the option. Although the time limited in the option had expired when the proceeding to evict the defendant was instituted, this did not cause the relation of landlord and tenant to arise between the person who had been put in possession by the holder of the option and one who was the successor in title of the owner who had given the option. The verdict in favor of the plaintiff was unwarranted, and the judge erred in not granting a new trial. Judgment reversed. All the justices concurring.

LUCAS v. STATE.

(Supreme Court of Georgia. May 11, 1900.)

CRIMINAL LAW—INSTRUCTIONS—ALIBI—EVIDENCE—NEW TRIAL.

1. A portion of a charge, wherein a complete, accurate, and pertinent proposition is stated, is not, in and of itself, erroneous, simply because it fails to embrace an instruction which would be appropriate in connection with that proposition.

2. In order to establish the defense of alibi distinctively as such, it is incumbent upon the accused to prove by a preponderance of the testimony that he was not present at the scene of the alleged crime; but evidence offered for the purpose for proving an alibi may and should be considered in connection with all the testimony in the case, with a view to determining whether or not the guilt of the accused has been established beyond a reasonable doubt. (a) The charge on the law of alibi given in the present case was in substantial accord with the rule above stated.

3. A ground of a motion for a new trial assigning error upon the refusal of the court to rule out evidence, but not setting it forth literally or in substance, cannot properly be considered.

4. The failure in the present case of the trial judge to instruct the jury that "a confession alone, uncorroborated by other evidence, will not justify a conviction," is cause for a new trial.

(Syllabus by the Court.)

Error from superior court, Dekalb county; John S. Candler, Judge.

Will Lucas was convicted of murder, and brings error. Reversed.

C. Jones and Green & McKinnly, for plaintiff in error. W. T. Kimsey, Sol. Gen., J. L. Travis, and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, P. J. This was a trial for murder, resulting in the conviction of the accused, who excepts to the overruling of a motion for a new trial.

1. The first ground of the motion is as follows: "Because the court erred in the following portion of the charge to the jury, to wit: 'To do that, the state has offered proof of certain circumstances; in other words, the state depends, in this case, upon what is known in law as circumstantial or indirect evidence.' This is error, in that it fails to define circumstantial or indirect evidence, and to inform the jury of the distinction between direct and indirect evidence. This definition and distinction is nowhere given in the charge." It is to be observed that the movant affirmatively alleges that the court erred in using the language to which exception is taken. In other words, he complains that the court ought not to have informed the jury that the state depended upon circumstantial evidence. The only reason, however, assigned in support of this contention, is that the court did not in the same connection explain to the jury the nature of circumstantial evidence. It is obvious that this reason is illogical and untenable. If, as matter of fact, the state did depend upon circumstantial evidence, the trial judge very properly so informed the jury; and it cannot possibly be true that he erred in so doing because, forsooth, he failed to do something else which would have been appropriate. That is to say, the movant complains of an error of commission, when his real cause of complaint, if he had any at all, was that the court was chargeable with an error of omission. In this connection, see McIver v. Railway Co. (Ga.) 36 S. E. 901, in which it appeared that exception was taken to the giving of certain propositions of law which were abstractly correct, but which were alleged to be erroneous because the court failed to give in connection therewith a certain instruction which counsel contended was pertinent and applicable to the case. With reference to this complaint it was said: "We do not think this is the proper way in which to make a question of this kind. If counsel desired any particular principle of law to be given in charge, they should have submitted to the court an appropriate request in writing. Or, if the principle in question was one necessarily involved in the trial, they ought, independently of other matters, to have excepted to the failure of the judge, even though not so requested, to charge the jury thereon."

2. The propositions of law laid down in the second headnote have been fully established by repeated decisions of this court, and the trial judge charged substantially in accord therewith.

3. Complaint is made that the court refused to rule out all of the testimony of a named witness on the ground that the same was irrelevant. The ground of the motion for a new trial dealing with this matter fails, however, to state what the evidence in question was; and therefore, as has often been expressly ruled, the question sought to be made is not properly presented. See Wright v. Willingham (Ga.) 35 S. E. 636; Petty v. Railway Co., Id. 82, and cases cited.

4. The judge charged the jury upon the law of confessions. The instructions given upon this subject were full and accurate, save only that there was an entire failure to inform the jury that an uncorroborated confession was not of itself sufficient in law to warrant a conviction. The motion for a new trial complains of the omission to give this principle in charge to the jury. Unquestionably, it ought to have been given. It is an essential and vital part of the law as to confessions, and without it no charge on this subject can be fair and complete. We think it was the imperative duty of the judge to give this rule of law in charge to the jury in the present case, though no request to do so was presented. He undertook to instruct the jury on the law relating to confessions, and the failure to mention this particular rule may, and probably did, leave the jury under the impression that they could lawfully render a verdict of guilty upon the confession alone. The evidence relied on by the state as corroborative of this alleged confession was by no means strong, and it is impossible for us to know that the jury did not disregard this evidence altogether, and base their verdict exclusively upon the testimony relating to the confession. The case at best, is close and doubtful, and it is by no means clear that the evidence warranted a conviction. It was therefore essential to the fairness of the trial that the jury should have distinctly understood that they could not lawfully convict upon the confession alone, and that it was incumbent upon them to pass on and determine the all-important question whether or not the confession, if proved to their satisfaction, was corroborated by other evidence which, in connection with the confession itself, was sufficiently strong and convincing to satisfy their minds, beyond a reasonable doubt, of the guilt of the accused. After cautioning the jury that confessions "are to be scanned with care," the court added, "They are to be given just such weight, in a case where they are admissible in evidence, as the jury see fit to give them." It is not at all improbable that the jury were thus led to believe that, if fully satisfied that the alleged confession was in fact made, they would be authorized to base a conviction thereon, if they saw fit to attach that much weight to the same. If, indeed, they acted under this impression, it is obvious that their finding should not be permitted to stand; and, as we have no means of determining by what particular process of reasoning they arrived at their verdict, it seems clear that the ends of justice demand that the accused

should be granted a new trial. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

PAYNE v. BOWDRIE.

(Supreme Court of Georgia. April 10, 1900.)

TRUST—DISTRIBUTION OF FUNDS—RES ADJUDICATA — LIMITATIONS — REMOVAL FROM STATE—FINAL SETTLEMENT—INTEREST.

1. Where one, as trustee under a will, was chargeable with funds to be held for the benefit of one for life, with remainder over to her children, if any, and, if not, to other designated persons, and in an equitable proceeding, to which both he and the cestui que trust were parties, it was decreed that he pay the entire fund held by him as trustee directly to the cestui que trust in her own absolute right, such decree was binding upon the trustee, and made it his duty as such to settle with the cestui que trust. This is so although the decree purported to cut off the rights of contingent remainder-man. This might have been a reason for not rendering the decree, but it was nevertheless binding if actually rendered.

2. The trustee is also finally concluded by any other adjudications embraced in such decree, in so far as the decree was based upon and warranted by the pleadings.

3. While, under such a decree, it is incumbent on the trustee to settle at once with the cestui que trust, until he does so, and takes an acquittance from the latter, his relation to the cestui que trust continues to be that of trustee; and the statute of limitations applicable in such a case is that which the law provides as to suits against trustees, to wit, the limitation of 10 years.

4. Until final settlement the relation of trustee continues, and the liability of trustee applies as to any collections made by the trustee for the benefit of the cestui que trust, even after the rendition of such a decree as that above indicated.

5. The statute of limitations is, under section 3783 of the Civil Code, suspended as to a debtor who removes from the state, and does not run in his favor until his return to the state to reside therein.

6. In making a final settlement between a cestui que trust and a trustee, the rule for computing interest is that laid down in section 3498 of the Civil Code, to wit, the trustee should, except as otherwise provided by the statute, be charged with 7 per cent. per annum, without compounding, for six years from the date of his qualification, and with compound interest at 6 per cent. thereafter.

7. In the light of the rulings above announced, the court committed no error in admitting testimony, or in construing the decree which was introduced in evidence, or in adjudging that the defendant was not protected by the statute of limitations, or in directing against him a verdict for the two amounts specified, with interest thereon computed in the manner above stated.

(Syllabus by the Court.)

Error from superior court, Catoosa county; A. W. Fite, Judge.

Action by Susan Bowdrie against W. H. Payne and G. W. Thomas. Judgment for plaintiff, and defendant Payne brings error. Affirmed.

Shumate & Maddox and Payne & Payne, for plaintiff in error. R. J. & J. McCamy and Jones & Martin, for defendant in error.

LEWIS, J. This was an action brought in Catoosa superior court by Susan C. Bowdrie against W. H. Payne and G. W. Thomas as trustees for the plaintiff in the suit. Briefly stated, the petition alleged that certain sums of money had been received by the defendants as trustees of petitioner, and that they had failed to pay over the same to her, which they were authorized and required to do by virtue of a decree of the superior court of Catoosa county in the year 1885, upon a suit brought by her against W. H. Payne and her other brothers and sisters, who were, under the will of her father, Thomas J. Payne, to have the trust fund in case of petitioner's death without issue; she alleging in said action that all her brothers and sisters had released to her their contingent interest in said fund, and that W. H. Payne was willing that the same be paid to her in case it could be done under the releases aforesaid. The defendants in that case were duly served, and upon hearing the evidence the chancellor decreed, in effect, that the contingent interest should be vested absolutely in petitioner. The petition in the present case further alleged that it was claimed by the defendant Thomas that he had resigned from his trusteeship in the year 1883, and settled for all the funds he had received as trustee with his cotrustee, Payne, and that, whether or not this was true, it was the duty of Payne to force a settlement with Thomas, and in either event he was liable for the amount in Thomas' hands. To this petition W. H. Payne filed a demurrer on the ground that the petition shows upon its face that plaintiff's cause of action, if she ever had any, is barred by the statute; 14 years having elapsed since the alleged cause of action accrued. He admitted receiving $175, as charged in the petition, and that he still held the same, and, although plaintiff's right of action is barred by the statute of limitations, he is willing to pay her said sum, with accrued interest. He denies the resignation of Thomas, and denies that Thomas ever settled with him for any funds he had in his hands. He also pleads the statute of limitations, and denies his liability for any funds that ever came into the hands of Thomas as trustee.

The record substantially discloses the following facts: Thomas J. Payne died, leaving a will, appointing W. H. Payne and G. W. Thomas his executors, and directing that after collecting all debts and demands due testator, and after paying his wife a certain sum, the remainder should be divided among his children, to wit, W. H. Payne, A. J. Payne, Arthur Payne, M. V. Ward, Mary F. Thomas, and Susan C. Bowdrie, equally. He also in the will devised that certain land be sold as soon as the interest of his wife therein terminated under a deed to her, and that the proceeds be divided in the same way as the money above mentioned. The will stipulated, as to the bequests made to Susan C. Bowdrie, that her interest in the property was subject to the restrictions and limitations named as follows: "To be held by my

executors in trust, and by them loaned out, and the interest arising therefrom be paid her; it being my desire that this fund be held by them for her use and benefit, and that her present husband or any of his relations shall never have any interest in or control of said funds, and, in the event that the said Susan C. Bowdrie should die without children in life, then the amount hereby willed to her in this fund be by my executors equally divided among my other children then in life, or their children then in life." The following receipt was read in evidence by plaintiff's counsel: "$306-$^{00}/_{100}$. Received of G. W. Thomas, trustee for Susan C. Bowdrie, one note for $278-$^{87}/_{100}$ on W. E. Johnston and J. H. Johnston, principals, and A. T. Hackette, security, dated March 25th, 1879, payable to G. W. Thomas and W. H. Payne, trustee for Susan C. Bowdrie; interest paid on same for two years; also, the sum of $32 $^{22}/_{100}$ cash, funds of said trusteeship turned over to me as sole trustee by said Thomas, former co-trustee. This December 10, 1883. [Signed] W. H. Payne, Trustee for Susan C. Bowdrie." There was also introduced in evidence by plaintiff the bill of petitioner above referred to, filed by Susan C. Bowdrie against A. J. Payne, Arthur Payne, Mary F. Thomas, M. V. Ward, and W. H. Payne in Catoosa superior court on July 19, 1884. This bill brought by Mrs. Bowdrie set forth the will of Thomas J. Payne, admitted that the property therein given to oratrix was limited to a life estate, with remainder to her brothers and sisters, should she die leaving no children surviving her; also, alleging that all her brothers and sisters, except W. H. Payne, had conveyed to her all their contingent interest in the property devised to her, and that W. H. Payne expressed himself willing to assign his contingent interest therein. Copies of the assignments or transfers were attached to the bill. The bill also alleged that G. W. Thomas, one of the trustees named in the will to hold the portion of the estate given to her, had resigned his trust, and that the trust fund had been turned over to the other trustee, W. H. Payne. It was insisted that under the laws of Georgia she was entitled to receive all the trust fund, with the permission of said W. H. Payne, and, if he declined to consent, at least four-fifths of the fund. W. H. Payne was willing to turn the fund over to oratrix if he was allowed, under the law, to do so, but desires the decision of the court whether, under the facts and law applicable thereto, he would be safe in so doing. Service of this bill was acknowledged by all the parties named, including W. H. Payne. The following decree was rendered thereon: "The foregoing bill having been duly served, and the allegations therein being admitted to be true, and the trustee W. H. Payne, who also has a remainder interest in the property devised, expressing his willingness to relinquish his contingent interest, it is therefore decreed that the said W. H. Payne, after deducting such amount as may be necessary to pay any cost to the ordinary for dismission as trustee, and his commission as trustee, should he claim any, that he pay over to complainant, and her receipt shall be an acquittal to him, and the complainant pay the cost of this bill. Feby. term, 1885. [Signed] J. C. Fain, J. S. C. C." Payne testified in his own behalf in the case at bar that, while he admitted giving Thomas the receipt above copied, he did not receive the note and cash therein mentioned, and never had received any funds from Thomas. He admitted receiving the $175 in 1891, as Mrs. Bowdrie's distributive share in the sale of certain lands. Thomas swore positively that he did turn over the note and cash mentioned in the receipt to Payne. Hackette, the security on the note, testified that he paid the amount due thereon to Payne; that he first went to Thomas to pay him, but Thomas refused to receive it, because he intended to resign as trustee, and turn the whole matter over to Payne. Hackette admitted that he once told Payne that he did not pay him this fund, but afterwards, upon his recollection being refreshed, he was positive in his testimony that he had paid it to Payne. A joint annual return made by W. H. Payne and G. W. Thomas, as executors of T. J. Payne, deceased, to the ordinary, in 1891, was introduced in evidence, showing, among other things, "$175 for S. C. Bowdrie, to be held for further consideration and direction." The original return was in the handwriting of W. H. Payne, and one item was, "By amount received as trustee of Susan C. Bowdrie." This item was erased, and the words first above quoted inserted. Counsel for defendant Thomas introduced a return made by him as trustee for Susan C. Bowdrie to the ordinary of Catoosa county on December 10, 1883, showing the note on W. E. and J. H. Johnston, principals, and A. T. Hackette, security, dated March 25, 1879, payable to W. H. Payne and G. W. Thomas, trustees for Susan C. Bowdrie, for $273.87; also, the receipt of W. H. Payne for said note and $32.22 cash, as a voucher. Thomas insisted in his testimony that he had resigned, and turned over all the assets held in trust for Mrs. Bowdrie to Payne, as trustee; that he employed counsel to obtain this resignation. But there was a failure to show any record of such resignation or discharge in any court, save the decree of the chancellor rendered in 1885, as above set out. The uncontradicted testimony showed that W. H. Payne moved from Catoosa county, Ga., to Chattanooga, Tenn., on April 27, 1889, and has lived there continuously since that date.

After the introduction of the evidence by all the parties, the portions material to the issues in this case being above set out, pending the concluding argument of counsel for plaintiff the court below stopped the argument, and announced that he held that the

proceedings introduced by the plaintiff as evidence in the suit brought by her against W. H. Payne and others in Catoosa superior court, in July, 1884, were conclusive upon the following points: (1) That Thomas had resigned or had been discharged from the trusteeship; (2) that all the assets that came into the hands of Thomas as trustee for Susan C. Bowdrie, the plaintiff, were turned over by said Thomas to his co-trustee, W. H. Payne, and that by said proceedings the defendant Payne was estopped from denying that Thomas had resigned, and that said Payne had received all of the assets that were in the hands of Thomas as trustee of the plaintiff. The court further announced that he held that Payne was not protected by the statute of limitations, and that he was liable for the $175 received by him in April, 1891, with interest thereon, and also liable for the amount of the note specified in the receipt which had been read in evidence by the plaintiff's counsel, and interest thereon, and that the court would direct a verdict against the said Payne for the said two amounts, with interest thereon at the rate of 7 per cent. per annum for six years on all funds that were in his hands at the date of the decree rendered in the suit brought by the plaintiff against W. H. Payne et al., and on all funds that came into his hands subsequent to the date of this decree at the rate of 7 per cent. per annum for the first six years, without compounding, and at the rate of 6 per cent. per annum after the first six years, compounded annually. The court directed the jury to return a verdict in accordance with such holding and instructions, and a verdict was accordingly rendered. This case was brought here by direct bill of exceptions, alleging error in the action of the court above set out.

1, 2. Counsel for plaintiff in error contend that the court erred in admitting in evidence at all the record of the proceedings in the case of Mrs. Susan C. Bowdrie against W. H. Payne and others, under which a decree was taken at the February term, 1885, and that the court also erred in its rulings as to the effect of that decree. The grounds of objection were as follows: (1) Because said petition shows that the suit was not between the same parties as the suit now on trial; (2) because G. W. Thomas, one of the defendants to the suit now on trial, was not a party to the suit, the record of which is offered in evidence; (3) because the decree rendered in said case does not specify any amount as due from defendants in said suit, or either of them, to the plaintiff, nor does it specify what choses in action or other assets are in the hands of the defendants, or either of them; (4) because the petition in the suit tendered in evidence does not set out any specific amount claimed against the defendant.

We do not think that any of the grounds of objection are well taken. The fact that the former suit of Mrs. Bowdrie did not include all of the parties to the present case cannot possibly affect the validity of the decree as to those who were parties in the original case. No question is presented that the court did not have jurisdiction of the persons and subject-matter in that case, and no question is made that the adjudications in the final decree were not based upon and warranted by the pleadings. The same plaintiff in that suit was the plaintiff below in the present action. One of the parties defendant (and it appears from the record that he was the main and principal party defendant) was W. H. Payne, who is the principal party defendant in this case. That bill was filed, not for the purpose of establishing any particular amount, or obtaining a judgment for any particular sum, with which the defendant Payne might have been chargeable as trustee. It was a proceeding in equity, the sole purpose of which was to obtain a decree empowering Payne, the trustee, to turn over whatever trust funds with which he might be chargeable to the complainant. It alleged that all the brothers and sisters having a contingent interest in this fund had conveyed their respective interests to the complainant, except W. H. Payne, and that he was willing to assign his contingent interest therein. These assignments by the others were shown in evidence on the trial. The bill further alleged that G. W. Thomas had resigned his trust, that his resignation had been accepted, and that the trust fund had been turned over to the other trustee, W. H. Payne. The complainant insisted that under the laws of the state she was entitled to receive the trust fund, with the permission of said W. H. Payne. The decree recites the fact that the bill had been duly served; that its allegations were admitted to be true; that W. H. Payne, who had a remainder interest in the property devised, had expressed his willingness to relinquish his contingent interest; and it was therefore decreed that after deducting the costs for his dismissal as trustee, etc., he pay over the balance to complainant, and that her receipt would be an acquittal to him. Of course, the decree does not undertake to fix any amount against the trustee, and we think that, if it did so, such a portion of it would have been void, for the reason that the pleadings did not authorize it, or pray for any such adjudication. This record was not, therefore, introduced for the purpose of establishing the liability of the defendant in any particular amount, but solely to show that Payne had become the sole trustee of the estate, and that it authorized him to settle with the cestui que trust, the complainant in that case. The principle of law controlling this question is so well settled by the Code of Georgia as to amount to an absolute demonstration that the ruling of the court in admitting this record, and his conclusions with reference to the effect of this decree, were sound. Section 3741 of the Civil Code de-

clares, "An adjudication of the same subject-matter in issue in a former suit between the same parties, by a court of competent jurisdiction, should be an end of litigation." Section 5233 declares, "A judgment is admissible between any parties to show the fact of the rendition thereof; between parties and privies it is conclusive as to the matter directly in issue, until reversed or set aside." Section 5348 declares, "The judgment of a court of competent jurisdiction is conclusive between parties and privies, as to the facts which it decides, until reversed or set aside." In the case of Claflin Co. v. De Vaughn, 106 Ga. 282, 32 S. E. 108, the principle is declared that a decree in equity is conclusive upon the parties to the case on all questions raised, or which could have been raised, relating to the property to be affected by the decree. There is nothing in the contention of counsel for plaintiff in error that the decree purports to cut off the rights of contingent remaindermen who were not parties to the action. It is contended, for instance, that if one of the brothers or sisters should die before the death of the life tenant, and leave children surviving, such children would be entitled to an interest in remainder. This might have constituted a reason for not rendering the decree, but this does not prevent the decree from being actually binding on all the parties to the case who were properly before the court. Our conclusion, therefore, is that the rulings of the court below construing this decree, and in determining its legal effect, were entirely in accord with the well-established principles of law.

3. Under this decree, it was incumbent on the trustee to settle at once with the cestui que trust; but it does not follow from this that the contention of counsel for plaintiff in error is correct,—that the effect of the decree was to end the relation of the parties to each other as trustee and cestui que trust. Nor is there anything in the contention of counsel that the plaintiff in error, under the will, does not occupy the position of trustee towards the defendant in error, as she was sui juris, and was entitled under the will only to the interest on the property, or its proceeds, devised for her benefit, and that therefore the executors named in the will were only trustees for the remainder-men. This was clearly an executory trust. The beneficiaries thereof were not only contingent remainder-men provided for, but also Mrs. Bowdrie, who had an interest in the property or its proceeds for life. She was not, under strict law, entitled to the corpus of the fund on account of the contingent remainders created, but it was manifestly the duty of the trustee to retain the corpus, not only for the protection of such remainder-men, but also to manage it in such a way as to realize interest therefrom, to be paid to the life beneficiary. Now, this relation of trustee and cestui que trust continues until the trustee effects a final settlement with the beneficiary. This he was authorized and required to do under the decree, but until this is done he still occupies the position of trustee. He has never been discharged from this trust. He has never had any settlement with the beneficiary, and in a suit against him for such a settlement it is necessarily an action against him as trustee. He therefore does not occupy the position of an individual indebted upon an open account, which is barred in a period of four years after the right of action accrues; but the statute of limitations applicable to the case is embodied in section 3772 of the Civil Code, which declares that all actions against executors, administrators, guardians, or trustees, except on their bonds, can be brought within ten years after the right of action accrues.

4. Until such final settlement is had between the trustee and beneficiary, the relation of trustee continues, and, of course, the liability of a trustee applies to any collections made by him for the benefit of the cestui que trust, even after the rendition of a decree by a court, requiring a final settlement of the trust estate. Therefore the money collected by this defendant Payne in 1891 was received by him as trustee. Under the record, however, in this case, this is a question of no importance, in so far as the result of this trial is concerned, because the defendant admits collecting this money, and expressly declines to defend against its recovery.

5. It is claimed that this right of action accrued when the decree was rendered, and that about 14 years had elapsed between that time and the bringing of this suit. It appears, however, from the evidence, that in 1889 the defendant left the state of Georgia, and moved to the state of Tennessee, where he has been living ever since. Section 3783 of the Civil Code declares: "If the defendant, in any of the cases herein named, shall remove from this state, the time of his absence from the state, and until he returns to reside, shall not be counted or estimated in his favor." Clearly, then, under this statute, and the undisputed evidence in the case, the bar of ten years had not attached, and the court was right in holding that the claim had not been barred by the statute of limitations.

6. Exception is also taken to the ruling of the court upon the subject of interest chargeable against the defendant. By comparing the ruling above set forth with the statute embodied in section 3498 of the Civil Code, it will be seen that his conclusions were exactly in accord therewith, and no reason is urged why that section is not applicable to this case.

7. The verdict in this case was only against the defendant Payne, as the jury found a verdict for the defendant Thomas. No exception was filed to this finding as to Thomas, and therefore the record, in so far as it bears upon his liability or want of liability, is not considered in this opinion. In the light of

the rulings above announced, the judge committed no error in admitting testimony, in his construction of the decree, in his judgment that the defendant was not protected by the statute of limitations, or in directing against him a verdict for the two amounts specified, with interest computed thereon as required by the statute. Judgment affirmed. All the justices concurring.

VARNER v. STATE.

(Supreme Court of Georgia. May 11, 1900.)

LICENSE—SOLICITING EMIGRANTS.

1. An emigrant is "one who quits his country for any lawful reason, with a design to settle elsewhere, and takes his family and property with him."

2. It follows from the foregoing definition that one charged with a violation of law prohibiting the soliciting or procuring of emigrants cannot be convicted upon proof showing that the persons whom he solicited or procured to leave the state had no intention of abandoning their residence in this state, or of acquiring a domicile in the other state, but were leaving merely for the purpose of temporarily engaging in work in the latter state.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Jim Varner was convicted of soliciting emigrants without a license, and brings error. Reversed.

Albert H. Russell and M. E. O'Neal, for plaintiff in error. W. E. Wooten, Sol. Gen., for the State.

COBB, J. Varner was placed upon trial in the city court of Decatur county charged with a violation of section 601 of the Penal Code, which declares: "Any person who shall solicit or procure emigrants, or shall attempt to do so, without procuring a license as required by law, shall be guilty of a misdemeanor." The accused was convicted, and applied to the judge of the superior court for a writ of certiorari, and, sanction of the application having been refused, the accused excepted. Upon the trial it appeared that the accused had made an arrangement with two persons, under which they were to go to the state of Florida, and there be employed in cutting turpentine boxes. The accused was to meet them at a boat on the river, and pay their way to their destination. He stated that he was paid one dollar for each person he carried down the river. The two persons went to the boat, but the accused never came. It clearly appears from the evidence that the purpose of each of these persons was to go to the state of Florida to work, and that neither had any present intention of taking up his residence there. The tax collector of the county testifies that the accused had not paid to him the license imposed by law on "emigrant agents." The section of the Code under which the accused was tried prohibits simply the soliciting or procuring of emigrants, or attempting to do so, without having obtained a license to carry on that business. An emigrant is "one who emigrates or quits one country or region to settle in another." Webst. Int. Dict. "One who quits his country for any lawful reason, with a design to settle elsewhere, and takes his family and property with him." 10 Am. & Eng. Enc. Law (2d Ed.) 1042. The two persons with whom the accused made the agreement were to go to the state of Florida to work. They did not take their families with them, and there was no sufficient evidence to warrant a finding that they intended to acquire a domicile in that state. For this reason the accused was not guilty of a violation of the section of the Code under which he was tried. Whether there is "a license required by law" so as to make any one who procures or solicits emigrants amenable to the section now under consideration is not necessary to be determined in this case. The tax imposed by the general tax act of 1898 is upon "emigrant agents," and an emigrant agent is a "person engaged in hiring laborers in this state, to be employed beyond the limits of the same." See Williams v. Fears (Ga.) 35 S. E. 699, where a full discussion of this question appears. Had the accused, therefore, been charged with having violated the provision of the general tax act above referred to, the evidence in the record would have warranted his conviction; but, having been charged with soliciting or procuring emigrants, or attempting to do so, and the evidence showing that he procured laborers simply to leave the state temporarily, with no intention of abandoning their residence, his conviction was unwarranted, and the judge erred in refusing to sanction the certiorari. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

CENTRAL OF GEORGIA RY. CO. v. FELTON.

(Supreme Court of Georgia. April 11, 1900.)

CONTRACT BY AGENT—REPUDIATION BY PRINCIPAL—RATIFICATION.

1. One may at pleasure repudiate a contract which his agent, in direct violation of positive instructions previously given him, undertakes in his representative capacity to make with a third person who is fully cognizant that such agent is transcending his authority in the premises. (a) This familiar rule of law is peculiarly applicable to a case where it appears that the agent of a railway company attempted to make with himself, as consignor, a totally unauthorized contract of affreightment.

2. There was, in the present case, no evidence authorizing a charge to the effect that, notwithstanding the agent may have violated his instructions, yet, if the railway company "had knowledge of such contract, and acquiesced in it, then it would be liable to the plaintiff under that contract."

3. For no reason assigned were other portions of the charge excepted to erroneous, and, save as to the matter referred to in the preceding

note, no material error appears to have been committed at the trial.

(Syllabus by the Court.)

Error from superior court, Macon county; Z. A. Littlejohn, Judge.

Action by W. H. Felton against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Wm. D. Kiddoo, for plaintiff in error. M. Felton Hatcher and Guerry & Hall, for defendant in error.

FISH, J. The plaintiff below, W. H. Felton, brought suit against the Central of Georgia Railway Company for damages alleged to have been sustained by reason of unreasonable delay in the transportation of four car loads of peaches shipped by him during the month of July, 1896, from Winchester, Ga., to Baltimore, Md., under through contracts of affreightment, by the terms of which he reserved the right to divert the shipments from the destination specified to such other point as he might designate before carriage was completed by delivery at Baltimore. In its answer, the defendant company denied that any through contract was made as alleged. It set up the defense that, on the contrary, it accepted the shipments for carriage to the end of its line only, with the express understanding that its liability should cease upon delivery of the peaches in good order to the next connecting carrier; and, having fully performed its undertakings in this regard, it was not answerable in damages for any delay which might have occurred on any of its connecting lines. On the trial of the issue thus formed, a verdict was returned in favor of the plaintiff. The case comes to this court upon a bill of exceptions assigning error upon the refusal of the judge to sustain a motion for a new trial duly filed by the losing party. Such other facts as are essential to an understanding of the rulings herein made will be developed as the discussion which follows progresses.

1. Having alleged the making of special contracts by the terms of which the company obligated itself to transport the peaches within a reasonable time to their ultimate destination, it was, of course, incumbent on the plaintiff to prove his case as laid, especially in view of the fact that the undisputed evidence showed that the delay complained of occurred on a line other than that operated by the Central Railway. On the trial it appeared that the plaintiff was the company's agent at Winchester, the station from which the shipments of peaches were made, and, as such agent, undertook to bind the company by contracts of affreightment made in behalf of himself in his capacity of shipper, which, the company contended, were on terms more favorable than it had authorized him, as its agent, to offer to its patrons. The issue was thus squarely presented whether or not Felton, acting as agent for the company, really exceeded his authority in the premises, and in this connection the defendant showed by uncontroverted evidence the following facts: In June, 1895, the company fixed the rates to be charged by its local station agents on "green fruit," and issued to each of them printed instructions in regard thereto. The copy of these instructions which was sent to Felton, its agent at Winchester, was introduced in evidence, the same having come from his custody under a notice to produce it at the trial. Direction was thereby given him that certain rates named therein applied "only on shipments when the carrier is released from liability, except for its own negligence, and when the valuation is limited to $500 per car, in accordance with the contract of bill of lading prepared for such shipments, which must be signed by the shipper before these rates can be taken advantage of"; and that "on all shipments for which released bills of lading are not signed by the shipper the rates [were] 50 per cent. higher than those shown." Felton was furnished with a suitable quantity of blank bills of lading of the form just referred to, with instructions that the same were to be used in the shipment of fruit, and he was also directed to "make a request on the purchasing agent" if more were needed. The contract therein embraced contained various stipulations as to the obligations assumed by the company and as to its liability in the event of loss or delay. Among others was the following: "The responsibility, either as common carrier or warehouseman, of each carrier over whose line the property shipped hereunder shall be transported shall cease as soon as delivery is made to the next carrier or to the consignee; and the liability of the said lines contracted with is several, and not joint; neither of the said carriers shall be responsible or liable for any acts, omissions, or negligence of the other carriers over whose lines said property is or is to be transported." Another stipulation was that, unless the destination of any given shipment should be "on its road," the individual carrier obligated itself merely "to deliver to another carrier on the route to destination." The same rates prevailed during 1896, and in June of that year the company redistributed to all of its freight agents the printed instructions issued to them in 1895. Notwithstanding his positive instructions not to give to shippers the benefit of the reduced rate unless they signed bills of lading setting forth the contract of limited liability above referred to, Felton, when he shipped the peaches which are the subject-matter of this litigation, took advantage of this reduced rate without signing such bills of lading; and long subsequently, when this fact came to the knowledge of the officials of the railway company, he

positively declined to furnish them with bills of lading of this kind, signed by himself as the shipper of the four cars in question, though expressly requested to do so. From the testimony introduced in behalf of the plaintiff it appears that while he was, indeed, the company's agent at Winchester, the routine work connected with the office at that point was really done by a clerk in his employ, he merely exercising a general supervision over the business; and, accordingly, when he shipped the peaches in question at the reduced rate without signing bills of lading in the prescribed form, he acted in perfect good faith, and with no purpose of violating or disregarding the duty he owed the company as its agent. In this connection it was further shown that he had uniformly, as such agent, given the same rate to other shippers at Winchester, without requiring them to sign any special contract, and had himself previously shipped from a near-by station peaches on his own account at the same rate, the agent at that station not requiring him or other shippers to sign any bill of lading at all. This explanation, though showing absolute good faith on the part of Felton, cannot, in our opinion, overcome the positive and unequivocal evidence introduced by the company showing that, as matter of fact, there was at least a technical violation on his part of the duty he owed it as its agent, the consequences of which he, rather than it, should suffer. Clearly, the fact that he had previously, in dealing with other shippers, disregarded his principal's orders, could not be invoked by him as an excuse for failing to observe such orders when undertaking to bind the company by a contract made with himself individually. Nor can it be said he was relieved of the duty he owed to his company merely because another agent, at a neighboring station, for any reason neglected to obey like instructions from the company, which he had received. The law is well settled that: "When the directions to an agent are clear and well defined, it is his duty to follow them faithfully, provided this may be lawfully done. * * * Although the agent is, in the absence of instructions, bound to follow the established usage or mode of dealing, yet no custom or usage will authorize a departure from positive instructions. The instructions of the principal make the law by which the agent is to be governed." 1 Am. & Eng. Enc. Law (2d Ed.) 1062. And as a matter of course, when, in dealing with third persons, the agent transcends his authority, or otherwise violates his duty, "if such persons are aware of the instructions, the principal is not bound." Id. 995. So, even if the plaintiff stands upon the same footing as would a third person, who, knowing all he did, made a similar contract of affreightment with an agent of the company, the conclusion seems irresistible that the company cannot legally or equitably be held liable to the plaintiff on the ground that it became bound by the acts of its agent, irrespective of the question whether such agent did or did not act within the scope of his authority. The company had issued explicit printed instructions to all its agents, including Felton, concerning the rates to be charged on different classes of freight. Considered as an individual, he certainly knew that as agent he had no authority to himself fix any rate in disregard of express orders, and that the precise measure of his authority as to the shipment of fruit was readily ascertainable by reference to printed instructions on file in his office. In other words, he was, not a general agent, but one with restricted powers. Accordingly, one who knew not only this fact, but also that his authority as agent was in writing, and open to inspection at the particular time and place, could not be heard to say that he was acting within the apparent bounds of his authority. "Third parties dealing with an agent are put upon their guard by the very fact, and do so at their own risk. They cannot rely upon the agent's assumption of authority, but are to be regarded as dealing with the power before them, and must, at their peril, observe that the act done by the agent is legally identical with the act authorized by the power." 1 Am. & Eng. Enc. Law (2d Ed.) 986, 987, cited approvingly in Camp v. Trust Co., 97 Ga. 586, 25 S. E. 362. In no view of the question, therefore, can it fairly be said that the defendant company was not at liberty to defend the plaintiff's action on the ground that it was not legally bound by the alleged contracts of affreightment upon which he bases his right to recover.

2. A witness introduced by the plaintiff testified that he lived "at Marshallville, about three miles from Winchester," and, though he had "been engaged in shipping peaches from Marshallville to the Northern markets for twenty years or more," he never saw a bill of lading until after 1896, and did not "think shippers took any bills of lading before" that year. On cross-examination, however, he further testified: "I never shipped peaches from Winchester. We were required this year, for the first time, to get bills of lading, and I trusted to the refrigerator company to get my bills of lading. It is a fact that I have seen bills of lading like the blank handed me by counsel prior to that time, signed up for myself and others. I stated before that we signed bills of lading years ago, but we have not done it recently. I do not recollect about 1896, but I do recollect that the roads were using the blank handed me for some of the bills of lading. I do not remember whether the parties, when they signed these, got a less rate of freight than if there had been a shipment without or not." Several other witnesses testified on the same line, but none of them undertook to say that the reduced rate was allowed in any instance where

a bill of lading was not required. Felton himself swore: "We shipped peaches for the very price other people were charged. There was no bill of lading issued to anybody. I shipped from Marshallville last year, and never had a bill of lading from there nor anywhere else. I never had one until this year." He also testified: "We are compelled to issue them this year,—we never did before,—and turn them over to him [the shipper]. Now we force him to take the bill of lading." The plaintiff's son-in-law, who acted as his agent in the Northern markets in disposing of his fruit, testified: "Mr. Felton shipped peaches from Marshallville in 1895, 1896, and 1898 at the same rate as from Winchester, which rate has prevailed ever since we have been shipping peaches. I do not know about the special rate given without release at all. I know that is the rate we paid. I don't know whether it was a rate given released or not." In this connection the trial judge, after charging the jury to the effect that the railway company would not be bound by any contract which Felton undertook to make with himself in violation of his positive instructions, added: "Yet if you should believe from the testimony that such contract was made contrary to his instructions or authority from the railway company, and they had knowledge of such contract, and acquiesced in it, then it would be liable to the plaintiff under that contract." This portion of the charge is excepted to "because not good law under the facts of this case," and because "there was no evidence of any knowledge on the part of any officer or employé of the company who could acquiesce, or any acquiescence on the part of the railway company" itself. We think the point well taken. The mere fact that during the season of 1896 one or more agents of the company departed from their orders in regard to shipping fruit to points beyond its line certainly would count for nothing in the absence of any evidence tending to show that the company was aware that no bills of lading were issued, and tacitly assented to shipments being received at reduced rates without requiring shippers to sign the special contract hereinbefore mentioned. It does appear that the plaintiff or his agent was permitted to divert the shipments from their original destination to other Northern markets, and that the peaches were delivered without the production of a bill of lading. But this circumstance was fully explained by the company's general agent who was in "charge of the movement of the peach business" during the season of 1896, and who testified, in substance, as follows: As a favor to its patrons, the company tried to assist them to reach good markets. When it was ascertained their fruit was consigned to an "overstocked" market, they were permitted, upon giving the company prompt notice of this fact, to change the original destination, and direct the shipments to be turned over to different consignees. As to two of the cars shipped by the plaintiff, when notice was received from his Northern agent to divert the shipments to points designated, the company's general agent immediately complied with the request to give appropriate orders for such change, without requiring a surrender of bills of lading, as the shipments were composed of "perishable stuff," and the matter could not be delayed. He, however, at once telegraphed to the company's local agent at Marshallville to procure the bills of lading which he supposed had been issued to Felton, and in a day or two received two bills of lading, properly filled out, which purported to have been signed by Felton. As to the other shipments which were subsequently diverted in like manner, the necessary orders were at once issued without requiring the production of bills of lading, upon the assumption that the same were in Felton's possession, and would be surrendered on demand. In other words, the company endeavored to accommodate the shipper by giving orders to divert the shipments, and to turn the same over to such person at the ultimate destination as the shipper might direct; and although its general agent desired to protect his company by getting possession of the bills of lading, in order that they might not get into the hands of innocent third persons, he relied upon the shipper to surrender such bills of lading as soon as practicable after the change requested by him was made. The two bills of lading which the witness testified were received by him in response to his request upon the agent at Marshallville to secure the originals issued to the plaintiff were produced at the trial, although neither of the signatures to the same appear to have been made by the plaintiff, or by any one authorized by him to sign his name thereto. On the contrary, both the plaintiff and his clerk testified that no bills of lading covering any of the shipments were ever issued, and those produced at the trial were not genuine. In several telegrams which passed between the railroad officials concerning the diversion of the four cars of peaches shipped by the plaintiff reference is made to the matter of procuring the surrender of the bills of lading which they assumed had been issued; so, it would seem, no inference can fairly be drawn that, simply because the company allowed the shipments to be diverted, and turned the same over to the plaintiff's agent in the North without requiring a surrender of a bill of lading, the company's officials must, of necessity, have known that no bills of lading were in fact issued. Nor was it shown that the company derived such knowledge from any other source. The record before us does disclose that the company had in its employ an auditor, who, during the years 1895 and 1896, visited the company's office at Winchester from time to time, examined the agent's books and other papers, and reported that the affairs of the office were being properly

conducted. However, it affirmatively appears that this auditor had no knowledge of the fact that Felton did not require shippers to sign bills of lading, and that it was not in the line of the auditor's duty to inquire whether the company's station agents followed the instructions issued to them as to giving reduced rates only in the event shippers signed the prescribed form of special contract in consideration of which such rates were offered. The plaintiff himself testified he never told the auditor about the practice in this regard which prevailed at that office, and further said on cross-examination: "We have now to keep a duplicate bill of lading. We give one to the shipper, and the other is kept. We were never forced to do it, I will say, before this case was commenced." So it would seem, if, during the years 1895 and 1896, agents were not required to keep on record in their offices duplicate bills of lading, the auditor, however diligently he may have performed his duties, could hardly have surmised, from the absence of such duplicates, that no original bills of lading were being issued in accordance with instructions. Whether, had it been shown this officer did in fact know of a violation by agents of such instructions, his failure to make objection to the practice would amount to an implied ratification binding upon the company, we are not called upon to decide. Suffice it now to say that knowledge was not brought home to any official of the company who had power, in its behalf, to ratify the contracts of affreightment upon which the plaintiff relies, but which, as has been seen, cannot be deemed binding upon the company in the absence of satisfactory evidence tending to show that it subsequently ratified the same.

3. Exception is also taken to other instructions given to the jury, though no attempt to assign error thereon is made otherwise than by characterizing such instructions as erroneous. As was ruled in Anderson v. Railway Co., 107 Ga. 500, 33 S. E. 644, a general assignment of error upon a designated portion of a charge is to be treated as raising the single question whether or not the instruction thus complained of "states a correct abstract principle of law." The charges now under consideration are not open to the objection that the propositions therein announced are unsound. Whether these instructions were precisely adjusted to the facts of this particular case is a question upon which we will not attempt to pass, as this is a matter which the loose and general assignment of error above referred to does not properly bring under review.

In the motion for a new trial complaint is made that the court erred in rejecting certain evidence offered in behalf of the defendant, and also in admitting other evidence introduced by the plaintiff over objection of counsel for the railway company. In the view we take of the case, however, the points thus raised are of little importance, and need not be specifically dealt with; for they cannot become material at the next hearing, unless—as we think it hardly probable—the facts brought to light by the evidence are essentially different from those appearing in the record before us. At any rate, if any substantial error was committed by the trial judge in the admission or rejection of evidence, we may safely trust him to correct the same upon the next hearing. Judgment reversed. All the justices concurring.

ELLIS et al. v. GRAY et al.

(Supreme Court of Georgia. April 11, 1900.)

DEED—CONSTRUCTION—RESERVATION OF POWER.

Where a deed, after conveying property in fee simple to two named grantees, further stipulated that the grantor retained and reserved to herself the right to reinvest or dispose of the property as she might think necessary "for the advantage and use" of the grantees, *held*, that this reservation did not, at most, confer upon the grantor anything but a mere power to sell, and reinvest for the benefit of the grantees. *Held*, further, that a subsequent deed from the same grantor, dealing with the same property, and undertaking to convey a life estate to one of the grantees, with remainder over to her children, and second remainder over to the other grantee named in the original deed, was not a good execution of such power.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Action by Charles S. Ellis and others against Z. T. Gray and others, trustees. Judgment for defendants, and plaintiffs bring error. Affirmed.

John A. Hood, F. A. Cantrell, and W. R. Rankin, for plaintiffs in error. Starr & Erwin and R. J. McCamy, for defendants in error.

COBB, J. Ellis and others brought an action against Gray and others, trustees of a Methodist church, to recover possession of a parcel of land. Upon the trial the following facts appeared: Both parties claimed under E. A. Neal. On August 17, 1866, Mrs. E. A. Neal (evidently then a widow) conveyed the property in controversy to her two daughters, Indiana E. Neal and Laura J. Neal, upon a consideration of five dollars and natural love and affection. The deed recited that the grantees were "to have and to hold said tract or parcel of land, stock, and household and kitchen furniture, to them, the said Indiana E. Neal and Laura J. Neal, and the heirs of their bodies, together with all and singular the rights, members, and appurtenances to the same in any manner belonging, to them and the heirs of their bodies, for their own proper use, benefit, and behoof, forever, in fee simple, except so much as may be necessary of above property to pay my present debts, or that I may in future create in my own name, but not to

be subject to the debts existing or hereafter created by any future husband that I may hereafter marry, but the right of the possession and free use of all of the above property I retain to myself in trust for my aforementioned children; and, should I think it necessary at any future time to sell any or all of said property, I retain and reserve to myself the right to do so, reinvest or dispose of as I may think necessary for the advantage and use of my said daughters before named. I also retain and reserve the use of all of the above property to myself during my natural life, but not for the use and benefit of any future husband that I may hereafter marry, nor subject to any of his debts existing at the time of our marriage or created after the marriage." On May 27, 1878, Mrs. E. A. Neal executed another paper, in the form of a deed, which purported, in consideration of natural love and affection, to convey to "Indiana E. Ellis [formerly Neal], and her children, if any she has, * * * for and during her natural life, free from the debts and contracts of her present or future husband," the property in controversy; the deed further reciting that Indiana E. Ellis was to hold the property "for and during her natural life, and at her death to her child or children then living, in fee simple, and, if the said Indiana E. Ellis should die without any child or children surviving her, then and in that event I give and grant said property to my daughter Laura Camp [formerly Neal], in fee simple." On August 13, 1888, Indiana E. Ellis, for a valuable consideration, conveyed the property in controversy to the defendants. On August 16, 1888, Laura J. Camp, for a consideration of five dollars, executed and delivered a quitclaim deed to the property in controversy to the defendants. The judge directed the jury to return a verdict in favor of the defendants, and to this ruling the plaintiffs excepted.

Construing the provisions of the deed of 1866 as a whole, the legal effect of that paper was to reserve a life estate in the property to the grantor, and pass the remainder in fee to the grantees, but subject to a trust of which the grantor was the trustee—First, for the purpose of paying the then existing debts of the grantor; second, for the purpose of paying any future debts which she might create; and, third, for the purpose of selling the property, should the grantor see proper to do so, and reinvesting the proceeds for the benefit of the grantees. Subject to these trusts, upon the execution of that paper the title to the estate in remainder created by the deed passed to the grantees. The deed being voluntary, the trust in favor of existing creditors was undoubtedly valid. Whether the trust in favor of future creditors was also valid, it is not necessary to determine. The provision authorizing the grantor, as trustee for the grantees, to sell the property and reinvest the same for their benefit, was valid, so long as the grantees were persons for whom the law authorized a trust to be created. This trust would be good during their minority, and would become executed upon their arrival at majority. But, even if the trust had continued after majority, it was limited by the terms of the deed to a power in the trustee to sell, and reinvest for the benefit of the grantees. The deed of 1878 was not executed by the grantor for the purpose of paying any debts which she owed, either existing at the date of the deed of 1866, or created thereafter, nor in pursuance of a sale, the proceeds of which were to be reinvested for the benefit of the grantees. On the contrary, this deed was a palpable effort on the part of the grantor to deal with the property as her own, and to transfer the entire estate, except an interest that might arise upon a bare contingency, from one of the grantees in the deed of 1866 to the other. It therefore follows that the deed of 1878 was void, except so far as it conveyed the life estate of the grantor. The grantees in the deed of 1866 acquired a fee-simple interest in remainder in the property in controversy, notwithstanding the deed was made to the daughters "and the heirs of their bodies." Civ. Code, § 3085; Griffin v. Stewart, 101 Ga. 722, 29 S. E. 29. Upon the death of Mrs. Neal they became the absolute owners of the property. This being so, the defendants acquired the absolute title under the respective deeds of the two daughters. Judgment affirmed. All the justices concurring.

SOUTHERN HOME BUILDING & LOAN ASS'N v. PACE.

(Supreme Court of Georgia. April 11, 1900.)

BUILDING AND LOAN ASSOCIATIONS—DEFAULTING MEMBERS.

1. Every question involved in this case, as to the respective rights and obligations of a building and loan association, and a member thereof who has received an advance upon his stock, has been settled by repeated adjudications of this court, and the law applicable to suits by such associations against defaulting members has been clearly laid down.

2. The instructions given by the court to the jury for arriving at the amount of the defendant's liability were out of harmony with the established rules for determining the same, and were therefore erroneous.

(Syllabus by the Court.)

Error from superior court, Dade county; A. W. Fite, Judge.

Action by the Southern Home Building & Loan Association against W. W. Pace. From the judgment, plaintiff brings error. Reversed.

T. J. Lumpkin, W. A. Wimbish, and Ligore Johnson, for plaintiff in error. Jacoway & Jacoway and R. J. & J. McCamy, for defendant in error.

COBB, J. The present record discloses the usual controversy between a building and loan association and one of its borrowing members. All the questions involved in the present case have been settled by repeated adjudications of this court, and the law applicable in such cases has been clearly laid down. See Reynolds v. Association, 102 Ga. 126, 29 S. E. 187; Hollis v. Association, 104 Ga. 318, 31 S. E. 215; Cook v. Association, 104 Ga. 814, 30 S. E. 911; Kirklin v. Association, 107 Ga. 313, 33 S. E. 83; Morgan v. Association (Ga.) 33 S. E. 964; Angier v. Association (Ga.) 35 S. E. 64; Smith v. Association (Ga.) 35 S. E. 707. The instructions given by the court to the jury in reference to the manner in which they should arrive at the amount of the defendant's liability were not in harmony with the rules laid down in the cases cited, and for this reason the judgment must be reversed, and a new trial had. Judgment reversed. All the justices concurring.

CANNON v. CENTRAL OF GEORGIA RY. CO.

(Supreme Court of Georgia. May 12, 1900.)

CARRIERS—EXPULSION OF PASSENGERS.

The evidence for the plaintiff being substantially the same as when this case was here before (32 S. E. 874, 106 Ga. 830), and being, under the ruling then made, insufficient to authorize a recovery against the defendant, the trial judge did not err in granting a nonsuit. Smith v. Railroad Co., 10 S. E. 111, 82 Ga. 801.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Action by H. A. Cannon against the Central of Georgia Railway Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Robt. T. Daniel, for plaintiff in error. Hall & Boynton, W. C. Beeks, and Robt. L. Berner, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

ROBERTS v. SMITH.

(Supreme Court of Georgia. May 14, 1900.)

APPEAL IN FORMA PAUPERIS.

This case is controlled adversely to the contention of the plaintiff in error by the ruling made in the case of Truitt v. Shumate, 33 S. E. 48, 107 Ga. 235.

(Syllabus by the Court.)

Error from superior court, Pike county; E. J. Reagan, Judge.

Action between R. C. Smith and J. I. Roberts. From the judgment, Roberts brings error. Affirmed.

A. B. Pope, for plaintiff in error. Jas. M. Smith and John F. Redding, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

WOODS et al. v. PRICE.

(Supreme Court of Georgia. May 12, 1900.)

NEW TRIAL.

There was no error in refusing to grant a new trial upon any of the grounds of the motion therefor, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Butts county; W. M. Henry, Judge.

Action by J. E. Price against J. A. P. Woods and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Ray & Ray, for plaintiffs in error. F. Z. Curry and M. W. Beck, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

MORGAN v. LATHAM et al.

(Supreme Court of Georgia. May 12, 1900.)

GARNISHMENT—PROCEDURE—BOND—LIABILITY.

Where a plaintiff brought two suits in the same court against the same defendant, upon different causes of action, and sued out one summons of garnishment based upon the two suits, consolidating them in the affidavit and bond to obtain the garnishment, the proceeding was illegal and void, and the defendant in the suits could take advantage of the illegality of the proceeding, although he had given bond and dissolved the garnishment. Rich v. Kiser, 61 Ga. 370. (a) The proceeding being illegal, the plaintiff was not entitled to a judgment upon the garnishment bond on both suits or on either.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by B. F. Morgan against R. D. Latham and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Edwards & Ault, for plaintiff in error. W. P. Robinson, for defendants in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

BROOKS v. PROCTOR et al.

(Supreme Court of Georgia. May 12, 1900.)

APPEAL—REVIEW—MOTION FOR NEW TRIAL—BRIEF OF EVIDENCE.

1. The bill of exceptions complaining only of the overruling of a motion for a new trial, and

it appearing that no brief of evidence was filed, the case is controlled by Baker v. Johnson, 27 S. E. 706, 99 Ga. 374; Mize v. Improvement Co., 32 S. E. 22, 106 Ga. 140; Holloman v. Small (Ga.; this term) 35 S. E. 665.

2. As no brief of evidence whatever was filed in the lower court, or brought to this court in the record, and as it has been definitely settled by decisions of this court that there cannot be a valid motion for a new trial without an approved brief of evidence, and as this must have been known to counsel for the plaintiff in error, obviously the writ of error was sued out for delay only, and damages are awarded against the plaintiff in error.

(Syllabus by the Court.)

Error from city court of Forsyth; W. M. Clark, Judge.

Action between B. C. Brooks and Proctor & Huddleston. From the judgment, Brooks brings error. Affirmed.

Stone & Williamson, for plaintiff in error. Persons & Persons, for defendants in error.

PER CURIAM. Judgment affirmed, with damages.

FISH, J., absent on account of sickness.

SOUTHERN RY. CO. v. ARNOLD.

(Supreme Court of Georgia. May 12, 1900.)

APPEAL—REVIEW.

There was no material error in any of the charges complained of in the motion for new trial, when read in connection with the whole charge; there was no error in the admission or exclusion of evidence; the evidence warranted the verdict; and the court did not err in refusing a new trial.

(Syllabus by the Court.)

Error from superior court, Fayette county; S. W. Harris, Judge.

Action by L. Arnold against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Arthur Heyman and Wise & Blalock, for plaintiff in error. Arnold & Arnold and W. B. Hollingsworth, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

NANCE et al. v. STOCKBURGER et al.

(Supreme Court of Georgia. April 9, 1900.)

CANCELLATION OF CONTRACT—MENTAL INCAPACITY.

Proof of weakness of mind not amounting to imbecility is not sufficient to warrant a jury in setting aside a contract, there being no proof of fraud or undue influence. Maddox v. Simmons, 31 Ga. 512; Richardson v. Adams (Ga.; this term) 35 S. E. 648.

(Syllabus by the Court.)

Error from superior court, Catoosa county; A. W. Fite, Judge.

Bill by S. E. Stockburger and others against R. W. Nance and others to cancel a contract. Judgment for defendants, and plaintiffs bring error. Reversed.

W. E. Mann and R. J. & J. McCamy, for plaintiffs in error. Payne & Payne, for defendants in error.

PER CURIAM. Judgment reversed.

LAWSON v. LAWSON.

(Supreme Court of Georgia. April 11, 1900.)

CUSTODY OF CHILD.

In view of the provisions of section 2503 of the Civil Code, and of the evidence disclosed by the record, it appears that the ordinary's discretion was wisely exercised in awarding to the mother the custody of the children concerning whom the controversy existed, and that the superior court did not err in refusing to sanction the petition for certiorari sued out by the father.

(Syllabus by the Court.)

Error from superior court, Randolph county; H. C. Sheffield, Judge.

Action between W. H. Lawson and E. O. Lawson. From the judgment W. H. Lawson brings error. Affirmed.

W. C. Worrill, for plaintiff in error. Arthur Hood, for defendant in error.

PER CURIAM. Judgment affirmed.

HARDEN v. LANG.

(Supreme Court of Georgia. April 6, 1900.)

SALE—CONTRACT—CONSTRUCTION — BREACH—RESCISSION—TROVER—RECOUPMENT.

1. When two parties enter into a contract for different articles of machinery, which altogether constitute an outfit for ginning cotton, for a gross price, the contract is an entire one, and a breach of it is caused by a failure to deliver any separate article of the machinery named. When a breach is so occasioned, the purchaser has a right to rescind the contract on notification and return of the articles which he has received, or he may, at his pleasure, abide by the contract, and have a right of action to recover damages for the breach, but he cannot do both. When, after such breach, he not only retains the articles received, but puts them to his own use, and notifies the seller that he has purchased elsewhere the part of the machinery contracted for, but not delivered, this is equivalent to an election to abide by the terms of the original contract, and he thereafter holds the articles received under those terms.

2. A claim for damages arising from a breach of a contract cannot be allowed by a plea of recoupment in defense to an action of trover, unless some special intervening equity arises in favor of the defendant, such as insolvency or nonresidence of the plaintiff.

(Syllabus by the Court.)

Error from superior court, Burke county; W. M. Henry, Judge.

Action between S. G. Lang and R. A. Harden. Judgment for plaintiff. Defendant brings error. Affirmed.

Phil. P. Johnston, for plaintiff in error. Rawlings & Hardwick and Lawson & Scales, for defendant in error.

LITTLE, J. Harden purchased from Lang certain machinery. The contract between them is embodied in an order of which the following is a copy: "Louisville, Georgia, July 31st, 1897. S. G. Lang, Sandersville, Georgia: Please ship as early as possible the following described machinery: One 8 H. P. portable Ajax engine, mounted on four iron wheels; speeded to 225; small pulley 30 by 8; Pemberta injector; one sixty-saw Pratt gin, with condenser; driving pulley 16 by 9,—for which I agree to pay the sum of ——, one-half Oct. 15th, 1897; one-half Oct. 1st, 1898. Last note to draw 8% interest from Sept. 1st. Ship condenser only to Keyesville, Ga., f. o. b. Waynesboro, Ga. This order is made with the distinct understanding that the title to the said property is to remain in the said S. G. Lang until the purchase money to said property, and all other expenses incurred in the collection of the same, shall be fully paid, and hereby agree to sign and execute all notes as per contract above upon arrival of machinery, and it is understood that these notes shall embody the above understanding. Ship released, and insure, if by water. This contract covers my understanding in full, and there exists no verbal agreement. To be delivered by Sept. 1st, 1897. R. A. Harden. Shipping point, Waynesboro; post office, Oats, Ga." All of the machinery was delivered, and received by Harden according to contract, except the cotton gin, which was promised to follow the shipment of the other articles in a few days. On the 23d of September, finding that his efforts to obtain the gin were unavailing, Harden purchased another gin, and telegraphed that fact to the defendant in error, in consequence of which the gin originally contracted for was never shipped. Harden put in place and used the machinery which he purchased from Lang in connection with a gin which he procured elsewhere, and was in his possession and being so used when the first of the notes became due under the contract. The defendant in error requested Harden to pay him the value of the machinery which he had received. This Harden declined to do. He then instituted an action of trover to recover the engine, fixtures, and other machinery which Harden so received. To this action Harden filed several pleas. Among them was one to the effect that, by reason of the failure of Lang to ship the gin, the reservation of the title to the other property named in the contract became null and void, and Lang was not, therefore, entitled to recover. He further averred that the contract was an entire one; that he purchased the machinery as a plant to establish a cotton ginnery, with the object not only of ginning his own cotton, but that of the public generally, all of which was well known to Lang; that, anticipating the prompt delivery of the machinery, he had entered into contracts with various farmers to gin their cotton for a consideration of $1.50 per bale, all of which he lost by the failure to deliver the gin. Other items of damage resulting from such failure were also set forth, all of which he pleaded in the nature of recoupment against the plaintiff's action. The court sustained a demurrer to a part of the plea on the ground that the damages claimed were too vague, remote, and speculative to be recovered. The court also ruled that unless the defendant should make proof of the insolvency of the plaintiff, who, it was admitted, was a resident of Washington county, in the state of Georgia, the plea of recoupment for the damages sustained by the nondelivery of the gin could not be sustained; and on an admission made by counsel for the defendant that he was not prepared to make proofs of such insolvency, and the admission of the receipt of the machinery which the action was brought to recover, and on proof of its value, the court directed a verdict for such proven value, less the amount of freight paid by the defendant, the plaintiff having elected to take a money verdict. To the rulings which sustained the demurrer and directed the verdict, the defendant excepted.

1. There can be no doubt but that the contract entered into between the parties is by its terms an entire one, and not divisible. While there were several articles of machinery contracted for, they were all articles purchased to be used in one business, to wit, that of ginning cotton, and it required all of them to constitute the plant which Harden proposed to establish, and it seems that these facts were known to the seller. No separate price was put on any of the articles, but Harden agreed to pay a gross sum for this entire plant. The contract, therefore, was not by its first terms divisible. In relation to entire contracts, section 3643 of the Civil Code declares that the whole contract stands or falls together, and it is further declared that the character of the contract is determined by the intention of the parties. Treating this as an entire contract, the failure to deliver the cotton gin at the time agreed was a breach, and the question arises, what remedies or rights accrued to Harden by reason of that breach? Under plain principles of law, as we understand them, his rights were threefold in number: (1) If he elected to treat the breach as a discharge from further performance of the terms of the contract on his part, he was legally entitled to do so. (2) If he had done anything under the contract, or paid out any money in the execution of its terms, he had a right to sue on a quantum meruit and recover for the same; this being a cause of action distinct from the original contract, but based upon a contract created by law. (3) He had a right of action on the original contract, which he might sustain either by a suit to obtain damages for the loss occasioned by the breach, or a suit to obtain specific performance of the contract. He could not exercise all of these rights, but he was entitled to have any one

of them enforced. But if he acquiesced in the breach, and did not claim his discharge from the terms of the contract, but chose to go on with it, instead of repudiating it, and took a benefit under it, he can only have the right of recovery of damages. Clark, Cont. p. 676, and authorities cited in note 177. It was his right originally to have required a delivery of all of the machinery he contracted to purchase, and to have refused to receive any part of it unless the whole was delivered, and we do not mean to say that, if a part of it was received on the promise of the seller that the remaining part would also be thereafter immediately furnished, he would not have been justified in receiving the part shipped, and waiting a reasonable time for the other part, without losing his right to claim that he was discharged from the terms of the contract. But, in order for such claim to be effectual, it was necessary, not only that he should have made an election whether he would continue under the contract or claim that he was discharged therefrom in a reasonable time, but he must also have notified the other party, and surrendered, or offered to surrender, the articles which he had received. If he desired to rescind the contract for the breach occasioned by the nondelivery of the gin, it was necessary, in any event, that the other party should be notified (Parmlee v. Adolph, 28 Ohio St. 10); and this must have been done within a reasonable time, and he must otherwise have done what would have put him and the other party in statu quo, and if he did not do this there was no legal rescission. The rule which prescribes the duty of the party seeking to rescind the contract is that the one proceeding to rescind must either give back or offer to return whatever, of any value to himself or the other, he has received under the contract, because there cannot be a part affirmance and a part rescission. Kellogg v. Turpie, 93 Ill. 265; Bishop v. Stewart, 13 Nev. 25; Lane v. Latimer, 41 Ga. 171; Miller v. Cotten, 5 Ga. 341; Glover v. Green, 96 Ga. 126, 22 S. E. 664; Civ. Code, § 3712,—elaborating this well-recognized principle of law. Justice Bleckley, in the case of Summerall v. Graham, 62 Ga. 729, tersely said: "Restitution before absolution is as sound in law as in theology, and that doctrine prevents an ex parte rescission by the plaintiff without restoring the defendant to his original situation." Now, as to the facts of the present case, we find that Harden not only did not return or offer to return the machinery which he had received, but that he retained it, and put it in operation, in connection with a cotton gin which he obtained in lieu of the one Lang had agreed to deliver. More than that, on September 23d he telegraphed the fact to Lang that he had purchased a gin elsewhere. The evident meaning of this notification was that Lang need not deliver the gin which was originally embraced in the contract, and, while the necessity for the procurement of another gin was undoubtedly caused by the fact that Lang failed to comply with his contract and ship him a cotton gin, this notification, in effect, operated as a waiver of the obligation that Lang should thereafter deliver the gin. So that by the failure to return the machinery which he had already received, and the appropriation of it to his own use, as well as by the waiver, it must be held as a matter of law that Harden did not elect to rescind, and it follows that as to the machinery which he received and kept his rights are to be governed by the terms of the original contract. It would not at all be in accordance with the law governing contracts to hold that, as Harden received the machinery under a particular contract which had been broken by the seller, he could retain possession and use that portion received by him with no other liability than being under an equitable obligation to pay its value, when the contract he had entered into declared that he should have no title until he had paid for it, because having, when the breach occurred, different and distinct rights, he elected not to return the machinery, but to keep it as his property. It was delivered to him under a particular contract, and in law he must receive it under that contract or not at all. But, if he did receive it and keep it, then the terms of the contract became operative as to what he did receive. By that contract Lang retained title to the property which he had shipped in himself, and when Harden received and kept it necessarily he must hold it on the terms originally agreed to and under which it was delivered to him. But it is argued that, inasmuch as only one-half of the purchase money was past due, even if it were maintainable an action of trover could not be brought until the time of the payment of the entire purchase money had elapsed. In the case of Jones v. Snider, 90 Ga. 276, 25 S. E. 968, this court held that a seller of personal property who had reserved title in himself could, even after obtaining a judgment against the buyer for the price and collecting a portion of the same, without canceling the judgment or paying or tendering back what had been received, maintain against the buyer an action of trover for the purpose of collecting the balance of the purchase money; citing Dykes v. McVay, 67 Ga. 502; Bowen v. Frick, 75 Ga. 786. See, also, Guilford v. McKinley, 61 Ga. 230; Hill v. Winn, 60 Ga. 337. An action of trover raises only the issue of title, and, even where a money verdict is elected to be taken, that verdict is, ordinarily, the value of the property. Campbell v. Trunnell, 67 Ga. 518. Certainly, where the action is brought under title reserved in a conditional sale, it may be defeated by tendering the purchase price, which is the value of the property fixed by the parties. But this is on the principle that the payment of the purchase money under the contract defeats the title of the seller, and vests it in the purchaser. So that, while title

remains in the plaintiff where there has been a conditional sale, and the purchase money or any part of it is past due, while the seller may proceed to recover a judgment against the vendee for the purchase price, his right to maintain trover and assert his title under the terms of the purchase remains intact until the condition which defeats his title—that is, the payment of the purchase money—has been performed, and in case of recovery the measure of damages is the value of the property.

2. Another contention of the plaintiff in error is that the court erred in directing a verdict for the plaintiff for the value of the machinery in his possession, and ruling, in effect, that, unless it could be shown that the plaintiff was insolvent, the damages claimed to have been sustained because of the breach of that contract could not be pleaded in the nature of recoupment in an action of trover, it being shown that the plaintiff was a resident of another county in this state. The action of trover is, of course, an action sounding in tort, the gist of which is the conversion by one of the goods of another. The damages sought to be pleaded, being for the breach of a contract, had their existence by virtue of the contract. By section 3759 of the Civil Code, it is provided that recoupment may be pleaded in all actions ex contractu, where, from any reason, the plaintiff, under the same contract, is in good conscience liable to the defendant. Some of the features of the doctrine of recoupment are near akin to those of set-off, and in the case of Fontaine v. Baxley, 90 Ga. 416, 17 S. E. 1015, it was said in the opinion that there is practically no difference between the plea of set-off and recoupment. While we may not go to this extent in our ruling, because there is an essential difference between the two, as shown in section 3757 of the Civil Code, yet it must be conceded that each of these pleas is admitted as a defense under a like general rule. By section 3996 of the Civil Code it is declared that, as to set-off, equity generally follows the law; but if there is an intervening equity not reached by the law, or if the set-off be of an equitable nature, the courts of equity take jurisdiction to enforce the set-off. So that, at law, recoupment may be pleaded in cases arising ex contractu, and by this rule in equity recoupment in the nature of a set-off may be pleaded when from some intervening equity good conscience requires it to be done. If the seller of the property had instituted an action against the defendant below to recover a judgment for the value of the property, which was one of his rights, then, under our statute as interpreted by a number of the decisions of this court, he would have been entitled to plead his damages in the nature of a recoupment; but when the seller instituted an action to recover the property by virtue of his title, which was another of his rights, the intervening equity which alone authorizes such a plea to be entertained is wanting under the proven facts of this case. The plaintiff, while not a resident of the county where he brought suit, is a citizen of this state residing in another county. He cannot, therefore, be classed as a nonresident, because he is an inhabitant of the state of the forum. Black, Law Dict. tit. "Nonresident." Not only so, but he is solvent,—at least must, under the admissions made in the record, be so treated for the purpose of this case. As a matter of fact, it will be inconvenient for the plaintiff in error to bring suit against the seller in the county of his residence, but this inconvenience is one that is felt by all creditors who hold a claim on a person residing out of the county of the residence of the creditor, and must be borne because it is the result of a constitutional provision. The plaintiff below asserted that the defendant was in possession of certain goods to which he had no title. The defendant admitted the fact charged, but said in reply that the plaintiff had injured and damaged him in a matter growing out of the contract on which the plaintiff relied to recover, and while, in furtherance of justice, a court of equity in certain instances will aid the defendant in such an action to liquidate his damages occasioned by a breach of the contract, although it was brought for the specific purpose of asserting title to property, there must be more than mere inconvenience which will authorize it to do so. In the case of Barrow v. Mallory, 89 Ga. 76, 14 S. E. 878, this court ruled that, "in an action of trover, unless there be some special equitable ground (such as nonresidence or insolvency of the plaintiff) for allowing the defense, the damages sustained by the defendant from a breach of contract by the plaintiff are not the subject-matter of set-off, and cannot be so pleaded." And Mr. Pomeroy in his Code Remedies (section 767), in reaching a conclusion on this subject, practically announces the same rule in the following language: "It would seem that, in an action to recover the possession of specific chattels, no counterclaim is possible, unless, perhaps, equitable relief may be awarded under some very exceptional circumstances." See, also, Deford v. Hutchison (Kan. Sup.) 11 L. R. A., note on page 257 (s. c. 25 Pac. 641); Green v. Combs, 81 Ga. 210, 6 S. E. 582; Smith v. Printup, 59 Ga. 610. This rule, so clearly founded on principle, must not be confused with that announced by this court in several cases where actions were brought to recover personal property when title was reserved in the seller until the purchase price was paid, and where it was ruled that if the property so purchased was defective, or not as warranted, for which reason the real value of the article purchased was less than the contract price, proof of these facts could be made under proper pleading in an action of trover. There is no

denial in any of these cases of the principle we are contending for, but the reasoning rests on the facts that the property is contracted to be sold for a given price, which, according to the representations and warranty made, is its value. If the representation or warranty as to quality or soundness be in fact not true, then the contract price was not really the value of the article. The sale having been made on the condition that the title is reserved until the price be paid, the condition of the title depends, of course, on the fact whether the purchase money has been paid. So that, when an action of trover is brought under a contract of that character, it can be defeated by showing that the price has been paid. If this be true, the title of the seller is devested, and it is in the purchaser. If it be not entirely paid, then, under a proper construction of the terms of the contract, title vests in the purchaser when the true and correct purchase price is paid. Therefore the measure of damage is such correct price; and, in order to ascertain it in cases of this class, proof is allowed touching the real value, not as a set-off, nor in the way of recoupment, but as a defense to the assertion of title which the plaintiff makes and to fix the real measure of damage. See Guilford v. McKinley, 61 Ga. 230. The conclusion, then, seems to be that, as a legal proposition, a claim arising ex contractu cannot be set off at law in an action sounding in tort, and that, while in exceptional cases a court of equity will entertain a prayer for relief founded on such a claim, it will only do so because of some special equity. Tested by this rule, the plea interposed by the plaintiff in error in the trial of the case below, by which he sought to have his damages for the breach of the contract liquidated, was not good, and we find no error in the ruling of the court of which he has complained. Judgment affirmed. All the justices concurring.

JAQUES et al. v. STATE.

(Supreme Court of Georgia. May 11, 1900.)

CRIMINAL LAW — CHARACTER OF ACCUSED — QUESTIONS BY JUDGE—ROBBERY —INSTRUCTIONS.

1. When persons on trial for crime put their characters in issue, and introduced a witness who testified that the same were good, it was error for the presiding judge to ask the witness if he had ever known the accused "to do any honest work," and to press upon him other inquiries, the nature of which manifestly indicated that the judge did not believe the accused were persons of good character. In thus acting, the judge violated the provisions of section 1032 of the Penal Code.

2. In addition to the error above indicated, the court on the trial of the present case erred further in admitting hearsay testimony, and in giving a charge to the effect that the testimony in behalf of the state, if true, made a case of robbery by intimidation; this charge being unwarranted for the reason that, if the crime of robbery was committed at all, it was, under the evidence, necessarily robbery by force.

3. There is no merit in any of the special grounds of the motion for a new trial not dealt with above, nor do they, singly or collectively, present any question of special importance.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Will Jaques and others were convicted of crime, and bring error. Reversed.

M. Felton Hatcher and Jere M. Moore, for plaintiffs in error. Robt. Hodges, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

SAMS v. THOMPSON HILES CO.

(Supreme Court of Georgia. May 12, 1900.)

EXECUTION—CLAIM CASE—BURDEN OF PROOF —WIFE'S SEPARATE PROPERTY— DEBTS OF HUSBAND.

1. When, on the trial of a claim case, the burden of proof was upon the plaintiff in execution, and the evidence in his behalf failed to show that the property in dispute belonged to the defendant in execution at the time of the levy, a verdict finding it subject was unwarranted.

2. Where, in such a case, the plaintiff in execution proved affirmatively that the defendant in execution had "turned over" to his wife a tract of land, telling her and their children "to go ahead, and work it, and support themselves as best they could," a crop produced thereon by the labor of the wife and children was not subject to a judgment against the husband, there being nothing to show that he was insolvent, or that thus allowing the wife the use of the land was a merely colorable transaction, the real object of which was to defraud his creditors. The above is true although the husband may, in the capacity of surety for his wife or otherwise, have aided her in procuring stock and other supplies with which to make the crop, the only testimony as to these matters coming from a witness introduced by the plaintiff, and the same affirmatively showing that the farming enterprise in which the wife engaged was exclusively hers, and in no sense that of the husband.

(Syllabus by the Court.)

Error from superior court, Chattooga county; W. M. Henry, Judge.

Action by the Thompson Hiles Company against Deller Sams. Judgment for plaintiff, and defendant brings error. Reversed.

Neel & Neel, for plaintiff in error. T. J. Harris, for defendant in error.

LUMPKIN, P. J. The nature of this case is sufficiently indicated by the headnotes. Obviously, it is not one falling under the statute, which declares that gifts of property by insolvent debtors are void as to creditors, for there was no proof that the defendant in execution was insolvent, or that he "turned over" the land to his wife or allowed her the use of it with a view to defrauding his creditors; nor did he "give" her anything upon which, as his property, an execution could have been levied. It is equally clear that this is not a case to which

the decision in Wood v. Machine Co., 76 Ga. 104, to the effect that prior to 1866 the earnings of a married woman who was not a free trader belonged to her husband, is applicable. It is also apparent, we think, that the case in hand is essentially different from that of Lee v. Guano Co., 99 Ga. 572, 27 S. E. 159, laying down the doctrine that a married man is by law entitled to the services of his wife, so far as relates to the performance of her ordinary household duties, and that she cannot make against him a charge for such services, and thus become a creditor in satisfaction of whose claim a conveyance of realty from him to her would be good against those to whom he was really indebted. In the opinion delivered in that case it was remarked that the court was not dealing with "the question of the husband's appropriation of money made by his wife as earnings from work or labor performed in spheres entirely outside of her household duties and obligations"; and, further, that "such earnings are oftentimes exclusively her own; certainly so when her husband expressly consents to her engaging in the occupation or business from which they are realized." Page 575, 99 Ga., and page 160, 27 S. E. Even before the passage of the married woman's act of 1866 this court held that a wife, with or without the assent of her husband, might devise by will, as her separate estate, realty purchased with her earnings, derived from an independent business carried on by her with his consent. Cavenaugh v. Ainchbacker, 36 Ga. 500. Since the passage of that act the status of married women as factors in the world of business has been fully and uniformly recognized. This court is thoroughly committed to the doctrine that a wife may acquire a separate estate by making contracts and carrying on an occupation in her own name and on her own account. See Hays v. Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373; Schofield v. Jones, 85 Ga. 816, 11 S. E. 1032. It was in these cases distinctly ruled that, under the act mentioned, a married woman may engage in business, and by so doing acquire and hold property as her own. This court has in many instances followed the doctrine thus established, and has not, so far as we are aware, ever departed from it. Applying that doctrine to the case before us, the wife was entitled to the crop which she made in the farming enterprise carried on with the labor of herself and her children. The evidence did not warrant a finding that this enterprise was really that of her husband, ostensibly conducted in the wife's name. While certain facts and circumstances in proof, had they been unexplained, might have warranted an inference that such was the case, they were explained fully and satisfactorily by the affirmative and uncontradicted evidence of the plaintiff's witness. As the burden of proof was on the plaintiff, and as the evidence did not show that the property levied on belonged to the defendant in execution, but the contrary, the verdict finding the property subject was unwarranted, and the court ought to have set it aside. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

McINTOSH v. CLEGHORN et al.

(Supreme Court of Georgia. May 12, 1900.)

EXECUTION—CLAIM CASE.

1. This case, in principle and upon the facts disclosed by the record, is controlled by the decision this day rendered in Sams v. Thompson Hiles Co. (Ga.) 36 S. E. 104.

2. It results that the verdict complained of was contrary to the law and to the evidence, and the court below erred in not setting it aside on the general grounds contained in the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Chattooga county; R. T. Fouché, Judge pro hac vice.

Action between Tinny McIntosh against J. S. Cleghorn & Co. From the judgment, McIntosh brings error. Reversed.

Wesley Shropshire, for plaintiff in error. C. L. Odell, for defendants in error.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

SMITH v. COKER.

(Supreme Court of Georgia. May 12, 1900.)

SECONDARY EVIDENCE—APPEAL FROM JUSTICE—DISTRESS WARRANT.

1. There was no error in refusing to admit in evidence certified copies of registered deeds when it was not shown that the originals had been destroyed, or that they were lost, or inaccessible, or that due diligence had been exercised in endeavoring, by proper search and inquiry, to ascertain in whose custody they were.

2. When the finding of a jury in a justice's court upon issues of fact is directly supported by testimony, it cannot be said that the superior court, on certiorari, erred in holding that the verdict was not "contrary to the evidence."

3. One who, while in possession of premises as the tenant of another, promised to pay rent therefor to a third person, could not, on the ground that the promise was made to prevent a wrongful eviction, defeat a distress warrant sued out by the promisee, without showing that the threatened eviction would have been unlawful.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Distress warrant by W. H. Coker against Nathan Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

Rowell & Rowell, for plaintiff in error. M. B. Eubanks, for defendant in error.

LUMPKIN, P. J. A distress warrant sued out by W. H. Coker against Nathan Smith was levied on property belonging to the lat-

ter. The defendant filed a counter affidavit alleging that the sum distrained for was not due, because he had never rented from the plaintiff the premises for which the rent was claimed, or recognized him as landlord, but, on the contrary, had expressly refused so to do. The issue thus made was found against the defendant in a justice's court, and he sued out a certiorari, to the overruling of which by the superior court he excepted. The petition for certiorari in general terms complained (1) that the magistrate erred in refusing to admit certain documentary evidence, and (2) that the verdict was contrary to law and to the evidence.

1. The documentary evidence just referred to consisted of certified copies of two registered deeds; one from C. W. Borders to J. A. Stansbury and A. Rawlings, and the other from Stansbury and Rawlings to Hattie E. Borders. The petition for certiorari recites that the justice of the peace rejected these papers because they were only certified copies, notwithstanding that counsel for Smith, by way of accounting for the originals, stated in his place that Hattie E. Borders had been for some time, and was then, residing in the state of Texas; that Smith "had made every endeavor to obtain the originals of these deeds from every source where it would avail for him to do so, and had failed to get them." There was no error in rejecting these documents. In the first place, it does not distinctly appear that the originals had been destroyed, or were lost, or beyond the jurisdiction of the court; secondly, the statement of counsel, in his place, even giving it the force of sworn testimony, as to what his client had done in searching for the originals, was not proper proof as to the alleged efforts of Smith to find the deeds; and, thirdly, the loose statement embraced in the words just quoted certainly did not show that any one had exercised due diligence in endeavoring to ascertain in whose custody the deeds really were. The court ought to have been distinctly informed, by one having personal knowledge of the facts, as to the extent of the search and of whom inquiries were made, in order to be able to pass intelligently upon the question of diligence. Smith's attorney might have thought that his client's search was sufficiently exhaustive, and that it was prosecuted in good faith, and with all reasonable diligence; but, if the facts had been developed, the court might very properly have been of a different opinion. In other words, counsel, upon information derived from his client, the particulars of which were not disclosed to the court, undertook to pass upon the very question which it was the duty of the court to decide, and, in effect, asked the court to concur in the correctness of his (counsel's) conclusion in ignorance of the facts upon which it was based.

2. As a witness in his own behalf, Coker testified on the trial in the magistrate's court that, having purchased at sheriff's sale the property for which he claimed rent, he and the sheriff went to Smith's place of business, and informed him that the officer would dispossess him unless he agreed to become Coker's tenant, and pay him rent at the rate of five dollars per month; that Smith agreed to this; that he remained in possession accordingly, and that the stipulated rent for one month was due and unpaid. Coker put in evidence a deed to himself from the sheriff, reciting that the property in dispute had been sold to the former by the latter under an execution in favor of Coker against one C. W. Borders. The testimony of Coker was corroborated by that of the sheriff. On the other hand, Smith swore positively that he never agreed to become the tenant of Coker, or to pay him rent, but that he had expressly refused to enter into a contract with Coker respecting the use and occupation of the property. Smith further testified, in substance, that he went into possession of the premises as a tenant of one Amos Black and had retained possession all the while by virtue of his contract with Black. A witness named Robert Love corroborated Smith as to what was said in the interview between him and Coker and the sheriff. Upon the issue thus presented by the conflicting testimony of Coker and the sheriff, on the one side, and Smith and Love, on the other, the jury found in favor of Coker. It is impossible to ascertain, either from the petition for certiorari or the magistrate's answer, that any other issue of fact was submitted to the jury. Manifestly, their finding was warranted, for they had the right to believe Coker and the sheriff and to disbelieve Smith and Love. As stated above, the petition for certiorari alleges that the verdict was contrary to the evidence. It does not undertake to point out how or in what respect the finding of the jury was erroneous. So far as we can discover, they passed upon a single disputed question of fact, viz. did Smith, or did he not, agree to become Coker's tenant, and pay rent to him? They found in the affirmative upon positive testimony directly supporting their verdict. Certainly, then, it could not be said that the superior court erred in holding that the petition for certiorari was without merit in so far as it averred that the verdict was contrary to the evidence.

3. In alleging that it was contrary to law, the petition is as noncommittal as in the other attack upon the verdict of which we have just disposed. There is complete silence as to how the law was violated by the finding of the jury. If, therefore, the loose and general assignment that the verdict was contrary to law is entitled to any consideration, it must be upon the idea that, taking the evidence most favorably to Coker, the verdict upon the facts thus established was, on its face, illegal. We cannot say that this is so. Coker purchased the property at a sale thereof under an execution against C. W. Borders. Accordingly, Coker had a right to evict one

claiming possession as a tenant of Black, if Black's claim of title depended upon a deed executed by Borders after the date of the judgment against him under which the property was sold to Coker. The rejected deeds might have thrown some light on this question, but they are out of the case, and properly so, for reasons above given. It does appear that Black claimed under a deed from the Citizens' Bank & Trust Company, to which and another corporation Mrs. Hattie Borders had conveyed the property by a security deed embracing a power of sale. No title was shown in Mrs. Borders, and, for aught that appears, she may have held under a deed from C. W. Borders executed after the date of the judgment against him. It is perfectly safe, then, to say that the record does not affirmatively show that the threatened eviction of Smith would have been unlawful. So far, therefore, as he is concerned, it should be assumed that it was lawful. This being so, if he really agreed, as was found by the jury, to pay rent to Coker, he should have been compelled to comply with his contract unless he showed some better reason for refusing to do so than that argued here by his counsel, viz. that, being the tenant of Black, he wrongfully attorned to Coker. The attornment was not wrongful or improper if Coker had a right to evict Smith; and, as has been seen, Smith completely failed to show that Coker had no such right. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

SMITH v. COKER.

(Supreme Court of Georgia. May 12, 1900.)

EXECUTION—EVICTION—CONTRACT—JUDGMENT—RES JUDICATA.

1. An officer who has made a sale of realty under execution is not, by virtue thereof, authorized to evict from the premises "any other person than the defendant, his heirs, or their tenants or assignees since the judgment."

2. A promise to pay rent, made solely to prevent an unlawful eviction, is not binding upon the person making the same.

3. A judgment in favor of a plaintiff in execution against a claimant does not affect one to whom the latter had conveyed the property in dispute before the claim was filed, or one holding under such claimant's grantee.

(Syllabus by the Court.)

Error from city court of Floyd county; George A. H. Harris, Judge.

Action by W. H. Coker against Nathan Smith. Judgment for plaintiff, and defendant brings error. Reversed.

Rowell & Rowell, for plaintiff in error. M. B. Eubanks, for defendant in error.

LUMPKIN, P. J. This is a companion case to that between the same parties (this day decided) 36 S. E. 105. In addition to the distress warrant, Coker sued out a "dispossessory warrant" against Smith for the purpose of evicting him from the premises as a tenant who had made default in the payment of rent. Smith filed a counter affidavit denying the alleged tenancy. On the trial of the case thus made, a verdict was returned in favor of Coker. The issues involved, and the evidence pro and con, were substantially the same as in the other case, except that in the case which we are now considering Smith succeeded in introducing in evidence the certified copies of the two deeds which were excluded at the hearing of the case originating with the distress warrant. As a result, the case in hand differs widely from the other one. The difference is just this: In the first case Smith failed to show that the threatened eviction would have been unlawful; in the second case, he overcame this difficulty by proving that Black, under whom he held possession, claimed title to the premises under a deed made by C. W. Borders, the defendant in the execution in favor of Coker under which the property was sold by the sheriff to Coker, and that this deed was executed before the judgment on which that execution issued had been rendered. The sheriff, therefore, had no right to turn Smith out of possession, for section 5468 of the Civil Code expressly declares that an officer who has made a sale of realty is not, by virtue of the law thereto relating, authorized "to turn out any other person than the defendant, his heirs, or their tenants or assignees since the judgment." It follows that, if Smith made a promise to become Coker's tenant, and pay rent to him, solely for the purpose of preventing the threatened unlawful eviction, the promise was not binding, because made under duress, and without consideration. The case ought to have been tried on the line just indicated, but it was not, and of this Smith in divers ways complains in his motion for a new trial. The record discloses that when Coker caused the land to be levied upon Mrs. Hattie Borders filed a claim to it, and that on the trial thereof the property was found subject. It appears, however, that this claim case originated and was disposed of after Mrs. Borders had conveyed the property to two corporations, one of which had subsequently, under a power of sale, conveyed it to Black, Smith's landlord. Nevertheless, the court, over Smith's objection, admitted in evidence the record of the claim case, and in substance charged the jury that Black and his tenant were bound by the judgment therein rendered. In both these particulars the court committed manifest error, for it is obvious, without discussion, that after Mrs. Borders had parted with the title, no adjudication against her respecting the same could bind or affect her grantee, or one claiming under the latter. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

BROWNING'S EX'R v. BROWNING.[1]

(Supreme Court of Appeals of Virginia. June 22, 1899.)

HUSBAND AND WIFE—SERVICES OF HUSBAND FOR WIFE—DEBTS ASSUMED BY WIFE.

1. A husband may recover from his wife the value of the use of his teams in cultivating the wife's farm, the crops of which passed into her separate estate, where the teams were furnished with the expectation of being remunerated therefor, though there was no express agreement to that effect.

2. Where the wife directed an account which the husband before their marriage had contracted with a firm of which she was a member to be charged to her own account with that firm, a finding that she had assumed its payment to the exoneration of the husband, and was not entitled to recover therefor from the husband, is warranted.

Appeal from circuit court, Russell county.

Bill by Margaret J. Browning against her husband for divorce and for an accounting. Complainant died during the pendency of the suit, and from the decree her executor appeals. Reversed.

J. C. Gent and H. A. Routh, for appellant. White & Penn, for appellee.

KEITH, P. This controversy originates in a bill filed by appellant's testatrix, Margaret J. Browning, praying for a divorce a mensa et thoro, and for protection in the possession and enjoyment of her separate estate, consisting of real and personal property, owned by her at the time of her marriage.

The defendant answered the bill, and the cause was referred to a commissioner, who returned a report which finds an indebtedness on the part of the estate of Mrs. Browning, who died pending the litigation, and a decree was rendered in favor of the husband for $1,861.33, and from that decree an appeal was allowed.

The errors assigned by the appellant, the executor of Mrs. Browning, are to the ruling of the circuit court upon certain exceptions filed by him to the report of the commissioner.

It seems that at the time of the marriage Mrs. Browning was the owner of large real estate, and personal estate consisting of cattle, horses, mules, milch cows, sheep, household and kitchen furniture, and crops growing upon her farm.

A. P. Browning, the defendant, was also engaged in agriculture, though upon a less extensive scale, and shortly after the marriage the family removed from his home to her's, and A. P. Browning assumed, with his wife's consent, the management and control of her real estate and the personal property upon it, as well as his own. The items of account which are now in dispute are for work done by him upon the land of Mrs. Browning, and for money paid by him for various objects of which it is claimed the estate of Mrs. Browning received the benefit.

That the several sums of money with which he is credited by the commissioner were paid by Browning for articles purchased by him is sufficiently proved by the evidence; but with respect to some of them the evidence wholly fails to show that the purchases were made for the benefit of her estate. Browning controlled, managed, and cultivated his own lands and those of his wife, and it was his duty to keep accounts and to furnish evidence which would enable the court to determine whether or not he is entitled to be reimbursed for the debts contracted and paid by him during the period of his joint management of the two estates.

Without going into a discussion of the testimony bearing upon each item, we are of opinion, with respect to the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and twelfth items, that it is insufficient to support the claim of appellee, and the said several items are disallowed.

We are also of opinion that the items of $167.75 for 225 bushels of corn, and $126.75 for 169 bushels of corn, paid to W. G. Jessee, were improperly allowed.

The item of $25, the amount of an order on the county treasurer collected by appellant, and the item of $40.80 for household furniture belonging to the appellee and retained by Mrs. Browning, were properly allowed by the commissioner.

The items for the use of teams, amounting to $424, we are also disposed to allow. The work was done upon the farm of Mrs. Browning in the cultivation of crops which passed into her estate. While there was no express contract between the husband and wife that he should be paid the sums allowed by the commissioner, it does sufficiently appear that Browning expected to be remunerated in some way for the work done by him, and the amount allowed by the commissioner is a reasonable one.

We are of opinion that the circuit court was right in disallowing a credit to appellant of $410.11. The circumstances connected with this transaction warrant the conclusion that Mrs. Browning, in directing the amount due by her husband to the firm of Carrell & Seacatt, before her marriage, to be incorporated with and charged to her private account with that firm, of which she was a member, intended to assume its payment to the exoneration of her husband.

In the conclusions here presented we have not been unmindful of the weight to be attributed to the finding of a commissioner which has been approved by the trial court. See Shipman v. Fletcher, 91 Va. 473, 22 S. E. 458.

Upon the whole case we are of opinion that the decree of the circuit court should be reversed, and that a decree should be

[1] For opinion on rehearing, see 36 S. E. 525.

entered in favor of appellee for the sum of $509.80, with interest from July 9, 1891.

RIELY and BUCHANAN, JJ., absent.

APPLEBY et al. v. SOUTH CAROLINA & G. R. CO.

(Supreme Court of South Carolina. May 22, 1900.)

APPEAL—NOTICE—TIME FOR SERVICE—CONSTRUCTION OF STATUTE—MOTION TO DISMISS.

Where an order overruling a motion for a new trial is made six days after the final adjournment of the trial court, and judgment is entered accordingly on the verdict on the next day, the judgment and order are to be deemed "rendered at chambers," within Code, § 345, providing that, in appeals from an order or judgment granted or rendered at chambers, notice of an intention to appeal must be given by appellant within 10 days after written notice that such order has been granted or judgment rendered. Per divided Court.

Appeal from common pleas circuit court of Charleston county; Ernest Gary, Judge.

Action by Mary K. Appleby and husband against the South Carolina & Georgia Railroad Company for damages. From a judgment for plaintiffs, defendant appeals. On motion to dismiss the appeal. The court being equally divided, the motion failed.

Joseph W. Barnwell, for appellant. Legare & Holman, for respondents.

McIVER, C. J. This was a motion to dismiss an appeal based solely upon the ground that no notice of an intention to appeal was given within the time prescribed by law. The facts are undisputed, and may be stated as follows: The case came on for trial before his honor, Judge Ernest Gary, and a a jury, which rendered a verdict for the sum of $10,000 in favor of the plaintiff. The defendant gave notice of a motion for a new trial on the minutes, and such motion was heard by Judge Gary during the term at which the verdict was rendered, but the decision was reserved. On the 20th day of April, 1900, the court was adjourned sine die, and on the 26th of April Judge Gary rendered his decision, granting the motion for a new trial unless the plaintiff would, within a specified time, remit upon the record the sum of $2,500, but if the plaintiff remitted said sum upon the record within the time specified "then this motion is refused." On the 27th of April, 1900, the plaintiff did remit upon the record the said sum, and on that day judgment was entered for the amount of the verdict as thus reduced, to wit, for the sum of $7,500 and costs. On the 5th day of May, 1900, the defendant served upon the plaintiff's attorneys the following notice: "Please take notice that the defendant intends to appeal to the supreme court from the judgment entered in the above-entitled case upon the verdict rendered against the defendant and in favor of plaintiff at the late term of said court of common pleas for said county." This notice was promptly returned, "for the reason that service came too late."

The question, therefore, is whether this notice of intention to appeal was served within the time prescribed by law. If it was, then the motion under consideration must be refused; but if it was not, then the motion must be granted, for the time within which notice of intention to appeal must be given is prescribed by statute, and is imperative upon this court, as well as upon the parties to this cause, and hence this court has no power to relieve a party from an omission to comply with this statutory requirement. Renneker v. Warren, 20 S. C. 581, besides many other cases to the same effect. Indeed, it seems to me that the legislature has been careful to avoid delegating to this court any power whatever to regulate the time within which notice of an intention to appeal may be given, or to relieve a party from the effect of an omission to give such notice within the time prescribed by statute; for while the Code contains various provisions authorizing this court, or one of the justices thereof, or in some cases the judges of the circuit court, to extend the time for doing various acts, or to relieve parties failing to take certain required steps necessary to perfect an appeal, such provisions were always accompanied by an exception as to the time within which notice of an intention to appeal must be given. See sections 353 and 420 of the Code, as originally adopted, and sections 339, 345, 348, and 349 of the present Code.

What, then, is the statutory requirement upon this subject? It is to be found in subdivision 1 of section 345 of the Code as it now stands, which reads as follows: "In every appeal to the supreme court from an order, decree or judgment granted or rendered at chambers from which an appeal may be taken to the supreme court, the appellant or his attorney shall, within ten days after written notice that such order has been granted or decree or judgment rendered, give notice to the opposite party or his attorney of his intention to appeal; and in all other appeals to the supreme court the appellant or his attorney shall, within ten days after the rising of the circuit court, give like notice of his intention to appeal to the opposite party or his attorney," etc. From the language of this section, it is very obvious that the legislature has divided the cases in which appeals to the supreme court may be taken into two separate and distinct classes or cases: (1) Those in which the appeal is taken "from an order, decree or judgment granted or rendered at chambers"; (2) "all other appeals to the supreme court." So that, if an appeal in a given case does not fall into the first class, it must necessarily fall into the second class; and, if it falls into the first class, then the notice of intention to appeal must be given within 10 days after written notice that the

order sought to be appealed from has been granted, or if from a decree or judgment within 10 days after written notice that such decree or judgment has been rendered; but, if it falls into the second class, then the notice of intention to appeal must be given "within ten days after the rising of the circuit court."

Now, in this case it is clear that the appeal cannot fall into the first class; for it is not an appeal from an order granted, or a decree on judgment rendered, at chambers, and does not even purport to be so, as will be seen by the terms of the notice of intention to appeal copied above. Indeed, Judge Gary would have had no power to grant an order for a new trial at chambers. Section 402, Code; Clawson v. Hutchinson, 14 S. C. 517. Nor would he have had the power to render a decree or judgment in a case like this at chambers, and he did not undertake to do so; for, as appears by the terms of his order granting a new trial nisi, which was before us upon the hearing of this motion to dismiss the appeal, he heard a motion for a new trial on the minutes, during the same term at which the case was tried, and after full argument on both sides he reserved his decision, and a few days after the rising of the court he filed his order granting a new trial nisi. This was exactly the course pursued by his honor, Judge Wallace, in the case of Calhoun v. Railway Co., 42 S. C. 132, 20 S. E. 30, which was approved by this court, in which this court held that, the motion for a new trial having been made and argued during the term, the order, though not actually filed until after the rising of the court, must be regarded as filed nunc pro tunc, having relation back to the time of the hearing, and the motion, in contemplation of law, was heard and decided during the term at which the verdict was rendered. That case, in principle, is precisely like the present, and the order of Judge Gary cannot be regarded as an order made at chambers, but must, in contemplation of law, be regarded as made during the term at which the verdict was rendered. This case, therefore, falling, as it must, under the second class, the statute in express terms requires that notice of intention to appeal must be given within 10 days after the rising of the court, and, as it is conceded that this was not done, the appeal must necessarily be dismissed.

The elaborate argument of counsel for appellant, against the motion, while of much persuasive force to show the necessity of further legislation upon the subject, is not sufficient to show that this court can disregard the imperative requirement of a statute. It may not be amiss to note that the case of Molair v. Railway Co., 31 S. C. 510, 10 S. E. 243, was decided prior to the passage of the act of 1889 (20 St. at Large, 356), by which an important amendment was incorporated into section 345 of the Code, doubtless for the purpose of supplying what was supposed to be a casus omissus in the section, and that the case of Wallace v. Railroad Co., 36 S. C. 599, 15 S. E. 452, decided after the passage of the act of 1889, holds that the requirement to give notice of an intention to appeal within 10 days after the rising of the court is explicit, and must be observed, and that such notice may be given even before the judgment is entered up. I am therefore of opinion that the motion to dismiss the appeal should be granted, but, as the court is equally divided upon that question, the motion must necessarily fail.

JONES, J., concurs.

POPE, J. On the 14th day of May, 1900, after due notice, the plaintiffs moved before this court to dismiss the appeal which had been taken by the defendant from a judgment rendered in plaintiffs' favor at a trial had before Judge Ernest Gary and a jury of the above-stated action, had in the court of common pleas for the county of Charleston, in said state, during the spring term of the year 1900, on the ground the notice of such appeal had not been served within the 10 days next succeeding the adjournment sine die of said term of said court, which adjournment was on the 20th April, 1900. By affidavits and otherwise, it is made to appear that the verdict of the jury was in favor of the plaintiffs for the sum of $10,000, but that immediately after the rendition thereof, and during term time, the defendant gave notice of its motion for a new trial on minutes of the court; that such motion was fully heard by Judge Gary during said term, but the term was adjourned sine die, on the 20th day of April, 1900, while the order passed by Judge Gary on such motion was not filed until on the 26th day of April, 1900, which was six days after the adjournment of the term: that the order of Judge Gary granted a new trial to the defendant, unless the plaintiffs would remit the sum of $2,500 of their verdict for $10,000; that on the 27th day of April, 1900, the plaintiffs remitted $2,500 of the verdict, and on the same day entered up their judgment for the sum of $7,500; and that on the 5th day of May, 1900, the defendant gave notice to the attorneys of the plaintiffs in writing of their intention to appeal from the judgment entered upon the said verdict, but soon thereafter said notice was returned to the attorney of the defendant, upon the ground that it came too late.

Thus is raised the sole question we are called upon to consider. If the date at which begin the 10 days during which notice of intention to appeal may be served is the 20th day of April, 1900 (when the court of common pleas was adjourned sine die), then, inasmuch as more than 10 days intervene between the 20th of April, 1900, and the 5th of May, 1900, the motion must be granted; but if such date at which the 10 days be-

gin is from the 27th day of April, 1900, when the notice was given of Judge Gary's order and the judgment thereon, then the motion must be denied, for the reason that 10 days had not expired from the 27th April, 1900, to 5th May, 1900. This is a very serious question to the defendant; for, if the appeal is dismissed, the right of appeal to the court of last resort in this state is forever lost to it in this cause. Of course, if the laws of this state regulating appeals from the court of common pleas to the supreme court fix the date of adjournment sine die of the former courts in such cases as the present as the time when the 10-days notice of appeal begins, this court must say so; for it is our duty to obey the law as it is written. Is it so written? I do not think so, and I hope to be able to show that it is not so written, and in doing so I propose to show this from two standpoints—First, that the provisions of the laws of our state regulating appeals allow notice of appeals in cases like the present to be given 10 days after notice of order of Judge Gary and judgment thereon was served upon the defendant, to wit, from the 27th April, 1900; and, second, that our adjudicated cases sustain this view.

1. It is admitted that section 345 of the Code of Civil Procedure governing appeals from the court of common pleas to the supreme court recognizes two distinct classes of appeals, namely, those taken from orders, judgments, and decrees rendered out of term time, and those taken from orders, decrees, and judgments rendered during term time. In cases following within the first class, the law requires that notice of intention to appeal must be served within the 10 days next succeeding the service of a notice of the filing of such order, judgment, or decree filed out of term time upon the opposite party or his attorney, while in cases falling within the second class the law requires that a notice of intention to appeal from an order, judgment, or decree rendered during term time must be filed within the 10 days next succeeding the adjournment sine die of the term of the court wherein such order, judgment, or decree was rendered. It is evident that I have attached to the words, "rendered out of term time," the same meaning as belongs to the words of section 345, "in every appeal to the supreme court from an order, decree or judgment granted or rendered at chambers," etc. Is this the proper meaning to be attached to the words "rendered at chambers"? It must be apparent that the legislature is endeavoring to provide for all appeals from orders, decrees, or judgments. Such orders, decrees, or judgments must be rendered either after the court is adjourned sine die,—that is, out of term time; or such orders, decrees, or judgments must be rendered while the court is in session,—that is, in term time. But it is contended that words of the statute are rendered "at chambers." Is it contrary to any rule to say "at chambers" means "out of term time"? Mr. Anderson, in his Dictionary of Law, at page 163, in defining the meaning to be attached in the law to the words "judge at chambers," says it is meant "a judge acting out of court," and cites in the support thereof a case from Wisconsin decided in the year 1886. See Whereatt v. Ellis, 65 Wis. 644, 27 N. W. 630, 28 N. W. 853. If I fail to give this meaning to these words in our statute, then there is a casus omissus in our law regulating appeals. I prefer to attach this meaning to the words actually occurring in the statute, rather than to give those words a meaning which will fail to cover all cases of appeals, but, on the contrary, will leave a class of appeals without any law to protect them. I do not find any difficulty in adopting this view of the meaning of the words "rendered at chambers," by reason of the decision of this court in the appeal from an order rendered by Judge Wallace in the case of Calhoun v. Railway Co., 42 S. C. 132, 20 S. E. 30, granting a new trial about 36 days after the term of court at which such motion was heard during the term had been adjourned sine die. Section 286 of the Code required that such motion for a new trial on the minutes should be heard and decided during the same term at which the action was tried. We merely held that, in contemplation of the law, the order should be regarded as filed nunc pro tunc, and, as I shall show presently, this decision had no reference to the statute governing appeals.

2. I think our adjudicated cases sustain the view that the words "rendered at chambers" mean rendered out of court. Take that very case of Calhoun v. Railway Co., 42 S. C. 132, 20 S. E. 30, and we will see that in speaking of the appeal it is stated by Chief Justice McIver: "Within ten days after notice of the filing of the order of Judge Wallace granting a new trial plaintiff's counsel gave notice of intention to appeal." As before stated, in Calhoun's Case, Judge Wallace had heard the motion for a new trial on the minutes during the term of court at which the action was tried, but he suffered the term to be adjourned sine die, and then, in more than 30 days after such adjournment, filed his order granting a new trial. So, in the case at bar, Judge Ernest Gary heard the motion for a new trial on the minutes. During the same term at which trial had been had court was allowed to adjourn sine die without a decision on the motion being rendered. But, on the contrary, an order for a new trial nisi was filed six days after court had adjourned. Defendant's counsel, "within ten days after notice of the filing of the order of Judge Gary granting a new trial nisi, and the acceptance by plaintiff of the reduction of the verdict from $10,000 to $7,500, and entry of judgment thereon," gave notice of appeal. It is true no question was made in the Cal-

houn Case as to the time of appeal, but still this court acted upon the theory that such appeal was taken in ample time, and under the very terms of section 345 of the Code, upon which I here rely. Otherwise, this court had no authority for its decision, and the objection as to nunc pro tunc would still be availing. But I think the court was right in the Calhoun Case, and so I think this court would be right now in adopting the meaning herein suggested as to the words occurring in section 345 of the Code. I think if the case of Archer v. Long, 46 S. C. 292, 24 S. E. 83, where Justice Gary construed this section 345, is examined, it will be found to give support to this view. Then it was held by this court that the date of the filing of an order, or, rather, of the notice of its being filed, is that from which the time for an appeal commences to run, even where the attorneys had actual notice of the signing of the order out of term time. I might prolong this discussion, but I prefer to be brief. I must announce my view that the motion should be refused.

GARY, A. J., concurs.

SPRINKLE v. KNIGHTS TEMPLAR & MASONS LIFE INDEMNITY CO.

(Supreme Court of North Carolina. May 22, 1900.)

LIFE INSURANCE—APPLICATION—FAILURE TO DISCLOSE PHYSICAL CONDITION—REFUSAL TO SUBMIT ISSUES.

Where, in an action on a life policy, the defense was that the defendant had hemorrhages of the lungs when he made application for the policy, and had had a dangerous case of measles, and rheumatism and pleurisy, and that such facts were not disclosed by the application, the fact that the agent of the company who took the application said that he did not regard measles as a dangerous disease did not tend to show that the agent did not deem such facts material, or that he had waived the fact of such diseases; and it was not error for the court to refuse to submit such issues to the jury.

Douglas, J., dissenting.

Appeal from superior court, Madison county; McNeill, Judge.

Action by J. B. Sprinkle against the Knights Templar & Masons Life Indemnity Company on a life policy. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

J. M. Gudger, Jr., for appellant. G. A. Smuford and W. W. Zachary, for appellee.

MONTGOMERY, J. This action was brought to recover the amount mentioned in a policy of insurance issued by the defendant company to George R. Sprinkle; the beneficiary named therein being the plaintiff, the father of the assured. The application for insurance was made on the 18th day of September, 1896, and the policy was issued thereon upon the 18th day of October following. The collection of the amount of the policy was resisted by the defendant on the ground that the assured made false and fraudulent statements, in matters material to the risk, as to the state and condition of his health, and that he fraudulently withheld from the company information concerning those matters which he ought to have communicated in his application. The plaintiff tendered several issues, among which was one as to whether the agent of the company by mistake or blunder omitted or failed to incorporate in the application statements of the assured relative to his health prior to the date of the application, the agent not deeming the answers material; and another as to whether the agent of the company, after full knowledge of the facts, waived the fact that the assured had been afflicted with dangerous diseases. His honor refused to submit those two issues, and there was no error in his so doing. They were not raised by the pleadings, nor was there a particle of evidence to that effect. The issues which were submitted were sufficient in all respects to have every phase of the plaintiff's cause of action properly presented.

This case was heard before this court at February term, 1899, and is reported in 124 N. C. 405, 32 S. E. 734. We thought then, and we think now, that there was less of merit in the claim of the plaintiff than in any case involving life insurance in our Reports. The assured, by the overwhelming weight of the evidence, was shown to have been a badly-diseased man from the year 1891, when he had hemorrhages from the lungs, until the day of his death, on the 24th of February, 1897,—four months after he had procured the policy. He had had a dangerous case of measles. He had had rheumatism. He had pleurisy, with effusion, in 1895, which became chronic, finally resisting the absorption treatment, and showing signs of fatty degeneration, so that in January, 1897, the fluid passed out of the pleura, through the mouth. Between July and November, 1896, about the time or a little before he made application for insurance, the assured was treated and examined by Dr. Frank Roberts. He was found to be suffering from pulmonary consumption, and was told that he could not be cured. He had a cough, night sweats and emaciation, and cavities in his lungs. As will be seen by a reference to the case as reported in 124 N. C., and 32 S. E., a new trial was ordered because there was evidence going to show a conspiracy between the agent and the examining physician and the assured to cheat and defraud the company. The chief difference between the case as it was then constituted and as it now stands is an attempt on the part of the plaintiff to show, not actual fraud on the part of the agent of the company, but that he, through a mistake and blunder, entered answers of the assured to questions put to him in his application which the assured never made; that is, that although the as-

sured said he had been spitting blood, and had had rheumatism and other dangerous diseases, yet the agent thought they were not dangerous diseases, nor material to the risk, and he therefore answered them "No," when he should have answered them "Yes." There is nothing in the evidence on which this theory can be founded. The agent did say that he did not regard ordinary measles as a dangerous disease; but it nowhere appeared in evidence that measles attended with after complications was regarded by the agent as an immaterial matter, or that he thought pleurisy, spitting of blood, and rheumatism were not serious diseases. The special instructions asked by the plaintiff were based on the idea of this alleged mistake and blunder on the part of the agent, and they were properly refused. We have carefully looked over the other exceptions of the plaintiff to his honor's charge, and we find no error of sufficient consequence to justify us in ordering a new trial. The judgment of the court below is affirmed.

DOUGLAS, J., dissents.

STATE v. HIGGINS.

(Supreme Court of North Carolina. May 22, 1900.)

STEALING UNGATHERED CORN—INDICTMENT—OWNERSHIP IN LESSOR.

An indictment which charges defendant with stealing ungathered corn, as the property of a tenant who rents for agricultural purposes, is not bad, for not alleging that the corn is owned by the lessor, as Code, § 1754, providing that the possession of the crops on lands rented for agricultural purposes shall be in the lessor, is only for his benefit, and the tenant is entitled to possession of such crops as against third persons.

Appeal from superior court, Buncombe county; Coble, Judge.

One Higgins was convicted of stealing ungathered corn, and from the judgment he appeals. Affirmed.

Carter & Curtis, for appellant. The Attorney General, for the State.

FAIRCLOTH, C. J. The defendant is indicted for stealing several ears of corn in August, standing, growing and ungathered, in the field, being cultivated for food and market. The indictment alleges that the corn was the "property of George Thomas." The proof shows that the prosecutor, Thomas, was a tenant, and rented the land from Bassett, who was to have one-third of the corn; that Thomas did not live on the land, but had charge of the field. At the close of the evidence the defendant moved to be discharged on the ground of a variance in the bill and in the proof, in that the ownership was alleged to be in Thomas, whereas it should have been in Bassett, the landlord. This is the only question presented. Where lands are leased or rented for agricultural purposes, the possession of the crop is deemed to be vested in the lessor. Code, § 1754. That section is only for a lessor's protection. Against any third person, the tenant is entitled to the possession of the land and the crop, and for an injury thereto while it is being cultivated he may maintain an action in his own name for the injury. He is the "real party in interest." Id. § 177. Id. § 1754 et seq. are intended to adjust the rights of landlord and tenant. Bridgers v. Dill, 97 N. C. 222, 227, 1 S. E. 767. With this construction, we think the ownership of the crop was well charged in the indictment. Affirmed.

WRIGHT v. FORT.

(Supreme Court of North Carolina. May 22, 1900.)

DEED OF TRUST—SALE BY TRUSTEE—ACTION FOR LAND—TITLE OF PLAINTIFF.

1. A deed from defendant to P., trustee, to secure notes executed by defendant to P., trustee (the deed authorizing P., on default in payment of the notes, and on application of any one rightfully in possession of the notes, to sell the property and apply the proceeds on the notes), is a deed of trust, not a mortgage, so that, the trustee dying, another may be appointed, with right to foreclose by sale.

2. The equitable title of the owner of a mortgage is sufficient to authorize an action by him for possession of the land, defendant having no equitable defense.

Appeal from superior court, Wake county; Moore, Judge.

Action by Augustus Wright against D. F. Fort. Judgment for plaintiff. Defendant appeals. Affirmed.

N. Y. Gulley, for appellant. J. N. Holding and Douglass & Simms, for appellee.

FURCHES, J. This is an action for the possession of land. The plaintiff claims that he is entitled to maintain the action upon two grounds: First, as the purchaser of the land in controversy at the sale of W. C. Douglass, trustee; and, secondly, as the purchaser and assignee of a note due the Rex Hospital by the defendant, and mortgage by defendant to secure said note. The fact that the plaintiff was the purchaser at the sale made by Douglass as trustee is not denied; nor is it denied that the defendant executed the note and mortgage to the Rex Hospital, and that the plaintiff is the owner thereof. But the defendant resists the plaintiff's right to recover upon both of these grounds. He resists plaintiff's right to recover upon the title received from Douglass as trustee, for the reason that he professed to act as trustee in the place and stead of W. H. Pace, who is dead, under an appointment made by the clerk of the superior court of Wake county, pursuant to section 1276 of the Code, which appointment, the defendant

contends, is void for the reason that said section does not apply. The defendant does not deny that he executed the deed to Pace, and that Pace is dead. But he denies that it is a deed of trust, for the reason that the cestui que trust is not named in the deed. Defendant contends that, if it is a deed of trust, as there is no cestui que trust named the estate conveyed resulted and returned to the defendant; that, if this is not true, the most that can be made out of this deed is that it is a mortgage, and should have been foreclosed by the personal representatives of Pace under the statute. It seems to us to be too plain for argument that it is a deed of conveyance to Pace to secure debts of the defendant, and that nothing can result to the defendant until these debts are paid. And this he is entitled to by the express terms of the conveyance. It cannot be a mortgage, as it is made to W. H. Pace, trustee, and is to secure certain notes therein specified, executed by the defendant on the same day the deed was executed. These notes are made payable to W. H. Pace, trustee, and are specifically described as follows: "That whereas, D. F. Fort is justly indebted to said W. H. Pace, trustee, in the sum of six thousand and nine hundred dollars, evidenced by six several bonds of even date herewith, as follows: One thousand dollars due October 1, 1886; one thousand dollars due November 1, 1886; one thousand dollars due December 1, 1886; seventeen hundred dollars due January 1, 1887; eleven hundred dollars due October 1, 1887; and eleven hundred dollars due December 1, 1887,—each of said bonds bearing interest from date at 8 per cent. per annum." And it is further provided in said conveyance that said property is "conveyed to the said W. H. Pace, trustee, his heirs and assigns, upon the following trusts, namely: If the said D. F. Fort shall fail or neglect to pay the said bonds, or either of them, at maturity, with all interest due and payable, or any part of either the principal or interest when due and payable, that the whole of said debt shall be considered due and payable, and upon the application of any party rightfully in possession of the said bonds, or either of them, the said W. H. Pace, trustee, is hereby authorized and fully empowered to expose the interest, claim, property, and demands of said D. F. Fort in the lands, crop, personal property, stock of goods, and all other things of value herein conveyed, to public sale to the highest bidder for cash at the court-house door in said county of Wake, after making advertisement of the time and place of sale for thirty days in some newspaper published in the county of Wake, * * * convey the lands to the purchaser in fee simple, and after paying the expenses of making such sale, with five per cent. commissions on amount of sales, apply the proceeds of said sales and collections to the discharge of whatever may remain unpaid on said bonds, and all interest thereon accrued, and pay the surplus, if any, to the said D. F. Fort, his legal representatives or assigns." So it clearly appears that this conveyance to W. H. Pace, trustee, is a deed in trust to secure and pay the notes therein named, and that the rightful holder of these notes had the right to demand a foreclosure of said trust, and the payment of the same. It is not denied but what these notes were assigned and delivered to the plaintiff by W. H. Pace, trustee, without recourse, and that the plaintiff is now the rightful holder and owner of these notes. To our minds, this deed is not a mortgage; that there is no resulting trust to the defendant until the notes therein secured are paid; that it is a deed of trust, and the trustee, Pace, being dead, the said Douglass was properly appointed trustee, and had the right to foreclose by sale. This establishes the plaintiff's title under the sale by Douglass, as we do not think he has shown that these notes have been paid or otherwise discharged. This is simply an action for possession of land. It is not for the recovery of the notes, or any balance due on them. And the reference was not for the purpose of taking and stating an account and settlement between the parties; but, as the defendant had alleged that the indebtedness secured by the deed of trust had been paid or discharged, this reference was made for the purpose of ascertaining the truth of this plea, and for no other purpose. The account does not, therefore, furnish a basis for a judgment on the indebtedness of the defendant to the plaintiff, and no such judgment is asked or granted. And, if the plaintiff shall sue the defendant on these notes, the defendant may set up any defense he may have, and the judgment in this action will be no estoppel against his doing so. This entitles the plaintiff to recover on the Douglass deed. And we see no reason why he might not recover on the Rex Hospital mortgage, as the admitted facts as to that make him the equitable owner of the property embraced in that mortgage. It has been several times held by this court that, as the courts are now constituted, a party may maintain an action for possession upon an equitable title where the defendant has no equitable defense to such action. Condrey v. Cheshire, 88 N. C. 375; Taylor v. Eatman, 92 N. C. 601. But mortgagees and the holders of equitable estates do not usually bring actions for possession, as the possession by them, before the trust is closed, would usually subject them to a claim for rents. In this case it might not do so, as the plaintiff is entitled to possession under the Douglass deed. The judgment of the court below must be affirmed. But, if the defendant has continued in possession, he and his bondsmen will be liable for rents and damages, if any, since the date of the judgment appealed from, and not included in that judgment. Affirmed

RAPER v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina. May 22, 1900.)

RAILROAD CROSSING ACCIDENT—DEFECTS—EVIDENCE.

1. Evidence of how two or three other crossings were constructed is not admissible to show that the crossing at which the accident occurred was defectively constructed.

2. For the purpose of showing defective construction of a railroad crossing at which plaintiff's intestate was killed by a train, his shoe having caught between the main rail and a guard rail, plaintiff may ask a witness whether, if the roadbed beneath the rail and guard rail had been filled to within two inches of the top of the rail, it would have been possible for the shoe to have been caught in the rail; he further proposing to show the depth of the space necessary to protect the flange of the wheels.

3. Under Code, § 1957, subsec. 5, authorizing a railroad company to construct its road across a street, but requiring it to restore the street "to its former state, or to such state as not unnecessarily to have impaired its usefulness," dangerous condition of the crossing is prima facie evidence of the company's negligence.

4. To show that a railroad crossing at which an accident happened was dangerous, it may be shown that others constructed like it had proved to be dangerous because of such construction.

5. If a railroad crossing is so constructed as to be safe to one crossing the railroad, this is enough, though it might be dangerous to one walking along the railroad.

Appeal from superior court, Wilson county; Moore, Judge.

Action by Martin Raper, administrator of W. H. Raper, deceased, against the Wilmington & Weldon Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

F. A. Woodard and Connor & Son, for appellant. Aycock & Daniels and F. H. Busbee, for appellee.

DOUGLAS, J. This is an action brought by the plaintiff for the recovery of damages for the alleged negligent killing of his intestate. The testimony tended to show that the plaintiff's intestate was killed at a point on the defendant's track where it crossed the public highway, at which point a guard rail had been placed upon the cross-ties, and attached to them, curving at each end, being about 2½ inches at center from the rail on the main track. The guard rail was shivered at a point about one foot from where the shoe worn by plaintiff's intestate was found wedged in between the guard rail and the rail of the main track. There seems to be no question but that the plaintiff's intestate was killed by the defendant's train. The plaintiff contends that the defendant was guilty of negligence in the construction of its track at said crossing; that the guard rail was made out of an old worn-out rail, which by wear and tear had become shivered; and that the defendant was also negligent in failing to fill in the space between the guard rail and the main rail with dirt, so that a person walking along or crossing the track would not be in danger of having his foot caught between the guard rail and the main track. There was testimony tending to support these contentions. The defendant introduced no evidence, and the jury found that the defendant was not negligent. There are no exceptions to the charge, and therefore the only questions before us are the plaintiff's exceptions relating to the exclusion of evidence.

The plaintiff proposed to show the manner in which the guard rail was placed at the crossings of defendant's tracks over the streets at Wilson, for the purpose of showing that the crossing at which the intestate was killed was defectively constructed. This evidence was excluded, and, we think, properly so. It was competent to show that the crossing in question was defectively constructed, or that it was constructed in an unusual, unnecessary, and dangerous manner; but the mere fact that two or three other crossings were constructed in a different manner does not of itself even tend to prove either of these essential facts.

The second and third exceptions are for the exclusion of the following testimony: The plaintiff asked the witness, "If the roadbed beneath the rail and guard rail had been filled to within two inches of the top of the rail, would it have been possible for the shoe to have been caught in the rail?" The plaintiff further proposed to show the depth of the space necessary to protect the flange of the wheels. We think this evidence was clearly competent, and that there was consequent error in its exclusion. It directly tended to prove the material fact in controversy,—the defective construction of the crossing. We presume no one will question the duty of a railroad company to construct and maintain a safe and convenient crossing where it intersects the public highway. Bullock v. Railroad Co., 105 N. C. 180, 10 S. E. 988; Hinkle v. Railroad Co., 109 N. C. 472, 13 S. E. 884; Tankard v. Lumber Co., 117 N. C. 558, 23 S. E. 46; Wood, Ry. Law, § 420. The public highway—in olden times, the king's highway—is the highest form of easement known to the law, and, whether by land or water, cannot be interfered with except under the direct stress of circumstances. The invention of steam locomotion introduced a new form of common carriers whose peculiar nature, with its resulting benefits, as well as duties to the public, necessitated the creation of a new form of highway. Railroad companies cannot run their trains on the ordinary public road, and, if they could, by so doing they would practically destroy their use to the public. They must have a road of their own, constructed in such a manner as to meet the peculiar requirements of their business; in the construction and operation of which they necessarily acquire peculiar privileges and exemptions with their corresponding duties and liabilities. These peculiar privileges can be given only in consideration of public serv-

ice, and are limited by the necessities of such service. Thus they are given the right to cross the public highway, and even to change its location, if necessary; but this they must do with as little inconvenience as possible to the traveling public. Where they interfere with the highway in any manner, they must, as far as they can, make it as safe and convenient to the public as it would have been had the railroad not been built; otherwise, they become guilty of obstructing a public highway, with its consequent civil and criminal liabilities. The Code (section 1957, subsec. 5) provides that: "Every railroad corporation shall have power to construct their road across, along or upon any stream of water, water course, street, highway, plank road, turnpike or canal which the route of its road shall intersect or touch, but the company shall restore the stream or watercourse, street, highway, plank road and turnpike road, thus intersected or touched, to its former state, or to such state as not unnecessarily to have impaired its usefulness." Section 1954 gives the company the right to carry the highway under or over its track, as may be found most expedient, and to acquire, by condemnation or otherwise, such land as may be necessary to use in restoring the highway. The granting of such powers presumes their use when necessary, and clearly indicates the purpose of the law that the highway shall be fully restored, as far as possible, at any reasonable expense. In the case at bar, if the highway was obstructed, or its use rendered dangerous, by any unnecessary act of the defendant, either in its negligent construction of the crossing or its failure to keep it in proper repair, then the plaintiff is entitled to recover such damages as resulted therefrom. The plaintiff was entitled to show the dangerous condition of the crossing. This dangerous condition, when proved, would be prima facie evidence of negligence on the part of the defendant whose duty it was to keep the crossing in proper condition. Marcom v. Railroad Co. (at this term) 35 S. E. 423. The defendant might then either rest upon its denial of the fact, or show that the dangerous condition arose from circumstances and conditions beyond its control. For instance, the defendant might deny that the guard rail was dangerous to travelers on the highway, or, admitting its danger, might show that the guard rail was necessary for the safety of its train; that it was laid down so as to cause as little obstruction or danger as possible to the highway; that it was at the proper distance from the main rail, and that it would be dangerous to fill up between the rails with dirt to any extent. In other words, it might deny the dangerous condition of the crossing, the burden of proving which would rest upon the plaintiff, or it might assume the burden, and show that such condition did not arise from any negligence of its own.

The plaintiff's fourth exception is to the exclusion of the following testimony, as shown by the record: "Plaintiff proposes to show by this witness that the crossing near his house on same road is constructed like this one, and that people have got their feet caught in it between main rail and guard rail." We think the evidence was competent. It is essentially dissimilar from the first exception, because it is proposed, not simply to show that this crossing was like another crossing, but that this crossing was dangerous, because another crossing of similar construction had proved to be dangerous. Similar causes, under similar circumstances, produce similar results, and if a machine of a certain make prove dangerous in ordinary handling it is fair to presume that other machines of the same make may be equally dangerous. Where, however, the danger arises from some flaw or defect peculiar to the individual machine, and not arising in any way from its method of construction, this rule may not be applicable. In the present case the evidence was clearly competent. We have treated this case as depending upon the negligent construction of a crossing at the intersection of a public highway, and so it is presented to us. But there is a suggestion in the evidence that we think proper to notice. If the crossing was so constructed and maintained by the defendant as to be perfectly safe to any one crossing its track upon any part of the highway, we think it has sufficiently fulfilled its duty to the public, even if it were possible for a person walking down the track to get his foot caught in such a manner as would be impossible were he simply in the ordinary use of the highway. A railroad company using machinery of the most dangerous nature is held to a high degree of care in the performance of its legal duties; but its track is not a public footway, and it is not required to keep it in repair for such a purpose. Of course, this want of previous negligence would not relieve the defendant from liability for injury to one on its track when such injury might have been avoided by reasonable care and diligence on its part. But that question is not developed by the evidence.

It is alleged in the complaint and admitted in the answer that the crossing in question was "a public crossing for the passing of persons and vehicles over said track." Whether the crossing was defective, and, if so, whether such defect was the cause of the injury, are questions for the jury under proper instructions from the court. If there was no defect either in the construction or maintenance of the crossing, there was no negligence on the part of the defendant in that regard, who, unless shown to have been negligent in some other respect, would not be liable to the plaintiff for the death of his intestate. These are questions to be settled by the jury upon a new trial, which must be ordered for the exclusion of competent testimony. New trial.

NEAL v. CAROLINA CENT. R. CO.

(Supreme Court of North Carolina. May 22, 1900.)

ACCIDENT ON RAILROAD TRACK—CONTRIBUTORY NEGLIGENCE—PROVINCE OF COURT AND JURY.

1. A person killed in the daytime, while walking on a railroad track, where it was straight for 150 yards, by a train going in the same direction at a speed in excess of that allowed by ordinance, no bell being rung, and he not being seen by the trainmen, though they could, if looking, have seen him, is guilty of contributory negligence preventing recovery.

2. Plaintiff only having introduced evidence, and there being no contradiction in it, and its truth being admitted by defendant by demurrer thereto and motion for nonsuit, and the only reasonable inference therefrom being that plaintiff's decedent was guilty of contributory negligence, the court may so find, and take the case from the jury.

Douglas and Clark, JJ., dissenting.

Appeal from superior court, Mecklenburg county; Starbuck, Judge.

Action by W. K. Neal, administrator of Charles M. Coffin, deceased, against the Carolina Central Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Jones & Tillett and Clarkson & Duls, for appellant. Burwell, Walker & Cansler, for appellee.

FURCHES, J. This is an action to recover damages for the wrongful killing of Charles M. Coffin. The defendant does not deny the killing, but denies that it was caused by its default or negligence, and alleges that it was the result of the negligence of plaintiff's intestate. The evidence of plaintiff showed that intestate was killed by the shifting engine on defendant's road, in the city of Charlotte; that this engine was running backwards, drawing a gondola car after it; that it was running at a high rate of speed, in a westward direction, and intestate was walking on defendant's track, going in the same direction; that this train had come very near running over a team of mules at the street crossing, scaring the mules, and making them unmanageable, and that the engineer and crew were watching the mules, and laughing at the driver trying to manage them. The road was straight for 150 yards, and, as the killing occurred in open daylight, the crew and engineer might have seen intestate, and intestate have seen the train, for that distance. The intestate was walking on the defendant's track when he was knocked down by defendant's train, run over, and killed. The plaintiff also offered in evidence an ordinance of the city forbidding trains to run at a greater speed than four miles an hour while passing through the city, and requiring the bell to be rung. Plaintiff showed that this train was running at a high rate of speed, and greater than that allowed by the ordinance, and that no bell was being rung. The plaintiff, having offered evidence as to amount of damages, rested the case. Defendant offered no evidence, demurred to plaintiff's evidence, and moved to nonsuit plaintiff, under chapter 109, Acts 1897. After hearing argument of counsel, and upon full consideration of the matter, the court allowed defendant's motion, and assigned the following reasons therefor: "First. That the evidence, if believed, showed the defendant guilty of negligence. Second. That the evidence being that offered by the plaintiff, and without contradiction, must, as to the plaintiff, be believed, and, if believed, it showed, and the conclusion could not be reasonably avoided, that the plaintiff's intestate, by his own negligence, contributed to cause the injury. Third. That while it might be found that, notwithstanding the negligence of plaintiff's intestate, the defendant might, by ordinary care, have avoided the injury, the evidence, which, as to the plaintiff, must be believed, clearly showed that, notwithstanding defendant's negligence, the plaintiff's intestate, by the exercise of ordinary care, might himself, up to the last moment, have avoided the injury. Therefore the negligence of plaintiff's intestate, if not the proximate cause, at least concurred with defendant's negligence, up to the last moment, in together constituting the proximate cause of the injury. The third issue, therefore, should be answered 'No,' and the plaintiff is not entitled to recover in the action. In deference to this intimation, the plaintiff, having excepted, submitted to a nonsuit, and judgment was entered accordingly." The plaintiff assigned the following grounds of error: (1) "That the court added at the end of the third issue tendered the clause, 'And, if so, was defendant's failure to avoid the injury the proximate cause thereof?'" (2) "The plaintiff assigns as error the rulings of his honor sustaining the demurrer and dismissing the action." (3) "That the court, in and by its said judgment, dismissed the action." The evidence was all introduced by the plaintiff; the defendant introduced none; and there is no exception as to the competency of any of the evidence.

The court finds from this evidence that the defendant was guilty of negligence; and while we think from the evidence, taken to be true, that it was guilty of negligence, as this negligence was shown by the evidence of the plaintiff, the court could not have found this issue against the defendant, if it had complained of and excepted to it, and brought it before us for review. It was the finding of an affirmative issue against the defendant upon the evidence of the plaintiff. Spruill v. Insurance Co., 120 N. C. 141, 27 S. E. 39; Anniston Nat. Bank v. School Committee of Durham, 121 N. C. 109, 28 S. E. 134; White v. Railroad, 121 N. C. 484, 27 S. E. 1002. But this ruling is not before us for review. The defendant neither excepted nor appealed, and the plaintiff cannot except to this finding, because it is in his favor. And it seems to us

that there can be no doubt but what the intestate of the plaintiff was also guilty of negligence, if the evidence be true, and every word of it believed. This issue is, then, not one that must be found by a jury, but one that may be found by the court. It does not present a question where reasonable men might put different constructions upon it, and come to the conclusion that the plaintiff's intestate was not guilty of negligence. If plaintiff's intestate was walking upon defendant's road, in open daylight, on a straight piece of road, where he could have seen defendant's train for 150 yards, and was run over and injured, he was guilty of negligence. And, although the defendant may have also been guilty of negligence in running its train at a greater rate of speed than was allowed by the town ordinance, or in not ringing its bell as required by said ordinance, and in not keeping a lookout by its engineer as it should have done, yet the injury would be attributed to the negligence of the plaintiff's intestate. It has been so held in Meredith v. Railroad Co., 108 N. C. 616, 13 S. E. 137; Norwood v. Railroad Co., 111 N. C. 236, 16 S. E. 4; High v. Railroad Co., 112 N. C. 385, 17 S. E. 79. These cases hold that it is not negligence in a railroad company where its train runs over a man walking on the railroad track, apparently in possession of his faculties, and in the absence of any reason to suppose that he was not. This is put upon the ground that the engineer may reasonably suppose that the man will step off in time to prevent injury. In McAdoo v. Railroad Co., 105 N. C. 140, 11 S. E. 316, this doctrine is expressly held; and it is further held in that case that, on account of plaintiff's negligence in standing on the road and allowing defendant's train to run over him, this was concurring negligence, and prevented him from recovering damages. McAdoo v. Railroad Co. has been cited and approved on this point in Syme v. Railroad Co., 113 N. C. 565, 18 S. E. 114, and in Smith v. Railroad Co., 114 N. C. 744, 19 S. E. 863, 923, 25 L. R. A. 287, and many other cases. We know that it has been held in many cases that a railroad company is liable for damages for carelessly and negligently running over and killing or injuring persons on its road, in which it appeared that the persons killed or injured were also guilty of negligence; and it may not be easy to distinguish some of these from the one under consideration. But there is a distinction, and a distinct line of decisions, as we have shown by the cases we have cited. The distinction does not seem to lie so much in the negligence of the parties, where both are guilty of negligence, as it does in the condition of the parties. And we think, upon examination, that it will be found that, where the company has been held liable, it is in cases where the party injured was not upon equal opportunities with the defendant to avoid the injury, and in cases where there was something suggesting to the defendant the injured party's disadvantage or disability; as where the party injured is lying on the railroad track, apparently drunk, or asleep, or on a bridge or trestle, where he could not escape, or could not do so without great danger. In such cases, if the engineer saw the party injured or by proper diligence should have seen him, the company is liable. It is in such cases as these that the doctrine of proximate cause, or the "last clear chance," is called in to determine the liability.

The doctrine of proximate cause—the "last clear chance"—is firmly established in this state, and we have no idea of abandoning or in any way disturbing it. We think the line of cases where it applies are distinct, and distinguishable from this case, whether we have succeeded in pointing out the distinction or not. Indeed, we do not understand the plaintiff to make this the principal ground upon which he rests his appeal and insists upon a new trial. Nor do we understand the plaintiff seriously to insist but what there is evidence tending to prove—if not to prove—that the plaintiff's intestate was guilty of negligence. But it is contended that if the intestate was guilty of negligence, the defendant being also guilty of negligence, the intestate's negligence was what is termed "contributory negligence," and that contributory negligence is an affirmative issue, and cannot be found by the court. To sustain this position, a number of recent cases have been cited; among them, Spruill v. Insurance Co. and Anniston Nat. Bank v. School Committee of Durham, supra. In these cases, and quite a number of others, it was held that the court could not find an affirmative issue. This holding was entirely correct in those cases and in every other case where it has been held, so far as we remember. We do not wish to overrule or disturb this doctrine, as held in those cases; but to our minds this case is clearly distinguishable from them, as we hope to be able to show. In those cases, and in all others, as we think, where this has been held, there was some doubtful or disputed fact to be found, dependent upon the weight or the credit of the evidence. In such cases the court cannot find the facts, nor even intimate an opinion, without violating the statute of 1796 (Code, § 413); and, if the court has done so in this case, the plaintiff is entitled to a new trial. But the function of the jury is to find the facts (this must mean disputed facts), and must be exercised where there is evidence proving or tending to prove the facts disputed. If there is not, it is the duty of the court to say so, and withdraw this dispute—this issue—from the jury. This was conceded by the plaintiff, it being a negative finding of the issue. But the plaintiff contends that to find the intestate guilty of negligence was an affirmative finding, and one the court could not find. This is logically and legally true if the court had to find any disputed fact where there was any evidence showing or tending to show the negative of the issue, or if it was necessary that

he should pass upon the weight or credit of the evidence. Where this is the case, the usual rule is to submit the issue to the jury, with the instruction that, if they believe the evidence, they will find the issue yes or no, as the case may be. This is usually a good rule, and in many cases saves an appeal to this court. But the court could not do that in this case without impeaching the plaintiff's witnesses. All the evidence was offered by the plaintiff, and the defendant had demurred to it. This was an admission by the defendant that the evidence was true. The plaintiff, by offering the evidence, had vouched for its credit. He could not impeach its credit. As to the plaintiff, it stood unimpeached and unimpeachable. It is true that, if the plaintiff offered other evidence tending to show the facts different, then it would have become a matter for the jury as to which witness they would believe. But both witnesses stand alike credited, so far as the plaintiff or the party introducing them is concerned. If this evidence, or any part of it, had been introduced by the defendant, it would have been the duty of the court to submit it to the jury, because the plaintiff would not have been bound to give credit to the defendant's witnesses, and the defendant could not give them credit by demurring to their evidence. But when the defendant demurred to the plaintiff's evidence (and but one construction can reasonably be drawn from it; that is, it could not reasonably mean different things), we cannot see why it did not become a question of law, as much so as if the facts stated in the evidence had been agreed to, as the facts in the case; and, if this is so, it certainly became a question of law for the court. This view of the case is sustained by Williams v. Telegraph Co., 116 N. C. 556, 21 S. E. 298; Hinshaw v. Railroad Co., 118 N. C. 1047, 24 S. E. 426; Ice Mfg. Co. v. Raleigh & G. R. Co., 122 N. C. 881, 29 S. E. 575; White v. Railroad Co., 121 N. C. 484, 27 S. E. 1002,—and we do not think it will be found to conflict with any opinion of this court. A number of cases may be found (some of which we have cited) in which it is said that the court cannot find an affirmative issue; and this is true in those cases, and in all cases where the court would have to find the facts to establish an affirmative issue. But in this case the court finds no facts. They are admitted by the demurrer of the defendant to the plaintiff's testimony. This being so, and the plaintiff's evidence clearly establishing the intestate's negligence, which was the concurrent cause of the injury, the plaintiff cannot recover, without overruling the authorities we have cited, and many others not cited. The doctrine of proximate cause and "the last clear chance" is not involved in this case. It falls under the doctrine announced in McAdoo v. Railroad Co., supra, and that line of cases. Taking the view of the case we do, the judgment of the court below must be affirmed.

FAIRCLOTH, C. J. (concurring). When the plaintiff closed his evidence, defendant moved that plaintiff be nonsuited for the reason that upon his own evidence he was not entitled to recover. His honor was of opinion that the evidence, if believed, showed the defendant guilty of negligence; that the evidence, being that of the plaintiff, and without contradiction, must, as to the plaintiff, be believed, and, if believed, it showed that plaintiff's intestate, by his own negligence, contributed to cause the injury. The intestate was walking on the track of the defendant company when he was struck by the defendant's shifting engine and killed. At the time he was struck the intestate was walking along the track, in full possession of his senses, and in a place where he had a full view of the approaching engine for a long distance. The track was perfectly straight from the place where the intestate was struck by the engine to the crossing of the Southern Railway Company, a distance of 2 blocks and 225 feet, or 1,000 feet in round numbers; and there was no obstruction whatever to his view. There was a path running alongside of the track where plaintiff was walking at the time the engine struck him. Plaintiff's witness Sophia Lee testified that she saw the train, and heard it coming, and that plaintiff's intestate was between her and the train, walking right along the track, on a clear day. Upon this evidence it appears to me that, assuming the defendant to have been negligent, the causation of the injury was the concurrent negligence of both parties, and it has often been held that in that event neither party can recover. In McAdoo v. Railroad Co., 105 N. C. 140, 11 S. E. 316,—a case quite like the present,—the court held that "the plaintiff could not recover if the engineer and fireman, without actual knowledge of or acquaintance with him, had acted, as they did, on the assumption that intestate would get out of the way." "There was no error in the instruction predicated upon the supposition that they failed to ring the bell. According to the plaintiff's own testimony, he stood upon the track with his back towards the engine, and did not see it till after he was stricken by it. He was, therefore, in any aspect of the case, negligent, and the jury would not have been warranted in any finding that the defendant could have prevented the injury by using ordinary care." The court further says that it could make no difference at what rate of speed the engine was running at the time. "All this might possibly have been more clearly presented, if there had been a third issue, and his honor had said there was no testimony to support an affirmative finding on it." The principles stated and applied in McAdoo's Case have since been repeatedly affirmed by this court, and expressed in emphatic language. In Meredith v. Railroad Co., 108 N. C. 616, 13 S. E. 137, the court said: "We

concur with the judge below in the opinion that the plaintiff was not entitled to recover, because, by the undisputed facts, considered in any phase presented by them, the plaintiff was negligent in failing to see the train approaching him from behind, while the servant of the defendant was not in fault in acting on the belief that plaintiff would get out of the way of the engine before it would reach him." In Norwood v. Railroad Co., 111 N. C. 236, 16 S. E. 4, this court decides: "If the engineer could, by proper watchfulness, have seen intestate standing or walking on the track, he would not have been negligent in acting on the assumption that intestate would step off in time to avert injury; and where the intestate was seen, or could, by proper care, have been seen, by the engineer, sitting upright on the end of a cross-tie, the latter was justified in believing that he would get out of danger; and his failure to leave the track, whether he was a trespasser or licensee, is considered by the law as the proximate cause of his death, unless it is shown that his condition or situation was such that he could not leave the track, and that this was known, or could, by the exercise of proper care, have been known, to the engineer." In High v. Railroad Co., 112 N. C. 385, 17 S. E. 79, this court decides: "Where an engineer sees on the track, in front of the engine in which he is moving, a person walking or standing, whom he does not know at all, or who is known by him to be in full possession of his senses and faculties, the former is justified in assuming, up to the last moment, that the latter will step off the track in time to avoid injury; and, if such person is injured, the law imputes it to his own negligence, and holds the railroad company blameless." "The failure of the engineer to keep a proper lookout subjects the company to liability only in those cases where, if he had seen the situation of the injured party, it would have become his duty to pursue such a course of conduct as would have averted it. Whether he saw the plaintiff at a distance of 150 yards or of 10 feet, he was not at fault in acting on the supposition that she would still get out of the way. It is not material whether the train was moving fast or slow in such a case as this." "If the plaintiff had looked and listened for approaching trains, as a person using a track for a footway should, in the exercise of ordinary care, always do, she would have seen that the engine was moving towards her. The fact that it was a windy day, and that she was wearing a bonnet, or that the train was late, gave her no greater privilege than she would otherwise have enjoyed as licensee, but, on the contrary, should have made her more watchful." "There was nothing in the conduct or condition of the plaintiff that imposed upon the engineer, in determining what course he should pursue, the duty of departing from the usual rule that the servant of a railroad company is warranted in expecting licensees or trespassers, apparently sound in mind and in body, and in possession of their senses, to leave the track till it is too late to prevent a collision." In Syme v. Railroad Co., 113 N. C. 558, 18 S. E. 114, this court decides: "When a person is injured while walking on a railroad track by an engine that he might have seen by looking, the law imputes the injury to his own negligence. There being no testimony tending to bring this case within any exception to the general rule, we are of the opinion that there was no evidence of the want of ordinary care on the part of the defendant, while, in any aspect of the case, the plaintiff's intestate was negligent in getting upon the track in front of the engine without looking, and in exposing his person to injury, when he might have seen that the engine was approaching, and have avoided the collision by stepping off the track." "On the other hand, the engineer was justified in assuming that the intestate had looked, and had notice of his approach, and would clear the track in ample time to save himself from harm." Other cases might be cited of the same purport.

The defendant's motion was, in effect, a demurrer to the plaintiff's evidence, admitting every word to be true, and every fact that can be gathered from it. I am unable to see what is left for the jury to pass upon. I understand that when facts are agreed upon, or found by a special verdict, or admitted by demurrer, nothing remains to be done, except for the court to apply and fit the law to the facts. Here the proximate cause of the injury is plainly and manifestly the joint, concurrent negligence of both parties, and there is no place found in these facts for what is called the "last clear chance." When the facts are clearly settled, from which only one inference can be drawn, the question is then one of law for the court to decide, and in such case the court should take the case from the jury, and direct a nonsuit or verdict, as the case may be. 1 Shear. & R. Neg. p. 68, § 56; Cooley, Torts, 670. That the causes of the injury are concurrent seems plain according to these facts. Possibly, some sort of logic might conclude differently, but that is not the common-sense view to my mind; and, when logic and common sense cannot be reconciled, logic must give way.

DOUGLAS, J. (dissenting). It is within a feeling of deep regret and much hesitation that I am forced to enter my most earnest dissent from the opinion of the court. I wish I could agree with the majority of the court that its opinion does not conflict with our former rulings, but I am utterly unable to do so with those cases before me. That plain words may have a hidden legal meaning utterly at variance with the ordinary usage of the language, and which I did not intend them to have, and never dreamed they

could have, when I used them, is beyond my comprehension. Feeling as I do, I would be untrue to myself were I to concur in an opinion which, to my mind, destroys the principle of our recent decisions, is in direct violation of the statute, and flatly contravenes the letter and the spirit of the constitution. The rule as now laid down, stripped of its incidents, is as follows: "That the court may withdraw an issue from the jury, and direct an affirmative finding of contributory negligence against the plaintiff, whenever it thinks that the evidence of the plaintiff's own witnesses is sufficient to prove the fact in controversy." That is all there is in it, dilute it as we may. It is true the court says, "provided there is no conflict in the testimony," but such a want of conflict does not of itself prove the issue. There may be only one witness or fifty witnesses swearing to the same thing, and, unless they swear to enough to prove the fact in issue, neither the court nor the jury can find it to be true. This line of reasoning forces me to the conclusion which this court has recently so repeatedly and emphatically announced, but which it now seems at least partially to repudiate,—that the court can never direct an affirmative finding of fact. To do so, it would be necessary for the court to pass directly upon the weight of the evidence, and to find that it was of sufficient weight to overcome the negative presumption always arising from the burden of proof; in other words, it would be saying, in the teeth of the statute, that a fact which the law required to be proved had been "sufficiently proven." And yet Mr. Justice Furches, speaking for a unanimous court in Anniston Nat. Bank v. School Committee of Durham, 121 N. C. 109, 28 S. E. 134, says that this cannot be done, using the following words: "But no matter how *strong* and *uncontradicted* the evidence is in support of the issue, the court cannot withdraw such issue from the jury, and direct an affirmative finding. To do this is to violate the act of 1796 (section 413 of the Code)." In White v. Railroad Co., 121 N. C. 484, 489, 27 S. E. 1002, the same justice, again speaking for a unanimous court, says: "The court can *never* find nor direct an affirmative finding of the jury. The most the court can do is to instruct the jury, where there is no conflict of evidence, that, if they believe the evidence, they should find yes or no, as the case may be." In Wood v. Bartholomew, 122 N. C. 177, 186, 29 S. E. 960, Justice Furches, again speaking for a unanimous court, says: "The burden of the issue of contributory negligence is on the defendant. It is an affirmative issue, and cannot be found by the *court*. It must be determined by the *jury*." Other opinions of the same learned justice contain expressions to the same effect. The italics are my own. These emphatic expressions were neither casual nor obiter, but were used in the decision of questions directly raised, and in answer to the strenuous contentions of counsel urged in repeated and elaborate arguments. This court, at the last term, after most careful consideration, speaking without dissent through Mr. Justice Montgomery, in Crews v. Cantwell, 125 N. C. 516, 519, 34 S. E. 688, after intimating that the burden was really on the defendant, uses the following language: "The instruction then of his honor was erroneous, for, as the burden of proof was assumed by the plaintiff, the court could not withdraw the issue from the jury. Anniston Nat. Bank v. School Committee of Durham, 121 N. C. 109, 28 S. E. 134. In that case Justice Furches, delivering the opinion of the court, said: 'But, no matter how strong and uncontradictory the evidence is in support of the issue, the court cannot withdraw such issue from the jury, and direct an affirmative finding.'" It should be noted that in that case the court based its judgment solely upon the fact that the plaintiff had assumed the burden of proof, and made no allusion whatever to the fact that the only evidence was that of the plaintiff. Mr. Justice Clark has used similar language in speaking for the court, and does not wish now either to modify or withdraw it. Speaking for a unanimous court in Sherrill v. Telegraph Co., 116 N. C. 655, 21 S. E. 429, he says, on page 657, 116 N. C., and page 429, 21 S. E.: "But when the plaintiff makes out a prima facie case, then to instruct the jury that the evidence rebuts it and overcomes it is to invade the province of the jury, and violates chapter 452 of the Acts of 1796 (Code, § 413), which forbids an expression of opinion by the judge upon the weight of the evidence."

I may be pardoned for citing some of the opinions of the court written by myself. They are in plain words, plainly setting forth the views I was known to possess and intended to express. Whatever other faults they may have, my opinions are neither the intangible mists of summer nor the shifting winds of March. In Spruill v. Insurance Co., 120 N. C. 141, 27 S. E. 39, during my first term upon the bench, it is said for a unanimous court: "Where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests. That the verdict should be directed against the party upon whom rests the burden of proof is the essence of the rule. * * * If the verdict of a jury is in the opinion of the court against the weight of evidence, it can be set aside; and to the proper exercise of this discretion there can be no objection. But to permit the judge to pass upon the sufficiency of the evidence necessary to rebut a legal presumption without submission to the jury would infringe upon the exclusive powers of the jury. * * * The rule laid down in some authorities that, wherever the judge would be justified in setting aside the verdict as against the weight of evidence, he

would be equally justified in taking the case from the jury and directing a verdict, cannot receive our sanction. It is not the law in North Carolina, and never can be under our present constitution. 'The ancient mode of trial by jury' guarantied by the constitution is that at common law, and is none the less the right of the citizen than it was of the subject. Direction of a verdict and granting a new trial are essentially different in nature and effect. The one regulates the trial by jury, the other denies it; the one recommits the case to the jury, the other takes it away completely; the one merely reopens the case for a fairer trial, while the other ends it without redress, save the precarious method of appeal, where findings of fact can be reviewed only from the meager notes of the judge and the uncertain recollection of counsel. The mere fact that the judge can never, save by waiver or consent, render a verdict, but can direct it only in the name of the jury, shows the intent and spirit of the law. These principles are 'fundamental,' and 'a frequent recurrence' thereto is of constitutional obligation." This case appears to have been cited in more than 20 different cases, including the opinion of the court from which I am respectfully dissenting. In Cox v. Railroad Co., 123 N. C. 604, 31 S. E. 848, this court, in reviewing Spruill's Case, says: "Had the question not been again presented by counsel, it would almost seem needless to repeat, what we have so often said, that the burden of proving negligence rests upon the plaintiff, while the onus of showing contributory negligence rests upon the defendant. In both cases this must be shown by a greater weight of the evidence, and of this relative weight the jury alone can determine. A negative presumption necessarily accompanies the burden, and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. * * * Where there is evidence tending to prove negligence on the part of both parties, the case must always be submitted to the jury, and it makes no difference if this evidence appears in the testimony of the plaintiff. The court may say to the jury that there is no evidence tending to prove a fact, but it can never say that a fact is proved. * * * It is the settled rule of this court that a verdict can never be directed in favor of the party upon whom rests the burden of proof, who in all cases is considered to have the affirmative of the issue, whatever may be its form. Though this rule was discussed and reaffirmed in Spruill v. Insurance Co., 120 N. C. 141, 27 S. E. 39, it did not have its origin in that case, but in Wittkowsky v. Wasson, 71 N. C. 451, where the doctrine was distinctly laid down in the following words, quoted from the opinion of Wells, J., in the court of exchequer chamber: 'There is in every case a preliminary question, which is one of law, viz. whether there is any evidence on which the jury could properly find the question for the party on whom the burden of proof lies. If there is not, the judge ought to withdraw the question from the jury, and direct a nonsuit, if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant.' In other words, the verdict must, in either event, be directed against the party on whom lies the onus, and by necessary implication can never be directed in his favor. * * * The burden of proving contributory negligence is always upon the defendant. Therefore a direction in his favor, based in any degree upon the contributory negligence of the plaintiff, would be a direction in favor of the party upon whom rested the burden of proof, which is directly opposed to the uniform current of our decisions. If there had been any reasonable doubt that the burden of proving contributory negligence rested upon the defendant, it has been set at rest by chapter 33 of the Laws of 1887. * * * It therefore follows that on a motion for a nonsuit the court can consider only the evidence relating to the negligence of the defendant, and, if there is more than a scintilla tending to prove such negligence, the motion must be denied, and the case submitted to the jury." That case cites a large number of authorities, which it is needless now to recite. Can there be any question as to its meaning? There was a single dissent. In Bolden v. Railway Co., 123 N. C. 614, 31 S. E. 851, this court, with a single dissent, says: "By force of statute, as well as a settled rule of decision, the plea of contributory negligence is an affirmative defense, in which the burden, both of allegation and proof, rests upon the defendant. It is true that contributory negligence may be shown by the evidence of the plaintiff, but whether the weight of that evidence is sufficient to overcome the presumption in his favor arising from the burden of proof is a question for the jury. The action of the plaintiff in going upon the bridge was argued as contributory negligence, but, if it be viewed as an implied assumption of risk, the same rule will apply. Both doctrines are alike as being in the nature of a plea of confession and avoidance, inasmuch as they are affirmative defenses set up to excuse the negligence of the defendant. As such, the burden of proof is in both cases upon the defendant, and an issue can be found in its favor only by a jury." In the subsequent case of Cogdell v. Railroad Co., 124 N. C. 302, 32 S. E. 706, it is said by a unanimous court that: "Contributory negligence and assumption of risk, being in the nature of pleas in confession and avoidance, are affirmative defenses, and cannot be considered on a motion for nonsuit;" citing Bolden v. Railway Co., supra. It is useless to further cite the large number of cases wherein this court has said that the court could never direct an affirmative finding. If it did not mean "never" when it said it in the above cases, I suppose it did not mean it in the others. I meant it then, and mean it now.

The rule now adopted by the court is an

adaptation of the federal rule; and, while it may find a home with us by adoption, it is not to the manner born, and is the legitimate offspring neither of our constitution nor of our laws. The federal courts, as well as those of some few of the states, still adhere to the English practice of allowing the court to express an opinion upon the weight of the evidence; that is, the court, under this rule, may in all cases say to the jury what it thinks ought to be their verdict. This practice, which may serve to explain some decisions in those tribunals where it still exists, has been repudiated by a large majority of the states, and was positively prohibited by statute in this state as far back as 1796. This prohibition has been brought forward in successive compilations, and is still in force as section 413 of the Code, which reads as follows: "No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." This distinct line of demarkation between the powers of the judge and the jury, established in the childhood of our state, and remaining in full force for more than a hundred years, has become a fundamental part of "the law of the land." I am aware that there are some cases tending to sustain the rule now adopted by the court, but they were decided before I came upon the bench, and are in direct conflict with our later as well as our earlier decisions. The earliest case cited by the court is that of Meredith v. Railroad Co., 108 N. C. 616, 13 S. E. 137, decided in 1891, which cites upon this point only the cases of McAdoo, Parker, and Daily. In McAdoo's Case all the issues were submitted to the jury, and none found by the court. In Daily's Case (decided in 1890), 11 S. E. 320, while the court below held that the plaintiff, who was an idiot, could not recover, on account of his contributory negligence, this court held that there was no evidence tending to prove the negligence of the defendant. Parker's Case, 86 N. C. 221, was decided before the passage of the act of 1887 (chapter 33), which expressly provides "that in all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it shall be set up in the answer and proved on the trial." I am also aware that there have been two or three dicta to the same effect, but I do not feel bound by them. I am not responsible for all that may be said in an opinion from which I do not dissent, but only for such matters as are necessarily involved in the decision of the case. Dicta are the overflows of judicial learning, and, like the freshets in our streams, are always dangerous, and generally harmful. Occasionally they add fertility to the fair fields of jurisprudence, but more often they tend to cut gullies through well-established principles, or to create stagnant ponds of doubt whose mist and malaria are equally dangerous.

The tendency of judges to invade the province of the jury is shown throughout the entire history of the law, and the survival of the system in full vigor as the foundation stone of Anglo-American jurisprudence is in itself the strongest proof of its inherent merit. Courts of equity from the first refused to recognize the system, and we have recently seen to what extent a trial by jury can be evaded by proceedings in injunction and in the nature of contempt. Courts of admiralty, following the principles of the civil law, have also discarded the jury; and it is a significant fact that they also have refused to recognize the doctrine of contributory negligence, always apportioning the damages in proportion to the comparative negligence of the parties. In view of this tendency, this court has felt it its duty more than once to assert the independence of the jury. In Cable v. Railway Co., 122 N. C. 892, 900, 29 S. E. 379, the court says: "This court does not favor the growing practice of taking cases from the jury. The jury is a constitutional body, as much so as the court itself, and in the exercise of its peculiar powers of equal responsibility and independence." In State v. Shule, 32 N. C. 153, the court says: "We think there was error in the mode of conducting the trial. * * * There was a departure from the established mode of proceeding, and the wisest policy is to check innovation at once; particularly as in this case it concerns the 'trial by jury' which the 'bill of rights' declares 'ought to remain sacred and inviolable.' This innovation is that, instead of permitting the jury to give their verdict, the court allows a verdict to be entered for them, such as it is to be presumed the court thinks they ought to render, and then they are asked if any of them disagree to it; thus making a verdict for them, unless they are bold enough to stand out against a plain intimation of the opinion of the court." The court then proceeds to lay down the rule substantially as stated in Spruill v. Insurance Co., supra. In State v. Allen, 48 N. C. 257, 262, Judge Pearson, speaking for the court, says: "It is our duty to see to it that the trial by jury shall remain 'sacred and inviolable,' and if, upon the circuits, there has grown up any practice encroaching upon the trial by jury as 'heretofore used,' although such practice may, to some extent, have been sanctioned by decisions of this court, it is our duty to put a stop to it; and, while we will not allow a jury to encroach upon the province of the judge,—i. e. to declare and explain the law, and undertake, by an abuse of their power, to decide questions of law,—on the other hand, we are equally solicitous to see that the court shall not commit usurpation upon 'the true office and province of the jury.' Repetition of error can never justify the violation of a positive enactment of a statute, much less the infringement of a fundamental

principle upon which our social existence is declared to rest. An error may have crept into our practice by reason of the judges not having attached due importance to the distinction between the condition of things in England, whence we are in the habit of taking our notions of law, and the condition of things here, where the trial by jury is protected both by the constitution and by legislative enactment. A judge is not at liberty to express an opinion as to the sufficiency of the evidence. When there is a defect, or entire absence of evidence, it is his duty so to instruct the jury; but, if there be any competent evidence, relevant and tending to prove the matter in issue, it is 'the true office and province of the jury' to pass upon it, although the evidence may be so slight that any one will exclaim, 'Certainly no jury will find the fact upon such insufficient evidence.' Still the judge has no right to put his opinion in the way of the free action of the jury, even should he deem it necessary to do so, in order to prevent them from being misled by the arguments of counsel or their own want of apprehension. It is true, juries will sometimes find strange verdicts, acting under the influence of ignorance or of prejudice, but in general juries are honest, and it is considered safer for the lives and property of the people to submit to the inconvenience of particular cases of this kind than in any wise to allow the judge to encroach upon 'the true office and province of the jury.' This partial evil is in a great measure obviated by allowing the judge to grant a new trial in all cases (except where a party is acquitted upon a criminal charge) whenever he thinks the jury have found against the weight of the evidence." I have no apology to make for quoting so much of this opinion. It is a great opinion of a great judge, fully equal in importance to that of Hoke v. Henderson, about which we have recently heard so much. I have given to the latter opinion the deliberate assent of my judgment and my conscience, and have carried it to its fullest legitimate extent. In doing so I have nothing to retract, but I feel equally bound by the underlying principles of State v. Allen. Are the constitutional rights of the officeholder any more sacred than the constitutional guaranties of the citizen? I think not. I understand the opinion of the court to admit that there is sufficient evidence tending to prove the negligence of the defendant, and to base its judgment purely upon the contributory negligence of the plaintiff, which it presumes to have been shown beyond the possibility of a reasonable doubt. It should be borne in mind that much of the evidence upon which the court apparently relies as showing contributory negligence was brought out by the defendant on cross-examination. That driving a train at a greater rate of speed than that allowed by law is at least evidence of negligence is well settled. In Railway Co. v. Ives, 144 U. S. 418, 12 Sup. Ct. 683, 36 L. Ed. 489, the court says: "Indeed, it has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city is negligence per se [citing authorities]. But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred, in determining whether the company was or was not guilty of negligence." The opinion of the court disposes of the case at bar in the following words: "And it seems to us that there can be no doubt but what the intestate of the plaintiff was also guilty of negligence if the evidence be true, and every word of it believed. This issue is, then, not one that must be found by a jury, but one that may be found by the court. It does not present a question where reasonable men might put different constructions upon it, and come to the conclusion that the plaintiff's intestate was not guilty of negligence." By this I presume the court means that the negligence of the deceased was the ultimate proximate cause. This remarkable finding, coupled with the unqualified assertion that no reasonable man can put a different construction upon it, becomes still more remarkable in view of the fact that two members of this court have put a different construction upon it. This exquisite but unconscious satire upon the rule itself well illustrates its inherent fallacy. I do not mean to be flippant, or to treat the opinion of the court with any disrespect, but surely it is a legitimate argument to show that it necessarily involves a reductio ad absurdum. If reasonable men cannot take a different view of this matter, it follows that the two judges who have taken a different view of it cannot be considered as reasonable men. But suppose two other judges should in some other case have the misfortune to differ from a majority of the court as to the effect of the evidence, they also would come under the ban. This would leave the remaining member of the court far above his associates upon the lonely pedestal of solitary infallibility. Suppose he, too, should fall from his high estate, what would become of the court? And yet this court must say that a reasonable man can draw but one conclusion from the evidence, or the case must go to the jury. Why not let it go to the jury, as was said in Allen's Case should be done, in all cases of doubt? The court is not only putting itself in the place of the jury, but is deciding the case by a majority verdict.

Another exceedingly able and interesting opinion is the dissenting opinion of Justice Bynum in Wittkowsky v. Wasson, 71 N. C., on page 458. The present attitude of the court renders that opinion almost prophetic. The opinion of the court in the case at bar says that the evidence introduced by the plaintiff must be taken as true, as far as he is concerned. This absolutely reverses the reason of the rule. A party is estopped from impeaching the credibility of his witnesses,

but not from denying the correctness of their statements. Moreover, much of the evidence was brought out by the defendant on cross-examination. On a motion for nonsuit, the defendant admits the truth of the plaintiff's evidence, which must be construed in the light most favorable to the plaintiff. So construing the evidence, can any one say that, if the engine had been going at not more than four miles an hour,—the maximum speed allowed by the ordinance,—the engineer could not have stopped in time to prevent the killing? As the intestate was going in the same direction, if he were walking at the rate of three miles an hour, the train would have gained on him only one mile in an hour. The intestate is presumed to have known the law, and he had a right to assume that the defendant would obey the law. He had a right to presume that the defendant would give him the ordinary signals required by law, and would not run him down, and crush the life out of him, without giving him some slight warning. Surely, a human life is still worth something,—the pulling of a bell cord, the opening of a whistle. We are constantly told that we should be shocked at the excessive verdicts of juries. That is often the case, but there are other things which also touch my judicial sensibility. A human form mangled beyond recognition, and an immortal spirit hurled into eternity without a moment's warning, are a greater shock to the instructed conscience of a Christian age than any verdict rendering merely pecuniary damages. This may be called mere sentimentality. Be it so. I can never hope to attain that high plane of judicial temperament where I shall be entirely free from human sympathy. In addition to the weight of reason and authority in favor of drawing the line at affirmative verdicts, another advantage is that it is a natural boundary, seen and known of all men. Where the dividing line between great principles is marked by nothing more substantial than stakes, which can easily be put down, and as easily pulled up and moved, the principles themselves are in imminent danger. I deeply feel the importance of this decision, and may overestimate its danger. I hope I do, but it seems to me to involve ultimate results far-reaching and dangerous in their nature. With such strong convictions and sincere apprehensions, I cannot afford to cast away the moorings of the past, and turn my opinions loose to float without chart or compass, the aimless driftwood of a shoreless sea.

CLARK, J. (dissenting). The jury system, whatever its defects, is the best which the wisdom of the ages has yet evolved for the ascertainment of the truth of disputed issues of fact. It is the bulwark of the liberty and the rights of the citizen. The line between the province of the court and of the jury was distinctly run and marked by our ancestors in the act of 1796 (now Code, § 413). Bynum, J., in Wittkowsky v. Wasson, 71 N. C. 458, ably and prophetically pointed out the evils of the judiciary passing beyond that line and invading the province of the jury as the sole triors of the facts. It is to be deeply regretted that his views did not then prevail. It is a still further invasion of the province of the jury, and contrary to a long line of the decisions of this court (as Mr. Justice DOUGLAS has shown), to permit a judge to direct an affirmative finding, which is nothing less than the court passing upon the evidence and holding that a fact is sufficiently proved. It is the province of the jury to disbelieve uncontradicted evidence if they attach no faith to the witnesses. If there is no evidence in support of the party having the burden of proof upon an issue, the judge may direct a negative finding for its absence; or, if the uncontradicted evidence is in support of the contention of the party having the burden of proof, the court may tell the jury, "if they believe the evidence," to find in favor of that side; but the judge cannot, even in such case, direct an affirmative finding, for that is to pass upon the credibility of the witnesses and the weight of the evidence, which the jury alone is authorized to do.

MOREFIELD v. HARRIS.

(Supreme Court of North Carolina. May 22, 1900.)

ANCILLARY ADMINISTRATION—POWER TO APPOINT ADMINISTRATOR—WHAT PROPERTY SUFFICIENT.

Under Code, § 1374, giving the clerk of the superior court jurisdiction to issue letters of administration where the decedent, not being domiciled in this state, dies out of the state, and assets of such decedent thereafter come into the county of such clerk, the certified copy of a judgment recovered by the administrator of an estate in Georgia against a resident of that state is sufficient property to authorize the issue of letters of ancillary administration in this state.

Appeal from superior court, Stokes county; Allen, Judge.

Action by J. W. Morefield, as administrator of estate of J. C. Foddrill, against W. E. Harris, to recover upon a judgment. From a judgment for plaintiff, defendant appeals. Affirmed.

A. M. Stack, for appellant. W. W. King, for appellee.

CLARK, J. The administrator in Georgia, who obtained a judgment against the defendant, also resident in that state, seeks to subject realty of the defendant lying in this state. The administrator appointed in Georgia cannot sue in this state. Butts' Adm'rs v. Price, 1 N. C. 201; Anon., 2 N. C. 355; Leake v. Gilchrist, 13 N. C. 81; Smith v. Munroe, 23 N. C. 345; Sanders v. Jones, 43 N. C. 246; Stamps v. Moore, 47 N. C. 80; Grant v. Reese, 94 N. C. 720. But ancillary administration must be taken out here. 13 Am. & Eng. Enc. Law (2d Ed.) 921. The intestate had no property in this state, but

when a certified copy of the Georgia judgment is sent here that is sufficient, bona notabilia, to authorize administration hereunder. Code, § 1374 (3); Shields v. Insurance Co., 119 N. C. 380, 25 S. E. 951. The creditor, if he had lived, could have sued here upon the debt, and have procured service by attaching the property here of the debtor, who is a nonresident of this state. The administrator is simply the personal representative of the intestate, and has the same right of action, and to attach property of a nonresident as the basis of jurisdiction, which the intestate would have had if living. Any other view would be a denial of justice. In Leake v. Gilchrist, supra, it is said that the assignee of the debt by the administrator appointed at the domicile of the deceased could maintain an action here, and this is reaffirmed in Grace v. Hannah, 51 N. C. 94; Riddick v. Moore, 65 N. C. 382. Of course, the assignee could have no higher right to sue than an ancillary administrator appointed in this state, and one of the court (Hall, J.) adds that administration should be taken out in this state to sue on the debt, if it had not been assigned. Under the present Code (section 177), an assignee for purposes of collection could not maintain the action. Abrams v. Cureton, 74 N. C. 523. In Smith v. Munroe, 23 N. C. 345, Ruffin, C. J., points out that our statute (now, with some amendment, Code, § 1374) was intended to prevent disputes as to what county should grant administration, where the deceased left goods in more than one county, and was not intended to exclude the necessary power to authorize administration where the intestate died out of this state, and holds that a right to a distributive share in an estate, or debts however desperate, or even a claim of one who had assigned for benefit of creditors, was sufficient, bona notabilia, to authorize grant of administration here upon the estate of one who died nonresident. In Shields v. Insurance Co., 119 N. C. 380, 25 S. E. 951, it was held that an ancillary administrator appointed in this state upon the estate of one dying domiciled in Alabama, upon proof that there was property in this state (there a policy of insurance), could maintain an action, "no matter when or how such chattels were brought within this state," and that is conclusive of the present action. "Being under a valid appointment, and having in his hands the policy sued on, the law did not allow the debtor to contest his right to collect on behalf of the administrator in Alabama." To same purport it has been generally held in other states that, if property is brought after the owner's death into a state of which he was not a resident, ancillary administration may be granted there, though he did not own any property in such state at the time of his death. In re Hughes, 95 N. Y. 55; Johnston v. Smith, 25 Hun, 171; Saunders v. Weston, 74 Me. 85; Stearns v. Wright, 51 N. H. 600; Pinney v. McGregory, 102 Mass. 186; McCord v. Thompson, 92 Ind. 565; Green v. Rugely, 23 Tex. 539, the latter case citing English authorities to the same effect. The lien relates back to the date of the levy, and not merely to the date of docketing the judgment in the superior court. Code, § 354.

Affirmed.

BEST et ux. v. DUNN et al.

(Supreme Court of North Carolina. May 22, 1900.)

APPEAL AND ERROR—MOTION—DENIAL—PREMATURE APPEAL—AMENDED VERIFICATION—ALLOWANCE.

1. Where plaintiffs appealed from the refusal of the trial court to grant their motion to remand an action to correct a mistake in a partition proceeding to the clerk, without trial of the issues raised by defendant's answer, and from an order permitting the defendant to make a new verification of his answer, the appeal was premature, since the plaintiffs should have taken exceptions to such rulings and urged the alleged errors on appeal from the final judgment.

2. Where the verification of an answer was insufficient, it is not error for the trial court to allow an amended verification, where such allowance tends to a fair trial of the case on the merits, and the adverse party is given a reasonable time to meet the amended pleadings.

Appeal from superior court, Wilson county; Moore, Judge.

Action by D. W. Best and wife against John W. Dunn and others. From the refusal of the trial court to grant plaintiffs' motion to remand the case to the clerk, and from an order permitting defendants to make a new verification of the answer, plaintiffs appeal. Appeal dismissed.

Deans & Cantwell, for appellants. J. E. Woodard, for appellees.

CLARK, J. This was a proceeding to correct a mistake in a partition under Code, § 1918, and was transferred by the clerk to the civil-issue docket upon issue joined. In the superior court a motion by the plaintiffs to remand to the clerk, without trial of the issue, was denied. A motion for judgment on the ground of insufficient verification of the answer was met by a counter motion to permit a new verification, which was allowed. Thereupon the plaintiffs appealed.

The appeal is premature. The plaintiffs should have had their exceptions noted in the record, and on the appeal from the final judgment the rulings excepted to would have come up for review. There is no judgment to appeal from, but simply the refusal of a motion to remand, and the allowance of a verification. In Kruger v. Bank, 123 N. C. 16, 31 S. E. 270, there was no answer, and no time allowed to file answer, or to demur, and the refusal of judgment under such circumstances was the denial of a substantial right given by section 386 of the Code. Phifer v. Insurance Co., 123 N. C. 410, 31 S. E. 716, and Cole v. Boyd, 125 N. C. 496, 34 S. E. 557, held that the verification of the complaint being insufficient, a judgment by default final should be corrected into default and inquiry,

but it was not held that the court could not permit a proper verification. As was said by Merrimon, J., in Grant v. Reese, 90 N. C. 8, "Slight attention to the decisions of the court would prevent miscarriages like the present, and facilitate the administration of justice." Appeal dismissed.

DOUGLAS, J. (concurring). I merely wish to emphasize the fact that this court did not intend by its decisions in Phifer v. Insurance Co., 123 N. C. 410, 31 S. E. 716, Cole v. Boyd, 125 N. C. 496, 34 S. E. 557, and Payne v. Boyd, 125 N. C. 499, 34 S. E. 631, to limit in any degree, even by disapproval, the power of the court below to allow amended verifications in the interest of substantial justice. The object of those decisions was to compel a sufficient verification, so that a pleader who took advantage of the form of the statute would be equally bound by its substantial purpose. In Cole v. Boyd the court says: "But the object of verification is to verify. If it fails to do this, it is worse than useless. If a party wishes to bind his opponent with the obligations of a verified pleading, he must bind himself, and must so state every material allegation that it will not only rest under the moral sanctity of an oath, but that its falsity will fasten upon him the penalties of perjury. This, being the object of a verification, is the true test of its sufficiency." Again, the court says in Payne v. Boyd: "We deem it necessary to adhere to the reasonable enforcement of this rule, in the interest of substantial justice. In the present case it does not appear to work any hardship, and in all cases the party can appeal to the discretionary power of amendment lodged in the court, which, we doubt not, will be exercised upon all proper occasions." Where the allowance of such an amendment tends to a fair trial of the case upon its merits, I think it is eminently proper that the court should grant it; giving, of course, to the adverse party a reasonable opportunity to meet the amended pleadings.

TIDDY v. GRAVES.

(Supreme Court of North Carolina. May 22, 1900.)

TAX SALES—REDEMPTION—CURTESY—PLEADINGS—ADMISSIONS—EXECUTORS.

1. The two years given a remainder-man in which to redeem applies only to sales for nonpayment of state or county taxes, and not in case of sales for city taxes.

2. Under Const. art. 10, § 6, providing that the property of a female shall be and remain her sole and separate estate and property, and shall not be liable for her husband's debts, "and may be devised and bequeathed, and with the written assent of her husband conveyed by her as if she were unmarried," the husband has no right of curtesy in land devised by her.

3. Admission by an answer of the paragraph of the complaint that "J., the husband of the said A., at her death became entitled to an estate by the curtesy in the said land, and he is still surviving," is an admission only of the fact that J. still survives, and not of the conclusion of law that J. became entitled to curtesy in land devised, as alleged in the complaint, by his wife.

4. One qualifying as executor of a will cannot claim a life estate in land contrary to a devise in the will.

Appeal from superior court, Guilford county; Brown, Judge.

Action by T. C. Tiddy against G. C. Graves. Judgment for plaintiff. Defendant appeals. Reversed.

L. M. Scott and A. M. Scales, for appellant. Osborne, Maxwell & Keerans, for appellee.

CLARK, J. The plaintiff alleges that he is the owner in fee of the premises, by virtue of his mother's will, by which it is devised to him in fee simple. She died in 1890. On May 6, 1895, the property was sold for nonpayment of taxes, both by the city, under the provisions of its charter, and by the sheriff, under the general statute, and purchased by the defendant at both sales. Over a year thereafter, no one having come forward to redeem the premises, deeds therefor were made to the defendant both by the sheriff and by the city. There is no impeachment of the regularity of these proceedings. The plaintiff made no offer to redeem till the 29th of April, 1897. The plaintiff contends, however, that his stepfather, Reed, who was in possession, was entitled to a life tenancy in the premises as tenant by the curtesy, and therefore that he (the plaintiff) had two years in which to redeem, instead of one, and therefore was in time, and that the defendant is estopped by an admission in the answer to deny that the stepfather was tenant by the curtesy. To this it is sufficient to say: (1) The two years given one who is remainderman after a life estate, in which to redeem, applies only to sales for nonpayment of state and county taxes; and, therefore, if the contention that the stepfather was tenant by the curtesy were valid, the defendant's title under the deed from the city is unimpeachable. (2) It is clear that under the present constitution there is no curtesy, after the death of the wife, in property which she has devised. In Walker v. Long, 109 N. C. 510, 14 S. E. 299, Merrimon, C. J., in a well-considered opinion, says: "But that constitution [1868, art. 10, § 6] has wrought very material and far-reaching changes as to the rights, respectively, of husband and wife in respect to her property, both real and personal, and enlarged her personality and her power in respect to and control over her property. It provides that 'the real and personal property of any female in this state acquired before marriage, and all property real and personal to which she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, liabilities or engagements of her husband, and may be devised and bequeathed, and with

the written assent of her husband conveyed by her as if she were unmarried.' This provision is very broad, comprehensive, and thorough in its terms, meaning, and purpose, and plainly gives and secures to the wife the complete ownership and control of her property as if she were unmarried, except in the single instance of conveying it. She must convey with the assent of the husband. It clearly excludes the ownership of the husband as such, and sweeps away the common-law right or estate he might at one time have had as tenant by the curtesy initiate. The strong, exclusive language of the clause above recited is that the property 'shall be and remain the sole and separate estate and property of such female, * * *' and the husband shall be, not tenant by the curtesy initiate, but tenant by the curtesy after the death of his wife, in case she die intestate." This is necessarily so, as the separate estate remains the wife's during coverture, with unrestricted power to devise and bequeath it. With this explicit provision in the constitution, no statute and no decision could restrict the wife's power to devise and bequeath her property as fully and completely as if she had remained unmarried.

The plaintiff insists that curtesy in the husband of the whole of the wife's realty is the correlative of dower in the wife of one-third of the husband's realty, and, if the legislature can confer dower, it can retain curtesy. That is true, when the feme covert dies intestate, as is pointed out in Walker v. Long, supra; but the constitution having guarantied that a married woman shall be and remain sole owner of her property, with unrestricted power to devise it, the legislature cannot restrict it. Blackstone justly says that no one has the natural right to dispose of any property after death. The power to do so is conferred by law, and varies in different countries. In England it did not exist after the Conquest, till the statute of wills (32 Hen. VIII.). Of course, as the legislature confers the right to devise, in the absence of constitutional inhibition it can repeal or restrict the power of devise; and, till the constitution of 1868, which gave a married woman the unrestricted power to devise and bequeath her property as if unmarried, the limitation of such power could be made by legislation allowing curtesy as well as dower. If the constitution had gone further, and provided that the property rights of a married man should remain as if he were single, and expressly conferred the unrestricted right to devise his realty, then, certainly, when he had devised it in fee there could be no right of dower. The legislature could only prescribe for dower in realty not devised, as it can now only confer curtesy in realty not devised.

The learned counsel for the plaintiff, however, relies strenuously upon the following admission in the answer: Paragraph 3 of the complaint alleges, "J. W. Reed, the husband of the said Annie G. Reed, at her death became entitled to an estate by the curtesy in the said land, and he is still surviving;" and paragraph 3 of the answer says, "Paragraph 3 [of the complaint] is admitted." This is an admission of the allegation of fact therein contained, to wit, that Reed was still surviving; but the allegation therein that the husband of the testatrix "at her death became entitled to an estate by the curtesy in the said land" which the wife had devised to the plaintiff was a matter of law, and that the court must decide upon the words of the constitution which guaranty to the wife the unrestricted power to devise and bequeath her property, which is to be and remain hers as if she were unmarried. No admission in the answer, intentional or inadvertent, could change the law arising upon a given state of facts. Here that state of facts is set out in the clause of the will (appended to the complaint) which devises the realty in controversy to the plaintiff in fee, as, indeed, he alleges in the complaint. Besides, Reed, having qualified as executor to the will, cannot claim a life estate in this land contrary to the will, and the plaintiff cannot do it for him. Allen v. Allen, 121 N. C. 328, 28 S. E. 513.

His honor below held correctly "(1) that under section 6, art. 10, of the constitution the estate by curtesy is destroyed where the feme covert dies testate and devises the property, as in this case; (2) that the husband, J. W. Reed, having duly qualified as executor to said will, cannot claim a life estate as against the plaintiff, a devisee of this lot; (3) that the plaintiff is not the owner of a reversion, but became the owner in fee of the present and all other interest in said lot by said will, and that the plaintiff was therefore only entitled to 12 months, and not two years, within which to redeem." But he erred in holding that, notwithstanding the above is the law, the defendant has admitted the contrary by his answer, and "cannot controvert that admission." Suppose, instead of the admission, there had been a denial, and an issue had been submitted to the jury, who had found thereon that Reed was "entitled to an estate by the curtesy" notwithstanding the will; would not such finding have been held immaterial, and judgment entered non obstante veredicto? Certainly the admission in the answer (if, indeed, it were intended to admit anything beyond the allegation of fact in clause 3 that Reed still survived) could have no greater effect than the finding of a jury. Upon the findings of fact, judgment should be entered for the defendant. Reversed.

McMILLAN v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina. May 29, 1900.)

RAILROADS — FIRES — TRIAL — QUESTION FOR JURY — SUFFICIENCY OF EVIDENCE — REMARKS OF JUDGE—APPEAL—EVIDENCE.

1. Evidence that defendant's right of way was covered with dry grass; that the fire which burned plaintiff's property, when first seen, was on the right of way; that defendant's train had recently passed; and that, though the engine had an improved spark arrester, it was known that sparks could escape therefrom,—was sufficient to present a question for the jury on the issue of defendant's liability for the injury.

2. On motion to dismiss an action for damages for setting fire to plaintiff's land on the ground that there was no evidence of defendant's liability, the remark of the court in denying the motion, in the hearing of the jury, but not to them, that the passing of the engine just previous to the fire was some evidence that the train set the fire, was not erroneous in view of the fact that the motion was denied, and that the passing of the engine was, in law, some evidence.

3. A verdict on conflicting evidence will not be disturbed on appeal.

Appeal from superior court, Duplin county; Robinson, Judge.

Action by John C. McMillan against the Wilmington & Weldon Railroad Company for damages for setting out fires. From a verdict and judgment in favor of plaintiff, defendant appeals. In refusing the motion of defendant to dismiss the case, the court said, in the hearing of the jury, that the engine passing was some evidence from which the jury might infer that the train set out the fire, which remark was objected to by defendant. Affirmed.

Junius Davis and H. L. Stevens, for appellant. Allen & Dortch, for appellee.

FURCHES, J. This is an action against the defendant upon the allegation that defendant negligently set fire to plaintiff's lands, by reason of which plaintiff was damaged. Upon the close of plaintiff's evidence defendant moved to nonsuit plaintiff upon the ground that he had not made a case entitling him to recover. Chapter 109, Acts 1897. As this action was tried before the passage of chapter 508, Laws 1899, the defendant is entitled to have the case reviewed upon its status at the time this motion was made. Purnell v. Railroad Co., 122 N. C. 832, 29 S. E. 953; Wood v. Bartholomew, 122 N. C. 177, 29 S. E. 959. We have, therefore, examined the plaintiff's evidence for the purpose of ascertaining whether defendant's motion should have been allowed. We find that Lewis Bryant testified that when he saw the fire in the morning it was on the right of way. He also testified that the right of way was grassy. Lewis Murphy testified that, "We had not burnt off the right of way north of Bear Ford that year." T. C. Carter testified it (the fire) had burned to a pond north of the culvert. "Beyond the pond the right of way was covered with brown grass. * * * I saw continuous signs of fire from above the culvert on and across plaintiff's land." While it is not negligence for a railroad to run its trains over its roads well managed and well equipped, as it seems the defendant's train was, yet we know that no spark arrester can be so constructed as to entirely prevent the emission of sparks, without destroying the efficiency of the engine; and, while it was not negligent in the defendant to run such a train over its road, the fact that it had recently passed over the road, and fire was found there, was some evidence tending to show that it emitted sparks that set the grass on fire. The negligence complained of is not that of a defective engine, or improper conduct on the part of the defendant in running its train, but in allowing the right of way to become foul with dead broom grass and other combustible matter, which caused its train to start the fire that injured the plaintiff. The evidence against the defendant is circumstantial, it is true, but so it often is in determining matters of the greatest consequences, criminal and civil. So in this case we have the undisputed facts that the defendant had a railroad track and right of way, that its train had recently passed over this track, and that the fire was there that damaged the plaintiff; and in addition to this we have the evidence stated above that the right of way was foul,—that is, covered with dead brown grass,—and that the fire, when first seen (by some of the witnesses), was on the right of way; and we have the fact—known from common knowledge—that no spark arrester, no matter how well constructed, will entirely prevent the emission of sparks. Whether this evidence is considered upon the defendant's motion to nonsuit the plaintiff, or upon defendant's prayer for an instruction from the court to the jury that there was no evidence, or that upon the whole evidence the jury should find the second issue for the defendant, the motion or prayer for instruction cannot be sustained. It is said in Purnell v. Railroad Co., supra, that in a motion to nonsuit the plaintiff upon the evidence whatever the evidence tends to prove must be taken by the court as proven. The same rule obtains in a prayer for instructions to the jury that there is no evidence. Upon this rule we are of the opinion that defendant's motion to nonsuit and its prayer for instruction that there is no evidence were properly refused.

The defendant's exception to the remark of the court in refusing its motion to nonsuit the plaintiff "in the hearing of the jury" cannot be sustained. This remark was not made to the jury, but in the hearing of the jury, and, as this fact (that it was not made to the jury) was called specially to our attention by plaintiff in the argument of the case, we would not have it

understood that because we do not sustain defendant's exception we mean to say that remarks made by the judge in presence of the jury may not be the proper ground of exception. It might have been better not to have made this remark, but such things often occur in the trial of a cause by mere inadvertence, and do no harm. But this remark seems to have been made upon defendant's motion to nonsuit the plaintiff upon the ground that there was no evidence against the defendant. So we see that defendant's motion called upon the court to decide this very question. The fact that the court refused the defendant's motion was, in substance, to say that, in the opinion of the court, there was evidence. And this brings the question to this: Was the remark of the judge correct as a matter of law? and we have already discussed this question, and agree with the judge that it was some evidence.

The defendant asked and the court gave the following instructions: "(1) The burden is upon the plaintiff to prove to you by a preponderance of the evidence that the fire which burned the plaintiff's land was set out by the engine of the defendant; and, if the evidence of the plaintiff fails to satisfy the jury that such was the fact, then plaintiff cannot recover, and the jury must find all the issues in favor of defendant. (2) If the jury shall believe that the fire that burned plaintiff's land was originated by the tramps mentioned in defendant's evidence, then the defendant is not guilty of any negligence in regard to the fire, and plaintiff cannot recover. (3) If the fire originated off the right of way of the defendant, then the defendant is not liable, even if it was caused by sparks emitted from the engine of the defendant." In addition to the above, his honor gave the following charge: "It is admitted by the plaintiff that the engine was equipped with a proper spark arrester, so that the only claim of negligence is upon the ground that the defendant permitted rubbish or other material liable to become ignited to accumulate on its right of way. The burden rests, therefore, on the plaintiff to satisfy you by the greater weight of evidence that the defendant company permitted rubbish, grass, or combustible matter to accumulate and remain on its right of way so near the track as to become ignited, and did become ignited, from sparks emitted from the engine, and spread over the right of way to the lands of the plaintiff. If the plaintiff has failed to satisfy you of this, you will respond to the second issue 'No,' and will not consider the issue as to damages. You must first be satisfied that the fire was occasioned by sparks emitted from the engine, and also that the sparks fell on the right of way, and ignited rubbish or combustible matter that had accumulated on the right of way. If the sparks fell from the engine beyond the right of way, the defendant would not be liable, and you will respond 'No' to the second issue." In our opinion, the prayers of the defendant given by the court, and the charge of the court in addition thereto, cover all the material facts developed by the evidence on the trial of this case, and contain a fair and correct exposition of the law. The other exceptions of the defendant are only evidentiary, or otherwise untenable. That the defendant offered much evidence tending to show that the fire was not set out by its train, but was the work of two tramps, who stayed in the neighborhood the night before the fire, must be admitted. But this seems to us to have been fairly submitted to the jury, and they have found against that view of the evidence. We cannot review their finding. Affirmed.

MEARES et al. v. MONROE LAND & IMPROVEMENT CO. et al.

(Supreme Court of North Carolina. May 22, 1900.)

BUILDING ASSOCIATIONS—LOANS—LIABILITY ON STOCK.

A corporation authorized F., who, as trustee, held title to land for its benefit, to borrow money for it from a building association. To do this, he had to subscribe for stock of the association. On the certificate therefor the association made him the loan; the certificate being assigned to the association, and deposited with it as collateral. At the same time the corporation, F., and others executed their bond to the association for the amount of the loan, and F. and the corporation executed as additional security a mortgage on the land held by him as trustee. *Held*, that the mortgage was liable for the amount the stockholder in the association was bound to contribute to restore the capital impaired by losses, whether the corporation be considered as the holder of the stock, through F. as agent, or whether F. be considered the holder.

Douglas, J., dissenting.

Appeal from superior court, Union county; McNeill, Judge.

Action by Iredell Meares and others, receivers, against the Monroe Land & Improvement Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Adams & Jerome, for appellants. R. B. Redwine, E. S. Martin, and Burwell, Walker & Cansler, for appellees.

FURCHES, J. The plaintiffs are the receivers of the Carolina Interstate Building & Loan Association, and the defendants are the land and improvement company and J. M. Fairley, J. W. Townsend, S. S. Brown, O. W. Carr, F. C. Beard, L. A. Burke, and A. P. Rhyne. The facts are found by the judge by consent of plaintiffs and defendants, and, among other facts, he finds that the plaintiffs are the duly-appointed receivers of the Carolina Interstate Building & Loan Association, which had become insolvent, and that the Monroe Land & Improvement Company is a corporation; that the defend-

ant J. M. Fairley is the trustee of said corporation, holding the title to the land hereinafter mentioned for the benefit of the defendant corporation; that the defendant corporation, being in need of money, by resolution authorized its trustee, Fairley, to borrow for its benefit $3,000; that, under the authority conferred by this resolution, the said Fairley, as trustee and agent of the defendant corporation, on the 11th day of April, 1892, made arrangements with the building and loan association to borrow that amount. In order to enable him to get this money, he had to subscribe for 30 shares of stock in the building and loan association, and become a member of the same. In other words, he had to become one of the incorporators of the said association, which he did, and the association issued to him a certificate for 30 shares of stock, of the par value of $100 per share, aggregating the sum of $3,000, and upon this certificate the building and loan association loaned him $3,000. To secure the payment of this money, the certificate of stock was assigned to the association, and deposited with it as collateral security. The defendants the land and improvement company, J. W. Townsend, J. M. Fairley, S. S. Brown, O. W. Carr, F. C. Beard, and L. A. Burke on the 5th day of May, 1895, made and executed their bond and obligation to the building and loan association for the $3,000; and on the same day (May 5th) the defendant corporation, the land and improvement company, executed its mortgage upon the land heretofore mentioned as being held in trust by the defendant Fairley for the benefit of said land and improvement company, as additional security for the payment of this loan. A large balance of the money so borrowed remains due and unpaid, and this action is brought to foreclose the mortgage. These are substantially the facts in the case necessary to be considered in determining the rights of the parties.

The defendants admit that the land and improvement company is liable for the balance of the $3,000 at 6 per cent. interest, giving it credit for all it has paid thereon, and defendants admit that the mortgage is liable as security for what the land and improvement company is liable for. But the defendants contend that the land and improvement company is not an incorporator in the building and loan association, and therefore is not liable for the 30 per cent. of lossage which has been found to be necessary to restore the capital and equalize the losses sustained by the building and loan association. The defendants say that the land and improvement company is not, as a matter of fact, one of the building and loan incorporators. But, as there is no express provision in its charter authorizing it to take stock in another corporation, it could not, in law, do so, if it had attempted to do so. And, while this seems to be the general rule, one of the authorities cited by the defendants in support of this position holds that, where a corporation in the course of its business has become the holder of such stock, it may be held to be liable on the same in case of insolvency of the company issuing the stock. Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198. And it would seem that under the authority of this case, treating Fairley as the agent, the land and improvement company could be held liable for this loss of 30 per cent., and it is admitted that the mortgage is liable for whatever sum the land and improvement company is liable.

But there is another principle involved in this action, which, to our minds, clearly makes the defendant corporation and the mortgage liable for the demand of the plaintiffs, including the 30 per cent. The defendant corporation, by resolution, authorized and empowered its trustee, who held the legal title to its land, to borrow this money for its use and benefit. Under this power and authorization, he borrowed the money, and the defendant corporation received and used it; and we must suppose that it was properly borrowed and legitimately used. To enable the trustee and agent of the defendant to borrow this money, he had to subscribe for 30 shares of stock in the building and loan association, and thereby become one of the corporators of said association; and he and the defendant company, and a number of other persons, executed a bond obligating and promising to pay the building and loan association this debt. It therefore became the debt of the defendant Fairley as well as that of the defendant company; and as he is one of the corporators, and liable for his part of the loss, this must be accounted for before he can be credited with the payments that have been made. Meares v. Duncan, 123 N. C. 208, 31 S. E. 476. This being a debt of the defendant Fairley, though as between the defendants he is a surety, makes no difference, so far as the plaintiff is concerned, and the mortgage is bound for whatever he is bound for. Meares v. Butler, 123 N. C. 206, 31 S. E. 477. The matter of usury, as between the corporators of this building and loan association, has been discussed and decided by this court so many times that we cannot afford to enter upon a discussion of the matter again. This must be considered as settled. If there are any errors in the computation of interest or the equalization of the losses, they should, of course, be corrected. We think every principle involved in this case has been settled by the various opinions of this court in cases arising out of the settlement of the insolvent Building & Loan Association of Wilmington. It is claimed that the supreme court of South Carolina, in the case of Meares v. Finlayson, 32 S. E. 986, has decided this question, or one similar to it, different from what we have held in the cases of Meares v. Duncan and Meares v. Butler, supra, and other cases referred to. But, upon examining the case of Meares v.

Finlayson, we find that it is principally put upon a South Carolina statute, and may be correct as a South Carolina decision. But the case of Meares v. Finlayson is not the case we have under consideration, and it is not our purpose to review that case. It cannot have the authority of a precedent, but only such weight as it is entitled to as the opinion of the highest court of a sister state. We cannot adopt it in this case without overruling at least a half dozen of our own decisions, which we do not care to do, as they seem to us to be based upon justice, equity, and sound reasoning. The judgment appealed from is affirmed.

DOUGLAS, J., dissents.

WHITE v. WORTH, Treasurer, et al.

(Supreme Court of North Carolina. April 22, 1900.)

OYSTER FISHERIES—CHIEF INSPECTOR—SALARY—MANDAMUS TO STATE OFFICER.

1. Laws 1897, c. 13, "An act to promote the oyster industry," provided, by section 12, for appointment of a chief inspector for the term of four years, and by section 13 fixed his salary at $900 per year. Laws 1899, c. 18, expressly amended Laws 1897, c. 13, and repealed said section 13. Laws 1899, c. 19, "An act providing for the general supervision of the shellfish industry," created seven named persons commissioners of the shellfish industry, and continued in their hands, among other duties, the duties of the chief inspector of the oyster industry, the officer corresponding to him being there styled "chairman of the shellfish commission," and the latter's salary being fixed at $400 per annum and mileage. In a proceeding to determine title to office, it was decided that he was not ousted from office, and that he had the additional duties given the commissioners by Laws 1899, c. 19. The acts of 1897 and 1899 appropriate money for salaries. Act 1899, c. 19, § 9, provides that salary shall be drawn on the warrant of the state auditor, "which warrant shall be issued by the auditor upon the certificate of the secretary of the said board, and countersigned by the chairman of the shellfish commission." Laws 1899, c. 21, prohibits the state treasurer from paying compensation to any person claiming the same for services rendered concerning the shellfish industry, unless such person is authorized to render such services under the provisions of Laws 1899, c. 19. *Held*, that the chief inspector was entitled to the salary provided by Laws 1899, c. 19; that he was a person authorized to render the services under the provisions of said chapter; that, it being decided that the chairman of the shellfish commission was not entitled to office, the provision for issuance of warrant for salary was to be complied with as near as possible, and was satisfied by the warrant being countersigned by the chief inspector in place of such chairman.

2. Mandamus would issue to the state auditor to issue a warrant for the inspector's salary, and to the state treasurer to pay it.

Montgomery and Clark, JJ., dissenting.

Appeal from superior court, Perquimans county; Starbuck, Judge.

Controversy between Theophilus White, as plaintiff, and H. W. Ayer, state auditor, and W. H. Worth, state treasurer, as defendants. From a judgment that writ of mandamus issue to defendants, they appeal. Modified.

F. H. Busbee and Cook & Green, for appellants. J. C. L. Harris, for appellee.

FURCHES, J. This is a controversy without action, under sections 567 and 568 of the Code. The facts agreed, upon which the judgment of the court is asked, are as follows: "The general assembly of North Carolina, in 1897, passed an act to provide for and promote the oyster industry of North Carolina, ratified February 23, 1897, being chapter 13 of the Laws of 1897. This act is made a part of the case. That on the 23d day of February, 1897, the plaintiff was duly appointed by the governor of North Carolina, under the provisions of said act, chief inspector for the constitutional term of four years, and was duly commissioned as such, and was inducted into said office, and proceeded to discharge the duties thereof. The compensation to be received by him was as provided in section 13 of the act. The general assembly of North Carolina, in 1899, passed an act to provide for the general supervision of the shellfish industry of the state, ratified March 2, 1899, being chapter 19 of the Laws of 1899. Under this act, the persons named in section two, namely, George H. Hill, of Washington, Beaufort county; B. D. Scarboro, of Avon, Dare county; Daniel L. Roberts, of New Bern, Craven county; Robert W. Wallace, of Beaufort, Carteret county; C. C. Allen, of Elizabeth City, Pasquotank county; J. M. Clayton, of Englehard, Hyde county; and Daniel B. Hooker, of Bayboro, Pamlico county,—undertook to discharge the duties of shellfish commissioners, under the claim that the act of 1897 was repealed by the act of 1899. That the persons named in the preceding paragraph, having undertaken, under the title of 'shellfish commissioners,' to discharge the duties devolving upon the plaintiff as chief inspector, and having taken possession of the steamer Lilly, the plaintiff brought suit in the county of Pamlico against said persons to try the title to the office. The record in said case, together with the opinion of the supreme court of North Carolina, adjudging that the title of the plaintiff was a valid one, is made a part of this case. That since the 15th day of March, 1899, up to November 20, 1899, the defendant H. W. Ayer, auditor of the state, has refused to issue to the plaintiff a warrant for the sum of seventy-five dollars per month and his actual traveling expenses, and has also refused to issue warrants to the deputy inspectors appointed by the plaintiff in accordance with the act of 1897; and the defendant W. H. Worth, state treasurer, for the same period of time, has refused to pay the salary and traveling expenses of the plaintiff as chief inspector, and also the fifty dollars per month claimed by the deputy inspectors. That since the opinion of the supreme court has been filed the plaintiff has again demanded of the auditor the issuance of a warrant in his favor for the amount of his salary

and expenses, and the same has been refused by the defendants. The defendants base their refusal upon Acts 1899, c. 21, which is made a part of this controversy. The plaintiff insists that under the decision of the supreme court, hereinbefore mentioned in the facts agreed, he is entitled to a salary of seventy-five dollars a month and actual traveling expenses from the time of the last payment made to him up to the present time, and that this is not prohibited by chapter 21, Acts 1899, above mentioned. He asks that a mandamus issue to the defendant the state auditor, requiring him to issue a warrant for the amount due him under the law, and also that a mandamus issue directed to the state treasurer, requiring and compelling him to pay the same, and for all further relief which, under the facts above mentioned and the law of North Carolina, he is entitled to. It is further agreed that no part of the compensation, as provided in chapter 19, Pub. Laws 1899, has been paid to the persons therein named as shellfish commissioners, and that the state treasurer has on hand of the oyster fund, collected under the provisions of chapter 13, Laws 1897, and chapter 19, Laws 1899, an amount sufficient and available for the payment of such salary and traveling expenses as the plaintiff may be entitled to."

Upon these facts the plaintiff contends that he is entitled to a writ of mandamus against the defendants. This contention is disputed by the defendants, and the plaintiff's right to a mandamus is denied.

It has been decided by this court that the plaintiff is entitled to hold his office of chief inspector, to which he was appointed in 1897, for the remainder of his term of four years. White v. Hill, 125 N. C. 194, 34 S. E. 432. This is settled, and the question is now presented as to whether or not he shall have pay for his services.

The plaintiff was duly appointed and inducted into his said office in March, 1897, for a term of four years, under an act of the legislature ratified on the 23d day of February, 1897, being chapter 13 of the Public Laws of that year. Under this act he was entitled to a salary of $75 per month, or $900 per annum, payable monthly. This is not denied by the defendants, but they say that chapters 18, 19, and 21 of the Public Laws of 1899 had the effect to destroy the plaintiff's right to pay. They say that chapter 18 repeals section 13 of the act of 1897, and this is true; and they say that chapter 21 prohibits them from paying a salary to any one not acting under chapter 19 of said act, and it is true that this act so provides. And the defendants say that the plaintiff is not acting under the act (chapter 19), and is not entitled to any pay for his services. But, as it is seen that the plaintiff's office to which he was appointed in 1897 still exists, and that he is entitled to hold the same and perform its duties, it would seem that he is entitled to receive the salary attached thereto. Dalby v. Hancock, 125 N. C. 325, 34 S. E. 516; Gattis v. Griffin, 125 N. C. 332, 34 S. E. 429.

The legislature may abolish a legislative office, and this is the end of it. White v. Hill, supra; Hoke v. Henderson, 15 N. C. 1. When the office is abolished, this ends the term of the officer holding it, as there can be no officer without an office, and, of course, no salary without an officer. The legislature may reduce the salary of an existing legislative office, if this is done for the benefit of the public, and not for the purpose of injuring the incumbent and to starve him out. But, if it clearly appears that it was done for that purpose, it would be void. State v. Gales, 77 N. C. 283; Hoke v. Henderson, supra. In cases where only a part of the salary is taken from the officer, it would have to appear from the legislation itself that the object was unlawful, or the courts would not interfere. Hoke v. Henderson, supra. But if the legislature should undertake to deprive the officer of the whole of his salary, while his office still continued, the intent would so plainly appear that the act would be declared void. Hoke v. Henderson, supra; Cotten v. Ellis, 52 N. C. 545.

The plaintiff holds his office under an appointment made in 1897, but he holds and discharges the duties of his office under such laws as may be passed and in force during his term of office. The legislature, on the 28th day of February, 1899, passed an act expressly amendatory of chapter 13, Laws 1897; this being the act under which the plaintiff was appointed. And on the 2d day of March, two days thereafter, it passed another act upon the subject of oysters and shellfish. This act does not state that it is an amendment of the former acts, nor does it purport to repeal the previous legislation on the subject of oysters and shellfish, except so far as they are in conflict with the act of the 2d of March, 1899. And on the 8th of March, 1899, it passed chapter 21, which is stated to be "supplemental to chapter 19, passed on the 2d of March." This last act prohibits the treasurer from paying any compensation claimed for services, unless the person so claiming them shall be authorized to render such services under chapter 19, of which act this act is a supplement. The legislature having general powers of legislation, all these acts must be observed and enforced, unless they conflict with the vested constitutional rights of the plaintiff. (We say the constitutional rights of the plaintiff, for the reason that his rights alone are before us for our consideration.) It is, then, the duty of the plaintiff to administer his office under the law as it now exists; that is, under the act of 1897, as modified and changed by the legislature of 1899. Chapters 18, 19, Pub. Laws 1899.

For the purposes of this action, it is not necessary for us to decide whether chapters 18 and 19, Laws 1899, were intended as amendments of the act of 1897 or not. They are both a part of the public laws of the state, and must be observed, when not in conflict with the plaintiff's vested rights.

Chapter 18 is expressly stated to be an amendment to the act of 1897, and chapter 19 does not state whether it is an amendment or not. But both acts are on the same subject, and must be considered together, and treated as amendments. And where they expressly repeal the former act, or are in conflict with its provisions, the provisions of the latter act must prevail, unless they are in conflict with vested rights. It is so held in White v. Hill, supra, which is expressly put on Abbott v. Beddingfield, 125 N. C. 256, 34 S. E. 412, and McCall v. Webb, 125 N. C. 243, 34 S. E. 430. And as the plaintiff is not only authorized to perform the duties required by chapter 19, but it is in fact his duty to do so, there can be no reason for applying the provisions of chapter 21; and it is not necessary for us to decide whether it would be valid or not, if it were necessary for us to decide that question.

The fact that the legislature of 1899 changed the name of "An act to promote the oyster industry of North Carolina" to that of "Shellfish Commissioners" did not abolish the plaintiff's office. White v. Hill and Abbott v. Beddingfield, supra; Wood v. Bellamy, 120 N. C. 212, 27 S. E. 113. Nor does the fact that the act of 1899 changed the name of the plaintiff's office from that of "chief inspector" to that of "chairman of the shellfish commission" oust the plaintiff from his office or deprive him of his salary. Wood v. Bellamy and Abbott v. Beddingfield, supra.

The plaintiff being entitled to his office and to the salary attached thereto, what is his salary, under the legislation as it now exists, and how is he to get it? Under chapter 19 of the act of 1899, it seems to us that it has been reduced to $400 per annum and five cents per mile travel, when engaged in his work, and extra expenses not to exceed $50 per annum. We cannot say that this reduction was not made for the public benefit, and we have no power to change it, and no disposition to do so if we had. The reduction may be made. State v. Gales and Hoke v. Henderson, supra; White v. Murray (N. C.; at this term) 35 S. E. 256.

Then, what is necessary to be done to enable the plaintiff to draw his salary? The act of 1897 did not give specific directions as to this. The act of 1899 (chapter 19, § 9) provides that this shall be done upon the warrant of the auditor, "which warrant shall be issued by the auditor upon the certificate of the secretary of the said board, and countersigned by the chairman of the shellfish commission." This was only a matter of detail, which seems to have been proper to supply a defect in the act of 1897, and was passed when it was thought that Hill and his force would be in office. And we cannot and do not construe this paragraph to mean that the incumbent should not receive any salary for his services. This, in our opinion, would be to construe the act to mean what we think the legislature could not do (Cotten v. Ellis, supra); and it would also be to construe it to mean what it does not say, and what we do not think the legislature intended it to mean.

So, if this direction as to the manner of issuing the warrant cannot be literally complied with,—in hæc verba,—it should be complied with "as near as may be"; that is, the certificate should be issued by the clerk of the present board, and countersigned by the plaintiff, who is acting as chairman, in place of Hill, and the auditor's warrant should issue upon this certificate.

This opinion might close here, and would do so, but for the arguments urged in opposition to the views we have expressed, some of which, it seems to us, should be noticed.

It is said that chapter 19 names certain persons as commissioners, and that the plaintiff is not one of those named in the act. This is true. But the act does not provide that the salary shall be paid to these parties, eo nomine, but to the commissioners performing the duties prescribed by the act. Suppose any or all of the commissioners named in chapter 19 had died or resigned; is it contended that still they should receive the salary, or that the work should stop, and the commission fall through and fail on that account? They are out, and, so far as we know, are not claiming any pay.

It was said this court had no jurisdiction of this matter; that it only has appellate jurisdiction; that the assumption of such jurisdiction is unheard of; that the judgment of the court will be ultra vires, unlawful, unconstitutional, and void, and that the legislature may declare it unconstitutional, and if it should do so, and the treasurer should obey the judgment of this court, he might be in danger. This argument seems to proceed upon the idea that this proceeding was commenced in this court, whereas the record shows that it is here on appeal from the superior court of Pasquotank county. And it would seem that the slightest examination would have shown that it is not a proceeding unheard of before. In Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60, which was mandamus against James Madison, secretary of the United States, it was held that the action would lie. In Cotten v. Ellis, 52 N. C. 545, which was a proceeding in mandamus by Cotten, claiming a salary as adjutant general of North Carolina, against John W. Ellis, governor of North Carolina, it was held that the action would lie, and the writ was issued. But a more recent case is that of Granville County Board of Education v. State Board of Education, 106 N. C. 81, 10 S. E. 1002, in which it was held that the action would lie, and the writ was granted. The opinion of the court in that case was written by Justice Clark, and seems to be a direct authority for issuing the writ in this case. The opinion in Cotten v. Ellis, supra, is not only authority for granting the writ, but it would be well to note what the court says, near the close of the opinion, with regard to the execution of

the writ, which is in these words: "We do not enter upon the inquiry as to how the writ will be enforced, because we are not allowed to suppose that the question will arise, feeling assured that the sole purpose of the governor is to obtain a judicial construction of the statute in question." The opinion (Cotten v. Ellis) also contains this language: "A statute which reduces a salary during the term of office, and one which takes away the salary altogether, stand on different footings; for in the latter case the object would evidently be to starve the incumbent out of his office, and thereby do indirectly what could not be done directly, so as to make applicable the remarks made in the case of Hoke v. Henderson, in which there seems to be much force that such indirect legislation is as obnoxious to the charge of being unconstitutional as an act directly depriving one of his office. A proper construction of the statute does not lead to the inference that it was the intention to abolish the salary, in the event that the applicant still continued entitled to the office and liable for the discharge of its duties. On the contrary, the clause which repeals so much of the ninth section as relates to the salary is a mere corollary or incident to the clause which repeals so much of that section as relates to the appointment of the adjutant general, and consequently the one cannot, by any rule of construction, be made to extend in its operation further than the other." "To hold otherwise," the court says, "would be to place the legislature in this attitude: 'We mean to abolish the office; if we have not the power to do so, then we mean to deprive the present incumbent of his office; if we have not the power to do that, then we mean to take away his salary.'" The facts in Cotten v. Ellis are so nearly the same as the facts in this case, is our excuse for quoting so much of the opinion.

Before the suggestion that the legislature may declare the opinion of this court unconstitutional may be adopted by any one, we ask them to read the opinion of Chief Justice Marshall in the case of Marbury v. Madison, supra. It is a full and complete answer to this suggestion. We would like to incorporate the whole of that opinion in the opinion of the court in this case; but, as this is impossible, we will again have to ask to be pardoned for making some quotations from this very able opinion, emanating from the mind of probably the greatest jurist this country has produced. It fully sustains the doctrine of Hoke v. Henderson, 15 N. C. 1, that an office is property,—a vested right,—of which he cannot be deprived. It discusses the relation of the government to the citizen; the supremacy of the constitution over ordinary legislative acts; the relation of the executive, legislative, and judicial departments of the government, and shows that all three of these departments are equally bound by the constitution, but within their own departments; that while it is the exclusive right of the legislative department to enact laws, and the duty of the executive to enforce them, it is the exclusive right of the judiciary to construe them, and to say whether they are repugnant to the constitution or not. The idea that the executive or the legislative department has any right to put a different construction on a statute, or a different construction on the constitution, than the court has, is utterly repudiated. On page 163, 1 Cranch, and page 69, 2 L. Ed., it is said: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested legal rights." And on page 61 it is said: "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the law of his country for a remedy." On page 167, 1 Cranch, and page 70, 2 L. Ed.: "The question whether a right has vested or not is in its nature judicial, and must be tried by the judicial authority." On page 170, 1 Cranch, and page 71, 2 L. Ed.: "What is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty, not depending on executive discretion, but upon particular acts of congress and the general principles of law?" On page 172, 1 Cranch, and page 72, 2 L. Ed.: "The doctrine, therefore, now advanced is by no means a novel one." On page 174, 1 Cranch, and page 72, 2 L. Ed.: "If congress remains at liberty to give this court appellate jurisdiction when the constitution has declared their jurisdiction shall be original, and original jurisdiction when the constitution has declared it shall be appellate, the distribution of jurisdiction made in the constitution is form without substance." On page 177, 1 Cranch, and page 73, 2 L. Ed.: "The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is no law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. * * * If an act of the legislature repugnant to the constitution is void, does it, notwithstanding its invalidity, bind the court, and oblige them to give it effect? Or, in other words, though it be no law, does it constitute a rule as operative as if it was a law?" On page 177, 1 Cranch, and page 73, 2 L. Ed.: "It is *emphatically the province and duty of the judiciary to say what the law is* [the italics are ours]. * * * So, if a law be in opposition to the constitution, if both the law and the constitution apply to a particular case, so that the court must either decide the case con-

formably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." We cannot quote all of this very able and exhaustive opinion, but we trust that we have quoted sufficiently from it to establish the separate independent jurisdiction and power of courts to decide the law, and to show that neither the executive nor the legislative department has any such power.

Our opinion, then, is that the plaintiff is entitled to the salary and compensation provided for in Act 1899, c. 19 (and the same that Hill would have been entitled to if he had remained in office), to be paid by the treasurer of the state out of the oyster fund appropriated by the act of 1897 and the act of 1899, admitted to be now in his hands, provided that the expenses of this commission do not exceed the sum of $6,000 per annum, and that the certificate and warrant shall be issued in the manner we have indicated. This action is to recover the salary of a public officer. The facts are agreed, and from these facts it appears that there is now money in the hands of the treasurer more than sufficient to pay the plaintiff, which arose from the oyster fund, under the acts of 1897 and 1899; that this fund is specially appropriated to the payment of the salaries of officers serving under the act of 1899; that the auditor and treasurer are honest men and faithful public officers, and want to do their duty. They wanted the opinion of the court as to what that was, and neither of them nor their counsel made any objection to both being defendants; but it is made, and it would seem that the party making it can see no difference between the salary of a public officer and a claim against the state, nor can he see the distinction between Garner v. Worth, 122 N. C. 350, 29 S. E. 364, and Cotten v. Ellis, supra. The judgment of the court below will be modified in conformity with this opinion, and, being so reformed, judgment will be entered in this court. Modified and affirmed.

DOUGLAS, J. (concurring). I shall be glad indeed when all the officeholding cases are finally decided, not only from their intrinsic difficulty, but more so from the vast amount of discussion to which they have given rise. Much of this discussion, viewed from my standpoint, has seemed irrelevant, and, indeed, liable to mislead. Hence upon one or two occasions I have felt compelled to explain myself in a concurring opinion, as I did not wish to be misunderstood upon important constitutional questions. My personal views are fully set out in Wilson v. Jordan, 124 N. C. 707, 33 S. E. 139, and Greene v. Owen, 125 N. C. 212, 34 S. E. 424.

I have given this case most careful consideration, especially in view of the division of opinion, and I see no reason to overrule the unanimous opinion of this court as expressed in Wood v. Bellamy, 120 N. C. 212, 27 S. E. 118. If I follow that opinion to its necessary and legitimate results, I am forced to concur with the court in the case at bar. In fact, the case as now before us presents no substantial difficulties to my mind. Whatever complications may have existed were solved when we decided that the plaintiff was entitled to the office. The only question now before us is whether he shall receive the compensation which the legislature attached to the performance of its duties. We are not creating any office, for the office was admittedly created by the act of 1897, and it does not appear to us that it was abolished by the act of 1899. We are not affixing any salary to the office further than that we find expressly provided in the act of 1899,—the last expression of legislative will. We are not levying any public taxes, nor appropriating any public money. This was done to the fullest necessary extent by both acts. That of 1897 raised and appropriated to the specific purposes of this case an ample fund, much of which still remains in the treasury unexpended and not otherwise appropriated. The case comes before us on facts agreed, and it is expressly stated that "the state treasurer has on hand of the oyster fund collected under the provisions of chapter 13, Laws 1897, and chapter 19, Laws 1899, an amount sufficient and available for the payment of such salary and traveling expenses as the plaintiff may be entitled to." No one else is now claiming it, and no one else is now performing the duties which would entitle him to receive it.

The only reason given why it should not be paid to the plaintiff is a construction of section 1, c. 21, Laws 1899, which, it seems to me, would ascribe to the legislature most unworthy motives. This section provides that "the treasurer of the state of North Carolina shall not pay any compensation to any person or persons claiming the same for services rendered concerning the shellfish industry, unless such person or persons are authorized to render such services under the provisions of the said act." Chapter 19, Laws 1899. We are asked, who were authorized to render such services under said act? Plainly, the person or persons rightfully performing the official duties prescribed by that act. Can we say that the primary object of the legislature was not the public welfare, but the private benefit of the individuals named in the act? Have we any right to say that the legislature, in providing for the protection and supervision of one of the great industries of the state, intended to say to the treasurer: "We think that the proper supervision of the shellfish industry is necessary for the public welfare, and for this purpose we have appropriated the public money; but if that public money cannot go into the pockets of our personal friends, whom we have named in the bill, we prefer that those important public duties should remain unperformed, and those

great public interests entirely neglected?" The legislature has not said so, it could not legally say so, and it shall not be made to say so, even inferentially, by any construction of mine. It is my duty, as well as my pleasure, to place upon its acts a construction in harmony with the public interests which they are bound to protect, and the constitution which they are sworn to obey. They may well have believed that the office held by the plaintiff had been legally abolished, and that they had the right to fill the offices they had presumably created. So believing, they may have intended simply to instruct the treasurer not to pay any mere claimant under any other act, but, if he could not pay their appointees, to hold the fund until it was legally determined to whom it should be paid. Such would have been their legal intent, and such I prefer to believe was their actual intention.

Of course, I would deeply regret to see my native state visited by earthquakes or cyclones of a civil or material nature, and I am glad to say they have no germ in the decision we are rendering. This case is a small one, actually and potentially. It enunciates no new principle, and involves but little money. Construing the two acts together, we find an office created by the legislature with a salary attached thereto, and a fund specifically appropriated for the payment thereof. All we now say is that the man legally and rightfully performing the duties of the office is entitled to the compensation thereunto affixed by law.

MONTGOMERY, J. (dissenting). Because of the great public importance of the matters involved in the discussion and decision of this case, I have given to it a more thorough consideration than a judge of this court usually gives, or has time to give, to the investigation of cases generally; and, after all, I find myself unable to agree to the conclusion reached by a majority of the court, that the plaintiff is entitled to writs of mandamus against the auditor and the treasurer to enforce the collection of his claim. It has been decided in White v. Hill, 125 N. C. 194, 34 S. E. 432, that the plaintiff is entitled to his office. I therefore agree in the present case with the court, that he is entitled to his salary, whatever that may be. I think he is entitled to the whole amount named in the act of 1897,—$75 per month, and his necessary traveling expenses. While the salary is no part of the office, but only an incident thereto, it is yet the consideration for which the services and duties of the office are performed, and the salary therefore must follow the office. I am of this opinion because I regard the decision in White v. Hill, supra, as determining that that part of the act of 1899 which undertook to create a board of commissioners, and to distribute among them the duties of the plaintiff as chief inspector, was unconstitutional, and therefore, no such board being in existence, the plaintiff cannot be their chairman, and entitled to a salary of $400 allowed by the act of 1899 to such chairman. He is still, however, the chief officer, by whatever name to be called, of the oyster or shellfish industry, and is to discharge the duties of that position as best he may under the provisions of the act of 1899. I further agree with the court that the legislative department of our state government is not the supreme, sovereign power in the state. I also agree with the court that any public officer who is required by law to perform a specific duty, which concerns individual rights dependent upon the performance of that duty, may be compelled to perform that duty at the suit of a person who alleges that he is injured; and I agree with the court that, when any act of the general assembly is plainly contrary to the provisions of the constitution, such act is void, and it is the right and the duty of the supreme court to so declare it. The only point of difference, then, between my views and the opinion of the court, is this: The court construes the act of 1899 in reference to the shellfish industry to mean that the funds now in the hands of the treasurer, derived from that industry, are not only appropriated specifically by law to the payment of the expenses of carrying out that law, but that, as the plaintiff has been declared by this court to be entitled to his office acquired under the act of 1897, he is therefore performing services under the act of 1899, and is therefore entitled in law to have his writs of mandamus against the auditor and treasurer to have enforced the payment of his salary; that the plaintiff is entitled to this remedy notwithstanding the act of 1899 specifies a method by which the money is to be drawn from the treasury, and it is apparent that that method cannot be followed. The contention last mentioned I cannot agree to, however much force there may be in the former, under the decision in Day's Case, 124 N. C. 362, 32 S. E. 748.

The method by which the oyster funds are to be drawn out of the treasurer's hands is set out in section 9, c. 19, Acts 1899. The auditor's warrants are required to be issued upon the certificate of the secretary of the board of commissioners of the shellfish industry, and countersigned by the chairman of the board. That method cannot be complied with; for, under the decision in White v. Hill, supra, there is no chairman or secretary of such a board. Any other method of drawing this money out of the treasurer's hands, in my opinion, would be one arbitrarily prescribed by the treasurer, or one authorized by judicial construction, purely; and while I think, as I have said, that the plaintiff is entitled to his salary, yet I cannot get my consent, as a member of this court, to join in an order to the treasurer, for the reason that the method by which the same may be paid cannot be carried out.

It is true that the legislature, in appointing the method by which this money might be paid out by the treasurer, has been disappointed, in that those officers whose duty it was to certify to the auditor the persons and the amounts to be paid have been declared by the supreme court to have had and to have no existence, yet I do not think that by judicial construction another method may be substituted. If the general assembly, when it enacted section 9 of chapter 19 of the Laws of 1899 in place of section 13 of chapter 13 of the Acts of 1897, had provided that warrants issued by the auditor for the payment of claims against the oyster fund should be certified by a committee, the persons composing that committee being dead, and the legislature not being aware of that fact, or by a committee who might die while charged with the duty of certifying the claims, the method would fail by reason of the nonexistence of the certifying committee, but neither the courts nor the treasurer could adopt another method for the payment of the claims than the one prescribed by the general assembly. Another method would have to be adopted by the legislature, and the claimant would have to wait until that was done. This is not a case where the officer is left to discharge his duties, and at the same time be deprived of his entire salary, in so many words, by legislative enactment. In such a case the attempt to deprive the officer of his entire salary,—to starve him out,—and still to require him to discharge the duties of the office, would be void, under the decision in Hoke v. Henderson. But this is a case where the general assembly considered that they had abolished the office, and it is only by judicial construction that the abolition of the office was not effected; and while, under the judicial decision, the old officer retains his position, and while the oyster fund in the hands of the treasurer is appropriated to the payment of claims against that fund, yet the essential prerequisites to the drawing out of that fund cannot be complied with, for the reasons that I have given above.

It has been said (not by counsel in the case, however) that, if this court is powerless to compel the payment of a salary due to a public officer, then the decisions of this court that an office is property are of no avail, since the legislature hereafter, in removing legislative officeholders, could simply declare that such displaced officers should not receive compensation for their services. That, in my opinion, is not a true proposition of law, and that any general assembly of North Carolina should pursue such a course is unthinkable to me. If an officer should have his office taken from him by legislative enactment before his term expires, and the duties of his office are continued, the courts can declare such an act of the legislature void. If an appropriation has been made by the general assembly for the payment of a salary of such an officer, and no particular method has been prescribed by which it is to be paid, the auditor can issue his warrant to the claimant, and the treasurer must pay it. If a particular method has been prescribed, that method must be followed. If an office is continued, and the officer is required to perform the duties thereof, and the general assembly should fail or refuse to make an appropriation for the payment of his salary, that would present a case, indeed, where the courts could not compel the legislative branch of the government to perform a plain duty. If such an abuse of power were possible, the courts could give no relief. The people themselves would have to correct it. In Hoke v. Henderson the court said: "The constitution of this state provides that the governor, judges, attorney general, treasurer, and other officers shall be elected, and that certain of them shall have adequate salaries during their continuance in office. Suppose the legislature (at that time the elective body) should refuse to elect those officers or to give them salaries, or after assigning them salaries, in a statute, should refuse to lay taxes or to collect a revenue to pay them; all these would be plain breaches of constitutional duty. And yet a court could give no remedy, but it must be left to the action of the citizens at large to change unfaithful for more faithful representatives. Yet no one will say that the legislature can by law remove the governor or a judge, or any other head of a department, because they can unconstitutionally refuse to provide salaries for them, and the courts cannot compel the raising of such salaries. Nor can it be said, because there cannot be such compulsion, that therefore the law is constitutional." That quotation is certainly an answer to such a suggestion, and it must be that, unless our system of government is an absolute failure, no body of men could ever get or hold power who would resort to such a device to defraud men of their property rights in the offices they hold. The legislature of North Carolina has undertaken to abolish offices, and, as a result, salaries have been thought to be destroyed; but that body has never undertaken to continue the office, and at the same time to deprive the officer of his compensation, and, I believe, never will. This, it is to be hoped, is the last of the cases which involve the title to public office. The first one was Wood v. Bellamy, 120 N. C. 212, 27 S. E. 113. There it was held by a unanimous court that in North Carolina a public office is property belonging to the officeholder, by contract between the state and himself, as had been held in Hoke v. Henderson, 15 N. C. 1. That unanimity of opinion continued up to and during the September term, 1897, of this court, when the case of Ward v. City of Elizabeth City, 121 N. C. 1, 27 S. E. 993, was decided. The opin-

ion in that case was written by Justice Clark, who, after stating the proposition that the legislature could not turn an officer out by an act purporting to abolish the office, but which in effect continues the same office, said, "This is on the ground that an office is a contract between the officer and the state, as was held in Hoke v. Henderson, 15 N. C. 1, and has ever since been followed in North Carolina, down to and including Wood v. Bellamy, though this state is the only one of the 45 states of the Union which sustains that doctrine." Since the decision last mentioned, Justice Clark has entered numerous dissenting opinions, which are a part of the history of this court,—notably, in the case of State Prison v. Day, 124 N. C. 362, 32 S. E. 748; Wilson v. Jordan, 124 N. C. 683, 33 S. E. 139; Gattis v. Griffin, 125 N. C. 336, 34 S. E. 429; and Abbott v. Beddingfield, 125 N. C. 256, 34 S. E. 412,—in which he has with marked ability attacked the doctrine so long and so firmly established in the decisions of this court, that an office is property, and that it exists by contract between the state and the officeholder.

It has been suggested that the legislative department of the government may resent the opinion of the court in this case, and pronounce it extraconstitutional itself. I feel satisfied, however, that the general assembly will follow the course which has characterized that body since the foundation of the government; that is, respect the authority and decisions of the highest court in the state as the final determination upon any matter of law or legal inference that may be before it under its appellate jurisdiction. In 1787 the highest court in the state, in Bayard v. Singleton, 1 N. C. 42, where an act of the general assembly alleged to be unconstitutional was before it for the decision of that question, said: "But that it was clear that no act they [the legislature] could pass could by any means repeal or alter the constitution, because, if they could do this, they would at the same instant of time destroy their own existence as a legislature, and dissolve the government thereby established. Consequently the constitution, which the judicial power was bound to take notice of as much as any law whatever, standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must, of course, in that instance, stand as abrogated and without any effect." And since that time this court has continued, in proper cases, to decide acts of the general assembly to be unconstitutional.

In Marbury v. Madison (1803) 1 Cranch, 137, 2 L. Ed. 60, where an act of congress alleged to be unconstitutional was before the supreme court of the United States, the court took jurisdiction, and decided against the constitutionality of the act; and that decision has been followed in proper cases by that court to this day. The opinion of the court in that case is so opposed to the view of the sovereignty of the legislative branch of the government, that it may be well to quote from it at some length. It is there said (Judge Marshall delivering the opinion of the court): "The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then the legislative act contrary to the constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. Certainly all those who have framed written constitutions contemplated them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void. If an act of the legislature repugnant to the legislature is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the constitution,—if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution, or conformably to the constitution, disregarding the law,—the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

The court has not undertaken to decide that the treasurer of North Carolina can be made to pay out money in a case where no appropriation by the general assembly has been made. There is not a member of the court who would think of doing such a thing. The decision of the court rests upon the foundation and proposition that the general assembly has appropriated a particular fund for the payment of the plaintiff's claim. There can, therefore, be no clash between the two departments of government. Nobody would dispute the proposition that, if this fund had been appropriated by the general assembly to the payment of the plaintiff's claim, the treasurer could be made by mandamus to pay it. The duty required of the treasurer would involve no judicial discretion, and would be simply a ministerial

duty. Granville County Board of Education v. State Board of Education, 106 N. C. 81, 10 S. E. 1002. In the last-mentioned case, Marbury v. Madison, supra, is cited as authority. Upon examination of that case upon that point, the facts are that Marbury was appointed by the president of the United States (John Adams) a justice of the peace for the county of Washington, in the District of Columbia. The commission had been signed by the president, and the seal of the United States affixed thereto, but it had not been delivered when Mr. Jefferson entered upon his duties as president. Mr. Madison, the new secretary of state, refused to deliver the commission to Marbury, whereupon Marbury moved in the supreme court of the United States for a rule to James Madison, secretary of state, to show cause why a mandamus should not issue, commanding him to be caused to deliver to him his commission. The court held that it was a plain case of a mandamus either to deliver the commission or a copy from the record. But the rule was discharged, not because mandamus was not the proper remedy, but because the supreme court was a court of appellate jurisdiction, and did not have the jurisdiction to hear the motion as an original proceeding in that court.

CLARK, J. (dissenting). The general assembly of 1899, by chapter 21, ratified March 8, 1899, enacted: "Section 1. The treasurer of the state of North Carolina shall not pay any compensation to any person or persons claiming the same for services rendered concerning the shellfish industry, unless such person or persons are authorized to render such services under the provisions of the said act, entitled 'to provide for the general supervision of the shellfish industry of the state of North Carolina,' and ratified March second, eighteen hundred and ninety-nine." Who are "authorized to render such services under the provisions of the said act"? Plainly, we must turn to the provisions of said act, which is chapter 19. We find it there provided: "Section 1. There shall be seven commissioners, hereinafter named in this act, to carry out the provisions of this act." And section 2 names the seven commissioners, and it is provided that if any one of those named shall die or resign, those remaining shall fill the vacancy. There can be no possibility of doubt who are authorized "under the provisions of the said act." They are named in the act, and the treasurer is forbidden to pay any one else. The plaintiff is not one of them. Can the court order the treasurer to pay him, when the legislature has ordered the treasurer not to pay him? The identical point has been expressly decided against the plaintiff by this court in cases on "all fours" with the one before us. In Boner v. Adams, 65 N. C. 639, the court says that a mandamus cannot be brought against the auditor and treasurer at the same time (as is here attempted), because in no case could a mandamus lie against the treasurer until a warrant had been issued by the auditor. Reade, J., then says, as to the auditor, that he is "not a mere ministerial officer," because he is to judge whether there is "sufficient provision of law for its payment." He adds: "The most this court could do would be to order the auditor to examine the claim and to allow it, if he thought it correct, and in that event to issue his warrant for it, if in his opinion there is sufficient provision of law for its payment." The court then says: "Nor can we pass upon the merits of the claim." In Bayne v. Jenkins, 66 N. C. 356, we have a duplicate of the present case (if an office is a contract). There L. P. Bayne & Co. had a contract with the state, and, as in the present case, the legislature directed that no payment should be made under it. The court held that a mandamus could not issue for payment of plaintiff, and said: "The auditor, in his warrant upon the treasurer, in any case, must recite the law under which it was issued; and, as the legislature has expressly forbidden a warrant or the payment of money in this case, the auditor could not issue a warrant. If the plaintiff have a claim, as alleged, it seems that his remedy is an application to the legislature or a suit originated in this court" (which could only recommend payment to the legislature. Const. art. 4, § 9). If the plaintiff's claim that his office is a contract be conceded, then these cases are precisely alike, differing only in the name of the plaintiff. It is passing strange if the constitution permits any superior court judge to issue a mandamus to the public treasurer to pay a claim against the state, when it expressly forbids the supreme court, in a case begun there, to do more than recommend payment to the legislature. The original jurisdiction of claims against the state is given by the constitution to the supreme court alone. As is well said in the brief of Mr. K. P. Battle in the latter case: "If each superior court in the state could order the treasurer to pay out moneys, or command the auditor to issue warrants, the fiscal concerns of the state could not be regulated or intelligently conducted. All claimants could in effect sue a sovereign state by resorting to mandamus against the officers in charge of her funds." These cases have ever since been held as authority, and have never been questioned in any way. In Koonce v. Commissioners, 106 N. C., at page 200, 10 S. E. 1041, the court quotes with approval from Boner v. Adams: "The most this court could do would be to order the auditor to examine the claim, and report the fact, with his opinion, to the general assembly." In Burton v. Furman, 115 N. C., at page 169, 20 S. E. 444, the court again cites Boner v. Adams, saying: "It was held that mandamus would not lie against the treasurer because no warrant had been issued, and not against the auditor because it was something more than a ministerial duty sought to be required of him.

* * * The principles governing the issue of mandamus were the same then as now, and the decision is a controlling one, in which we fully concur." This was in 1894. In Garner v. Worth (1898) 122 N. C. 250, 29 S. E. 364, it was still the law, for the same judges that are now on the bench restate the same proposition and cite the above cases. In Lord & Polk Chemical Co. v. Board of Agriculture, 111 N. C. 135, 15 S. E. 1032, it was held that an action to recover back $1,000, wrongfully collected though paid under protest, could not be maintained because both the defendants were state agents, and the action was in effect against the state. The remedy was by application to the legislature. If the law, so clearly stated and so uniformly repeated, be not the law, where shall we look for it, and where shall we find stability in the decisions of the courts?

The repeal of an appropriation has always been sufficient to shut the doors of the treasury against any claimant; but there have been occasions when the legislature has, as in the present instance, expressly directed that a claim be not paid, notably, for instance, the resolution of 1870–71 (page 471), forbidding payment of warrants "already made or which may be made" on account of expenses incurred by order of the governor in the "Holden-Kirk war." No treasurer and no court has to this day deemed there was anywhere power to disobey that order of the legislature; but the power does exist, and has existed all along, if the state can be ordered by the court in the present case to pay a claim against it. And there is this difference against the plaintiff: He entered upon the discharge of his duties knowing the legislature had directed he should not be paid, while, in the matter of the Holden-Kirk claims, the services had already been rendered, the salaries accrued, and the supplies furnished, when the legislature intervened and forbade payment. This power of the legislature over the public purse is the most essential one in the system of a government of the people by the people, and its abandonment under any pretext whatever can never with safety be allowed. In the recent case of Garner v. Worth (Feb. Term, 1898) 122 N. C. 250, 29 S. E. 364, it was held by a unanimous court, composed of the same justices as now: "The courts cannot direct the state treasurer to pay a claim against the state, however just and unquestioned, when there is no legislation to pay the same; and when there is such an appropriation the coercive power is applied, not to compel the payment of the state's liability, but to compel a public servant to discharge his duty by obedience to a legislative mandate." Here there is not only no legislative mandate, but a positive prohibition. In that opinion attention is called to the fact that the eleventh amendment to the United States constitution was passed to prohibit the federal courts from coercing the states, whose sovereignty protects them from subjection to the jurisdiction of any court whatever.

What is the plaintiff's ground for this action? It is that by virtue of chapter 18, § 12, Acts 1897, he was appointed "chief inspector of the oyster industry" for four years, and that this court has held in White v. Hill, 125 N. C. 194, 34 S. E. 432, that chapter 19 of the act of 1899, creating Hill and six others "commissioners of shellfish industry," continued in their hands, among other duties, the duties he had been discharging, and therefore the act was unconstitutional in so far as it took away his property in his office. The court did so hold, and put Hill and the other commissioners out, and put the plaintiff back. The court, construing the other parts of the act of 1899 in connection with the act of 1897, gave the plaintiff the additional duties bestowed by the act of 1899 upon the commissioners created in that act, and which were not conferred upon the plaintiff by the act of 1897. But his title to hold office rests upon the act of 1897, and notwithstanding the act of 1899, not under the act of 1899. The opinion of the majority of the court in the present case says: "The plaintiff's office to which he was appointed in 1897 still exists, and he is entitled to hold the same and perform its duties. It would seem that he is entitled to receive the salary attached thereto." The legislature has not, as has been asserted, prohibited the treasurer "from paying a salary to any one not acting under chapter 19 of the Acts of 1899." There would be no point or purpose in such a statute. On the contrary, chapter 21, Acts 1899, prohibits him from paying "for services rendered concerning the shellfish industry, unless such person or persons are authorized to render such services under the provisions of the said act" (chapter 19, Acts 1899); and the provisions of the act name the seven commissioners it authorizes to act, and authorizes them alone to fill vacancies in their own body, and to employ all subordinates. The court held in White v. Hill, supra, that the act of 1899, in putting seven commissioners in office, violated the contract made by the plaintiff with the state under the act of 1897. If so, with whom did the plaintiff make the contract? With the state. If the office is a contract, who has attempted to break it? The state. The court, having in White v. Hill, supra, put Hill back into office, is now asked to order the state treasurer to open his vaults and pay the plaintiff, as it would order any private individual under similar circumstances. Has the court that jurisdiction? The constitution (article 4, § 9) says not. It says: "The supreme court shall have original jurisdiction to hear claims against the state, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the general assembly for its action." The constitution

(article 14, § 3) says: "No money shall be drawn from the treasury but in consequence of appropriations made by law." This is an exact repetition of the United States constitution (article 1, § 9, cl. 7). Where is the appropriation to pay the plaintiff? There was an appropriation in the act of 1897 of $900 per annum to pay him for supervising the oyster industry. But the act of 1899, c. 19, placed the exclusive supervision in the hands of seven commissioners named therein, and appropriated $400 per annum to pay each of them, and repealed all laws in conflict therewith, and chapter 21 forbids the state treasurer to pay any one else. It is true, the court has held that the act was unconstitutional, in putting the seven commissioners in discharge of duties which the plaintiff had "contracted" with the state to perform. But that does not repeal the legislative prohibition upon the treasurer against paying the plaintiff. The court has audited this claim, and holds it fixed, not at the $900 allowed the chief inspector by the act of 1897, but at $400, which is the sum allowed each of the seven commissioners for discharging that and other duties under the act of 1899. It directs its mandamus to issue to the treasurer to pay that sum to the plaintiff, which is "process in the nature of an execution," to enforce collection out of the state, notwithstanding the statute prohibiting payment to any one unless "authorized under the provisions" of chapter 19, Acts 1899, which provisions name those who alone are authorized. This is placed by the opinion of the court on the ground that, "the legislature having general powers of legislation," its statutes "must be observed and enforced, unless they conflict with the vested constitutional rights of the plaintiff" (i. e. unless the state breaks its contract with the plaintiff, by the legislature's refusing to pay him the salary to which he is entitled by virtue of the "contract" he made with the state in 1897 to hold the office of chief inspector of the oyster industry). Instead of sending its recommendation to the legislature "for its action," as the constitution provides, the court is asked by the plaintiff to send its mandamus, which is "in the nature of an execution," to the public treasurer, to pay that salary, because nonpayment "conflicts with the vested constitutional rights of the plaintiff," under his "contract," to hold that office and receive the salary. Though the court has reduced this from $900 (the contract price) to $400, it is not the saving of a petty $500 which concerns the state, but the assertion by the court of the power to order payment out of the state treasury of any sum, however small, when the proper department which is alone vested with such authority (the legislature) has not ordered such payment, but has forbidden payment. The courts have often held that, if the legislature attempted to do a judicial act, it is null and unconstitutional, because beyond their powers. It follows that when the courts attempt to do a purely legislative act, such as ordering payment of a state liability, it is null and unconstitutional, because beyond our powers. An assertion of such power in the court is so novel, so opposed to all previous adjudications, that it will challenge attention, not only in this state, but elsewhere. It is doubtless the first time, in this or in any country, that a court has issued its order to a public treasurer to pay a claim which the legislative department has forbidden him to pay. If this can be done, this court can direct the public treasurer to pay the "special-tax" bonds issued under the broad seal of the state, and signed by the governor and treasurer, and which the lawmaking power, for reasons as satisfactory to itself as the act here in question, has forbidden the treasurer to pay; for, if a contract can be enforced against a state, a constitutional amendment can no more impair the obligation of such contract than a mere legislative enactment. Louisiana v. Taylor, 105 U. S. 454, 26 L. Ed. 1133; Clay Co. v. Savings Soc., 104 U. S. 579, 26 L. Ed. 856. If the contract of the plaintiff in 1897 to hold office and receive a salary for four years is a "vested constitutional right," which the courts can enforce by directing the public treasurer to pay, notwithstanding a legislative prohibition, certainly the contract evidenced by bonds issued by authority of the general assembly, and signed by the governor and treasurer, with the public seal attached, which is unquestionably a contract, can be enforced by mandamus on the same ground that an act of the legislature "must be observed and enforced unless it conflicts with the vested constitutional rights of the plaintiff" to receive his money, which the court may think the state justly owes him. And the same would be true as to any other claim which the court might deem a valid indebtedness of the state, but which the legislature failed to appropriate money to pay. An officeholder has no greater "vested constitutional rights" in his salary than any other creditor of this state.

Judged by the provisions of both state and federal constitutions, and the unbroken decisions of all the courts (for not one has been cited that sustains the exercise of this authority), this court has no power to direct the public treasurer to pay the plaintiff, when expressly forbidden by the legislature. Among the numerous decisions of the United States supreme court that the courts have no such power are Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805, which holds that the officer is merely the nominal party when the object is to coerce money out of the state treasury, and, the action being really against the state, no court has jurisdiction. In Cunningham v. Railroad Co., 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. Ed. 992, it is said that "no judgment can be entered against a state through its officers or treasurer"; and in Louisiana v. Jumel, 107 U. S.

711, 2 Sup. Ct. 128, 27 L. Ed. 448, the same doctrine is repeated, the court pointedly adding, "It needs no argument to show that the political power cannot be ousted of its jurisdiction, and the judiciary set in its place." To same effect, Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, and many others. In Osborn v. Bank, 9 Wheat. 738, 6 L. Ed. 204, the same high court says, "Judicial power is never exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the legislature." The will of the legislature has been plainly expressed that the plaintiff shall not be paid out of the state's treasury. Under our constitution (article 1, § 8) the three departments of government are "forever separate and distinct from each other." To the legislature belongs exclusively the function of raising money for the public treasury and directing its disbursement. As said in the late case of Garner v. Worth, supra, the court is powerless to issue a mandamus to the treasurer to pay out a single cent, however just and unquestioned the claim, unless there is a legislative enactment directing him to pay it. The legislative department may, if it sees fit, acquiesce in this novel assertion of power on the part of the court. If so, we are witnessing a new development in our history, a profound modification of our organic law, which places "the power of the purse," for the first time in the history of the world, in the possession of the judiciary. But the legislature may not accept this view; for that department, as well as the executive, is equally a custodian of the constitution with the judiciary, whose duty is to adjudicate private rights and construe the laws made by the legislature, as it is the duty of the executive to execute them. Though the court has often exercised the power to declare void an act which is in conflict with a constitutional provision, it has never gone so far as to order payment of money by the state where the legislature has made no appropriation to pay, or has forbidden payment. Neither the executive nor the legislative department is bound by the delimitation of powers which the judiciary may give to itself; for that would be to make this department sole judge of its own powers, however much it might see fit to narrow those of the other two. Like Aaron's rod, it would swallow them up. The members of the executive and legislative departments take an oath to support the constitution. Should the legislature, as they have the highest warrant for doing, hold that the mandamus issued by this court to the public treasurer, contrary to legislative enactment, is beyond the constitutional power of the judiciary, the condition of the public treasurer would not be an enviable one; for an order of this court outside its constitutional jurisdiction is no greater protection to one who obeys it than a writ of ejectment, or to execute a capital sentence, issued by a magistrate, would be to an officer who chooses to obey that.

No one who reads chapter 21, Acts 1899, can doubt that the legislature meant to prohibit, and does prohibit, the treasurer from paying the plaintiff, or any one else claiming his office, as the court says the plaintiff does, under the act of 1897. The court has held that public office is property, and that by virtue of that property in his office the plaintiff is entitled to continue to discharge the duties of his office, notwithstanding the act of 1899 gave those duties to others, and that as a consequence the plaintiff is entitled to his salary. If that be granted, the court can certainly go no further. It cannot take charge of the public treasury, and adjudge that, because the state has violated its contract, and the court has restored the plaintiff, the state shall pay him. It is true, Hoke v. Henderson, 15 N. C. 1, held that a public office was private property,—a decision unsupported by any decision of any other court, anywhere; but it limited the decision to saying that the officeholder's property was in his "emoluments," and expressly says (page 27) that, if the legislature should refuse to give officers salaries or to pay them, "this would be a plain breach of constitutional duty, and yet the court could give no remedy." And Hoke v. Henderson also expressly admitted that the legislature could abolish any office created by the legislature. The recent decision in Day's Case, 124 N. C. 362, 32 S. E. 748, which holds that an officeholder has property not merely in the emoluments, but in the duties, of his office, which he may claim as long as those duties are continued, makes it practically impossible to abolish any office having duties necessary to be continued, as is the case with most offices; and the later cases of Wilson v. Jordan, 124 N. C. 683, 33 S. E. 139, and Abbott v. Beddingfield, 125 N. C. 256, 34 S. E. 412, hold that as long as there is legislation on the same subject-matter (in pari materia, as it is termed) the former office is not abolished, though the new act may expressly so declare, as in Wilson v. Jordan, and though the new office may have a different title and different duties, and added duties, as in Abbott v. Beddingfield and White v. Hill. If to this indestructibility of a legislative office, for the term of the incumbent, however long, the court has the power, now asserted for the first time in the history of jurisprudence, to coerce by its writ payment by the state of the old officer, legislative power over government, which is most largely exercised by the shaping of public agencies, is at an end. Whenever one legislature shall create an office, for no matter how long a term, so long as similar duties are discharged subsequent legislatures are powerless to get rid of the incumbent, and the court will see that the public pays him. The assertion of such vast power by the court over the operations of the legislative department challenges its denial by that department. Should

the treasurer, under legal advice, deem the action of the court in excess of its just constitutional powers, will the court put him in jail for disobedience? Should the legislature, whose action in forbidding payment the court treats as unconstitutional, because impairing "the vested constitutional rights" of an officer to receive a salary, return the compliment by holding unconstitutional the action of the court in assuming jurisdiction over the public treasury, what then will be our condition? The people of North Carolina control their treasury through their representatives in the general assembly. If the general assembly levies taxes in excess of what should be levied, or less than is necessary, the court cannot correct this. If the general assembly be too extravagant in its appropriations on the one hand, or, on the other, shall withhold appropriations to pay debts which the court deems just and meritorious, the court cannot compel a different conduct on the part of the co-ordinate branch in the discharge of the functions entrusted to it. The people alone can supervise such action of their representatives when acting within the sphere of their duties, by the election of another general assembly, or, as was said in Hoke v. Henderson, "it must be left to the action of the citizens at large to change unfaithful for more faithful representatives." It is true that, if the court cannot coerce payment of an officer's salary, the decisions (peculiar to this state) that an office is property based upon a contract are futile, since the legislature hereafter, in removing the incumbents of a legislative office, need only to add a clause that the removed officer shall not be paid. But may it not be that such result demonstrates the possibility that the decisions of this state are incorrect, and the uniform rulings of other courts are correct,—based as they are upon the principle that the legislature alone has the power to create officers, and to pay or to refuse to pay them, when not created by the constitution? But, at any rate, a claim for salary is of no higher dignity than any other indebtedness of the state, and the officeholder has the same remedy as all other creditors of the state,—an appeal to the sense of right among the people, which always will be surely expressed by them, sooner or later, through the legislature,—and he has no more.

No stronger proof of the inadmissibility of the plaintiff's application can be had than the three cases which, after the most diligent and thorough research, his counsel have presented to the court in support of the claim that the court has power to order the treasurer, by mandamus, to pay a salary which the legislature has forbidden him to pay: Firstly, Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60. In that case the mandamus was refused. That case was where the commission of a justice of the peace for the District of Columbia had been signed by the outgoing president, Mr. Adams, and the new secretary of state, Mr. Madison, refused to deliver it. Marbury applied for a mandamus. Marshall, C. J., wrote an elaborate opinion, expressing his views of government and of the functions of the judiciary, antagonistic to those known to be entertained by President Jefferson, the new executive, saying, in substance, that Marbury was entitled to have his commission, and that the opinions of the judiciary ought to control in such matters, but concludes by deciding that "the authority * * * to issue writs of mandamus to public officers appears not to be warranted by the constitution," and denied the writ, and Marbury never got his commission. The entire discussion in the opinion, however able and interesting, is therefore, a discussion of abstract questions of law; and the case, for now near a century, has been cited to law students by their instructors as an able opinion, which was entirely and altogether obiter dicta, the decision of the court being that it was without jurisdiction of the subject-matter. Yet the relief there denied (a mandamus to the secretary of state to deliver a commission, signed and sealed, which the departing president had inadvertently failed to deliver) was by no means equal to the assertion of power here asked of the court (to issue a mandamus to the public treasurer to pay the public money which the legislative power has levied and placed in his hands, and from which it has directed him not to pay to this plaintiff). But neither in the wide range of the discussion in Marbury v. Madison, nor in any other case which the most minute research has found, has there ever been a decision by any court that there was private property in public office, or that the office was a contract between the state and the officer, save only the cases in this state based upon Hoke v. Henderson, and the expansion of that doctrine by recent decisions of this court, the logical result of which later cases (but not of Hoke v. Henderson, which denies the power) may be the power claimed for the courts by the present application to enforce such "contracts" by issuing our mandamus to open the public treasury. In several decisions the United States supreme court has explicitly and expressly denied that there was or could be, from the nature of things, any property or contract as to a public office,—notably, in Butler v. Pennsylvania, 10 How. 402, 13 L. Ed. 472; Newton v. Commissioners, 100 U. S. 548, 25 L. Ed. 710; Crenshaw v. U. S., 134 U. S. 99, 10 Sup. Ct. 431, 33 L. Ed. 825. See quotation in State v. Beddingfield, 125 N. C. 274, 279, 34 S. E. 417, 419. And in the famous Dartmouth College Case, 4 Wheat. 629, 4 L. Ed. 629, Chief Justice Marshall, while holding that the legislature could not revoke a charter, because that was a contract (before the provision since inserted in state constitutions to the contrary), expressly says that legislatures unquestionably have the right to change or abolish offices created by

legislative enactment, because they are governmental agencies, and, unlike charters, are not held by virtue of any contract. In a very recent case—Keim v. U. S. (decided April 9, 1900) 20 Sup. Ct. 574, Adv. S. U. S. 574, 44 L. Ed. —,—the United States supreme court held that, except where protected by express constitutional or statutory provision, "the power of removal is incident to the power of appointment," and that, where an officer is thus removed, "the courts cannot issue mandamus either to reinstate him, or to compel payment of his salary." Thus, that court disavows the power in the judiciary, in both particulars, which this court is asked to assert. The plaintiff, not being a constitutional officer, is not protected by any constitutional provision, and cannot be protected by legislative provision when it is by legislative enactment that he has been removed. In a still more recent case in the United States supreme court, in which the opinion was filed May 21st, in the contest over the governorship of Kentucky (Taylor v. Beckham, 20 Sup. Ct. —, Adv. S. U. S. —, 44 L. Ed. —), the question was presented whether an office was "property" and therefore protected by the fourteenth amendment. The case was of unusual importance, and was argued by able and eminent counsel. The court, speaking through Chief Justice Fuller, after quoting numerous cases, all holding that public offices are mere agencies or trusts, and not property, as such, and that the salary and emoluments are not property secured by contract, but compensation for services only when actually rendered, says, "In short, the nature of the relation of a public officer to the public is, generally speaking, inconsistent with either a property or a contract right." If there was anything in the obiter dicta in Marbury v. Madison which might be justly construed as favoring, by implication, a different doctrine, there is no obiter and no possible doubt as to the meaning of this latest enunciation of the highest court in the land,—an enunciation which the opinion itself shows is in conformity with the uniform decisions of that court, and required by the very conception of the nature of an office, which belongs to the public, not to the individual who is assigned to discharge its duties at the will of the appointing power, and subject to removal at the will of the legislature, except when the constitution fixes the term. Cotten v. Ellis, 52 N. C. 545, was a case in which the court expressed the opinion that, because Cotten's office had been created by act of congress, the legislature had no power to abolish the office, as it could do with offices created by legislative enactment, and that consequently the salary was like the salaries of those officers who were protected by express constitutional provision from legislative abolition, and could not be taken away. The court issued an alternative mandamus (i. e. a notice to show cause why a mandamus should not issue), but intimated very clearly that a peremptory mandamus, as here asked, could not issue, saying, "We do not enter upon the inquiry how it could be enforced." In a still more recent case (Blount v. Simmons, 119 N. C. 50, 25 S. E. 789) the court, speaking through Faircloth, C. J., while adjudging the state liable for certain obligations, was careful to add, "How the judgment will be satisfied is a question not now before us." But it was soon before the court upon an application for a mandamus upon that very claim, in Garner v. Worth, 122 N. C. 250, 29 S. E. 364, in which it was held by a unanimous court, composed of the same justices as now, that "the courts cannot direct the public treasurer to pay any claim against the state, however just and unquestioned, when there is no appropriation to pay the same." Here there is not only no appropriation, but an act of the legislature forbidding the treasurer to pay the plaintiff. In Burton v. Furman, 115 N. C. 166, 20 S. E. 443, the court refused a mandamus to the auditor and treasurer, such as is asked here, though there was an appropriation, because "there was no sufficient provision to pay the plaintiff," the amount, as in the present case, being disputed. In Granville County Board of Education v. State Board of Education, 106 N. C. 81, 10 S. E. 1002, the court held that the state board of education, being an agency of the state, could only be sued because the legislature had authorized and directed that it might "sue and be sued." It also held that a mandamus might issue "to compel public officers to discharge a mere ministerial duty, not involving an official duty"; that is, where the statute directs them to perform a certain duty. That would be the case here if the legislature had directed the treasurer to pay the plaintiff a certain salary, but it is not a ministerial duty, nor a duty at all, when the legislature has told him, as in this instance, not to pay the plaintiff. If the case of Ward v. City of Elizabeth City, 121 N. C. 1, 27 S. E. 993, cited by Mr. Justice Montgomery, and which was decided by a unanimous court, had been followed, all the line of cases, from Day's to White v. Ayer, would have been decided in accordance with the dissenting opinions in those cases, as a glance at Ward v. City of Elizabeth City will sufficiently show. These cases certainly do not sustain the plaintiff's contention, and the utmost research has not brought forward any other, from any court whatever, that will justify this court in directing payment of this or any liability by the state treasury when there is no appropriation by the legislature, unrevoked, to pay it. The plaintiff's contention rests upon two fallacies: First, that the agencies created for mere governmental purposes are "contracts"; and, if that is conceded, that the state can be forced by the courts to execute the contract and to pay the salary. Whether a sov-

ereign state will perform its contract, and pay out money under it, must ever be left solely to the sense of right and justice in the sovereign. This is inherent in sovereignty, and every one who makes any contract of any kind with a state does so with the knowledge that this right is safeguarded and reserved to each state by the eleventh amendment to the United States constitution, and by express provision in the state constitution.

ROUSS v. KRAUSS.

(Supreme Court of North Carolina. May 22, 1900.)

PROMISSORY NOTE—PRINCIPAL AND SURETY—RELEASE—EVIDENCE—DIRECTING VERDICT.

1. Where the maker, sureties, and payee to a note enter into a contemporaneous agreement for the payment of 10 per cent. of said note weekly, in consideration of which the payee agrees to permit the makers to order an equal amount of goods, the sureties cannot claim a release because new goods are shipped the makers without the payment of the 10 per cent.

2. To a request by one of the makers of a note that one of the sureties be released, the payee replied, "We have already permitted you to assume the indebtedness, and that is sufficient." *Held*, that the question whether a release of the surety was intended by the payee was for the jury, and, they having answered it in the negative, his co-surety could not claim a release on such ground.

3. The direction to the jury to find against the surety was not erroneous because of their previous finding that plaintiff accepted remittances from the principal of less than 10 per cent. per week upon their indebtedness, and extended credit to them in excess of the amount of their remittances, contrary to the terms of the agreement between the makers, sureties, and payee of the note.

Appeal from superior court, Union county; Allen, Judge.

Action by Charles B. Rouss against W. H. Krauss and others upon a promissory note. From a judgment for plaintiff, defendant Krauss appeals. Affirmed.

Adams & Jerome, for appellant. Redwine & Stack and Burwell, Walker & Cansler, for appellee.

CLARK, J. This is an action upon a note signed by F. A. Krauss and J. F. Clyburn (who were partners as Krauss & Clyburn), W. H. Krauss, and H. N. Clyburn, for $1,300, to be held as collateral security for the indebtedness of said Krauss & Clyburn. The said Krauss & Clyburn, with the above two sureties, signed a contemporaneous agreement that said Krauss & Clyburn would remit 10 per cent. per week upon the above indebtedness, and that said Rouss would permit the ordering of an equal amount of goods with remittance sent, and there is a stipulation that said Rouss could, in his discretion, grant extension of time to the principal debtor without notice to the sureties. Bank v. Couch, 118 N. C. 436, 24 S. E. 737. There was in fact no extension of time granted, but the defendant W. H. Krauss contends that he was released because the payments of 10 per cent. per week were not made, and new goods were shipped exceeding the amount of the remittances, and therefore the said surety was released. The nonpayment of the weekly 10 per cent., however, was not the default of the plaintiff, but of the defendants, and W. H. Krauss' obligation was that he should be responsible if such payment was not made. He cannot plead a release by his own wrong. Indeed, the contract of guaranty expressly provides that, if "the said weekly payments remain unpaid as much as four weeks, then the said Rouss is authorized to proceed with the collection of the note." The sale of more goods to the amount of remittances made was not a restriction upon the guaranty, but a privilege to the defendants. The guaranty is of a line of credit of $1,300, a continuing guaranty (14 Am. & Eng. Enc. Law, 1140), and at no time did it exceed that amount, and, if it had, the overplus would simply have been beyond the guaranty, and unsecured by it, but that would not have released the guaranty as to the $1,300.

The defendant, however, contends that he is released because, after the dissolution of the partnership, to a letter of F. A. Krauss, asking a release of J. F. Clyburn, the plaintiff replied: "There is no need of Mr. Clyburn being released from the guaranty given by the old concern as collateral. We, of course, would not look to him, if unfortunately anything should go wrong; the surety is the proper person. His name on the paper does not make it any stronger; in fact, we will not recognize it. We have already permitted you to assume the indebtedness, and that is sufficient. You may explain this to your partner, and it will cover the ground." If this had been an agreement to release, it was without consideration (Bank v. Sumner, 119 N. C. 591, 26 S. E. 129); but, in fact, while it is not a blunt refusal, it is none the less a declination, though in rather diffuse and diplomatic style. Treating it, however, as ambiguous,—capable of two explanations,—the construction was a matter for the jury. There was clear and explicit evidence from the plaintiff and two of his head clerks, and not excepted to, that no release was ever made or intended. The jury found upon the issue of fact thus submitted to them, (1) "Did the defendant F. A. Krauss, with the consent of the plaintiff, assume the payment of the indebtedness of the firm of Krauss & Clyburn, upon which this suit is brought, and plaintiff cease further to regard J. F. Clyburn as debtor? No." The jury further found in response to the second issue, "Did plaintiff accept remittances from Krauss & Clyburn of less than 10 per cent. per week of the open account of their indebtedness, and did plaintiff extend credit to the said Krauss & Clyburn for goods sold and delivered them in excess of the amount of their remittances on

plaintiff on said debt? Yes." And thereupon the court directed an affirmative response to the fourth issue, "Is defendant W. H. Krauss liable to the plaintiff?" This was a matter of law, and was correctly held; for, as above said, the default in making 10 per cent. weekly payments lay upon the defendant, who guarantied they should be made, and the credits allowed Krauss & Clyburn at no time exceed the $1,300, which the sureties guarantied. In truth, the plaintiff, rather than the defendants, has cause to complain because the jury, in response to the third issue, have credited the defendants with $841.25 paid by F. A. Krauss after the dissolution of the partnership, in face of the uncontradicted testimony that such payments were cash payments exacted of F. A. Krauss for the goods bought by him after the dissolution. The rule applying payments to the oldest indebtedness has no application where the understanding of parties is to the contrary. Miller v. Womble, 122 N. C. 185, 29 S. E. 102. But the jury having applied them to the debt of the firm, the balance recovered by the plaintiff in this action is only $192.32, instead of $1,011.25, which was due by the firm at the date of the dissolution, and which was covered by the contract of guaranty; leaving a loss to the plaintiff of the amount due by F. A. Krauss after the dissolution, though the evidence was that the above $841.25 was applied for goods as he bought them. The jury having found that such payments were to go upon the firm debt, there is only the question left whether the $192.32 was released by action of the plaintiff, and the jury have found with the plaintiff as to that. No error.

STATE v. NEWCOMB.

(Supreme Court of North Carolina. May 22, 1900.)

INTOXICATING LIQUORS—DISPENSARY LAW—INDICTMENT—SUFFICIENCY—MOTION IN ARREST.

1. An indictment under Acts 1899, c. 254, § 1, creating a "dispensary" in the town of Greensboro, and making it a misdemeanor to sell spirituous liquors otherwise than as therein provided, need not aver that the dispensary was in operation upon the date when the offense is charged to have been committed, since under section 3 of said act, providing that the dispensary board shall establish the dispensary "on the 1st of July, 1899, or as soon thereafter as possible," and that there shall be no prosecution under the act until said dispensary is open, the presumption is that the law went into force July 1, 1899; and, if it did not, that fact is a matter of defense, which the defendant must set up.

2. It cannot be taken advantage of by a motion in arrest of judgment, which admits the truth of the allegations of the indictment.

Douglas, J., dissenting.

Appeal from superior court, Guilford county; Timberlake, Judge.

E. G. Newcomb was indicted for the offense of selling liquor in the town of Greensboro, contrary to Acts 1899, creating a dispensary. From a judgment convicting him of the offense charged, defendant appeals. Affirmed.

Bynum & Bynum and J. N. Staples, for appellant. Brown Shepherd and the Attorney General, for the State.

CLARK, J. This is an indictment for selling liquor in Greensboro contrary to the provisions of the act creating a "dispensary" in that town. Acts 1899, c. 254. The defendant frankly and properly abandoned here the exceptions upon which the appeal has come up, conceding that they had been settled by the decision in Garsed v. City of Greensboro (N. C.; at this term) 35 S. E. 254, which sustained the constitutionality of the act. The sole point now raised is a motion in arrest of judgment, made for the first time in this court (probably an afterthought), on the ground that the indictment does not aver that the dispensary was in operation upon November 7, 1899, when the offense charged was committed. The act was ratified on February 24, 1899. Section 1 thereof makes the sale of spirituous liquor, otherwise than is therein provided, a misdemeanor; and section 3 provides that the dispensary board shall establish the dispensary "on the 1st of July, 1899, or as soon thereafter as possible," and that "there shall be no prosecution under the provisions of this act for the sale of liquor until said dispensary is open." The clear presumption is, nothing else appearing, that the law went into force on July 1, 1899, and, if it did not, the fact which would withdraw the defendant from liability is a matter of defense, which he might have set up if the evidence and his admission had not been the other way. The rule of pleading in criminal actions has been long settled, by uniform decisions, that where the matter which would withdraw a case from the operation of a statute creating a criminal offense (here section 1) is in another section of the statute (here section 3), or, indeed, when in the same section, if it is in a proviso, then such matter is not required to be negatived by the indictment, but must be set up on the trial as a matter of defense. State v. Downs, 116 N. C. 1064, 21 S. E. 689, citing Same v. George, 93 N. C. 567; Same v. Lanier, 88 N. C. 658; Same v. Heaton, 81 N. C. 542; Same v. Tomlinson, 77 N. C. 528; Same v. Norman, 13 N. C. 222. In the last-named case, Henderson, C. J., draws a clear distinction between a proviso which withdraws a case from the operation of a statute, which is a matter of defense, and need not be negatived in the indictment, and a condition upon the existence of which the statute depends, which must be averred. It has since been approved, among other instances, in State v. Davis, 109 N. C. 780, 14 S. E. 55, and Same v. Melton, 120 N. C. 591, 26 S. E. 933.

The indictment charges that the defendant, "on the 7th of November, 1899, at and in the

county of Guilford, and in the city of Greensboro, unlawfully and willfully did sell and retail to James B. Taylor spirituous liquor, the said E. G. Newcomb not then and there being manager for, or agent or servant of, the dispensary board for the city of Greensboro, empowered to sell as provided by the act of 1899 (chapter 254, Pub. Laws), contrary to the statute in such case made and provided." The motion in arrest admits the truth of these allegations, and, indeed, it is determined by the verdict; and as the defendant seeks by this motion to withdraw himself from liability to the statute, contrary to whose provisions it is both admitted and found that he made the sale, it was incumbent upon him to prove such fact in his defense. State v. Ballard, 6 N. C. 186. This is not like State v. Chambers, 93 N. C. 600, chiefly relied on by the defendant. That was not a case where the act was to go into effect on a day named, subject to be suspended if something was not done, which is this case, but the act was not to go into effect at all until, upon a vote of the people, it was affirmed and made a law. Of course, in the latter case, it must be both averred and proved that the vote which was essential to the validity of the act was in favor of making it a valid statute. Here the act is positive, and goes into effect on the date therein specified, with a provision withdrawing the selling of liquor from prosecution thereunder "until said dispensary is open"; thus making the defeasance a matter of defense, for unless the defeasance is shown the statute is in force from July 1st. It is no more necessary to aver in the indictment that the sale was after the opening of the dispensary than it would be to aver that any other act, made criminal by statute, took place after the statute was passed. State v. Fleming, 107 N. C. 905, 12 S. E. 131. If the occurrence was before the time at which such act became criminal, that is a matter of defense arising upon the evidence. State v. Ballard, supra. If it were necessary to put in an indictment now a negative averment that this sale was not before the dispensary opened, the same averment would be necessary in every indictment under the statute for all the years to come, as long as it is in force. State v. Fleming, supra.

The other cases cited by the defendant are all cases in which the exception is named in the same clause which created the offense, and it is not negatived in the indictment, and therefore upon its face the offense described in the act is not charged. Indeed, this was also the case in State v. Chambers, supra, where it is said: "The indictment does not sufficiently charge an offense under the statute," which "provides that in a contingency specified in it, depending upon a popular vote to be taken as therein directed, it shall be unlawful to sell spirituous liquors," etc.; hence in the face of the indictment, it not appearing that the contingency dehors upon which the statute was to have validity had occurred, proof of sale did not prove its illegality. Here, the statute being valid, any fact dehors which would withdraw the defendant from its operation is a matter of defense. The sale is alleged on November 7, 1899, and the motion in arrest of judgment admits the fact, which, besides, was not controverted on the trial. There can be, in fact, no injustice done the defendant; for there is an express admission in the record by him that the dispensary was opened in the city of Greensboro under said act on July 1, 1899, and has been in operation ever since. If the judgment could, under the settled rules of criminal procedure, be arrested, it would therefore be a vain thing, and of no benefit to the defendant. Though this consideration should not avail to defeat the defendant of any legal right, if such he had, to have the judgment arrested, still it shows the wisdom of the rule that such matters are defenses to be set up and proved by the defendant who seeks to withdraw himself from the operation of a statute creating a criminal offense. Affirmed.

DOUGLAS, J. I cannot concur in the judgment of the court. Whatever may be my personal views as to the benefits of the dispensary system, I cannot ignore the right of one charged with crime to be tried according to the law of the land. To my mind, an indictment must directly charge a criminal offense. The jury cannot find the defendant guilty of more than is charged in the indictment, and, if the facts therein stated are not of themselves sufficient to show the guilt of the defendant if they are found to be true, then no judgment can be pronounced upon the verdict. If every allegation in the bill is consistent with the innocence of the defendant, a verdict that he is "guilty in the manner and form as charged in the bill of indictment" has no legal effect. Guilty of what? Of what the indictment charges, but not of what the law condemns. The penalty is prescribed for violating the law, and where there is no violation of the law no penalty can be imposed. In the case at bar every word in the indictment may be true, and yet the defendant may not be guilty of any criminal act, because it is not charged that the dispensary had been opened,—an essential requisite to any conviction under the act. The essential parts of section 3 of the act are as follows: "The said dispensary board on the 1st day of July, 1899, or as soon thereafter as possible, shall establish one dispensary in said city, to be located on one of the principal streets, for the sale of spirituous, vinous and malt liquors, and there shall be no prosecution under this act for the sale of liquor until said dispensary shall be open." The latter part is not an exception, or even a proviso, but is a part of the very sentence itself which establishes the dispensary. There is not even a

semicolon between them, only a comma. It does not profess to "withdraw" any individual or class "from the operation of the statute," but withdraws the statute itself from operation as to any criminal effect until the condition is complied with. It is in the nature of a condition precedent, which must be strictly complied with before the statute can have any penal effect whatsoever. So far from there being a "clear presumption" that the law went into force on July 1, 1899 (by which, I suppose, is meant the criminal operation of the law), this presumption is rebutted by the statute itself, which specifically provides (1) for its failure to do so, and (2) that it shall not do so until after the happening of a certain event. This event might never have happened. Indeed, the author of the bill evidently anticipated some trouble, as he provided in one place that the city of Greensboro should appropriate $2,000, or as much thereof as might be necessary, to establish the dispensary, and then immediately provided that the dispensary board might establish said dispensary without receiving said appropriation. His foresight was justified by subsequent events, as the city has been enjoined from appropriating the money. Garsed v. City of Greensboro (N. C.; at this term) 35 S. E. 254. All these anticipations, precautions, and provisos arising on the face of the act tend strongly to show that there is no legal presumption that the dispensary was opened on July 1, 1899. The very reasoning of the opinion, with the authorities cited therein, prevents me from concurring in its conclusion. The opinion of the court says: "In the last-named case [State v. Norman, 13 N. C. 222], Henderson, C. J., draws a clear distinction between a proviso which withdraws a case from the operation of a statute, which is a matter of defense, and need not be negatived in the indictment, and a condition upon the existence of which the statute depends, which must be averred." To my mind, the case at bar comes clearly within the second class, as its existence as a criminal statute absolutely depends upon the establishment of the dispensary. Again, it is said this case is not like State v. Chambers, 93 N. C. 595. I think it is. In that case the act making it a misdemeanor to sell liquor in the town of Morganton was not to go into effect until after ratification by a vote of the people. In the case at bar an act making it a misdemeanor to sell liquor in the city of Greensboro is not to go into effect until after the opening of the dispensary. In Chambers' Case this court said it could not take judicial notice that an election had been held and of the result thereof. Neither can we take judicial notice that a dispensary has been established in Greensboro. In Chambers' Case this court held that the indictment was fatally defective, because it did not allege "that the contingency happened upon which it became unlawful and indictable to sell spirituous liquors within the area of the territory specified." Why is not the indictment in the case at bar fatally defective, inasmuch as it failed to allege that the contingency had happened—the opening of the dispensary—upon which alone the statute in question could have any criminal operation? I fail to see. Whoever the prisoner may be, or whatever he may have done, he is presumed to be innocent until lawfully convicted, and is entitled to a fair and impartial trial according to "the law of the land." I am in favor of a prompt and faithful enforcement of the law, without useless delay or needless technicality, but I am not in favor of breaking down, by judicial construction, all the barriers which the wisdom of the common law has erected around the liberty of the citizen.

HUTCHISON et al. v. HUTCHISON et al.

(Supreme Court of North Carolina. May 22, 1900.)

EQUITY—JURISDICTION—LIFE ESTATE WITH CONTINGENT REMAINDER—SALE.

Where land is devised to one for life, with remainder to such child or children of the devisee as may survive her, and to the children of any deceased child, equity is without power to decree a sale during the life of the life tenant, for investment, even with the consent of all parties having a present interest, since it has not the means of protecting the contingent interests that may arise under the devise.

Appeal from superior court, Mecklenburg county; Allen, Judge.

Action by D. P. Hutchison and others against A. W. Hutchison and others for an order for the sale of certain real estate devised to plaintiff Sarah W. Hutchison for life, with remainder to the children surviving her. A demurrer to the complaint was overruled, and defendants appeal. Reversed.

Jones & Tillett, for appellants. Burwell, Walker & Causler, for appellees.

FAIRCLOTH, C. J. David Parks died in 1873, having devised one half of the residue of his estate to his wife for life, and in remainder to his grandson D. P. Hutchison, and the other half of the residue to his said grandson, with power to sell the brick-house place and the Silas Orr tract when he thought best to do so. Prior to August term, 1891, M. A. Brem became the owner of the interest and estate of the said D. P. Hutchison in the said land known as the "David Parks Place." In 1891 the said M. A. Brem instituted this action against the defendants, who were the only persons living and interested in the subject of the action, for the sale of said land; the proceeds to be reinvested for their mutual advantage. In 1891 7.1 acres of the land was sold, and title decreed in this action, about which there is now no contention. In 1893 the said M. A. Brem died, leaving a will, in which she directed as

follows: "Item 1. I give, devise, and bequeath my entire estate, real and personal, to my daughter, Sarah W. Hutchison, for and during the term of her natural life, and at her death to such child or children as she may have surviving her; and in case any child or children of my said daughter should die, leaving child or children, then in that event such child or children shall taken the share that their deceased parent would have taken." D. P. Hutchison and wife, Sarah, were made parties plaintiff, as executor and executrix of Mrs. M. A. Brem's will.

It seems that all the parties now interested desire the sale of the land to be made, for better investment. The chief question is, can a court of equity decree a sale, with the consent of all interested parties now living, of land devised as above stated? We are compelled by authority and just reasoning to answer in the negative. The power of the court to sell the land of minors, etc., when they are properly represented before the court, has never been questioned since the act of 1827, c. 33, now Code, § 1602. But the difficulty in cases like the present is that there is no one in existence upon whom the court can act, to protect such contingent interest as may arise in the future. The devise is not to Sarah W. for life, and then to her children, but to such children as may survive her. She and some of her children are living, some dead, and others may be born, and some now alive may predecease their mother. So no one can say now who will take the remainder, and, such taker not being now known, no one can represent him, and it follows that no sale can be made, binding such remainder-man. There are cases, in which all interests are found in classes, when the court will act if one of each class is before the court. This is allowed because it is the policy of the law and the disposition of the courts to unfetter alienation and give property free circulation. The question was presented, by a similar devise, in Watson v. Watson, 56 N. C. 400, and the power of the court was denied. That decision has been followed in numerous instances, presenting strictly the same question. Williams v. Hassell, 74 N. C. 434; Justice v. Guion, 76 N. C. 442; Ex parte Miller, 90 N. C. 625. The sole ground of the demurrer was that the court, upon the admitted facts, was without authority to decree a sale. We think the judgment overruling the demurrer was erroneous. Reversed.

DUCKWORTH v. ORR et al.

(Supreme Court of North Carolina. May 22, 1900.)

GIFT CAUSA MORTIS—DELIVERY—EVIDENCE—BURDEN OF PROOF—PRINCIPAL AND AGENT—INSTRUCTIONS TO JURY.

1. Where, in an action for the recovery of moneys alleged to belong to the estate of a decedent, defendant claims to hold the same as an absolute gift from intestate, the burden is on defendant to prove both the gift and the delivery of the moneys before the death of the donor, by passing over the same with intent to transfer the right to the money and the possession thereof.

2. Where money is delivered to one's agent, with directions to deliver same to a third party as a gift, and the agent fails to make the delivery before his principal's death, the agency and power to deliver are thereby revoked.

3. Under Code, § 413, requiring the court in charging the jury to state, in a plain manner, the evidence, and explain the law arising thereon, the court is not required to charge the jury where the question at issue is simply one of fact, and the evidence is neither conflicting nor complicated.

Appeal from superior court, Transylvania county; Coble, Judge.

Action by J. E. Duckworth, as administrator of estate of Thomas P. Jordan, against Hulda Orr and another, for the recovery of certain moneys. From a judgment for plaintiff, defendants appeal. Affirmed.

Tucker & Murphy and W. W. Zachary, for appellants. Geo. A. Shuford, for appellee.

FAIRCLOTH, C. J. The main question is whether the plaintiff's testator gave and delivered to the defendant Hulda Orr, during his life, the moneys in controversy. It is shown, and not denied, that two years before his death Thomas P. Jordan removed to the house of his sister, the said Hulda, and remained there until his death, and that he carried with him $2,000 in gold, and $200 or $300 in other moneys. It is admitted by the defendant that she had received and appropriated said moneys to her own use, but she claimed that her said brother had made an absolute gift to her of all his money. The other defendant, Hannah, daughter of Hulda, testified that the said testator before his death made a gift of all his money to her mother; that she had kept the money for her mother until after her uncle's death, when she removed it from the place where it was deposited. Her language was: "It was kept in the house by me for my mother, and none of it was given away until after Uncle Tom died, when it was moved. I moved it, and no one else had anything whatever in any manner to do with it nor handled it." The issue submitted was: "Did Hulda Orr and Hannah Orr, or either of them, wrongfully and fraudulently convert to their own use, or to the use of either of them, the moneys of the testator, Thomas P. Jordan, as alleged in the complaint?" The jury answered, "Yes; Hulda Orr." There was evidence offered by the plaintiff tending to prove that, when the said Jordan moved to the house of the defendant Hulda, the said gold was put by him and the said Hannah Orr in a small room adjoining the room occupied by him and his wife, and that the gold remained there until after his death; that his other money was kept by him in a small box under his pillow until the day before his death, when he was supposed to be dying, when it was taken from under his pillow by Hannah Orr, and

immediately after his death all his money was taken possession of by Hulda and Hannah, and used as their own. There was also other evidence. The verdict settles the matter, unless there was error in the trial.

It does not appear, except as it is to be inferred from the verdict, whether the money was delivered to Hulda before or soon after the death of her brother. The burden of showing the gift and delivery of the property before the testator's death rested on the defendant. In the recent cases cited below, the whole question of the delivery of personal property, sufficient to pass title, was carefully and fully considered, and we deem it unnecessary to repeat the argument. It appears there that symbolical delivery does not prevail in this state, and that in a certain class of cases constructive delivery is sufficient when actual delivery is impracticable. Williams, Per. Pr. 34. It is also held that delivery is essential to a gift of personal property in Noble v. Smith, 2 Johns. 52, whether it be inter vivos or mortis causa. This means passing over the property with intent to transfer the right and the possession of the same. Newman v. Bost, 122 N. C. 524, 29 S. E. 848; Wilson v. Featherston, 122 N. C. 747, 30 S. E. 325; Medlock v. Powell, 96 N. C. 499, 2 S. E. 149.

The exceptions to the rejection of evidence are without force, as they refer to questions that were immaterial or incompetent under Code, § 590.

The tenth exception was to the charge. His honor told the jury that the burden of showing a wrongful conversion was on the plaintiff; also that if they should find that Thomas P. Jordan had money in his possession belonging to him when he went to the defendant's house, and said money was afterwards in possession of and claimed by the defendant as a gift, then the burden was upon the defendant to prove such gift by the greater weight of the evidence. Eleventh exception: His honor instructed the jury that if said Jordan delivered the money in question to his own agent, with direction to deliver the same to Hulda Orr, and said agent failed to do so before the principal's death, then the death of Jordan revoked the agency and power to deliver the same after his death. We do not observe any error in the tenth and eleventh instructions, and those exceptions were properly overruled.

The eighth exception was that his honor failed to "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon," as required by section 413 of the Code. That section has been so often construed that it seems only necessary to apply its true meaning to individual cases as they are presented. There was a simple fact at issue between the parties, i. e. whether the testator gave this money to the defendant Hulda. The principal evidence was that of the daughter Hannah, and the admission and claim of the defendant Hulda. The case clearly falls within the reasonable rule laid down by Ashe, J., in Holley v. Holley, 94 N. C. 96. The Code (section 413) does not require the judge "to charge the jury where the facts at issue are few and simple and no principle of law is involved, unless he is requested to do so; but in cases where the witnesses are numerous, or the testimony conflicting or complicated, and different principles of law are applicable to different aspects of the case, it is his duty to conform to the requirements of the statute." It would have been difficult in the present case for the jury to fail to understand the single fact at issue, and the bearing of the evidence thereon. Affirmed.

ARROWOOD et al. v. SOUTH CAROLINA & G. EXTENSION RY. CO.

(Supreme Court of North Carolina. May 22, 1900.)

RAILROADS — NEGLIGENCE — INJURY CAUSING DEATH — PROXIMATE CAUSE — DEFECTIVE LOOKOUT OF ENGINEER — EVIDENCE — INSTRUCTION TO JURY.

1. An ex parte map or plat of the scene of an accident may be used in evidence to explain the testimony of a witness in relation to points and distances referred to.

2. Where the public are accustomed to using a railroad track as a passway, the railroad company must exercise a greater degree of care in running its trains at such point than where the track is not so used.

3. Where, by reason of a curve in the road, and the obstruction of the view by the smokestack, the engineer is unable to keep a proper lookout for persons on the track, and such lookout can be maintained with the aid of a fireman, it is the duty of the railroad company to have a fireman assist the engineer in keeping the lookout.

4. Nonexpert witnesses who went to the place where plaintiff's intestate was struck by defendant's engine, on a dark night, such as that on which the intestate was killed, and made observation of the light cast by one of defendant's engines with an oil headlight, such as is used on all of defendant's engines, are competent to testify to the result of their observations.

5. Evidence that defendant's engineer could have seen the deceased, and that he did not see him when it was his duty to have seen him, is competent on behalf of the plaintiff.

6. Although plaintiff's intestate was wrongfully on defendant's track at the time he was killed, yet if by reasonable, ordinary care in keeping a lookout the killing might have been prevented, then the defective lookout kept by defendant was the proximate cause of his death.

Appeal from superior court, McDowell county; Shaw, Judge.

Action by Mathilda D. Arrowood and J. J. Davis, as administrators of estate of Albert Arrowood, deceased, against the South Carolina & Georgia Extension Railway Company for causing the death of plaintiff's intestate. The court permitted certain plats of the scene of the accident to be used in explanation of the testimony of one of the witnesses for plaintiff, but instructed the jury that the map was not evidence in itself, not having been made under an order of court,

but ex parte, in the absence of defendant, and that they were permitted to look at it and consider it only in explanation of the testimony of the witness. From a judgment for plaintiffs, defendant appeals. Affirmed.

Locke Craig and P. J. Sinclair, for appellant. D. W. Robinson, E. J. Justice, and J. T. Perkins, for appellees.

CLARK, J. The first exception for permitting the use of the map cannot be sustained, as it was admitted merely to explain the witness' testimony and as a part thereof. Riddle v. Town of Germanton, 117 N. C. 387, 23 S. E. 332, and cases cited; Tankard v. Lumber Co., 117 N. C. 558, 23 S. E. 46.

The court instructed the jury that if they found from the evidence "that this was a public passway, as heretofore defined, and that the engineer, by reason of the curve in the road and the obstruction of the smokestack, could not keep a proper lookout for persons on the track, and that the fireman could have done so, then it would have been the duty of the defendant to have had this fireman to have assisted this engineer in keeping this outlook." And also: "What might be ordinary care under certain circumstances might not be ordinary care under other circumstances; and if you should find from the evidence, under the rules to be hereinafter given you, that the public were in the habit of using the railroad track at the point of the accident as a passway, then a greater degree of care would be required of the defendant in running its trains at this point than the defendant would have exercised in running its trains along the track where the public had not been habitually permitted to use the track as a passway." "All that the defendant is required to do is to use ordinary care under the circumstances of the case, and, in determining whether the defendant was negligent as alleged in the complaint, you must first ascertain what duty, if any, it owed the plaintiff's intestate at the time of the alleged killing, and, if it owed a duty, whether or not it failed to perform that duty." The above paragraphs of the charge are excepted to, but without cause. There was ample evidence to go to the jury tending to show that the track was used habitually as a passway, and in telling the jury that, if they found such to be the fact, the defendant should observe a greater degree of care than in running its trains where the track was not so used, the court was stating almost a truism. In moving trains through a crowded city, it must be at a lower speed, with much greater control over the engine, and keener lookout kept in front, than in going along a straight track in an open and almost uninhabited country, and the court properly told the jury that the amount of care depended upon the circumstances of the case. So, on a straight track, the careful lookout of the engineer would ordinarily be sufficient; but on a winding mountain track, turning first to the right, then to the left, if the engineer could not see the track when the engine turned to the left, then it was his duty to have the fireman to look out forward on that side. The duty of keeping the lookout is on the defendant. If it can keep a proper lookout by means of the engineer alone, well and good. If by any reason a proper lookout cannot be kept without the aid of the fireman, he should also be used. If, by reason of their duties, either the fireman or the engineer or both are so hindered that a proper lookout cannot be kept, then it is the duty of the defendant, at such places on its road, to have a third man employed for that indispensable duty. In Pickett v. Railroad Co., 117 N. C. 634, 23 S. E. 264, 30 L. R. A. 257, Lloyd v. Railroad, 118 N. C. 1012, 24 S. E. 805, and a long line of similar cases, it is held that it is the duty of the defendant to keep a proper lookout. It is not held anywhere that such lookout as the engineer may be incidentally able to give will relieve the company, if that lookout is not a proper lookout.

The other exceptions do not require consideration. Similar exceptions have heretofore been before the court, and held to be without merit. The evidence of three witnesses who went to the place where the intestate was struck, and on a dark night (such as that on which the intestate was killed), and made observations of the light cast by one of defendant's engines with an oil headlight, such as all the engines of defendant used, was competent to go to the jury for what it was worth. It was not necessary on such matters of fact, depending on ordinary powers of observation requiring no special training, that the witnesses should be experts. It was also competent for the jury to consider the testimony of the engineer that he could have seen the intestate and did not see him when it was his duty to have seen him. Powell v. Railway Co., 125 N. C. 370, 34 S. E. 530.

The defendant's prayer was given, in substance, in the charge, with the exception that the court told the jury that, if the intestate was killed on a point of the road where the public were in the habit of using it with the knowledge and implied consent of the defendant, and on a curve which kept the engineer from seeing the track, and the fireman could have done so in time to have stopped the train and prevented the injury without endangering the persons on the train, it was the duty of the fireman to have kept the outlook. In this modification there was no error, as already stated. If the track was habitually used by the public to the knowledge of the company, of which there was evidence, it would not have decreased its duty to look out if such use had not been so long continued and acquiesced in as to amount to implied consent. Requiring implied consent to the use of the track, as well as knowledge of its habitual use by the pub-

lic as a precedent condition to the defendant's using the lookout, was an error against the plaintiff. Consent, express or implied, would have lessened the liability of the deceased for contributory negligence; but, the jury having found that issue against the plaintiff, the sole question is (the third issue) whether, "notwithstanding the negligence of the plaintiff's intestate, could the defendant, by the exercise of ordinary care, have avoided the killing of the intestate?" The railroad track is for the exclusive use of the company. It pays for its construction, and has from the state, by virtue of a grant under the state's eminent domain, power to condemn from private owners the right of way "for public uses"; but that use is to be exclusive in itself, subject, of course, to public regulation and control in its use. Others have no right to use the track, and when they do so they are guilty of contributory negligence, unless they have permission, express or implied, from the company. The discussion whether the intestate was a licensee or a trespasser has no bearing upon this appeal by the defendant; for the jury found in the second issue that the intestate, whether he was licensee or trespasser, was wrongfully on the track, i. e. that he was guilty of contributory negligence. If he was a licensee, nay more, if he had had an express permit to walk on the track, he certainly had no permission to lie down on the track, and the jury found that issue against the plaintiff.

But notwithstanding a human being is down helpless on the track, and is there in his own wrong, the railroad company acquires no right to run over and kill him for his foolhardiness, if by ordinary care it can be avoided. Even a cow or a hog does not forfeit its life under such circumstances, if the company's servants can by ordinary care avoid killing. If, on this occasion, by reasonable, ordinary care, in keeping a lookout on both sides of a winding mountain road, whose curves would sometimes obscure the track from the sight of the engineer on the right-hand side of the engine, and did so obscure it at the point where the deceased was killed, and such defective lookout caused the killing, which might otherwise have been prevented, then, notwithstanding the negligence of the deceased, the defective lookout kept by the defendant was the proximate cause of the death. Such the jury found to be the fact in this case. Affirmed.

SMATHERS v. GILMER.

(Supreme Court of North Carolina. May 29, 1900.)

DEEDS — DESCRIPTION — WARRANTY — APPLICATION OF RULE OF CAVEAT EMPTOR.

Where land is sold in a body without representation as to the number of acres, and a simple calculation, according to the definite boundaries, courses, and distances appearing in a recorded deed, would disclose the number of acres in the tract, and the conveyance to the purchaser describes the land by the same courses and distances, and as "containing five hundred acres, more or less," the rule of caveat emptor applies, and the purchaser cannot recover damages for any deficiency in the land conveyed.

Appeal from superior court, Haywood county; Starbuck, Judge.

Action by G. H. Smathers against R. D. Gilmer, as trustee and administrator of estate of James R. Love, for damages for deficiency of land described in a deed. From a judgment for defendant, plaintiff appeals. Affirmed.

T. H. Cobb, for appellant. Simmons, Pou & Ward, for appellee.

FAIRCLOTH, C. J. This is an action to recover damages against the defendant, trustee and administrator of James R. Love, for shortage in acreage in the land described in the complaint, lying in the wild lands of Haywood county, tried by the court by consent on facts admitted in the pleadings and facts agreed on and set out in the judgment; said tract being a part of a large body of land in Haywood and adjoining counties, owned by said James R. Love. These are the facts material to a decision: In February, 1876, the executors of said Love contracted in writing to convey to R. V. Welch a boundary of land supposed to contain 500 acres, more or less, etc., as soon as the purchase money was paid. On May 9, 1883, Welch transferred this bond for title to Richard Gray, and on the same day the surviving executors of Love executed and delivered a sufficient deed to said Richard Gray for the said tract of land adjoining the lands of A., B., and C., and bounded by definite courses and distances, "containing five hundred acres, more or less," with a covenant of authority to sell and to warrant the same. By a proper decree in some proceeding between the heirs at law of said Richard Gray, commissioners were appointed to sell said tract of land after due advertisement, etc., whose report of sale was confirmed by the court; the plaintiff being the purchaser at the price of $510. In September, 1895, the said commissioners made their deed to the plaintiff for said land, with same definite description by courses and distances, "containing five hundred acres, more or less," with warranty of title so far as they were required to do by the decree of the court. The deed to Richard Gray was registered on April 29, 1884. At the time the plaintiff purchased he believed there were about 500 acres in the tract. No representation was made at the sale as to the number of acres, and the defendant avers that the sale in 1883 to Gray was as a solid body of land, and not by the acre. Soon after the plaintiff had purchased, he caused a survey of the tract to be made, and the surface measurement showed only 262 acres. As a mat-

ter of law his honor adjudged that the plaintiff could not recover damages for the deficiency in acreage. The principles of law applicable to such cases are few and simple. The plaintiff had two opportunities for protection: (1) A simple calculation, according to the definite boundaries, courses, and distances appearing on the record from the day of the registration of Gray's deed for over 10 years before he purchased; (2) to require proper covenants in his deed for his protection. Failing to avail himself of those means, he purchased at his own risk, and subject to the principle of caveat emptor. When each party has equal means of information, that principle applies, and the injured party is without remedy. If, however, false representations are made, on which the other party may reasonably rely, and they constitute a material inducement to the contract, and the injured party has acted with ordinary prudence, courts of justice will afford relief. Ordinarily, the maxim of caveat emptor applies equally to sales of real and personal property, and will be adhered to where there is no fraud (Walsh v. Hall, 66 N. C. 233); and so as to quantity, etc. (Etheridge v. Vernoy, 70 N. C. 713, and cases cited). "Ordinarily, the quantity of acres contained in a deed constitute no part of the description, especially where there are specifications and localities given by which the land may be located; but in doubtful cases it may have weight as a circumstance in aid of the description, and in some cases, in the absence of other definite descriptions, may have a controlling effect." 1 Greenl. Ev. § 301; Baxter v. Wilson, 95 N. C. 137; Cox v. Cox, 91 N. C. 256. "Quantity is in no way material except where the boundaries are doubtful, and there it is a new circumstance." Reddick v. Leggat, 7 N. C. 539. These cases sufficiently show the universal rule in this state. There is no doubt as to the boundaries, and it does not appear that the defendant had any better information in regard to the number of acres than the plaintiff. It is not so alleged. His honor's legal conclusion was correct. Affirmed.

JORDAN et al. v. NEWSOME et al.

(Supreme Court of North Carolina. May 22, 1900.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCES — FRAUD — PRESUMPTIONS — HOMESTEAD — DEED — WIFE'S SIGNATURE — OMISSION—ALLOTMENT OF HOMESTEAD—INSTRUCTIONS.

1. A deed of assignment for the benefit of creditors is not presumptively fraudulent because payment of the claim of the assignor's mother-in-law is preferred over other creditors.

2. No presumption of a fraudulent intent in the execution of a deed of assignment for the benefit of creditors arises from the fact that at the request of the trustee an allotment of the assignor's homestead exemption was made by three of his neighbors without notice to creditors.

3. A preference given in a deed of assignment to a feigned and fictitious claim will not render the assignment fraudulent as to creditors, since such claim can be eliminated from the assignment, and the deed stand as to the valid indebtedness.

4. Where, in an action to set aside an assignment as fraudulent as against creditors, plaintiff shows that one of the preferred creditors is the mother-in-law of the assignor; that she resided with him at the time the deed was executed; that, with one exception, she was given preference over all others; and that the preferred claims will absorb all of the debtor's property outside of his exemptions,—and neither the mother-in-law nor the assignor make any effort to show that the debt is bona fide, plaintiff is entitled to have the jury instructed that the indebtedness is feigned and fictitious.

5. Where, in a suit to set aside an assignment for the benefit of creditors, plaintiffs made the assignment a part of their complaint, and alleged that the indebtedness to themselves, referred to in the assignment, was a valid indebtedness, an instruction that, in the absence of defendant's showing the genuineness of a substantial part of the indebtedness secured by the assignment, the jury should find the same fictitious and the deed fraudulent, was properly refused.

6. The omission to have the wife join in a deed of general assignment for the benefit of creditors does not render the assignment void, under Const. art. 10, § 8, providing that no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of his wife, where the debtor's homestead exemptions are reserved from the operation of the deed.

7. Where an assignment for the benefit of creditors reserved the debtor's homestead exemptions, and directed the trustee to make an allotment of the same before sale, such allotment cannot be made by persons appointed by the trustee, but should be allotted by petition and execution, or by three commissioners appointed by the court, or clerk under the instructions of the court.

Furches, J., dissenting.

Appeal from superior court, Hertford county; Bowman, Judge.

Action by Jordan & Parker and others against John F. Newsome and others to set aside a deed of assignment, as fraudulent. From a judgment for defendants, plaintiffs appeal. Reversed.

Winborne & Lawrence, for appellants. Geo. Cowper, for appellees.

MONTGOMERY, J. This action was commenced by the plaintiffs, creditors of the defendant John F. Newsome, for the purpose of having a deed of assignment made by Newsome declared fraudulent and set aside, and that the allotment of the homestead to the debtor be declared irregular and void. The deed of assignment was made to George Cowper, trustee, was dated January 2, 1893, set out the defendant's insolvency, and, after reserving to the debtor the homestead and personal property exemptions allowed him by law, conveyed the property, real and personal, of the debtor. The trustee was authorized to take possession of the property, collect the assets, sell the property, and dispose of the proceeds as follows: "(1) Allot and set apart to said Newsome

his homestead and personal property exemptions allowed him by law. (2) Deduct and retain such costs and expenses as shall be necessary for the proper execution of the trust, together with 5 per cent. commissions on receipts and disbursements. (3) Pay the Camp Manufacturing Company, a corporation duly chartered and organized, the sum due it by account, which is supposed and believed by the grantor to be about $1,500. (4) Pay George Cowper $200. (5) Pay Mrs. Elizabeth A. R. Parker, widow of the late King Parker, $1,500, for money borrowed of her, and now due. (6) The remainder, the said George Cowper shall distribute pro rata amongst each and every one of my creditors according to their respective claims. But, before any sale is had, the said George Cowper shall allot and set apart to said Newsome his homestead and personal property exemptions allowed him by law." The plaintiffs on the trial introduced evidence tending to prove that the real estate of the defendant debtor had been allotted to him, at the request of the trustee, by three of his neighbors, without notice to creditors, and that the land was worth from $2,000 to $3,000 at the time of the allotment; that Mrs. Parker, one of the preferred creditors, lived with Newsome at the time when the assignment was made, and was his wife's mother. At the conclusion of the plaintiffs' evidence the defendants moved to dismiss the action, under the act of 1897. The plaintiffs requested the court to instruct the jury: That, if they believed the evidence, they should answer in the affirmative the first and second issues: "(1) Was the deed of assignment * * * made with intent to hinder, delay, and defraud the creditors of John F. Newsome? (2) Were the debts set out in the deed of assignment, or any substantial part of them, feigned and fictitious?" That the homestead exemptions had been allotted contrary to law. That, the deed of assignment having been attacked for fraud, the defendants were required to show that the debts therein secured, or some substantial part of them, were genuine, and unless they had been so shown, the jury should answer the first issue, "Yes." That there was no evidence of the genuineness of these debts, or any part of them, and the jury should respond to the first and second issues, "Yes." That the assignment having been executed by John F. Newsome alone, and his wife not joining with him, and the judgments of the plaintiffs having been taken subsequently to the assignment, and the defendant Newsome being insolvent at the time, the assignment is void as to creditors and the plaintiffs.

The instructions were all (except that one which concerned the second issue) properly refused. Neither the preference by the debtor of the claim of his mother-in-law, Mrs. Parker, nor the manner of the allotment of the homestead, constituted a presumption of such a fraudulent intent on the part of Newsome in the execution of the deed of assignment as to make it void as to the genuine debts embraced in it. On that issue they were only badges of fraud, to be left to the jury upon all the facts and surrounding circumstances. Even if Mrs. Parker's debt was and is feigned and fictitious, that would not render the deed fraudulent as to the other creditors. That debt could be eliminated from the assignment, and the deed would stand as to the good debts. Morris v. Pearson, 79 N. C. 253.

We think, however, that his honor should have instructed the jury, on the second issue, to have answered that the debt of Mrs. Parker was feigned and fictitious. That debt was assailed by the plaintiffs. She was, as we have said, living in the home of the defendant debtor at the time of the execution of the deed of assignment, and she was the mother of his wife. With the exception of one creditor, she was given the preference over all the others, and according to the evidence the preferred debts would have absorbed all of the property of the debtor outside of his exemptions. Neither she nor the defendants made any effort on the trial to show the bona fides of her debt. Brown v. Mitchell, 102 N. C. 347, 9 S. E. 702; Hinton v. Greenleaf, 118 N. C. 7, 23 S. E. 924; Redmond v. Chandley, 119 N. C. 575, 26 S. E. 255.

We have said enough to send this case back for a new trial already, but there are other matters of importance before us in the case, which will be sure to arise on the next trial, and which we will consider now:

The plaintiffs' fourth and fifth prayers for instruction embrace the contention that, because the deed of assignment was attacked as fraudulent, the defendants were required to show that the debts therein secured, or some substantial part of them, were genuine, and that, as there was no evidence of the genuineness of any of these debts, the jury should find the first and second issues affirmatively. It is a sufficient answer to that position of the plaintiffs to say that their complaint alleges that their debts were in existence at the time of the execution of the deed, and they make the assignment a part of their complaint, and, in it, it appears that the plaintiffs' debts are included as general creditors. Besides, the plaintiff Parker, in his evidence, speaks of his debt against Newsome, and declares it to be a valid debt,—not in so many words, it is true, but by an implication so strong as to amount to a positive declaration about it. He said, "I had not sued Newsome when the deed of assignment was made." There was no need of any evidence in this case to show the existence of genuine debts; for the plaintiffs had alleged such debts in their complaint, and no issue, therefore, could have arisen on the pleadings. There can be no application here of the rule that,

where a party intends to use pleadings as evidence, he should put them in evidence, and therefore that the defendant, before he could avail himself of the plaintiff's complaint in reference to the existence of genuine debts, should have introduced that part of the complaint in evidence. The court had charge of the pleadings, and it was its province to act upon the record, and to apply the admissions of the parties and such other evidence as might appear in it. As we have said, there was no need for the intervention of a jury on this point, as no issue was raised on it by the pleadings. Smith v. Nimocks, 94 N. C. 243.

The seventh of the plaintiffs' prayers for instruction was to the effect that as the assignment had been executed by Newsome without the joinder of his wife, and, as the plaintiffs had procured judgments against Newsome subsequently to the assignment, and as Newsome was insolvent at the time, the assignment was void as to creditors. The case of Thomas v. Fulford, 117 N. C. 667, 23 S. E. 634, is cited as authority for the position. That case is verily a Pandora's box, and we will not open it. It does not support the contention of the plaintiffs. The execution of the deed of assignment by defendant Newsome does not violate section 8 of article 10 of the constitution of North Carolina. Newsome reserved most carefully to himself his homestead exemptions from the operation of the deed, and one of the special trusts in the deed was that the trustee should lay off and allot to him his homestead exemptions before a sale of any of the property conveyed in the deed was made by the trustee. The allotment of the homestead by the trustee was irregular, and cannot stand. The statutory methods by which homesteads are allotted are by petition and by execution. But this court held in Littlejohn v. Egerton, 77 N. C. 379, and also in Benton v. Collins, 125 N. C. 83, 34 S. E. 242, that there were other methods besides those, and that, where the superior court got control of the homestead lands, the court itself could appoint three commissioners, or instruct the clerk of the court to appoint the commissioners, to lay off the homestead, giving at the same time notice to the homesteader, "and in all particulars to observe, as near as may be, the requirements of the constitution and of the homestead act." We suggest that the last-named plan for the allotment to the defendant of his homestead be followed in this case by the court below. New trial.

FURCHES, J. I dissent from the opinion of the court in this case upon two grounds:

1. For the reason that the only mention made in the deed of assignment to the homestead is the following paragraphs: "(1) Allot and set apart to said Newsome his homestead and personal property exemptions allowed him by law." "(6) But, before any sale is had, the said George Cowper shall allot, lay off, and set apart to the said Newsome his homestead and personal property exemptions allowed him by law." These paragraphs are contained in the powers conferred on the assignee, Cowper, and nowhere else. They undertake to authorize him to do what he cannot do,—to lay off the assignor's homestead and personal property exemptions. There is not a word excepting the homestead or personal property exemption, unless it is contained in the paragraphs I have quoted, and I do not understand them to amount to an exception of a homestead.

2. In my opinion, the deed is void for the reason that the wife did not join in its execution. Const. N. C. art. 10, § 8.

WITTKOWSKY v. BARUCH et ux.

(Supreme Court of North Carolina. May 29, 1900.)

ASSIGNEE FOR BENEFIT OF CREDITORS—ASSETS—TRANSFER TO WIFE—COMPLAINT—DEMURRER—CREDITOR—SURRENDER OF NOTES TO ASSIGNEE—SUBSEQUENT SUIT—COMPROMISE OF DEBT—DEBTOR—PROMISE TO EXECUTE NOTE—FRAUD—OTHER CREDITORS—EFFECT.

1. Where a complaint alleges that defendant made a general assignment to plaintiff for the benefit of creditors, plaintiff himself being a creditor, and that plaintiff had transferred the assets to a third person, who was to effect a composition, and that such third person had transferred the assets to defendant's wife for a nominal consideration, the wife being insolvent, such facts show the transfer to the wife to have been in fraud of creditors, and hence constitute a cause of action against the wife.

2. Under Code, § 574, providing that, where agreements have been made to accept in satisfaction of money demands a less amount than that due, the payment of such less amounts shall discharge the whole, a creditor's surrender of notes to an assignee for the benefit of creditors, under an agreement that he should receive half of the amount due and a new note from the debtor for the balance, precludes him from afterwards maintaining an action on the surrendered notes.

3. Where a complaint shows that defendant had made a general assignment for the benefit of creditors, and that plaintiff, a creditor, had surrendered defendant's notes to the assignee under an agreement that he was to receive half cash and a new note from the defendant for the balance, and declares on a violation of this promise to execute the new note, such complaint is not demurrable as declaring on a promise made in fraud of other creditors, a community of understanding as to the terms of a composition being necessary among creditors to make a violation of the terms by one a fraud on the others.

Appeal from superior court, Mecklenburg county; Coble, Judge.

Action by S. Wittkowsky against H. Baruch and wife, D. H. Baruch, for money, and to declare a trust in favor of creditors. From a judgment sustaining a demurrer to plaintiff's complaint, he appeals. Reversed.

Jones & Tillett, for appellant. Burwell, Walker & Causler and Osborne, Maxwell & Keerans, for appellees.

FURCHES, J. The plaintiff alleges that the defendant H. Baruch was indebted to him in the sum of $20,000, and on the 1st day of October, 1894, the said H. Baruch executed four notes to the plaintiff therefor, in the sum of $5,000 each; that the said H. Baruch became financially embarrassed, and on the 1st day of July, 1895, made a general assignment to the plaintiff, as trustee, for the benefit of his creditors, the plaintiff being one of them; that by an agreement between the defendant H. Baruch, E. D. Latta, and the plaintiff, on the 21st day of September, 1895, the plaintiff assigned to said Latta all the property and effects of said Baruch, conveyed to him by said deed of trust dated 1st of July. And it is stated that said Baruch was desirous of paying his debts, and the assignment of the plaintiff to Latta was for the purpose of compromising and paying off said indebtedness; that upon said compromise and payment the creditors were to surrender their evidences of debt against said Baruch to said Latta. But the plaintiff further alleges that there was another agreement between him and said Baruch that, in consideration that he would make this assignment to Latta, and that he would surrender his notes to Latta, he should be paid $6,000 out of the assets, and commissions amounting to $4,000, and that said Baruch was to give to the plaintiff his note for the balance of his debt. The plaintiff then alleges that Latta paid him the $6,000 and the $4,000 commissions, and that Baruch paid him $1,000, and he surrendered his four notes of $5,000 each to Latta, as he contracted to do, but that there is still due him $9,000; that he has prepared notes for that amount for Baruch to sign; that he refused to sign the same, and still refuses to do so; that Baruch, for the purpose of defrauding his creditors, has procured Latta to assign and transfer the effects originally conveyed to him and by him to Latta to D. H. Baruch, the wife of defendant H. Baruch, for a nominal consideration; that said D. H. Baruch has very little or no means, and is insolvent; that, in addition to this, the said H. Baruch has bought valuable real estate in the city of Charlotte, and procured the deed therefor to be made to his wife, the said D. H. Baruch. Upon this complaint the plaintiff demands judgment for the $9,000; that the assignment of Latta to the said D. H. Baruch be declared fraudulent and void; and that the said D. H. Baruch be declared a trustee of the real estate so bought by her husband, and conveyed to her, for the benefit of the husband's creditors. To this complaint the defendants demurred, and say that it appears from the complaint that the plaintiff cannot recover on the original notes of $5,000 each, for they have been surrendered to Latta under the agreement for which the plaintiff has received $11,000; that he cannot recover on the new promise for the reason that it appears from the complaint that these notes were surrendered upon a composition contract; that the new promise was a stipulation for an advantage over the other creditors of the defendant H. Baruch, and was, therefore, a fraud upon them, and void; that the plaintiff was not only guilty of a fraud in this respect, as he was not only creditor, but he was the trustee of the assigned assets for the equal benefit of all the creditors of H. Baruch; and this was another reason why he should have acted fairly with the other creditors, and this made said contract void. And, further, that said complaint does not set forth a cause of action.

As to the allegations contained in this complaint as to the defendant D. H. Baruch we have had but little trouble. Taking them to be true, as we must, they are in plain violation of every principle of honesty and fair dealing, and are fraudulent as to the creditors of the husband. Redmond v. Chandley, 119 N. C. 575, 26 S. E. 255. But the question as to whether the complaint states a cause of action against the defendant H. Baruch or not has given us much trouble. That there are elements or badges of fraud apparent upon the complaint must be admitted. But it may be that they do not sufficiently appear upon the complaint to justify us in declaring the fraud as a matter of law. The plaintiff is a large creditor of H. Baruch, and is made assignee. Under the law as it was at the time of this assignment, all creditors stood on equal footing; no preference could be given. Laws 1895, c. 466; Farthing v. Carrington, 116 N. C. 315, 22 S. E. 9. This being the law, the question suggests itself, why was the assignment made by the plaintiff to Latta? They could not change the assignment or the law. It is stated that it was made by agreement between the plaintiff, the defendant Baruch, and Latta, and that the assets were to be used by Latta (we suppose) in compromising the debts of Baruch. How this could be done by either the plaintiff or Latta, we do not know; and, if it could be done by Latta, we do not see why it might not have been done by the plaintiff. But it seems that the creditors of Baruch were to surrender the evidences of their debts upon receiving the compromise money, and under this contract the plaintiff surrendered his notes to Latta upon the receipt of the amount agreed upon. And Latta, it seems, has conveyed the effects (conveyed to him by the plaintiff) to D. H. Baruch, wife of H. Baruch, and, the plaintiff says, without substantial consideration, and in fraud of Baruch's creditors. It would seem that the plaintiff has no cause of action on the $5,000 notes, as he surrendered them to Latta under the agreement with Baruch to do so (Code, § 574); and, if he has any cause of action, it must be upon the new promise to give the new notes; or, in other words, to pay the plaintiff the difference between what was paid out of the trust fund and the $20,000 due by the four notes of $5,000 each. The

defendants say that he cannot recover on this promise, for the reason that the contract entered into by the plaintiff and Baruch and Latta was not only a compromise of this indebtedness of Baruch, but that it was a composition of said indebtedness. The defendants say this appears from the facts that the indebtedness was to be compromised, and the evidences of debt were to be surrendered to Latta, and that Latta has since assigned the property and effects (assigned to him) to the wife of H. Baruch for a consideration so grossly inadequate as to be a fraud on the creditors of the insolvent husband; that, this being a composition of the debts of the insolvent assignor, the new promise upon which the plaintiff must rely is a fraud on the other creditors, and cannot be enforced in a court of law. This proposition of law seems to be correctly stated by the defendants, and is well sustained by numerous authorities. White v. Kuntz, 107 N. Y. 518, 14 N. E. 423; Goldenbergh v. Hoffman, 69 N. Y. 322. That there are badges or evidences strongly tending to sustain the charge of fraud contended for by defendants, must be admitted. And, while there is no form necessary to constitute a composition, and no formal release of the claim is necessary (6 Am. & Eng. Enc. Law, 377–380), still it is necessary that there should have been a community or understanding as to the composition between the plaintiff and the other creditors, or some of them, to make its violation a fraud upon them. This element of fraud, it seems to us, is not sufficiently apparent on the face of the complaint to justify us in saying that this new promise was in fraud of the rights of the other creditors. We have, therefore, concluded that the case should go to a trial, where the facts can be developed and found by the court or the jury. For this reason we think there was error in sustaining the demurrer. Error

BOARD OF EDUCATION OF VANCE COUNTY et al. v. TOWN OF HENDERSON et al.

(Supreme Court of North Carolina. May 29, 1900.)

COMMON-SCHOOL FUND—FINES AND PENALTIES—CITY ORDINANCES—STATE PROSECUTIONS — STATUTES CONSTRUED — CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT—LIMITATIONS.

1. Code, § 3820, provides that a violation of a town ordinance shall be a misdemeanor. Section 3818 invests mayors with the criminal jurisdiction of justices of the peace, who are state officers. Const. art. 9, § 5, declares that the clear proceeds of all penalties, and of all fines collected in the several counties for breach of the penal laws of the state, shall belong to such counties, and be appropriated for the benefit of the free public schools therein. *Held* that, whether the criminal offenses created by the violation of town ordinances are tried before the mayor or before a justice of the peace, they are state prosecutions, and the fines collected therefor belong to the common-school fund of the county.

2. Code, § 3820, provides that a violation of a town ordinance shall be a misdemeanor. Section 3818 invests mayors with the criminal jurisdiction of justices of the peace, who are state officers. Under the law of the state, towns have the right to create offenses and fix penalties for the violation of its ordinances, and can enforce these penalties by a civil action of debt, but have no right to create criminal offenses, and sections 3818 and 3820 extend to such towns the criminal law of the state. Const. art. 9, § 5, provides that the clear proceeds of all penalties, and of all fines collected in the several counties for a breach of the penal laws of the state, shall belong to the common-school fund of such counties. *Held*, that the proceeds of penalties collected by a town for violations of its ordinances by a civil action of debt belonged to the town, and not to the common-school fund of the county.

3. Laws 1899, c. 128, providing that fines and penalties collected in the several counties for breach of the penal laws of the state shall be paid into the treasuries of the towns in which they are collected for municipal purposes, is in violation of Const. art. 9, § 5, providing that such fines shall belong to the common-school fund of such counties, and is therefore void.

4. Since Const. art. 9, § 5, authorizing the application of funds collected for breach of penal laws to the common-school fund of the counties in which they are collected, creates a vested right to such fines in the counties for the benefit of such fund, Laws 1899, c. 128, § 2, providing that no action shall be brought against any town to recover any fines or penalties collected, and that such act should apply to existing actions, is in violation of the contract clause of the federal constitution, and is therefore void.

5. Under Const. art. 9, § 5, providing that "the clear proceeds of all penalties," and "of all fines collected" in the several counties for a breach of the penal laws of the state shall belong to the common-school fund of such counties, the phrase "clear proceeds" applies to penalties alone, and not to "fines collected," and, where a town collects such fines, the whole amount thereof, without deduction, must be paid into the county school fund.

Appeal from superior court, Vance county; Moore, Judge.

Action by the board of education of Vance county and another against the town of Henderson and others to recover for fines and penalties collected. From a judgment in favor of plaintiffs, both parties appeal. Affirmed.

T. T. Hicks, for plaintiffs. J. H. Bridgers and A. C. Zollicoffer, for defendant.

FURCHES, J. The plaintiff board of education of Vance county alleges that defendant town of Henderson has collected, and now has in its treasury, a large amount of money collected from fines and penalties belonging to the public-school fund of said county, which defendant refuses to account for and pay over to plaintiff. The defendant answers, and denies that it owes plaintiff anything; denies that it has collected any fines and penalties that belong to the plaintiff; pleads the statute of limitations; and also pleads an act of the legislature (Laws 1899, c. 128) in bar of plaintiff's right to maintain this action. A reference was had, and an account taken and reported, finding $407.90

in favor of plaintiff. This account and report are excepted to by both parties, and the amount reported may be changed, upon considering these exceptions, if it be found that plaintiff is entitled to recover anything. But, whether the amount found by the referee be correct or not, the evidence taken by the referee shows that defendant had collected a large amount of fines and penalties for which it had not accounted to plaintiff, upon the ground (as defendant alleges) that it is not liable to plaintiff for any part thereof.

To our minds, there is a clear distinction between a "fine" and a "penalty." A "fine" is the sentence pronounced by the court for a violation of the criminal law of the state, while a "penalty" is the amount recovered—the penalty prescribed—for a violation of the statute law of the state or the ordinance of a town. This penalty is recovered in a civil action of debt. Commissioners v. Harris, 52 N. C. 281; State v. Earnhardt, 107 N. C. 789, 12 S. E. 426. A municipal corporation has the right, by means of its corporate legislation, commonly called "town ordinances," to create offenses, and fix penalties for the violation of its ordinances, and may enforce these penalties by civil action; but it has no right to create criminal offenses. And, this being so, it was found to be almost impossible to administer and enforce a proper police government in towns and cities by means of penalties alone. It therefore became necessary to make the violation of town ordinances a misdemeanor,—a criminal offense,—which was done by section 3820 of the Code, and to invest mayors with the criminal jurisdiction of justices of the peace, which was done by section 3818 of the Code. This being so, in order that the mayor may have jurisdiction, the town legislature (the board of aldermen) pass ordinances or by-laws for the government of towns, and fix penalties for their violation, not to exceed a fine of $50 or imprisonment for a term not exceeding 30 days. And, while the town or city government has no right to make criminal law, the legislature has made the violation of such ordinances a criminal offense, and has given to mayors jurisdiction to try such offenses. State v. Higgs (at this term) 35 S. E. 473.

While such violations of town ordinances are criminal offenses, they are made so by a general act of the legislature (section 3820, Code); and, while the mayors of cities and towns have jurisdiction under section 3818 of the Code, any justice of the peace also has jurisdiction of such offenses (State v. Wood, 94 N. C. 855; State v. Higgs, supra). But whether the criminal offenses created by the violation of town ordinances, under section 3820, Code, are tried before the mayor, or before a justice of the peace, they are state prosecutions, in the name of the state, are for violations of the criminal law of the state, and at the expense of the state (State v. Higgs, supra), and the city cannot be charged with the costs of such prosecutions.

Article 9, § 5, Const., among other things, provides: "Also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the state; * * * shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of the state." It must therefore follow that all the fines the defendant has collected upon prosecutions for violations of the criminal laws of the state, whether for violation of its ordinances made criminal by section 3820 of the Code or of other criminal statutes, belong to the common-school fund of the county. It is thus appropriated by the constitution, and it cannot be diverted or withheld from this fund without violating the constitution. This is not so with regard to "penalties" which the defendant may have sued for and collected out of offenders violating its ordinances. These are not penalties collected for the violation of a law of the state, but of a town ordinance. But, wherever there was a fine imposed in a state prosecution for a misdemeanor under section 3820 of the Code, it belongs to the school fund, and, as we have said, must go to that fund.

But it is contended by defendant that, if this is so, it is protected by Act 1899, c. 128. This is an act to amend section 3806 of the Code, by making it read that "said fines and penalties shall be paid into the treasuries of said towns for municipal purposes"; and section 2 of said act provides "that no action shall be brought or maintained against any town for the recovery of any fines and penalties heretofore collected, and this act shall apply to existing actions." The provision of the first section of this act, that "said fines and penalties shall be paid into the treasury of said town for municipal purposes," is so palpably in conflict with article 9, § 5, Const., which says that all moneys so collected "shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of the state," that we feel unwilling to discuss its unconstitutionality. We cannot think it needs more than a comparison of the provisions of the statute with the provisions of the constitution to show the repugnancy of the statute to the provisions of the constitution. The second section of the act of 1899, "that no action shall be brought or maintained against any town for the recovery of any fine or penalty heretofore collected, and this act shall apply to existing actions," is equally unconstitutional, though it may not be so palpable as that of the first section. It will be seen that the act of 1899 does not undertake to "abolish" the school board of education. It is probable that it could not have done so, as the common schools are creatures of the constitution, and, while its machinery—its agency—may be changed and regulated by legis

nation, it cannot be abolished by legislation. It does not undertake to take from this board the general right to sue and be sued, but to prohibit it from suing for this money.

So we have this condition: The defendant has (we will say) $407.90 of plaintiff's money. This, we will say, is admitted; but defendant says it will not pay it to the plaintiff, and the argument of the defendant is that the legislature says to the defendant: "Hold on to plaintiff's money; you need it more than the poor common-school children do, and we [the legislature] will not let the plaintiff sue you." Can it be that the legislature can in this indirect way destroy the plaintiff's constitutional right? The defendant having received money that belongs to the plaintiff, the law presumes that it received it for the plaintiff upon an implied contract, and is liable to be sued for it upon this implied contract in what would have been an action of indebitatus assumpsit before the Code. Robertson v. Dunn, 87 N. C. 191; Houser v. McGinnais, 108 N. C. 631, 13 S. E. 139; Draughan v. Bunting, 31 N. C. 10. To say that to prohibit the plaintiff from suing the defendant for what it owes the plaintiff is not to impair the obligation of a contract, and not in violation of the constitution, would be to close our minds to all reason, and to disregard all precedent. It has been frequently held by this court that a general act staying for a period of time a plaintiff's right to collect his debts was a violation of both the state and federal constitutions. Jones v. Crittenden, 4 N. C. 55; Barnes v. Barnes, 58 N. C. 366. If such general legislation as that is in violation of both state and federal constitutions, how can it be that an act which perpetually enjoins the plaintiff from suing the defendant for a debt—money of plaintiff it has collected—can be constitutional?

It was said that this court has held that penalties recovered by parties suing for them might be given to the party suing, and Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968, and many other cases, before and since that decision, to the same effect, are cited. Those cases are, to our minds, distinguishable from this. Besides, the fact is that they were put upon the ground of public good,—to protect the public from flagrant violations of the law, such as public carriers; and, while these were inducements for making the decisions, we admit, even these reasons would not have justified the court in violating the constitution. The constitution provides that the "clear proceeds of all penalties" shall go to the school fund. It was held that there were no "proceeds" until there was a suit and a recovery, and, if it took all the penalty to enforce the collection, there were no "clear proceeds" left to go into the school fund. This may not be very satisfactory reasoning to some, as we know it was not in Sutton v. Phillips, supra, where both the chief justice and Justice Avery dissented. But it was held to be the law in that case, as it had been in other cases before and since. But in this case there is no ground for such reasoning. Here the money has been collected from fines imposed for the violation of the criminal law of the state, upon prosecutions by the state, and at the cost of the state. This, to our minds, makes a clear distinction between this case and Sutton v. Phillips, supra, Carter v. Railroad Co. (at this term) 86 S. E. 14, and other cases where an individual was induced to incur the expense, and take the risk, of paying costs by being allowed whatever he might recover in such actions. Here there was no one individual to sue for a penalty,—no one taking upon himself the expense of prosecuting an action and the risk of costs. This money was all collected at the cost and expense of the state.

But whether the distinction we have attempted to draw between this case and Sutton v. Phillips and that line of cases is sustained or not, does not materially affect the case at bar. Those cases were actions for penalties where the "clear proceeds" are given to the school fund, and this is an action for "fines collected." Mark the difference in the language of the constitution. With regard to penalties it says the "clear proceeds"; while it says "all fines collected in any county" shall belong to the common school fund, and there is no ground for deducting anything from it. We do not think that the statute of limitations interferes with the plaintiff's right to recover. We do not go into a discussion of the exceptions to the account further than to say that it does not appear to be unfavorable to the defendant, and, as the judgment seems to have been based upon correct principles of law, the same is affirmed. This opinion disposes of the substantial exceptions in the plaintiff's appeal. Affirmed.

FAIRCLOTH, C. J. (concurring in result). I fully concur in the conclusion in this case, but I cannot assent to the argument which attempts to distinguish Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968, from the present case. With entire respect, it appears to me that the argument is unsound and illogical, and I think the principle now and here decided necessarily overrules the decision in Sutton v. Phillips. The question depends on the meaning of article 9 of section 5 of the constitution: "All moneys, stocks, bonds, and other property belonging to a county school fund; also the net proceeds from the sale of estrays; also the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties for any breach of the penal or military laws of the state; and all moneys which shall be paid by persons as an equivalent for exemption from military duty, shall belong to and remain in the several counties, and shall be faithfully appropriated for establishing and main-

taining free public schools in the several counties of this state." Now, it is held that the legislature cannot divert the fines from the school fund, and give them to the defendant or any one else, as it attempted to do in Act 1899, c. 128, because the constitution appropriates fines to the public schools; and yet it was held in Sutton v. Phillips, supra, that the legislature, under a different statute, could divert the penalties mentioned in said article 9 from the school fund, and give them to a common informer, a municipal corporation, or any other, at its pleasure. Is that a reasonable and legal construction of section 5, art. 9? Look at the language itself, and the context of the several parts,—"also the clear proceeds of all penalties and forfeitures, and of all fines collected," etc. Is not the natural rendering of those words this: Also the clear proceeds of all penalties, and the clear proceeds of forfeitures, and the clear proceeds of all fines collected, etc.? If this is not the way of it, what is the use of the word "of" immediately before "all fines," and what duty does "of" perform? We must hold that every word in the constitution has a meaning and proper position. If this is the proper construction of the language, then the whole theory of Sutton v. Phillips falls to the ground, according to the decision in the case now before us.

But it is said that "penalties" are collected in "civil actions," and that "fines" are imposed and collected in "criminal actions"; also that in the case of penalties there are no "proceeds" until there is a suit and a recovery. Certainly; and so there are no fines until there is a suit or some judgment of the court. I think the authors of the constitution would be loath to consider this a serious argument, but rather an effort to reconcile Sutton v. Phillips and the present decision. The constitution does not attempt to prescribe the ways and methods, nor the agencies, for collecting penalties, fines, etc. The legislature unquestionably regulates the procedure, as in other matters, and may select proper agents; but the net moneys in every instance mentioned in article 9, § 5, are appropriated to the school fund.

Prior to 1868, the entire subject was under legislative control; but the constitution of 1868 established a school system, and appropriated the fund for its support, and the question now is whether the legislature can divert a portion of the fund, and give it to common informers, municipal corporations, or any other; that is, does the constitution or the legislature control? "The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is no law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. * * * If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be no law, does it constitute a rule as operative as if it were a law?" These are the words of Marshall, C. J., in Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60. It is urged that Sutton v. Phillips has been followed in several other cases. That is true, and that only shows a continuous list of errors. Repetition will never correct an error. I know of but one way to correct an error, and that is to cut it up by the roots, especially the tap root, and let it go. A familiar instance of heroic treatment will be found in Spruill v. Leary, 35 N. C. 225, 408. There the court fell into an error, and the court unanimously, at the first opportunity, corrected it by cutting it out root and branch. Myers v. Craig, 44 N. C. 169. I expressed my views in Sutton v. Phillips, 116 N. C. 511, 21 S. E. 968, and nothing but the importance of common schools induces me to write again. The revenues provided in article 9, § 5, are not inconsiderable, and the withdrawal from that source will reduce the school term, already below the constitutional requirement. I think every blow at common-school education is a strike at the principle of civilized and free government.

DOUGLAS, J. (concurring). After careful consideration, I am forced to concur in the opinion as well as the judgment of the court. If the argument in this case in any way interfered with the school fund as set apart by the constitution, I could not give it my assent; but such does not seem to me to be its effect, either in letter or in spirit. I fully concur in the view that the "clear proceeds of all penalties" belong to the school fund, because the constitution says so; but the words "clear proceeds" must have some meaning. The constitution might have said "all penalties," but this it does not say, and apparently does not mean to say. The proceeds of a debt do not mean the debt itself, but only what is received from the debt. The clear proceeds are only the amount coming into the hands of the creditor after the payment of expenses incurred in the collection of the debt. Therefore that section of the constitution can refer only to such penalties or parts thereof as come to the state. This was expressly decided by a unanimous court as far back as Katzenstein v. Railroad Co., 84 N. C. 688, and the principle thus established has since been uniformly followed. It has recently been discussed and reaffirmed, with full citation of authority, in Carter v. Railroad Co. (decided at this term) 36 S. E. 14.

Where the state alone can sue for the penalty, it is entitled to all the penalty, provided it does sue; but it gets nothing if it does not sue. I see no reason why the school

fund should not become entitled to the penalty given to a common informer if the suit therefor is first brought in the name of the state or of some officer for the benefit of the school fund. That such suits are rarely, if ever, brought (and I cannot now recall a single instance), tends to show that giving penalties to the informer does not subtract a dollar from the school, but simply gives to some one, usually in fact the injured party, the right to a penalty which the state itself would never exact. The imposition of a penalty presumes its collection, and, as its primary object is the enforcement of a public duty, it is proper that it should be collected. If the proper officers of the state cannot or will not collect it for their lawful fees, it is proper that the legislature, in its wisdom, should allow such part, or all, as may be necessary to secure its collection. If the state itself will not collect it, why should not the right be given to the injured public to collect it, and thus compel the performance of a public duty which it was intended to enforce? Under all the circumstances, I cannot but feel that the public school is merely a sentimental factor in such a discussion, and that the actual effect of a different construction of the constitution would be to give practical immunity to the wrongdoer, without any corresponding benefit to the school.

DAVISON et al. v. WEST OXFORD LAND CO. et al.

(Supreme Court of North Carolina. May 29, 1900.)

VENDOR AND PURCHASER — RECOVERY OF PURCHASE MONEY—COUNTERCLAIMS —EVIDENCE—APPEAL.

1. Findings of fact by the trial court cannot be reviewed on appeal.
2. Entries in the minute books of a corporation, which are no part of the minutes of any meeting, and which were made without authority from the corporation, are inadmissible against it.
3. Under Code, § 590, prohibiting the examination of a party in his own behalf against a person deriving his interest through a decedent as to personal transactions between the witness and decedent, unless testimony is given as to the same transaction, conversations between a defendant and a defendant deceased at the time of trial are properly admitted, where such decedent was not represented in the cause after his death, and no one claimed under him except plaintiff, and he had introduced evidence of similar conversations.
4. A vendor cannot recover on a contract for the sale of land which contains no written obligation to pay.
5. In an action for a balance due on a land contract, the vendee cannot recover on a counterclaim for payments on the price, made without his authority, where such payments were not made to plaintiff.
6. A vendee in an action for a balance due on a land contract cannot recover on a counterclaim for payments on the price, made without his authority, where plaintiff received the amount so paid as assignee for the benefit of creditors, and has paid it to such creditors.

Appeal from superior court, Granville county; Bryan, Judge.

Action by G. W. Davison and another, as trustees, against the West Oxford Land Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed as to plaintiffs' cause of action, and reversed as to defendants' counterclaim.

W. A. Devin and A. J. Feild, for appellants. A. W. Graham, Hicks & Minor, and J. W. Graham, for appellees.

FURCHES, J. The plaintiffs claim that, as trustees under an assignment of W. A. Davis and N. A. Gregory for the benefit of creditors of the assignors, they are the owners of a small tract of land lying in and near the town of Oxford, known as the "Johnson Land." The West Oxford Land Company is a corporation, and is insolvent. F. W. Carpenter has been appointed its receiver. W. A. Davis, D. C. Hunt, N. A. Gregory, and R. W. Lassiter were directors in said corporation. The plaintiffs allege that they sold to defendant corporation the Johnson land at the price of $6,000; that this trade was negotiated with W. A. Davis and R. W. Lassiter, representing the defendant corporation; and that said corporation paid $1,028 thereon, evidenced by two drafts, as follows:

"D. C. Hunt, treasurer West Oxford Land Co., will pay to John Johnson the sum of (528) five hundred and twenty-eight dollars on the Johnson land purchased by us. This December 13, 1890. [Signed] W. A. Davis, R. W. Lassiter, Executive Committee."

"$500. At ten days' sight, pay to order of G. W. Davison and E. C. Baker, trustees, five hundred dollars, in part payment Johnson land. Value received, and charge same to account of W. A. Davis, R. W. Lassiter, Executive Committee. To D. C. Hunt, Treasurer West Oxford Land Co., Oxford, N. C."

"Accepted. Payable at Bank of Oxford. West Oxford Land Co., D. C. Hunt, Treas. June 22, 1890."

"Paid July 10, 1891. Bank of Oxford."

—To which there is attached the following: "Oxford, N. C., June 16, 1891. Received of West Oxford Land Co. a draft for $500, in part payment of Johnson land, leaving a balance due of fifty-five hundred dollars, to be arranged as follows: Forty-five hundred to be settled for within 30 days after August 18, 1891; and for the remainder (one thousand dollars) we agree to accept the note of the company, 90 days after August 18, 1891, for one thousand dollars, with not less than 10 shares of stock as collateral security; and in the event that said security, at or after the distribution, shall equal more than the sum of one thousand dollars, then any excess to be paid over to the directors of said West Oxford Land Company. [Signed] G. W. Davison, E. C. Baker, Trustees."

These two drafts, and the receipt attached to the last draft, are what the plaintiffs allege contain the contract of sale and the obligation of the defendants to pay. Upon this alleged contract and the other evidence in the

case these issues were submitted to the jury: (1) "Did defendant company contract with plaintiffs for the purchase of the Johnson land described in the complaint, at the net price of $6,000? Ans. No." (4) "Is defendant company indebted to plaintiffs? If so, in what amount? Ans. None." (5) "Are the defendants R. W. Lassiter and D. C. Hunt, or either of them, indebted in their individual capacity to the plaintiffs? Ans. No." (6) "Are the plaintiffs indebted to defendant company? If so, in what amount? Ans. Yes; $1,028, and interest on the same."

Therefore there are two propositions contained in this appeal: Did the plaintiffs sell the Johnson land to the defendant corporation, and did the defendant obligate itself to pay for the same? and, secondly, are the plaintiffs liable to the defendant corporation for the amount of the two drafts, one to Johnson for $528, and the other to the plaintiffs for $500?

The jury have found by the first issue that the defendant corporation did not buy the Johnson land. This is an end to plaintiffs' right to recover against the defendant company, and also as against Lassiter and Hunt, because they could not be bound if the plaintiffs did not sell the land.

Besides the allegation of the defendants that these drafts did not amount to a written contract to sell land, they deny that Lassiter and Davis had any authority from the defendant corporation to make and enter into such a contract, and that said corporation did not know that such a contract had been attempted for many months after, and that the same was never approved or ratified by the corporation. The plaintiffs offer pages 9, 11, 13, and 15 of the minute book of the corporation, which they allege show the approval of this transaction and purchase by the defendant corporation. The defendants object to this evidence upon the ground that it is no part of the minutes of any meeting of the corporation; that there was no meeting when they were made; that they were in the handwriting of W. A. Davis, who was the agent of the plaintiffs in trying to effect a sale of this land, and were not a part of its minutes. The objection was sustained, and the plaintiffs excepted. We think there was evidence from which the facts stated in the defendants' objection might have been found to be true, and, as the court sustained the objection, we must suppose that the court found these statements of defendants to be true. And, whether they were in fact true or not, we have no right to review the court upon a finding of fact in the trial of a cause. If the allegations of the defendants were true, as we must take them to be from the ruling of the court, it is clear this evidence was incompetent, and should not have been received.

There is another exception to the evidence of the defendant Lassiter by the plaintiffs. This evidence does not seem to bear upon the issues now under consideration. But we do not think it can be sustained, if it does. This objection is with regard to a conversation between Lassiter and W. A. Davis, who was one of the original defendants, but dead at the time of the trial, and this evidence is objected to under section 590 of the Code. If Davis was represented in this case after his death, the record fails to show it, and there seems to be no one claiming through or under him except the plaintiffs. But, more than this, the plaintiffs had before this introduced similar evidence of conversations with Davis and the defendant Lassiter, and in this way opened the door, if there had been anything in the plaintiffs' objection. This disposes of the plaintiffs' right to specifically enforce the contract of sale, as there was no contract to enforce.

But it seems to us that there is another clear reason why the plaintiffs could not succeed, admitting that the drafts contained a contract for the sale of the Johnson land which might have been enforced. They contained no written obligation on the defendant corporation to pay, as was necessary in a sale of land. Hall v. Fisher (decided at this term; N. C.) 35 S. E. 425, and authorities there cited.

As we have seen that the plaintiffs cannot recover, it remains to be seen whether the defendant corporation can recover of the plaintiffs the amount paid by it on the two drafts, one to Johnson, and the other to plaintiffs, amounting to $1,028 and interest. The defendant corporation makes this by way of counterclaim. We are of the opinion that it cannot. When this case was before the court at September term, 1897 (121 N. C. 146, 28 S. E. 266), it was held that the money paid on the two drafts did not constitute a counterclaim growing out of the sale of land, as there had been no sale; and as it is held now, as it was then, that there was no sale, the proposition then stated by the court is true now if it was then. And we see no error in this statement, and no reason for reversing what was then said.

But, while this is true, the defendants may set up and maintain a counterclaim that does not grow out of the contract sued on, if the counterclaim be a cause of action arising upon contract; and, where one party has received money to which another is entitled, the law presumes a contract if it is necessary to do so to enable the party entitled to recover the same. Board of Education v. Town of Henderson (decided this term; N. C.) 36 S. E. 158. This entitles the party having the right to the money to an action of debt, indebitatus assumpsit, which, though an action at law, was equitable in its nature. It has been styled "an equitable action on the law side of the docket." But it arises only where the money was received and held under such circumstances that the law will imply the contract. Where it would be inequitable and unconscionable for the

party receiving the money to hold it, amounting to a moral fraud to do so, it will usually be so held. Where one person receives money belonging to another, and wrongfully refuses to pay it over, the action will lie. But to make him liable he must receive the money, and wrongfully refuse to pay it over to the party to whom it belongs. The plaintiffs never received the money on the $528 draft. The draft was made payable to John Johnson, and the money paid to him. Whether he could be held liable for it or not is not a question before us. But we fail to see how the plaintiffs can be held liable for the money paid on this draft to Johnson. The $500 draft was drawn payable to the plaintiffs, and collected by them. This distinguishes it from the $528 draft drawn payable to Johnson, and collected by him. And the plaintiffs' liability depends upon the fact as to whether it is unconscionable for them to refuse to pay the defendant corporation this money or not,—whether it is wrongful for them not to do so. If it is, the law will presume the contract,—presume that they agreed to do so,—and will not allow them to disprove this presumption. The fact that the plaintiffs received this draft ($500), and received the money on it, is not disputed. But how did they receive it, and for what purpose? Not wrongfully, nor as their money. They received it as the assignees of Davis & Gregory, for the benefit of the creditors of Davis & Gregory, and it must be presumed that it has long since been paid over to such creditors. This is the presumption, and no evidence has been offered to rebut it; while, on the contrary, it appears from the evidence (the correspondence between Davis and plaintiffs) that Davis was urging the sale of this land in order that "the long-deferred third-class creditors might be paid." Then, if the plaintiffs received this money as assignees—trustees—for the benefit of the creditors named in the deed of assignment to them, and have paid it over, as we must presume they have, can it be inequitable and unconscionable in them not to take their own money and give it to the defendant corporation, which has at least been guilty of culpable negligence in paying $500 on land that it had never bought? We do not think the case of Bahnsen v. Clemmons, 79 N. C. 556, cited by the learned counsel of defendants, sustains the defendants' right to recover back this money. The argument in that case, we think, tends to sustain the views we have expressed.

There are some other exceptions taken by the plaintiffs which have been examined, and cannot be sustained, or do not apply to the matters involved in this appeal. We are therefore of the opinion that the plaintiffs cannot recover, and that there is no error in the judgment as to the plaintiffs' right of action. We are also of the opinion that the defendants are not entitled to recover on their counterclaim, and there is error in the judgment of the court as to that. The judgment is therefore affirmed as to the plaintiffs' cause of action, and reversed so far as it gives the defendants judgment on the counterclaim. Let this be certified to the court below, that proceedings may be there had in accordance with this opinion. The costs of this court will be divided between the parties.

MILLS et al. v. CALLAHAN.

(Supreme Court of North Carolina. May 29, 1900.)

PLEADING—AMENDMENTS—DEFECT OF PARTIES.

Under Code, § 273, authorizing amendments to pleadings in furtherance of justice by adding the name of a party, where there is a defect of parties plaintiff in an action of ejectment, the court may, before trial, permit an amendment to the complaint, bringing in the necessary parties, where the cause of action is not changed, and no injustice is done the opposing party.

Appeal from superior court, Rutherford county; McNeill, Judge.

Action by Jane Mills and others against S. C. Callahan in ejectment to recover certain lands. From a judgment for plaintiffs, defendant appeals. Affirmed.

D. W. Robinson and R. S. Eaves, for appellant. M. H. Justice, for appellees.

FAIRCLOTH, C. J. Action of ejectment by the widow of L. A. Mills. At spring term, 1899, the heirs of L. A. Mills were made parties plaintiff, and the defendant excepted. The matter was tried at fall term, 1899, when the plaintiffs recovered the land, tracing their title from a grant older than that under which the defendant claimed. We had supposed that the power of the judge to make additional parties to an action was settled, especially when the amendment did not change the cause of action, nor work any injustice to the opposing party. Code, § 273; Bullard v. Johnson, 65 N. C. 436. The exceptions to evidence tending to show who were the heirs of L. A. Mills, and to identify and locate the land in dispute, were based on the theory that error in making the heirs parties was committed. They were properly overruled, and we see no error in the record. Affirmed.

McGLOUGHAN et al. v. MITCHELL et al.

(Supreme Court of North Carolina. May 29, 1900.)

SHERIFFS—PROCESS—LEVY—FAILURE TO RETURN—AMERCEMENT.

Where a justice of the peace issued an execution directed to a constable, which was placed in the hands of the sheriff of the county, who levied on the judgment debtor's property, but collected nothing, and failed to return execution in time, the sheriff was not liable to amercement at the instance of the execution creditor, since a sheriff cannot serve process addressed to a constable.

Appeal from superior court, Hertford county; Bowman, Judge.

Action by McGloughan & Northcott against J. S. Mitchell and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

George Cowper, for appellants. Winborne & Lawrence, for appellees.

FAIRCLOTH, C. J. The plaintiffs recovered judgment against the Roanoke & Chowan Lumber Company before a justice of the peace, who issued an execution directed to "J. E. Jones, Constable of Winton," which was placed in the hands of the defendant, who was sheriff of the county. The sheriff levied on some personal property of the judgment debtor, but nothing was collected, and the sheriff failed to return the execution in due time. On motion a judgment nisi for failing to make return was made absolute by the justice of the peace. The defendant appealed to the superior court, where the motion to amerce the sheriff was dismissed, and the plaintiffs appealed.

In this court a motion to dismiss the appeal for irregularities was discussed, but we express no opinion on the motion, and we treat the case on its merits. Where an execution is issued by a justice of the peace, it must be directed to "any constable or other lawful officer of the county," and, if it comes into the hands of the sheriff, he must obey it. Code, § 841. The sheriff must execute writs issued and directed to him from a superior or justice's court, under the penalty of $100 for neglecting to make return. Code, § 2079. A constable cannot serve process addressed to the sheriff, nor can a sheriff serve process addressed to a constable. Murfree, Sher. § 115. An officer may utterly disregard any process or writ not directed to him. He is a stranger to it, and, if he exercises power under such writ, it is an act of usurpation, and he will be liable in damages for any injury done, as if he were a private citizen. There are numerous reported cases in which sales are held void and pass no title for the want of authority in the officer selling; as a sale of land by the sheriff after a return of the execution and without a new writ. No title passes, because the sale is without authority. Tarkinton v. Alexander, 19 N. C. 87. The process not directed to him who acts under it is as a blank. Whatever power is granted is given to him to whom it is directed; otherwise, any stranger could act, which would be inconvenient. If the process confers no power or authority on the officer, it seems immaterial whether he makes a return or not. It was argued that, as the sheriff levied and sold, or attempted to do so, he was liable to amercement. That argument is that the assumption of authority confers the power, which we cannot agree to. Whatever cause of complaint the debtor whose property was seized may have, we can see no cause of complaint for the plaintiffs. If the defendants' sworn answer is substantially true, we may say that we see no evidence of bad conduct by the sheriff. It is a well-settled rule that penal statutes must be strictly construed. They will receive no equitable construction beyond their plain language. Smithwick v. Williams, 30 N. C. 268; Coble v. Shoffner, 75 N. C. 42.

Affirmed.

STATE v. SMITH.

(Supreme Court of North Carolina. May 29, 1900.)

HOMICIDE—MURDER IN FIRST DEGREE—EVIDENCE—INSTRUCTIONS TO JURY.

On a trial for murder, the principal testimony against the prisoner was by one of three persons engaged with him in a fight, and who was badly wounded at the time the deceased was killed. He testified that he and his companions were without fault, and that defendant left his premises and made an unexpected assault upon them in the public road, with a knife about eight inches long. Another witness testified that defendant admitted that he heard the men coming, and picked up a knife he had prepared to kill hogs with, and started out, telling his wife that he was going to stop that fuss; that deceased and his companions were shooting off Roman candles in front of the house; and that, when they stopped, defendant walked out and went to cutting deceased. *Held*, that an instruction, asked by defendant, that the evidence, at most, amounted to no more than a scintilla, and that in no aspect of the case could the jury find the prisoner guilty of murder in the first degree, was properly refused.

Appeal from superior court, Wayne county; Hoke, Judge.

Thomas Smith was indicted for murder in the first degree, and from a judgment of conviction for that offense he appeals. Affirmed.

Argo & Snow, for appellant. The Attorney General, for the State.

MONTGOMERY, J. The prisoner was convicted of the murder in the first degree of Charles Lewis Cawthorne, at August term, 1899, of Johnston superior court. He appealed from the judgment, and this court at September term, 1899, ordered a new trial. 125 N. C. 615, 34 S. E. 235. At November term, 1899, of the superior court, the cause was removed to the county of Wayne for trial; and at the March term, 1900, of that court, the prisoner was tried, and convicted again of murder in the first degree. There was no objection made by the prisoner to any of the evidence offered by the state, and no exception was made to the charge of the court. The only exception that appears in the case on appeal is one made to the refusal of his honor to instruct the jury as follows: "In no aspect of the case can the jury find the prisoner guilty of murder in the first degree; for the evidence, at most, amounts to no more

than a scintilla." The duty of a judge, on the review of the evidence in a criminal cause with a view to discovering whether there is any evidence against the prisoner fit to be submitted to the jury, is very different from the duty of juror who is to pass upon the weight of the evidence. There is more than a scintilla of evidence against the prisoner in this case. That evidence, it is true, was furnished, in the main, by the testimony of Thomas Winfrey, one of the three persons who were engaged in the fight with the prisoner, and who was badly wounded at the time Cawthorne was killed by the prisoner. But we cannot pass upon its credibility. That witness testified that the conduct of himself and his companion was without fault; that the knife which the prisoner used was not an ordinary knife, but one something like a butcher's knife, and about eight inches long; and that the prisoner left his premises, and made a sudden and unexpected assault with the knife upon Cawthorne and himself in the public road. Another of the state's witnesses (John O. Ellington) testified that the prisoner stated to him that he heard these men coming, and picked up a knife he had prepared to kill hogs with next morning, and started out; that his wife asked him where he was going, and he answered that he was going to see if he could not stop "that fuss," or "those boys"; that his wife asked him not to go; and that, if he had listened to her, he would not have been in this trouble. The witness further testified that the prisoner told him he went out to the crib, and stopped by the side of it; that they were shooting off Roman candles in front of the house; that they stopped; that he walked out, put his hand on one, and asked if it was Mr. Pendergrass; that the one replied, "No;" and that he pushed his head back and went to cutting. The whole evidence in the case is calculated to enlist the sympathies of any person who might read it from an unprejudiced standpoint. The sheriff of the county of Johnston (Ellington) testified that the prisoner's general character was "that he was honest, industrious, and truthful, but was violent at times." W. R. Creech testified: "I live about half a mile from where Tom Smith was raised. I have known him for 25 years. His character is good." A. W. Peedin testified: "He has been living within three and a quarter miles from me for 18 or 19 years. His character is good, except he had a little trouble with Moore and a sanctified preacher. This is all I know against him, except this last offense. He is a hard-working man, and pays his debts." J. C. Collier testified: "I know Tom Smith. I have known him for ten years. I have been seeing him about three times a day for about ten years. I regarded him as a good negro." Smith had been the superintendent of his Sunday school in the town of Selma for about 16 years. On the night after Christmas of 1898 he was engaged in distributing gifts to the children from the Christmas tree at the Sunday-school celebration. He had been at work all the morning before. At 11 o'clock, the festivities being over, he and his wife left for their home, walking, a short distance in the country. The father and mother of the prisoner, an aged couple, riding in an ox cart, were just behind; returning to their home, also. A short distance out of town the prisoner and his wife passed three persons who wore masks concealing their faces. They each had a woman's skirt. They had been drinking, and had liquor with them. The three masked persons were Charles Lewis Cawthorne, Graham Garner, and Thomas Winfrey. During the day they had been discharging fireworks in Selma, and, upon being prohibited by the town authorities from continuing this sport, they left the town. One of them (Winfrey) had in his pockets two loaded pistols. After the prisoner had reached his home, he heard the parties coming in his direction, shooting off their fireworks and firing their pistols. Roman candles were discharged into the trees of the yard of the prisoner and near his house, and the maskers threatened to shoot his dog. In front of the prisoner's gate, and in the public road, a difficulty occurred between the prisoner and the revelers. Cawthorne was killed and Winfrey dangerously wounded by the prisoner, the weapon used being a large and dangerous knife. The testimony of the prisoner tended to show justification,—certainly, not more than manslaughter,—while that of Winfrey and Garner and Ellington tended to show premeditation and deliberation on the part of the prisoner. Upon a consideration of all the evidence, it seems to us that the greater weight was in favor of the prisoner. But the jury decided otherwise, and the law has confided that finding to them. There was evidence (more than a scintilla) on the part of the state going to show premeditation and deliberation on the part of the prisoner, and that is the only question before us. The credibility of the witnesses and the weight of the evidence were for the jury. Affirmed.

BROWN v. TOWN OF LOUISBURG.

(Supreme Court of North Carolina. May 29, 1900.)

MUNICIPAL CORPORATIONS—STREET EXCAVATIONS — INJURIES — JOINT TORT FEASORS—LOT OWNER'S LIABILITY — RELEASE — EFFECT.

1. Where a lot owner excavated into the abutting sidewalk with knowledge of town authorities, the town, not having participated in the excavation, which was not made under its direction or for its benefit, was not liable, to a pedestrian injured thereby, as a joint tort feasor, but only for negligently permitting such dangerous place to remain unguarded.

2. Where a lot owner excavated into the abutting sidewalk with knowledge of town authorities, and a pedestrian fell into the same, without fault, and was injured, and, after commencing suit against both the town and the lot owner, released the latter from liability, such

pedestrian could not thereafter recover against the town, since the lot owner was ultimately liable to the town for damages recovered against it.

Appeal from superior court, Franklin county; Moore, Judge.

Action by Shelly Brown against the town of Louisburg and another. From a judgment in favor of plaintiff, defendant town appeals. Reversed.

C. M. Cooke & Son, W. H. Yarborough, Jr., and W. M. Person, for appellant. F. S. Spruill and W. H. Ruffin, for appellee.

MONTGOMERY, J. This action was brought against the defendants to recover damages for personal injuries sustained by the plaintiff on account of the alleged negligence of the defendant. The defendant Ponton, in building a store within the limits of the town of Louisburg, made a deep excavation, abutting upon the sidewalk; and, after the front wall of the building had been built up to the level of the sidewalk, there was still left a part of the excavation between the front wall and the center of the sidewalk, extending into the sidewalk about two feet. The hole was about two feet in width at the top, but slanting and narrow at the bottom. The town authorities had knowledge of the excavation in the sidewalk. On a dark night the plaintiff, without fault of his own, fell into this excavation, and was badly hurt. The hole was unguarded by rail or otherwise, and no danger signal was displayed. While the action was pending the plaintiff agreed in writing, through his attorneys, for the consideration of $75, "to enter a nonsuit, * * * and to release J. W. Ponton from any and all claims of the plaintiff against J. W. Ponton by reason of the facts set forth in the complaint filed in the above cause, and from any and all claims of every description which the said Shelly Brown may have against the said J. W. Ponton." It was verbally agreed at the time of the execution of the agreement that the payment of the $75 was not made or accepted in full satisfaction of the injuries sustained, but simply to discharge Ponton.

The contention of the plaintiff's counsel is that the defendants are not joint tort feasors, but that they were "co-trespassers, co-delinquents, co-wrongdoers," and that their liability to the plaintiff is not only joint, but several, and that therefore the effect of the contract between the plaintiff and Ponton and the payment of the $75 was only a payment pro tanto, which inures to the benefit of the other defendant, the town of Louisburg. It seems to us immaterial, in considering the effect of the contract between the plaintiff and Ponton, whether the defendants were joint tort feasors or co-delinquents, in the sense in which that word is used by the plaintiff's counsel. The defendants were not, however, joint tort feasors. To make persons joint tort feasors, they must actively participate in the act which causes the injury. The town of Louisburg had no active part in the matter of building the house or in creating the nuisance. The authorities of the town knew, or ought to have known, of the excavation in the street; but Ponton did not act under the directions of the corporation, nor were his acts in any way for its benefit. The absence of objection on the part of the town authorities to the defendant Ponton's digging the excavation cannot be considered a presumption that the town intended to authorize Ponton to leave the excavation unguarded. Ponton, therefore, was the active wrongdoer in digging a pit on the public street and leaving it unguarded. The town's liability arose out of its negligently permitting its sidewalk at that dangerous place to remain unguarded. The real question in the case is this: Upon which of the defendants is the ultimate liability resting, as between themselves? The plaintiff can, of course, sue either one; but which one of the defendants is liable to the other for the damages which the plaintiff would be entitled to recover for the injury which he has sustained on account of their negligence? We think that Ponton would be liable to the town, and that any recovery which might be made against the town could be ultimately recovered back from Ponton. Robbins v. City of Chicago, 71 U. S. 657, 18 L. Ed. 427. And, again, the plaintiff and the defendant had a legal right to make the contract which they entered into; and, the consideration having been paid by Ponton, he must be protected in his rights under that contract. He cannot be protected in those rights if the town is by law permitted to recover out of him whatever damages the town might be compelled to pay to the plaintiff. And the town, as we have seen, can bring such an action against Ponton, and recover from him the amount which it by process of law had been made to pay on account of his negligence. Such a result would be the complete destruction of Ponton's rights under his contract with the plaintiff. His honor should have instructed the jury that upon the evidence the plaintiff could not recover. New trial.

GLENN et al. v. WRAY, Sheriff, et al.

(Supreme Court of North Carolina. May 29, 1900.)

TOWNS — RAILROAD-AID BONDS — VALIDITY — PAYMENT OF INTEREST—ESTOPPEL—LEGISLATURE—AUTHORIZING BONDS—TOWN CHARTER — STATUTES — PASSAGE—THREE READINGS—AMENDMENT.

1. A town may urge the invalidity of bonds voted by it in aid of a railroad, on the ground that the town had no constitutional or statutory authority to issue the same, though it may have paid an installment of interest thereon.

2. Acts Gen. Assem. 1876–77, c. 183, incorporating the town of Stoneville, authorizes the levying and collection of taxes for internal

improvements only. Laws 1887, c. 87, incorporating a railroad company, provides that towns through or near which such railroad will run may vote bonds in aid thereof. *Held*, that it was competent for the legislature, in the act incorporating the railroad company, to grant authority to such town to vote the bonds without, in terms, amending the charter of the town.

3. Const. art. 2, § 14, provides that no act authorizing a town to raise money, create a debt, or lay a tax shall be valid unless the bill shall have passed three several readings on three several days in each house. Laws 1887, c. 87, provides that towns may issue bonds in aid of a railroad when authorized by a "majority of all the qualified voters" thereof. On the first and second readings of the bill, the words "majority of" did not appear, and the bill then read, "by all the qualified voters." On the third reading the words "majority of" were inserted as an amendment. *Held*, that the operation of the words "by all the qualified voters" would have implied that the sanction of a majority only of such voters was necessary, and the insertion of the words "majority of" added nothing to the bill, and was an immaterial amendment, not affecting its validity.

Appeal from superior court, Rockingham county; Starbuck, Judge.

Action by J. H. Glenn, in behalf of himself and all other taxpayers of the town of Stoneville, against W. B. Wray, sheriff of Rockingham county, and others, to restrain the levy and collection of a tax. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

Louis M. Swink, for appellants. Watson, Buxton & Watson, for appellees.

CLARK, J. The plaintiffs are not estopper by the decision in Claybrook v. Commissioners, 117 N. C. 456, 23 S. E. 360. That was an action to impeach the validity of the bonds now in question, but upon the ground of irregularity in the election, and that alone. The decision therein is conclusive that the bonds are not invalid on that ground. The present action is to attack their validity upon the entirely different ground that the act authorizing an election was not passed in the mode required by the constitution. This was not within the scope of the litigation in Claybrook v. Commissioners, and has not been passed upon. Hence it is not res judicata. Tyler v. Capeheart, 125 N. C. 64, 34 S. E. 108, which cites Williams v. Clouse, 91 N. C. 327; Wagon Co. v. Byrd, 119 N. C. 460, 26 S. E. 144. A case exactly in point is Union Bank of Richmond v. Board of Com'rs of Town of Oxford, 116 N. C. 339, 21 S. E. 410. In that case the indebtedness was first before this court upon an allegation of invalidity because the bonds were not authorized by the town charter of Oxford. The court sustained the objection, but found error because the bonds recited on their face that they were authorized by the act chartering a railroad company, in whose aid the bonds had been voted and issued. There had been no allegation in the pleadings as to the latter act, and its validity had not been passed upon. When the case went back the defense was set up that the latter act was invalid to authorize the issue of bonds, because not passed in the mode required by Const. art. 2, § 14, and on appeal that contention was sustained. Union Bank of Richmond v. Board of Com'rs of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487. Of course, the payment of interest by the commissioners would be no estoppel. Commissioners v. Payne, 123 N. C. 432, 31 S. E. 711, and cases cited at page 489, 123 N. C., and page 712, 31 S. E. The charter of the town of Stoneville did not authorize the issue of the bonds in this case, but it was competent for the legislature, by a provision in the charter of a railroad company, to authorize the town to hold an election to authorize such issue, without in terms amending the charter of the town. Jones v. Commissioners, 107 N. C. 265, 12 S. E. 69; Wood v. Town of Oxford, 97 N. C. 227, 2 S. E. 653; Union Bank of Richmond v. Board of Com'rs of Town of Oxford, 116 N. C. 339, 363, 21 S. E. 410. Const. art. 2, § 14, renders invalid any act to raise money or create a debt or lay a tax by the state, or to authorize any county, city, or town to do so, unless the bill shall have passed three several readings on three several days in each house, and unless the yeas and nays on the second and third readings shall have been entered on the journals. This is a constitutional requirement, and, unless strictly complied with, the attempted act of the legislature confers no authority, and is without any effect whatever. It is a restriction upon the exercise of legislative power, which the sovereign power has written in the face of the organic instrument which created the legislature. The creature cannot transcend the limits placed upon it by its creator. Union Bank of Richmond v. Board of Com'rs of Town of Oxford, 119 N. C. 214, 25 S. E. 966, 34 L. R. A. 487; Commissioners v. Snuggs, 121 N. C. 394, 28 S. E. 539, 39 L. R. A. 439; Mayo v. Commissioners, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163; Rodman v. Town of Washington, 122 N. C. 39, 30 S. E. 118; City of Charlotte v. Shepard, 122 N. C. 602, 29 S. E. 842; Commissioners v. Call, 123 N. C. 308, 31 S. E. 481; McGuire v. Williams, 122 N. C. 349, 31 S. E. 627; Commissioners v. Payne, 123 N. C. 432, 31 S. E. 711; Smathers v. Commissioners, 125 N. C. 480, 34 S. E. 554.

It therefore only remains to consider whether the act authorizing the election upon the issue of those bonds was passed in the manner required by the constitution. It appears from the journals that the bill passed its three several readings in each house on three several days, and that the yeas and nays were duly entered on the journals on the second and third readings in each house. On the third reading in the senate the bill was amended by inserting the words "a majority of"; and as thus amended the bill passed its third reading, and, being sent back to the house of representatives, the amend-

ment was concurred in, and the bill was duly enrolled and ratified. If the amendment were in a material matter, it would be necessary that the amended bill should be read over again three times in each house, with the yea and nay vote on the second and third readings entered on the journals. It is the bill in its final shape, not in another and different form, which requires these preliminaries to its validity. It would be a clear evasion of the constitutional guaranties and of the restriction upon legislative power, if, after a bill has passed one house and two readings in the other in the required manner, it should then be amended into something else; for in that case the bill as enacted into law will have had only one reading in one house in the constitutional mode, and a concurrence in the other, without a yea and nay vote recorded on the journals. In ordinary legislation, material amendments may be made, even on the last reading in the second house, and when concurred in by the other house the bill is law. In such cases the ratification is conclusive of the passage of the act. But it is otherwise as to legislation which the legislature is restricted from passing except in a manner specifically pointed out and prescribed. In the latter case any substantial, material amendment requires the passage of the amended bill in the prescribed manner de novo. Norman v. Board (Ky.) 18 L. R. A. 557. A statute may be ordinary legislation, not coming within the restrictions of Const. art. 2, § 14, except as to one or more sections. Riggsbee v. Town of Durham, 94 N. C. 800. Here the chapter in question (Laws 1887, c. 87) is not impeached, except as to section 17, and that section reads, "It shall be lawful for any county, township, city or town, through or near which the said road may run, to subscribe for and hold stock in said company or in any section thereof, in case any section be built alone, whenever such subscription shall be authorized under the provisions of this act by *a majority of* all the qualified voters of such county, township, city or town." The words in italics are those added by the amendment made on the third reading in the senate, and afterwards concurred in by the house. The amendment was immaterial, for it only placed in express words in the section that which was its meaning if the words in italics had not been inserted. We take it that the original requirement, "by all the qualified voters," meant simply "by the qualified voters," or "by the voters," and that has always been held to mean "by a majority of the qualified voters"; i. e. that a majority merely of those voting would not be sufficient in cases of this kind, but that the constitution requires a majority of the registered voters. Norment v. City of Charlotte, 85 N. C. 387; Duke v. Brown, 96 N. C. 127, 1 S. E. 873; Wood v. Town of Oxford, 97 N. C. 227, 2 S. E. 653; Lynchburg & D. R. Co. v. Board of Com'rs of Person Co., 109 N. C. 159, 13 S. E. 783. We do not think that the bill, before amendment, meant to require a unanimous vote, but merely a majority of all the qualified voters, instead of a majority only of those voting. The restraining order was therefore properly dissolved. Affirmed.

STATE v. KEITH.

(Supreme Court of North Carolina. May 29, 1900.)

EMBEZZLEMENT — INDICTMENT — EVIDENCE — CONSTRUCTION OF STATUTE.

1. A landlord who takes possession of the tenant's crop, of which he is entitled to one-half, and sells it, and refuses to account to the tenant for his share of the proceeds, is not guilty of embezzlement, under Code, § 1014, declaring "any officer, agent, clerk, employé or servant of any corporation, person or co-partnership, who shall embezzle or fraudulently convert to his own use" any money, goods, or other chattels belonging to any other person, shall be guilty of felony.

2. An indictment charging that defendant, being intrusted with money and a check by his tenant, did willfully, unlawfully, fraudulently, and feloniously appropriate the same to his own use, with intent to embezzle and convert to his own use the said money and check, does not charge the crime of embezzlement, under Code, § 1014, declaring that an agent, employé, or servant who converts to his own use any money, goods, or other chattels, bank note, check, or other order for the payment of money, belonging to any other person, shall be guilty of embezzlement.

Appeal from superior court, Cherokee county; Coble, Judge.

O. L. Keith was convicted of embezzlement, and he appeals. Reversed.

The Attorney General, for the State.

FAIRCLOTH, C. J. The defendant stands indicted under Code, § 1014, for embezzlement. That section declares that "if any officer, agent, clerk, employé or servant of any corporation, person or co-partnership * * * shall embezzle or fraudulently convert to his own use, or shall take, make way with or secrete, with intent to embezzle or fraudulently convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money," etc., "belonging to any other person or corporation, * * * which shall have come into his possession or under his care, he shall be guilty of felony." The evidence is that Young, the prosecuting witness, cultivated the defendant's land, and was to pay one-half of the crop; that defendant took possession of the crop and sold it. The tobacco belonged to Keith and Young and the proceeds of sale belonged to Keith and Young, and Keith has never paid Young his share of the proceeds. Is this embezzlement? As a crime, embezzlement is unknown to the common law. A fraudulent appropriation to one's own use of the money or goods of another was only a breach of

trust, remedial le by civil process only. As a criminal offense, embezzlement is exclusively of statutory origin, and is a felony or misdemeanor, as such statutes may declare. Our legislature has declared in several instances that misappropriation of the money or goods of another with intent to embezzle the same shall be an indictable offense, and has declared it to be a felony in some cases and a misdemeanor in others. They are found in our Code. Lessor and lessee are not partners (Code, § 1744); possession of crops deemed vested in lessor (Id. § 1754); when the lessee is deprived of the actual possession of his crop, he is left to his civil remedy (Id. § 1755). Upon the facts in this case the defendant cannot be treated as an "officer, agent, clerk, employé, or servant" of his tenant. They are joint owners of the crop, with possession deemed to be vested in the defendant landlord. The defendant has sold the crop, and has the proceeds in his possession. His failure and refusal to pay the tenant his share is a breach of trust as at common law. No statute has made it a crime, either as a felony or a misdemeanor. The indictment charges that the defendant was intrusted with money and a check by the witness (proceeds of the sale), and wilfully, unlawfully, fraudulently, and feloniously appropriated the same to his own use with intent to embezzle and convert to his own use the said money and check. This, as we have said, is only a breach of trust at common law, and we have no statute declaring it to be a crime. The bill of indictment therefore charges no criminal offense. State v. Barton, 125 N. C. 702, 34 S. E. 553. With this conclusion we need not consider any other exception. Error.

SMITH v. WILMINGTON & W. R. CO.

(Supreme Court of North Carolina. May 29, 1900.)

MASTER AND SERVANT—DAMAGES—EVIDENCE—INSTRUCTIONS TO JURY—APPEAL AND ERROR—CASE ON APPEAL—TESTIMONY IMPROPERLY INCLUDED—DOUBTFUL TESTIMONY—REVERSAL—SCOPE OF NEW TRIAL.

1. Where, in an action by a servant for injuries, there was no evidence as to his loss of time, payment for medical attention, or endurance of mental anguish, it was error to instruct that he was entitled to recover therefor.

2. Where the trial judge considered testimony as to negligence of a master causing an injury as improperly included in the case on appeal, and such testimony was thereafter included in a statement of the case in response to a certiorari, which such judge certified that he considered correct, after consideration of numerous affidavits and hearing arguments, and error appeared on the issue of damages, requiring reversal, a new trial should not be restricted to the trial of such issue, though the uncertainty as to such testimony might not be sufficient to warrant reversal.

Appeal from superior court, Sampson county; Adams, Judge.

Action by Frank Smith against the Wilmington & Weldon Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Junius Davis and H. L. Stevens, for appellant. Armistead Jones and Womack & Hayes (E. W. & J. D. Kerr and F. R. Cooper, on the brief), for appellee.

MONTGOMERY, J. This action was brought by the plaintiff to recover damages against the defendant company for a personal injury sustained by the plaintiff while in the performance of work for the defendant, which the plaintiff alleges was dangerous, and the character of which was unknown to him at the time he sustained the injury. On the issue of damages, his honor instructed the jury that, if the plaintiff was entitled to recover at all, he was entitled to recover such damages as would compensate him for the loss of his time, for the money paid out by him for medical attention, for the physical pain he had suffered, for the mental anguish he had endured, and for the deterioration in his labor as a carpenter. We have carefully read, over and again, every line of the evidence; and there is not a word in reference to the time lost by the plaintiff, nor of any money paid out by him for any medical attendance, nor of any mental anguish endured by him. There was, therefore, error in that instruction, for which there must be a new trial. We would restrict this new trial to the issue as to the damages the plaintiff is entitled to recover, but for the fact that we have grave doubts as to whether the case on appeal is the real case as it was tried. When this case was first called, a letter was read by the counsel of the defendant from his honor, Judge Adams, who tried the case below, in which it was stated that a part of the testimony of the plaintiff, to wit: "Since my injury, I have heard Nelms say it [the work] was dangerous, and he said he had told the officers of the company that it was dangerous. Nelms went to my boarding house after I was hurt, and he said during that visit that he told the company it was dangerous, at the time they gave him the orders to change the work,"—ought not to have been embraced in the case on appeal. His honor further wrote that his notes did not show such testimony, and that he had no recollection of the same. His language was: "I have no recollection of this evidence, and am confident the witness did not so testify, and did not intend to include it in the case on appeal." A certiorari was granted by this court, and the cause is now here upon the statement of the case made up by Judge Adams in response to the certiorari, with the same testimony of Smith, the plaintiff, included. The certificate of Judge Adams is in the following words: "After the foregoing case was settled, as above shown, and upon affidavit having been filed with me, I was of the opinion that there had been a mistake made with reference to the testimony of

Frank Smith. Since that time I have carefully gone over the notes of the testimony, and after considering the numerous affidavits on both sides as to what the witness swore to, and after hearing argument on both sides, I now certify the foregoing as a correct statement of the case on appeal." If this was the only matter which the defendant had a right to complain of, it might not be sufficient to warrant the court in sending the matter back for a new trial. But as the case is to be tried again because of the error, as we have seen, in the instruction which was given to the jury on the question of damages, we are decidedly of the opinion that the new trial should not be restricted to the trial of the issue on damages. Of course, we intend no reflection upon his honor, Judge Adams; but the whole matter shows that his own recollection of the testimony was not like that of the various persons who made affidavits in reference to the matter, and that he acted because of the effect produced on his mind by the number of the affidavits, and the positiveness of their statements, and the argument of counsel of the defendant. He did not state that his recollection had been refreshed, or that his notes contained the testimony. He was in doubt. New trial.

VANDYKE v. FARRIS et al.

(Supreme Court of North Carolina. May 29, 1900.)

PROCESSIONING PROCEEDING—JUDGMENT—SUBSEQUENT EJECTMENT—PLEA IN BAR—EFFECT.

Code, c. 48, as amended (section 1929), provides that any person whose land was processioned to him thereunder should be deemed and adjudged to be the sole owner thereof, and might give such proceeding in evidence in any suit commenced against him for the land. In decisions on these statutes it had been pointed out that this means of conferring title was in derogation of the common law, was attended with grave dangers, and should be strictly construed. Acts 1893, c. 22, repealing the former statutes, authorized the institution of such proceedings to locate boundary lines, but omitted the provision as to the effect of such proceedings on title. *Held*, that the legislature would be presumed to have intended to avoid the dangers pointed out as existing in the earlier provisions, and hence a processioning proceeding instituted by plaintiff against defendant under Acts 1893, c. 22, could not be pleaded in bar of plaintiff's subsequent ejectment for the lands.

Appeal from superior court, Gaston county; Starbuck, Judge.

Action by J. L. Vandyke against T. C. Farris and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Webb & Webb, for appellant. George F. Bason, for appellees.

FAIRCLOTH, C. J. This is an action of ejectment. The defendants, after denying the allegations of the complaint, entered a plea in bar of the action, and the case was tried on that plea alone. His honor held that the evidence and judgment relied on in support of the plea were an estoppel against the plaintiff, and the plaintiff appealed. The plea was that in 1893 the plaintiff instituted a processioning proceeding before the clerk against the defendant, to locate the line between plaintiff and defendant, under the act of 1893, c. 22, and that judgment was entered against the plaintiff for costs, from which no appeal was taken. At the trial of the present action it was admitted by the plaintiff that said processioning proceedings and judgment therein were in all respects regular, and in strict compliance with the act of 1893, c. 22. It was admitted by both parties that the question presented is whether, after said processioning proceedings, the plaintiff can bring an action in the superior court to recover the same land. We have to consider this question without any argument or authorities cited by counsel. Do the proceeding before the clerk, and his judgment therein, simply establish a line between the parties, without determining the title to the land on either side of the line? The act of 1893, c. 22, repeals chapter 48 of the Code. That chapter was an innovation on the common-law remedy in settling titles to land, and is therefore to be strictly construed. Several cases came to this court thereunder, but practically nothing was accomplished in any case. The original act indicated that two processionings would be conclusive as to title. As amended (Code, § 1929), it declared that "any person whose land shall be processioned to him, according to the direction of this chapter, shall be deemed and adjudged to be the sole owner thereof; and upon any suit commenced for such lands the party in possession may plead and give the proceedings under this chapter in evidence." And, singularly, no decision has been found on the question now presented. The inference is that under Code, c. 48, the processioning proceedings would establish title, and hence this court required strict conformity in every particular. In Hoyle v. Wilson, 29 N. C. 466, Ruffin, C. J., said: "Indeed, the very important and conclusive effect given by the statute to these inquisitions, whereby two of them vest an absolute title, requires the court to exercise the utmost vigilance to prevent surprise and injury to the true owners of land by tolerating any undue laxity in the proceedings." In Cansler v. Hoke, 14 N. C. 268, Hall, J., for the court, said: "When I observed that the first act * * * declared that any person whose land was twice processioned according to that act shall be deemed and adjudged the sole owner of such land, and that it was supposed that clause gave a title to land which might be twice processioned under the act of 1792, I could not but consider it as a proceeding fraught with danger to the rights of land proprietors, and felt myself altogether justified in throwing every legal impediment in the way of a

title to be thus consummated." The act of 1893 contains no language similar to that above quoted (Code, § 1929), on which the remarks of Judges Ruffin and Hall were predicated, and leaves the inference that the legislature desired no longer to continue the danger referred to by those judges. In Williams v. Hughes, 124 N. C. 3, 32 S. E. 325, it was held that in processioning under the act of 1893, c. 22, the title was not in issue; and in Wilson v. Alleghany Co., 124 N. C. 7, 32 S. E. 326, that an auxiliary remedy by injunction could not be given in such processioning proceedings, because there was no substantive relief under said act. Upon these considerations, and our own reasoning, our opinion is that the act of 1893, c. 22, provides that a line or lines may be established as therein provided if the parties desire to do so, but does not prohibit either party from asserting his rights as to the title to the same land. What benefit the act confers to the citizen, it is not our province to say. We think, therefore, that his honor was in error in holding that the defendants' plea was a bar to the plaintiff's action. Error.

DUNN v. BEAMAN et al.

(Supreme Court of North Carolina. May 29, 1900.)

EXECUTORS AND ADMINISTRATORS—CLAIMS—REFERENCE — CREDITORS' BILL — ARBITRATION — AWARD — WITNESSES — GUARDIAN — INDEBTEDNESS TO WARD—LIMITATIONS.

1. Code, § 1448, authorizes a creditor of a deceased person to sue his personal representative on behalf of himself and all other creditors, and section 1426 allows an executor or administrator to arbitrate disputed claims against his decedent's estate. *Held*, that the proceedings authorized by section 1426 were between the creditor and personal representative in the ordinary course of administration only, and hence an award in a proceeding under such section, brought after the filing of the creditors' bill under section 1448, was properly disallowed in the creditors' suit.

2. That decedent's administrator and children were made parties defendant in the creditors' suit did not authorize them to refer a claim by the children against the estate to arbitration, as authorized by Code, § 1426, and require the referee in the creditors' action to allow the award made on such reference.

3. Code, § 590, declares that a person interested in an action or proceeding shall not be examined in his own interest against the personal representative of the deceased person concerning a personal transaction or communication between the witness and the deceased person, unless such executor and administrator is first examined respecting the same. *Held*, that children seeking to charge their deceased father's estate with proceeds arising from a sale of land as guardian were incompetent to prove his nonpayment of the indebtedness or failure to inform them respecting the same.

4. Where a father, as guardian of his children, filed a bill with three of them for partition of lands devised to them, and the land was sold under a decree, the children were charged with notice thereof, and hence were not entitled to claim the proceeds of the sale from the father's estate as against his creditors after the period of limitation had run against the claim, on the ground that his concealment of his indebtedness amounted to constructive fraud.

Faircloth, C. J., dissenting.

Appeal from superior court, Sampson county; Timberlake, Judge.

Bill by W. A. Dunn, receiver, against M. R. Beaman, administratrix of the estate of J. R. Beaman, deceased, and others, to subject real estate to the payment of debts. From a judgment in favor of defendants, the receiver appeals. Reversed.

R. O. Burton and H. G. Connor & Son, for appellant. Allen & Dortch, J. D. Kerr, Marion Butler, and F. R. Cooper, for appellees.

CLARK, J. This proceeding was begun by a creditor of John R. Beaman, deceased, on the 23d of February, 1894, against the administratrix of said Beaman and his heirs at law to procure a settlement of his estate, and to subject his realty, under the provisions of Code, § 1448. At February term, 1895, a referee was appointed "to ascertain the indebtedness of the estate and the parties to whom it was due." Some time after this action was begun, the children of John R. Beaman, claiming that their father was indebted to them in the sum of $10,725, with interest thereon from July 15, 1861, for proceeds of realty, which, as the guardian of some of them, he had procured to be sold, agreed with their co-defendant and sister, the administratrix, to refer the claim under Code, § 1426. The referees reported on April 1, 1896, allowing the claim in full, although three of the children were of full age at the time of the sale in 1861, and parties to the proceeding under which the land was sold. The referee in this action properly disallowed the claim based upon such award under Code, § 1426, and ruled that, after one creditor has instituted a creditors' bill, he cannot be cut off from contesting another creditor's claim, and pleading the statute against it, by a collateral proceeding between the administratrix and such other creditor. The proceedings authorized by section 1426 are between a creditor and the personal representative in the ordinary course of administration, and have no application when an action has been begun under Code, § 1448, to take the administration into the hands of the court, which thereupon appoints the referee to ascertain the indebtedness, and a commissioner to sell the property, and takes in hand the settlement of the estate. Besides, the children and heirs at law of Beaman, as well as the administratrix, who assented to the attempted reference, were parties defendant in this action, and bound by the reference herein to determine the indebtedness. However, that side is not appealing, and the rejection of the attempted award of April 1, 1896, is not really before us upon any exception. The referee allowed the claim of those five of the eight children who were wards of Beaman at the time of the sale, and that brings up

the question of the statute of limitations, the decision of which in favor of the plaintiff renders it unnecessary to discuss his exceptions to the admission of evidence. It is proper, however, to say that the children seeking to prove their claims against the estate of John R. Beaman were incompetent, under Code, § 590, to prove nonpayment of the indebtedness to them by their father, or that he never informed them of this indebtedness, and it was error to admit their testimony.

The referee finds as facts that on February 19, 1861, John R. Beaman qualified as guardian of his five minor children; that at February term, 1861, as their guardian, and with the joinder as parties with him of his three adult children and their husbands, he filed a petition for sale for partition of 1,350 acres of land, which had been devised to his said children by one Carraway. The property was sold at the price of $10,800 to one Cobb, who paid the purchase money, netting $10,725 after deducting court costs, to the clerk and master, who executed a deed to the purchaser upon confirmation of the sale. The referee finds that the five-eighths belonging to the wards was paid over to John R. Beaman, guardian, but that there is no evidence that the shares of the three adults were paid to him. He finds that none of said wards have been paid their shares by their father, and that they had no knowledge of the facts upon which their claim is based, until within three years before their said claim was presented to him at the hearing, March 17, 1897. As the referee finds that the assets of the estate are insufficient to pay all the indebtedness, any creditor has the right to set up the statute of limitation (which is here pleaded by the plaintiff) against any other, although it has not been pleaded by the administrator. Wordsworth v. Davis, 75 N. C. 159; Oates v. Lilly, 84 N. C. 643; Lockhart v. Ballard, 113 N. C. 292, 18 S. E. 341. The statute of limitation being pleaded, the burden is upon the claimants to show that they are not barred. House v. Arnold, 122 N. C. 220, 29 S. E. 334, and numerous cases there cited. The youngest of the five wards living July 15, 1861, was necessarily of age some time prior to July 15, 1882; and in fact the age of the youngest person, which is found by the referee, is that of John R. Beaman, Jr., who became of age March 2, 1879. The referee held that the limitation of an action by a ward against his guardian is 10 years from his arrival at age, when no account is filed (Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135), and as to him the 10-year bar was completed March 2, 1889, prior to chapter 269, Laws 1889, which was ratified on the 6th of March, 1889. The provisions of Code, § 155(9), allowing three years from discovery of a fraud, applied only to "cases heretofore solely cognizable in courts of equity," and an action by a ward for recovery of an amount due him by his guardian could have been brought in a court of law, and hence the youngest of these wards was barred March 2, 1889. The referee holds, however, and was sustained by the judge below, that, though "this claim was already barred when chapter 269, Laws 1889, was passed, it was revived thereby." That chapter struck out the words, "in cases heretofore solely cognizable in courts of equity," from section 155(9) of the Code. The ruling that, though a debt is barred by the statute of limitation, the legislature may remove the bar by repealing the limitation after it has accrued, is within the reasoning of Pearson, C. J., in Hinton v. Hinton, 61 N. C. 410, and is sustained by Justice Miller in Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483, decided in 1885; the court in the latter case holding that this is true as to a debt, though not as to the title to property which has ripened, because time does not pay the debt, but time may vest the right of property. On the other hand, it has been held by the supreme court of this state (1884) in Whitehurst v. Dey, 90 N. C. 542, that the legislature cannot revive a right of action as to a debt when it has become barred by the lapse of time; though it is true the decision was not necessary to the disposition of that case. The point is an interesting and important one, but it is not necessary that we pass upon it, for there is no state of facts to which it is applicable.

There is no allegation of fraud as to John R. Beaman in the pleadings filed by his children as the foundation of their claim; nothing beyond the mere averment that they (the children) were not aware, till 1894, of the sale of the land and the receipt of the money by their father. There is no averment of any fraudulent concealment or any concealment of the facts by him. The averment made is not sufficient to predicate a finding of fraud, nor is there any proof of fraud, nor is there any evidence tending to show fraud on his part. Counsel for the children disavow any intention to charge their father with fraud in fact,—"any intentional or willful fraud,"—but say that their ignorance of the facts is proof of constructive fraud by him. It shows their confidence in their father, from whom they expected to receive a large estate, and who in fact made them large advancements, and their abandonment of all matters to him; but the inferential finding of fact (for it is not directly made) by the referee of "fraudulent concealment" by him is without any evidence or any allegation in the pleadings to support it, and the exception on that ground must be sustained. The children had legal notice of the facts. The will of Carraway, under which their title accrued, was probated and recorded in 1844; the land devised to them was sold for partition in 1861 at the court-house door, after due advertisement, under a decree in equity; the proceedings in equity were duly recorded, to which three of the children, who were

adults, together with their husbands, were parties praying the sale; and the decree of confirmation was properly enrolled. The deed from the clerk and master to the purchaser was duly recorded in the regster's office, and was notice to the children as well as to all the world, and they were put on notice by the recitals therein contained. There was the widest and most entire publicity, and an entire absence of any proof tending to fix John R. Beaman's memory with the stain of any fraud upon his children. The sale was in 1861. The youngest ward became of age in 1879. They all lived in the county, it seems, except one, who had left the state; and it is not to be held that all through these years there was constructively a "fraudulent concealment" of a transaction conducted with such publicity. The limitation is not "three years from the discovery by a party of rights hitherto unknown to him," but "from the discovery of facts constituting fraud." The children may have been negligent in inquiring as to their rights, or in asserting them, or may have forgotten facts which they once knew, and which three of them are conclusively fixed with having known at the time of the sale (since they cannot impeach the decree collaterally); but there is nothing to sustain a finding of fraud. This being so, the act of 1889 has no bearing and requires no discussion. Error.

FAIRCLOTH, C. J., dissents.

DUNN v. BEAMAN.

(Supreme Court of North Carolina. May 29, 1900.)

APPEAL AND ERROR—FINDING—REVIEW—EXECUTORS AND ADMINISTRATORS—CLAIMS—PARTNERSHIP—JUDGMENTS—DEMAND.

1. A finding of fact by a referee, approved by the trial court, is conclusive on appeal, where there is evidence to sustain it.

2. Where two of the partners of a firm paid a judgment to the judgment creditor, such payment extinguished the judgment, and the assignee thereof was not entitled to prove it as a claim against the estate of the third partner.

Appeal from superior court, Sampson county; Timberlake, Judge.

Action by W. A. Dunn, receiver, etc., against M. R. Beaman, executrix of the estate of J. R. Beaman, deceased, in which M. J. Hobbs sought to establish a claim against the estate. From a judgment dissolving the claim, Hobbs appeals. Affirmed.

Stevens & Beasley and Geo. E. Butler, for appellant. H. G. Connor & Son and R. O. Burton, for appellee.

CLARK, J. This was a proceeding by a creditor under Code, § 1448, to compel an account and settlement of the estate of John R. Beaman. The claim of M. J. Hobbs, the appellant, was No. 17, as numbered by the referee. The appellant, Hobbs, contended that he was assignee of a judgment which had been rendered against a firm composed of John R. Beaman, J. A. Ferrell, and T. M. Ferrell. The referee found that Hobbs paid no money to the plaintiff in the execution, but that said money was "really, though not directly, paid to him by the judgment debtors, J. A. and T. M. Ferrell." This finding of fact was approved by the judge. There being evidence tending to support the finding, it is conclusive on appeal. Clark's Code (3d Ed.) § 422, and cases cited. The conclusion of law follows that the claim of M. J. Hobbs was extinguished, and properly disallowed. Whatever balance, if any, is due the Ferrells on a settlement of their partnership accounts against John R. Beaman could be proven against Beaman's estate in this action, if not barred by the statute of limitations. This is not the case of a surety paying the debt of a principal, and, if it had been, the judgment was extinguished, because it was not assigned to a trustee for the benefit of the surety. Browning v. Porter, 116 N. C. 62, 20 S. E. 961. No error.

McCALL v. WEBB.

(Supreme Court of North Carolina. May 29, 1900.)

APPEAL AND ERROR—JUDGMENTS—AFFIRMANCE ON APPEAL—SUBSEQUENT MODIFICATION—REFERENCE—JURISDICTION.

1. After a judgment for plaintiff in quo warranto to try title to an office has been affirmed in the supreme court, it is too late to move in the superior court for an order of reference, to ascertain the amount of fees and emoluments the defendant has received while wrongfully in possession of the office, or for leave to amend the complaint so as to embrace a claim for such emoluments.

2. Plaintiff's neglect, in an action of quo warranto to try the title to an office, to ask for a reference to ascertain the amount of fees and emoluments received by defendant, does not estop him from proceeding by a proper action for the recovery of such fees and emoluments from the incumbent and his sureties.

Appeal from superior court, Buncombe county; McNeill, Judge.

Quo warranto by the state, on the relation of R. S. McCall, against Charles A. Webb, to try title to the office of solicitor. From an order overruling plaintiff's motion for a reference to ascertain the amount of fees and emoluments received by defendant while in wrongful possession of the office, he appeals. Affirmed.

Frank Carter, for appellant. T. H. Cobb, for appellee.

FURCHES, J. This was originally an action in the nature of quo warranto by the state, on relation of R. S. McCall, against Charles A. Webb, to try the title to the office of solicitor. Upon the hearing in the court below it was decided that the plaintiff was entitled to the office, and a judgment to that effect was rendered, declaring that the defendant was not entitled to the said office,

but that McCall, the relator, was; ousting the defendant from the office, and declaring that the relator was entitled to said office, to perform its duties, and to receive the fees and emoluments thereof. From this judgment the defendant appealed to this court, where the judgment of the court below was affirmed. 125 N. C. 243, 34 S. E. 430. When the judgment of this court was certified to the superior court of Buncombe county, the plaintiff moved for an order of reference to ascertain the amount of fees and emoluments the defendant had received while he was wrongfully in possession of said office. This motion was resisted by the defendant, and the plaintiff then moved to be allowed to amend his complaint so as to embrace the claim for the fees and emoluments of the office while so wrongfully held by the defendant, and this motion was also resisted by the defendant. Both of these motions were refused by the court below, and the plaintiff excepted and appealed.

It was held in Dobson v. Simonton, 100 N. C. 56, 6 S. E. 369, that a judgment of the superior court, affirmed by this court, could not afterwards be changed or modified by the superior court. It was also held in Calvert v. Peebles, 82 N. C. 334, that when this court affirms the judgment of the superior court it cannot afterwards be changed or modified in the court below on motion of the parties. It was held in Brendle v. Herren, 97 N. C. 257, 2 S. E. 158, that: "After final judgment disposing of the rights of the parties, it is too late to introduce a new cause of action into the controversy. So, in an action to have the holder of the legal title declared a trustee, it is too late after judgment to ask for an account of rents and profits." In Pearson v. Carr, 97 N. C. 194, 1 S. E. 916, it was held that: "No order of reference can be made to ascertain any facts taking place after the final judgment. After final judgment in the supreme court, the superior court has no power to order a further reference, or to take any action in the case." These cases seem fully to sustain the action of the court below, and the judgment must be affirmed.

It was contended by the defendant, and argued at length before us, that, as the plaintiff had failed to ask for this relief in his complaint, and have an order of reference before final judgment, he is estopped, and has no remedy to recover what seems to be due him by the judgment of the court. While we do not consider this question before us for adjudication, still, as it was argued and insisted upon by the defendant, we think it proper to say that we do not think the authorities cited by the defendant sustain this contention. This is an action of quo warranto by the state, on the relation of McCall, to try the title to this office. The state is interested in this question, in having its public offices filled by its proper officers. But this is as far as the state's interest goes, and it would seem to be the only issue triable in this action. And we doubt whether it would have been proper for the court to have made the order of reference asked for if it had been pleaded and asked for before final judgment, if resisted by the defendant. But it must be that the plaintiff has a remedy, not only against the defendant, but also against his sureties, as the legislature has provided for requiring him to give security, which he has done. In our opinion, this case is distinguishable from the cases cited by the defendant. Affirmed.

CLARK, J., concurs in the decision upon the point presented by the appeal, and for the reasons given, but is not to be understood as expressing any opinion upon the matters stated therein to be outside the present litigation. The plaintiff recovered (125 N. C. 243, 34 S. E. 430) upon the ground that this office was his private property, and that by the act of 1899, which put the defendant in office, the state had broken, or attempted to break, its contract. It would not seem that the state was "interested" in having this action brought to declare it had violated its contract. It is not a public question in that aspect, but a private action by the plaintiff to assert his property rights. It is otherwise where a quo warranto is brought merely to determine who is properly elected, or appointed, or entitled under proper construction of a statute, which is not sought to be set aside by the action as a breach of contract by the state. If office is a public agency, and not a "contract," then the state is "interested in having its public offices filled by its proper officers"; but that interest must be and has been shown through the legislature, which alone can create or abolish offices not established by the constitution, and which alone can prescribe how they shall be filled. This cannot be done by decree of court unless there is private property in office, and in that case the state has, as between the parties, no more interest than in any other action over any other private right arising upon contract.

LITTLE et al. v. BROWN.

(Supreme Court of North Carolina. May 29, 1900.)

WILLS — DEVISE — VESTED ESTATE — SUBSEQUENT CONDITION—CONVEYANCE—EFFECT.

Where testator devised a child's part of his real estate to his wife for life, the share of any child dying without living issue to go to the surviving children or their representatives, and the share devised to his wife for life to be equally divided on her death among the children and the issue of deceased children, the children took a vested estate in the devises and remainder, conditioned only that each child's share, at his death without living issue, should go to the surviving children or their heirs; and, as executory devisees could bind their heirs and convey absolutely their contingent interests, a deed by such wife and children conveyed a valid title in fee.

Appeal from superior court, Mecklenburg county; McNeill, Judge.

Controversy, without action, by Mary J. Little and others against Peter M. Brown. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Burwell, Walker & Cansler, for appellant. H. W. Harris, for appellees.

CLARK, J. This is a controversy submitted without action. The plaintiffs, the widow, the executor, and executrix of the testator, and his heirs at law and devisees, vendors of land, seek to compel the defendant, vendee, to comply with his agreement to purchase, by accepting their deed and paying the purchase money. The defendant resists their claim upon the ground that the deed does not convey an indefeasible estate in fee, and that he cannot be compelled, unless the deed should vest in him such an estate. The determination of the controversy depends upon the construction of the following clauses in the will of B. F. Little: "I give and bequeath and devise unto my beloved wife, Mary Jane Little, for the term of her natural life, all my household and kitchen furniture, including all my books, and a child's part of the balance of my estate, real and personal. The remainder of my estate, real and personal, I wish to be divided among all my children equally, share and share alike; and my will is to include any child or children that may be born after this date." This last clause was a devise in fee simple to all his children. This he made defeasible by adding the following limitation to surviving children: "Should any one of my children die without issue living at his or her death, then the property and estate of the one so dying to go to my surviving children, or their representatives." This condition must be construed to be operative at the earliest period, which is the death of each of the children. The words "or their representatives" are words of limitation, meaning "their heirs," and give no estate to the representatives by way of substitution. Hence all his surviving children (and the children of those deceased, if any there had been), as executory devisees, may now bind their heirs, and convey and release absolutely their contingent interests. Corbyn v. French, 4 Ves. 418; 2 Jarm. Wills, 625. The testator gives the wife an equal share with his children,—a "child's part," as he terms it,—and directs that the tract of land and residence where he lives should be included in her share, and restricts her devise to her life. He describes the property given to his children as "the remainder of my estate, real and personal." The limitation over to "surviving children or their representatives" on the contingency of any one of them dying without leaving issue makes the fee simple estate of the children defeasible, but does not operate to tie up the estate. That construction would give the grandchildren an absolute estate in both the original and accrued shares going to them, while his children, the primary objects of his bounty, would be deprived of absolute ownership of the original shares. The cases of Overman v. Sims, 96 N. C. 451, 2 S. E. 372, and Same v. Tate, 114 N. C. 571, 19 S. E. 706, differ from this. There the clause for construction was as follows: "To the sole and separate use of Mary Cornelia Tate, wife of said Thomas R. Tate for her life, and at her death to such child or children and the representatives of such as she shall have living by the said T. R. Tate, and their heirs forever. Should the said Mary Tate die without a child, or representative of such, living at her death, then to the said Thomas R. Tate and his heirs, forever." The words there used are plainly substitutional, and the issue of the child or grandchild is the object of the bounty, and is to take after a life estate. Here the children are the objects of the testator's bounty. They are given a fee simple, made defeasible upon death without issue, in which event their interest is to go to the other children of the testator, and the issue of such as may be dead, leaving issue. But the defendant contends further that the testator's wife has a life estate in an undivided share of this real estate, equally with the children, and that the remainder after her life estate in that share is so limited that she and the children cannot now make a good and indefeasible title. The clause of the will on which that contention is based is found in the fifth item, as follows: "At my wife's death it is my will and desire that all the property and estate, real and personal, that I have left to her for life, shall be equally divided among my children and the issue of any deceased child or children." But this should be read with the concluding clause of the same item of the will, to wit, "it being my intention that all my children shall receive an equal share in valuation of all my estate, real and personal, left to my wife for life." In this last clause he shows, by express terms, that he considered that he had already given to his children equally the remainder in fee after her life estate in one equal share; thus making their estate a vested remainder, without any other limitation over than that which follows in the next clause, "to surviving children or their representatives." In the devise to his wife, her life estate, and the vested remainder thereafter to his children, had already been devised by the first and second clauses, and the fifth item was intended simply to provide for the time and manner of the division of that share. There is no devise or bequest whatever in the fifth item, and it was manifestly not the testator's intention to limit any estate by its provisions, but only to direct the division of the real estate devised to his wife, and especially the family residence. The deed tendered conveyed a valid title in fee, and the judgment of the court below must be affirmed.

DYER v. ELLINGTON et al.

(Supreme Court of North Carolina. June 9, 1900.)

PENALTY—PENDING ACTION—ACT RELIEVING DEFENDANTS—EFFECT.

Code, § 3816, requires commissioners of towns to publish certain statements of taxes and expenditures, under penalty of $100, to any person who shall sue therefor. Plaintiff sued defendants, commissioners of L., for such penalty; and while the action was pending, and before judgment, the legislature passed Pub. Laws 1899, c. 349, releasing such commissioners of L. from any and all penalties for failure to comply with section 3816. Code, § 3764, provides that the repeal of a statute shall not affect any action brought before repeal for any forfeitures incurred or rights accruing under such statute. No other similar action was pending against defendants. *Held*, that as section 3816 created no contract between plaintiff and the state, and as the relieving act was not a repeal thereof, within the meaning of section 3764, and as the latter section was but a rule of construction, plaintiff's cause of action was destroyed by the relieving act before he obtained a vested right to the penalty, and hence his suit could not be maintained.

Appeal from superior court, Rockingham county; Shaw, Judge.

Action by W. F. Dyer against R. R. Ellington and others, commissioners of the town of Leaksville. From a judgment in favor of plaintiff, defendants appeal. Reversed.

This was a civil action tried before his honor, Thomas J. Shaw, at August term of the superior court of Rockingham county, 1899, brought before a justice of the peace in Leaksville township, for the purpose of recovering a penalty of $100 against the defendants named in the caption for failure, as commissioners of the town of Leaksville, to publish, as required by section 3816 of the Code, a statement of taxes levied and collected in said town, together with a statement of the amounts expended by them, and for what purpose, during the year 1897, and by due appeal was brought to the superior court, where a trial by jury was waived, and, by consent, his honor found the facts which appear in the judgment. Upon the facts found, the defendants moved for judgment, and the motion was disallowed, and his honor rendered the following judgment: "This cause coming on to be tried before Shaw, J., a jury trial having been waived, by consent of the plaintiff and defendants, the court finds the following facts: (1) That the town of Leaksville, in Rockingham county, was, on the 1st day of May, 1897, a municipal corporation, having been duly incorporated by the general assembly of North Carolina at its session of 1873–74 (chapter 133, Priv. Laws). (2) That on the first Monday in May, 1897, the defendants were duly elected as commissioners for said town, and on the 5th day of May, 1897, were duly qualified as such, and at once entered upon the discharge of their duties, and that their said term of office ended on the —— day of May, 1898. (3) That the defendants, during their term of office as aforesaid, levied and collected taxes in and for the said town of Leaksville, and disbursed the same. (4) That the defendants did not publish, as required by section 3816 of the Code, a statement of the taxes levied and collected in said town during their said term of office, nor did they publish any statement of the amount expended by them, and for what purpose, during their said term, as provided by law. (5) That on the 8th day of February, 1899, the plaintiff instituted this action against the defendants to recover the penalty of one hundred dollars ($100), as provided by section 3816 of the Code. (6) That while said action was pending in the court of the justice of the peace before whom it was brought, and before it was tried, the general assembly of North Carolina, on the 28th day of February, 1899, passed an act entitled 'An act for the relief of the commissioners of the town of Leaksville, in Rockingham county, North Carolina,' which said act, as contained in chapter 349, Pub. Laws 1899, is hereby referred to and is made a part of this finding of fact. (7) That this was the only action pending against the defendants at the time of the passage of the aforesaid act, and no other action had been brought by any person to recover the penalty sued for in this action. This fact found upon admission of counsel upon the trial. Upon the foregoing facts it is adjudged by the court that the plaintiff recover of the defendants, D. R. Ellington, W. S. Williams, and J. M. Hopper, the sum of one hundred dollars ($100), and interest on the same from the 28th day of February, 1899, until paid, and the costs of this action, as a penalty for their failure, as commissioners of the town of Leaksville, to publish, as provided by law, an annual statement of the receipts and disbursements for the year 1897."

The defendants make the following assignment of error: "First. The plaintiff had no standing in court upon the facts, his action being against the defendants individually, and, if entitled to sue at all, his action should have been against the town of Leaksville, or the board of commissioners of the town of Leaksville. Second. The defendants were protected, and the plaintiff deprived of his right of action, by reason of the act of the general assembly, being entitled 'An act for the relief of the commissioners of the town of Leaksville, in Rockingham county, North Carolina.' Acts 1899, c. 349."

Scott & Reid and Glenn & Manly, for appellants. J. D. Pannill, for appellee.

DOUGLAS, J. The act referred to in the case on appeal is as follows: "An act for the relief of the commissioners of the town of Leaksville, Rockingham county. Whereas, the commissioners of the town of Leaksville, in Rockingham county, North Carolina, by an oversight, failed to make an exhibit of the taxes collected and expenditures, as required by the Code, section 3816; and whereas, cer-

tain parties have sued said commissioners for such failure: Therefore the general assembly of North Carolina do enact: Section 1. That the commissioners of the town of Leaksville, in Rockingham county, N. C., be and the same are hereby released from any and all penalties that may attach to them for failure to make such exhibit. Sec. 2. That this act shall be in force from and after its ratification." Pub. Laws 1899, c. 349. This act was ratified on February 28, 1899. It does not repeal section 3816 of the Code, either generally or locally, nor pretend to repeal it, even as far as the town of Leaksville is concerned. It is simply what it professes to be upon its face,—an act of amnesty or pardon to the commissioners of the town of Leaksville for their failure to make an exhibit of taxes and expenditures for the particular year for which they had been sued. It is true the act is very loosely drawn, specifying neither the names of the persons nor the year of their default, and yet it seems plain to us to whom and to what the act was intended to apply. If there had been pending suits against different boards or for different defaults, the ambiguity might have been fatal; but there is no suggestion of any such ambiguity, whatever difference of opinion there might be as to the application of the Code. Whatever doubts we may have as to the propriety of the act or its probable effect, had it related to a criminal prosecution, we are not called on to express. The Code (section 3764) provides that "the repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute." This provision has been held good in Epps v. Smith, 121 N. C. 157, 28 S. E. 359, but does not apply to the case at bar, as here we have no repeal, but an absolute and express remission of the penalty. An informer has no natural right to the penalty, but only such right as is given to him by the strict letter of the statute. It is not such a right as is intended to be protected by the act, but is one created by the act. He has in a certain sense an inchoate right when he brings his suit,—that is, the bringing of the suit designates him as the man thereafter exclusively entitled to sue for that particular penalty,—but he has no vested right to the penalty until judgment. Until it becomes vested, we think it can be destroyed by the legislature. City of Wilmington v. Cronly, 122 N. C. 388, 30 S. E. 9. As the laws of one legislature do not bind another, except in so far as they may be absolute contracts, we must take section 3764 of the Code as merely a rule of construction, having no application where the intention of the legislature clearly and explicitly appears to the contrary. A statute providing a penalty creates no contract between the state and the common informer, even if he acts under the permission given him to sue. It is true he may thus lose the costs and expenses of his action, but, if he engages in a speculation from which he expects large profits from a small investment, he cannot complain much at the loss of his stake. If the penalty had been reduced to judgment, or had been given to the injured party in the nature of liquidated damages, the case would be essentially different. But we are not now deciding what is not before us. "Sufficient unto the day is the evil thereof." As this case comes before us on findings of fact by the judge, and as it appears to us that the cause of action was destroyed by the act of the legislature before it became vested, the judgment of the court below must be reversed. Reversed.

JAMES et al. v. WITHERS.

(Supreme Court of North Carolina. May 29, 1900.)

FORMER APPEAL — QUESTION CONSIDERED — SUBSEQUENT REVIEW—SALE UNDER TRUST DEED—REPAYMENT OF PURCHASE MONEY—CLAIM NOT CHARGEABLE TO REAL ESTATE.

1. Where certain questions have been adjudicated on a former appeal, and there has been no application for a rehearing, the correctness of such rulings will not be reviewed on a subsequent appeal.

2. J. conveyed a tract of land to G., and a trust deed was executed to secure the notes given for the purchase price. After J.'s death G. conveyed his equity of redemption in the tract to J.'s heirs in consideration of the release of his indebtedness to deceased. Thereafter J.'s administrator requested the trustee to sell the land, and turn over the proceeds for the payment of J.'s debts, which the trustee did during the pendency of an appeal from an injunction prohibiting such sale, which injunction was set aside on appeal, but plaintiffs were allowed to again make application for an injunction. *Held*, that it was error in a decree setting aside the sale to make the price paid by the purchaser a charge in his favor on the land.

3. Where the heirs of deceased made a contract with the county, by which the latter should pay for certain services, which should be charged to their distributive shares in decedent's estate, the sum so expended cannot be charged against real estate conveyed to the heirs, after the death of deceased, in consideration of a release of an indebtedness to deceased which was secured by a trust deed on the property.

Clark, J., dissenting.

Appeal from superior court, Stokes county; Shaw, Judge.

Suit by M. O. James and others against E. S. Withers. From a decree making certain indebtedness a charge on real estate, plaintiffs appeal. Reversed.

W. W. King and Glenn & Manly, for appellants.

MONTGOMERY, J. C. W. James, the plaintiffs' ancestor, on the 20th of July, 1892, conveyed a tract of land and certain personal property to James L. Grogan at the price of $2,350, and the purchaser and his wife executed a deed of trust upon the property to secure the notes which were given by Grogan for the purchase money. After the death of the grantor, Grogan conveyed his equity of redemption, his wife joining

in the deed, in the tract of land, to the heirs at law, without naming them, of the grantor, James. W. F. Campbell, the public administrator of Stokes county, qualified as administrator of C. W. James, and requested E. S. Withers, the trustee (defendant), to sell the land, and pay the proceeds to him, to be constituted assets for the payment of the debts of the intestate. The sale of the land was advertised by the trustee, and then this action was commenced to enjoin the trustee from making a sale of the land, to have the deed of trust canceled, and for such other and further relief as they might be entitled to. The injunction was granted, and an appeal taken by defendant from the order. This court, on hearing the appeal, reversed the order of the court below on the ground that it was improvidently made because no undertaking was required on the part of the plaintiffs. The plaintiffs were allowed to apply again for an injunction to be granted upon the filing of an undertaking on their part. During the pendency of the appeal, however, the trustee had sold the land, the defendant J. Walter Neal having been the purchaser. In the opinion of the court on the first appeal it was suggested that, when all proper parties should have been made, and the pleadings filed, if it should appear necessary, then there should be a reference to ascertain whether there were any debts of the intestate, and the amount, if any, and the sum which might become due for charges of administration. When all this should have been done, if it should appear to be to the interest of all the parties concerned, a decree would be proper giving to the plaintiffs a day before which they would be allowed to pay the ascertained debts and charges of administration, and upon payment of the same a decree might be made for the cancellation of the deed of trust, and for partition of property among the owners. It was further suggested that, if there should be no debts of the estate, the plaintiffs being entitled to the proceeds of the sale as distributees, and being also the owners of the equity of redemption, there should be a judgment directing a cancellation of the deed of trust upon the payment of the charges of administration. In deference to these suggestions, all the heirs at law of C. W. James were made parties plaintiff, and the administrator and J. W. Neal and the board of commissioners of Stokes county were made parties defendant. At August term, 1897, of the superior court, the sale by the trustee to Neal was set aside, and a reference ordered. The referee was instructed to find the facts and his conclusions of law thereon, and report the same to the superior court. The defendants appealed from that part of the judgment which decreed that the sale from the trustee to Neal should be set aside. At September term, 1897, of this court the judgment of the court below was affirmed. The referee made a report of the proceedings had before him as referee to the superior court, and exceptions were filed on both sides. He reported that the amount paid by Neal as the price of the land was $360; that the trustee retained $53 thereof for his charges and commissions in making the sale, and paid over to the administrator the balance, $307; that the administrator disbursed all but $9.55 of the amount, except the sum of $60, which he paid into the clerk's office for the plaintiffs,—the heirs of Calvin and Alexander James,—and the sum of $17.35, which he retained as commissions; that the disbursements made by the administrator were the sum of $12.30 for taxes assessed against C. W. James before his death, $30 attorney's fee, $168 to defendant board of commissioners, and the balance incidental cost of administration; and that most of the fund deposited in the clerk's office had been drawn out by the heirs at law of Calvin and Alexander James. It appeared further from the referee's report that the amount of $168, which was paid by the administrator to the board of commissioners, was a part of a claim which said board demanded by virtue of a contract and agreement made with them on the 5th of September, 1892, by certain of the plaintiffs,—M. O. James, R. A. Neal, William James, Pleasant James, and Faucett Odell. The contract was made because of a belief on the part of the plaintiffs named that the death of C. W. James was caused by poison having been feloniously administered to him, and a desire on their part to have the stomach of the deceased examined by a chemist, the plaintiffs being unable to furnish the money for that purpose. The agreement was in these words: "We, the undersigned heirs at law of C. W. James, deceased, do hereby agree and consent that all expenses incurred by the county of Stokes in having the stomach of the said C. W. James analyzed, including the charge made by the chemist who analyzes the same, may be paid by the personal representative and administrator of said James, deceased, out of our distributive share of his estate, and that a receipt of said administrator for said expenses may be and shall be a valid voucher for him in the administration of said estate." Upon his findings of fact, the referee concluded as matter of law: (1) That the defendants were bound by the judgment rendered at spring term, 1897, setting aside the sale, that judgment having been affirmed by the supreme court. (2) That the tax assessed in 1892 against C. W. James was a valid claim upon the estate of C. W. James. (3) That the $60 which was paid into the clerk's office by the administrator for the heirs at law of Calvin and Alexander James should be refunded to the purchaser of the land, Neal, and, unless refunded by the parties who received the same, Neal should be subrogated to their rights. (4) That the board of commissioners

should return to the purchaser. Neal, the $168 paid to them by the administrator, the referee holding that the contract made by a part of the plaintiffs with the board of commissioners did not constitute a debt against the estate of C. W. James. The referee further concluded as a matter of law that, in case the costs of administration, the debt (taxes) $12.30, and the $60 paid into the clerk's office should not be paid within a reasonable time, the administrator should have the right to enforce the sale of the land by the trustee, the net proceeds to be used by the administrator towards the payment of the costs of administration, including his commissions, the debt of $12.30, and the balance to be paid to the heirs at law (the plaintiffs) according to their respective rights; and in making this distribution of the surplus the administrator should pay to J. Walter Neal, from the interest of the heirs at law of Calvin and Alexander James, the $60 which was paid into the clerk's office for them. The exceptions filed to the report were heard at spring term, 1899, of the superior court, and the referee's conclusions of law were modified. It was adjudged by the court that the defendant Neal should be reimbursed to the extent of the whole of the purchase money, with interest from the day of sale; that the county commissioners should be paid the amount expended by them, to wit, $323.55, under the contract with certain of the plaintiffs; that the heirs at law (plaintiffs) pay to defendant Neal $232; that the trustee, Withers, pay to Neal the sum of $53; that the administrator, Campbell, pay to Neal $15 (overcharge in commissions); that the clerk of the court pay to Neal $60, originally paid into his office by the administrator, less the amounts paid out by him to the heirs at law of Calvin and Alexander James; that the heirs of Calvin and Alexander James pay to Neal the amount drawn out of the clerk's office by them respectively; that the plaintiffs who signed the agreement with the county commissioners pay to the county commissioners the amounts expended under said contract, less $168, which had been paid to them by the administrator. It was further ordered that the clerk of the court ascertain and report to the court at its next term the amount of rental value paid for the land since the day of sale, June 30, 1894, and by whom received; the amount of taxes paid since June 30, 1894, and by whom paid; and the amount received from the clerk of the court by the plaintiffs, or any of them, with their names; and the value of any timber sold from the land, and by whom; and what improvements, if any, have been put upon the land. Exceptions were made by the plaintiffs to the order and judgment of the court, and noted, and appeal entered. At the next term of the superior court the report was made by the clerk and confirmed, no exceptions having been made thereto. It appeared from the report of the clerk that J. Walter Neal was chargeable with $169.17 received from rents, and it was ordered by the court that that amount be credited and deducted from the amount due Neal in the order made at the last term of the court. It was further ordered that the plaintiffs pay the amounts as directed in the order made at the last term (spring term, 1899) to the defendant Neal and to the county commissioners of Stokes county, and the $10 allowed at the present term to the clerk of the court, on or before the 1st day of December, 1899, and upon their failure to do so it was ordered that Withers, trustee, should sell the land described in the deed, and report to the next term of court. It was further ordered that J. C. Flinn pay over to defendant Neal the $15 in his hands for cross-ties, and that Neal be chargeable with the same. The plaintiffs then perfected their appeal under their exceptions filed at spring term, 1899, of the superior court.

The report of E. B. Jones, referee, in this case, sets out the facts very clearly, and the referee held—properly, as we think—that the only debt which was proved against the estate of the decedent, James, was the one for the taxes assessed against the decedent during his lifetime. He properly held that the contract between certain of the plaintiffs and the county commissioners was not a debt against the decedent. As we shall hereafter see, the referee made an error in his conclusion of law that Neal should be reimbursed to the extent of the amount which he paid to the trustee for the purchase of the land.

We think there was error in the order and judgment made at spring term, 1899, of the superior court. Whether or not there was error in the judgment entered in the cause at spring term, 1897, of the superior court is not the subject of review. The sale of the land by the trustee to Neal was set aside peremptorily, and for reasons set out in the judgment. That judgment was affirmed by this court at September term, 1897 (121 N. C. 692, 31 S. E. 1002). There has been no application to rehear the case on the part of the defendants. For reasons satisfactory to ourselves, we do not think it incumbent on us to open the past record of this case. The defendant Neal then bought nothing at the trustee's sale. Such a case is not usual, but sometimes such investments are made. He has lost the money which he paid to the trustee, and we cannot affirm any judgment of the court below which orders that money to be paid back to him by any person into whose hands it may have come.

There was also error in the judgment of the superior court at spring term, 1899, in which it was ordered that the plaintiffs should pay to the defendant board of commissioners any part of the amount which the board claimed by virtue of their contract with certain named ones of the plaintiffs. As the matter stood after the execu-

tion of the deed by Grogan and wife, which conveyed the equity of redemption in the land to the heirs at law of C. W. James (the heirs at law being the plaintiffs in this action), the plaintiffs had the right to pay off the indebtedness of the estate, and have the deed of trust canceled, and thereby become the sole owners in fee of the land. The contract by certain ones of the plaintiffs with the defendant board of commissioners constituted no lien upon the land, and was no equitable assignment of the interest of these plaintiffs in it to the commissioners. It was a simple contract, and, while good faith has not been kept by those of the plaintiffs who executed that contract with the commissioners, yet we cannot subject the land by a judicial order, under that contract, to the payment of that obligation. Entertaining the opinion that we do of this case, judgment should be entered below in favor of the plaintiffs against the defendant Neal for the amount which he has received, as set forth in the report made by the clerk, and that the plaintiffs be allowed a reasonable time in which to pay the debt of $12.30 for taxes, and the proper costs and charges of administration, and that, upon their failure to do so, a sale of the land may be ordered by the court in order that the same may be paid; the surplus to be paid to the plaintiffs. If the plaintiffs should pay within the day named by the court the debt of $12.30 taxes, and the proper costs and charges of administration, then the deed of trust should be ordered canceled of record, and the plaintiffs, if they so desire, have the land divided, or sold for partition. The case is remanded for judgment according to this opinion. Reversed.

CLARK, J. (dissenting). On September 5, 1892, the plaintiffs, M. O. James, R. A. Neal, William James, Pleasant James, and Faucett Odell, made a written contract with the county commissioners that, if they would cause the stomach of C. W. James to be examined, all the expenses thereof should "be paid by the personal representative and administrator of said James out of our distributive share of his estate, and that the receipt of said administrator for said expenses shall be a valid voucher for him in the administration of said estate." At that time the only property belonging to the estate of the deceased was a bond for $2,250, secured by a trust deed on realty. The parties above named were then the distributees of C. W. James, and the aforesaid contract was upon good consideration, and amounted to an equitable assignment pro tanto of their interest in the estate. It was not a mere order upon the administrator, but a binding contract that the receipt for the amount so paid should be a valid voucher in the settlement of the estate. Subsequently the said plaintiffs arranged with the obligor of the bond and mortgagor to surrender the bond, and take over the realty in its stead. By this arrangement the only asset of the estate was now realty, and the plaintiffs became heirs at law, instead of distributees; but this act of theirs cannot, in equity, have the effect of destroying the rights of third parties. The commissioners have no lien on the realty, but they were pro tanto assignees of the personal estate. They did not assent to its being changed into realty, and to the extent of their claim the fund remains stamped with the nature of personalty. The realty should be reconverted into personalty by a sale of enough of the plaintiffs' shares to pay the expenses which, on the faith of the agreement of the plaintiffs, the commissioners expended at the instance and request of the plaintiffs. The county should not be "jockeyed" by the plaintiffs out of that money thus expended.

BRADLEY v. OHIO RIVER & C. RY. CO.

(Supreme Court of North Carolina. May 29, 1900.)

RAILROADS—ACCIDENTS AT CROSSINGS—NEGLIGENCE — EVIDENCE — ADMISSIBILITY —INSTRUCTIONS—TRIAL—APPEAL.

1. Where plaintiff's intestate was killed on a crossing by being struck by a backing train after it had stopped and discharged its passengers, plaintiff may show defendant's custom as to where it stopped its trains for the discharge of passengers, and the custom of defendant and the public in using the crossing, as bearing on defendant's negligence in backing its trains, as to the notice to be given, and whether intestate was negligent.

2. Where plaintiff's intestate was killed on a crossing by being struck by a backing train, it may be shown that the conductor knew the custom of hackmen in crossing after the train had passed, and had notified them that hacks could pass the crossing after the train had passed it.

3. Where a person was killed on a crossing by being struck by a backing train, evidence that the hack and the body of a companion of deceased were pushed back by the train is admissible, as showing what stopped the train; that it was kicked back, and was only stopped by such obstructions.

4. Statements made by a witness, and not testified to by him while on the stand, being hearsay, are inadmissible.

5. Where the issues submitted arise on the pleading, and every phase of the parties' contentions can be presented thereunder, they cannot be reviewed.

6. Requested instructions, which, in so far as they are correct, are covered by the charge, are properly refused.

7. Where a person is killed on a crossing by a backing train, which had stopped near such crossing for the discharge of passengers, it is proper to instruct, in an action for damages, that defendant was negligent, if the crossing was one which the public, with defendant's knowledge, was permitted to cross, and defendant, before backing its train on the crossing, failed to give signals of its intention to do so in time for persons approaching the crossing to avoid the danger.

8. Where issues are submitted to the jury, an instruction that plaintiff cannot recover cannot be granted.

9. The court's failure to submit whether or not an isolated fact was per se negligence is not reversible error, where it placed before the

jury all the facts as a whole, and properly instructed in regard thereto.

10. An instruction which assumes as a fact that about which the evidence is conflicting is properly refused.

11. Whether the sounding of a whistle when a train was 50 feet from a crossing was timely, is for the jury.

12. The failure to do what a reasonable and prudent person would ordinarily have done under the circumstances,—the omission to use means reasonably necessary to avoid injury to others,—is a sufficient definition of negligence.

13. Failure of those in charge of a moving train to keep a lookout when approaching a crossing, is negligence, where such lookout would have saved life.

14. Where a railway company kicks a train over a crossing, without having an engine attached to it, and without having proper means to apply the brake and stop the train, and a person in the exercise of ordinary care is killed by being struck on the crossing, the killing is a negligent killing.

15. A person engaging a hack is not responsible for the negligent conduct of the driver, unless he assumed to direct and control him.

Appeal from superior court, McDowell county; Allen, Judge.

Action by J. S. Bradley, as administrator of the estate of Sarah J. Kanipe, deceased, against the Ohio River & Charleston Railway Company, to recover damages for the negligent killing of plaintiff's intestate. From a judgment for plaintiff, defendant appeals. Affirmed.

P. J. Sinclair and Locke Craig, for appellant. E. J. Justice and S. J. Ervin, for appellee.

CLARK, J. The plaintiff's intestate, Mrs. Kanipe, was a passenger on the defendant's road, who had just gotten off the train at Henrietta station. She took passage on the hack of one Higgins to go to Henrietta Mills. It was necessary to cross the railroad track a few yards in rear of the train from which she had just alighted. The train backed, but was concealed from view by a line of box cars on a side track; and the backing train ran over the hack, killing Mrs. Kanipe. The jury found that the intestate was killed by the negligence of the defendant in backing its cars on the crossing without giving timely signals, and without keeping a reasonable lookout, and "kicking" its cars back over the crossing without reasonable and proper means to stop the train in case of danger; that the intestate was not guilty of contributory negligence,—and assessed the amount of damages. Appeal by defendant.

Exceptions 1–5, 7, and 10 to evidence, and 2, 3, and 5 to the charge, present the question whether it is competent to prove the custom of the defendant as to where it stopped its train and discharged its passengers, and the custom of the defendant and the public in using the crossing where the plaintiff's intestate was killed. This was competent, both upon the question of negligence of the defendant in backing its train, as to the notice to be given, and whether the intestate was guilty of contributory negligence in attempting to cross. "A crossing which the public have been habitually permitted to use" is treated as a public highway crossing. Russell v. Railroad Co., 118 N. C. 1098, 24 S. E. 512, and cases cited. The evidence showing that it was the custom of the company never to back its trains over this crossing after passing it was material in determining what degree of care was required when backing contrary to custom, and in showing that the intestate had a right to rely upon the custom of the company not to back its train (Blackwell v. Railroad Co., 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729), unless notice was given.

Exceptions 8 and 9 were to evidence that the conductor in charge of this train knew of the custom of hackmen crossing at this crossing after his train had passed it, and that he had notified the witness, who was foreman of the stables employing the hackman, that hacks could pass at that crossing after the train had once cleared it, and that the latter had so notified the hackman who drove Mrs. Kanipe. The evidence was competent and pertinent.

Exceptions 6, 13, and 14 to evidence are clearly without merit, and need no discussion.

Exceptions 11 and 12 were to the admission of evidence tending to show that the hack and the body of Miss Kanipe, who was injured at the same time, were pushed back by the train. The evidence was offered, and, the judge stated, was admitted only as a part of the res gestæ, as evidence tending to show what stopped the train; that it was detached from the engine, "kicked back," and was only stopped by this obstruction. The defendant's contention was that the train could not have been stopped so soon if the engine had been (as plaintiff alleged) detached.

Exception 15 is to the rejection of proposed testimony by the witness Horne as to statements made by one Coxe, who had testified for the defendant. So far as he corroborated Coxe, by showing that he had theretofore made similar statements to his testimony on the stand, the testimony was competent, and was admitted by the court; but when the defendant wished to go further, to show other statements made by Coxe, not testified to by him on the stand, it was mere hearsay, and did not come within any exception to the rule which rejects hearsay evidence, and was properly refused.

The exceptions to the issues cannot be sustained. The framing of the issues is largely left to the sound discretion of the trial judge. When the issues submitted arise on the pleadings, and every phase of the contention of the parties can be presented thereunder, they are not subject to review. Pretzfelder v. Insurance Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; Willis v. Railroad Co., 122 N. C. 905, 29 S. E. 941; Williams v. Gill, 122 N. C. 967, 29 S. E. 879.

The defendant's prayers for instructions numbered 1, 3, 5–16, 21, 22, and 24, so far as they were correct, were given, in substance, in the charge. The judge was not required to use the exact language of the prayer. See cases cited in Clark's Code (3d Ed.) p. 539. In lieu of the twentieth prayer, the court properly charged: "If you find from the evidence that this was a crossing where the public had been habitually permitted to cross, and with a sanction and knowledge of the defendant, then it became the duty of the defendant, before it backed its cars on the crossing, to give signals that it intended to do so, and to give them in time for persons approaching the crossing to avoid the danger; and if the defendant failed to give any signal when it backed its cars upon the crossing, or failed to give them in time to warn a person who was in the exercise of ordinary care, and the killing followed as a direct result, then it was a negligent act, and you should answer the first issue, 'Yes.'" Prayers for instructions numbered 2 and 4 were that there was no evidence to support the allegations therein contained, and the plaintiff cannot recover thereon. Under our system of issues being submitted, a general prayer that "the plaintiff cannot recover" should never be granted. Witsell v. Railway Co., 120 N. C. 557, 27 S. E. 125, and other cases cited in Clark's Code (3d Ed.) p. 535. Upon the issues found, the court adjudges, as a matter of law, whether the plaintiff shall recover judgment. Besides, in this case the court could not tell the jury that there was no evidence to support the allegation referred to.

Prayers 17 and 18 were that the court should tell the jury that two isolated facts, if facts, would not be negligence. Possibly it would not have been error to have given these prayers, though it is the weight of authority that whether a flagman ought to have been at the crossing was a question for the jury. Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. But the court is not called upon to express an opinion upon each isolated fact,—whether it per se would be negligence or not; and a failure to do so is not reversible error when, as here, the court has placed before the jury every phase of the circumstances which the defendant contended was true, as a whole, and instructed the jury properly in regard thereto. It is not whether any single, disconnected fact, taken alone, would or would not be negligence, but whether any given state of facts which there is evidence tending to prove would justify a certain finding upon the issue named. These two prayers leave out the important surrounding circumstances. It is as if a party were to ask the court to say that $1 is $1, that 0 is 0, and another 0 is 0, and therefore to argue that the defendant cannot possibly be indebted to the plaintiff $100, though the circumstances, taken as a whole, may show that he is entitled to that response upon an issue "whether the defendant is indebted to him, and, if so, how much."

The nineteenth prayer could not have been given; for it assumes as a fact that Mrs. Kanipe could have seen the train, when there was contradictory evidence.

As to the twenty-third prayer, whether the sounding of a whistle when the train was 50 feet away was timely was a question of fact for the jury, and not a matter of law.

The exception to the "charge as given" would, if intended as an exception, be untenable, as "broadside," but it is doubtless stated by the appellant merely as matter of inducement to the 18 specific exceptions to the charge which follow. The first of these is to the definition of negligence as "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; the omission to use means reasonably necessary to avoid injury to others." This definition is justified by precedent. Railroad Co. v. Jones, 95 U. S. 439, 24 L. Ed. 506; 16 Am. & Eng. Enc. Law (1st Ed.) 390. It was used by the judge in Norton v. Railroad Co., 122 N. C., at page 920, 29 S. E. 892, though it was not there excepted to. It may be that a more scientific definition could be framed by a skillful dialectician, but we cannot see that the defendant was prejudiced by the use of the one furnished by the judge.

The matter presented in exceptions 2, 3, and 7 to the charge, taken in connection with the context, is unobjectionable.

The fourth exception is as to matter which is in the defendant's tenth prayer for instruction, and as to which it has erroneously excepted, because not given.

As to the fifth and sixth exceptions to the charge, the law requires those in charge of a moving train to keep a lookout along the track, even where there is no crossing; and, if they could have saved life by proper lookout at a crossing, failure to do so is certainly negligence. Pharr v. Railway Co., 119 N. C. 756, 26 S. E. 149; Deans v. Railroad Co., 107 N. C. 686, 12 S. E. 77; 8 Am. & Eng. Enc. Law (2d Ed.) 293, notes 2, 3.

The eighth, ninth, and twelfth exceptions to the charge cannot be sustained. Patt. Ry. Acc. Law, § 167; 2 Wood, R. R. 1513; 8 Am. & Eng. Enc. Law (2d Ed.) 397, 398, note 2.

The matter referred to in eleventh exception is a correct statement of the law. 8 Am. & Eng. Enc. Law (2d Ed.) 419, 420, and notes. "Making flying switch" and "kicking cars" are terms denoting very nearly the same thing. In the former, the engine may be in front, and, upon being disconnected, the rear cars may be run upon another track while still rolling. In "kicking cars," the disconnected cars are given their impetus by a backward motion of the engine, which does not follow them. The same principle of law applies. In Schindler v. Railway Co., 87 Mich. 410, 49 N. W. 674, it is said, "It is gross negligence to kick a car across a highway,

unattended." Kay v. Railroad Co., 65 Pa. St. 269; Railway Co. v. Smith (Ky.) 20 S. W. 392, 18 L. R. A. 63; Railroad Co. v. Baches, 55 Ill. 379. Here the only person who the defendant contends was on the train was an 18 year old negro, and he was not on the end of the backing train, but says he was between two cars, to put on brakes.

The thirteenth exception to the charge is to the language, "She [Mrs. Kanipe] was not responsible for the conduct of the driver unless she assumed to direct or control him." There was no error in this. Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; Railroad Co. v. Powell, 89 Ga. 601, 16 S. E. 118; Railroad Co. v. Cooper, 85 Va. 939, 9 S. E. 321; Bottoms v. Railroad Co., 114 N. C. 699, 19 S. E. 730, 25 L. R. A. 784; Crampton v. Ivie, 124 N. C. 591, 32 N. E. 968. In the last-named case two judges dissented, but not upon this point, as to which the court was unanimous.

There are 54 exceptions in this case, all of which have been carefully considered. Only errors which are material and fatal can entitle a party to a new trial, and none which the appellant does not have reasonable ground to think such should be brought to this court. There could be no necessity to show 54 fatal errors in any trial. Counsel, not knowing what will be the views of the court, are the sole judges of what exceptions they shall think proper to bring up for review, but it is not necessary to bring up every exception which through abundant caution is taken on the trial. If, in making up a case on appeal, counsel will sift out and drop those presenting the same points already made by another exception, and those exceptions which have already been held against the appellant in other cases, and harmless errors not justifying a new trial, the number left will still be enough to occupy the time allotted for argument, and will concentrate both the argument of counsel and the attention of the court upon the vital points which should determine the appeal. Pretzfelder v. Insurance Co., supra. In saying this we are laying down no rule for counsel, who must always decide for themselves what exceptions the interest of their clients shall require them to bring up for review; but we are suggesting that a little more care and discrimination in selecting exceptions to be passed on by this court might in many cases lighten the labors of counsel, as well as of ourselves, and be conducive to the ends of justice, by concentrating attention upon the really vital points of the case. Affirmed.

COWELL v. PHŒNIX INS. CO.

(Supreme Court of North Carolina. May 29, 1900.)

FIRE POLICY—STATUTE OF FRAUDS—BUILDING ON LEASED GROUNDS—INSTRUCTIONS.

1. Where a fire policy provides that it shall be void if the insured is not the unconditional owner of the property, the company cannot defeat a recovery thereon by showing that the property insured was not conveyed to the insured in writing, as required by the statute of frauds, as the statute can only be invoked in actions between the parties to the sale.

2. An application attached to a fire policy recited that it covered a certain house on leased land. A condition in the policy provided that it should be void if the building insured was not on ground owned in fee by the insured, unless otherwise provided by agreement indorsed on the policy. The company knew that the building was on leased property when it was insured, but no indorsement showing such fact was made on the policy. *Held*, that the company could not defeat a recovery on the policy on the ground that it was on leased ground.

3. Where there was no evidence in conflict with that of plaintiff, which, if true, would entitle him to recover, it was not error to refuse to instruct that, if the jury believed the evidence, they should find for the defendant, and to instruct that, if they believed plaintiff's testimony, he was entitled to recover.

Appeal from superior court, Pamlico county; Starbuck, Judge.

Action by J. F. Cowell against the Phœnix Insurance Company. From a judgment in favor of plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Simmons, Pou & Ward, for appellant. W. W. Clark, for appellee.

FAIRCLOTH, C. J. This is an action to recover the amount of a fire insurance policy. The defendant issued the policy to the plaintiff on a dwelling house, household furniture, and other personal property. Policy issued May 24, 1898, and the property was destroyed by fire November 21, 1898. These facts are admitted. The defense is that the plaintiff was not the sole and unconditional owner of the house when it was insured or when it was burnt; that the plaintiff concealed the fact that he was not the owner of the land on which the house was situated, and failed to disclose the true ownership thereof; and that the policy was therefore void, according to the terms of the policy. The defendant introduced in evidence the record of an action instituted in 1896, styled Daniels v. Fowler (N. C.) 31 S. E. 598, from which it appeared that S. H. Fowler had made an assignment of his property to one Baxter, who conveyed the same to C. H. Fowler with an allegation that said assignment was fraudulent and void; that said suit continued until spring term 1898, when the verdict and judgment declared said assignment to be void; and that the plaintiff, Daniels, and others were the owners of the property in controversy. The plaintiff here was a party to the action of Daniels v. Fowler. The defendant offered other evidence showing that plaintiff and said C. H. Fowler were in business in a shop on said lot of land; that it was moved about 50 feet on said lot, and made to front another street, and separated from the balance of the lot, and was converted by improvements and additions into a dwelling house by plaintiff,

and occupied by him as a residence until the fire. This is the insured house, now the subject of this action. Plaintiff's evidence: J. F. Cowell testified that: "The burned building was formerly used as a barroom. Outside was of rough boards. I bought the house of C. H. Fowler in 1894. There was no deed. Paid him $100. (Defendant objected to the statement that he bought the house in 1894, on the ground that the sale would have to be in writing. Overruled, and defendant excepted.) I moved it to another part of the same lot. It cost me $1,000 to rebuild it. I leased the land which it was moved on from C. H. Fowler. I had no notice of any fraud at the time I made the purchase. I leased the land a year from each January, in 1894, when I moved the building. I leased it with the understanding that it was to be renewed each January as long as C. H. Fowler and I remained partners in the store business. I first leased it in 1894, when I moved the building. I would say I rented it each January 1st. It was understood that the lease should be to January 1, 1895, and should be renewed each successive January as long as Fowler and I remained in business together. It was renewed each January by the previous agreement made in 1894. I gave my time to the business. I was to have one-half the profits, and also possession of the lot fenced in about the dwelling, as long as we remained in business. I understood I was holding it under lease made in 1894." Cross-examined: "Were you holding at the time of the fire, in 1898, under the parol lease made in 1894? Ans. I was holding under this lease, with the understanding that it was to be renewed from year to year as long as our partnership lasted. The partnership was renewed each year after 1894 till we went out of business after the fire. We renewed the partnership about January 1st each year, and it was understood that the lease was renewed each year as the partnership was renewed. Nothing was said about the rest of the business each January." The plaintiff further testified that he did not know whether this was the second or third annual policy he had taken out on the property in this company. It was admitted here that at the time the policy was issued the defendant had notice that the plaintiff claimed that the building was on leased ground. The plaintiff's application, attached to the policy, is: "On his two-story, shingle-roof, frame building and additions, * * * on leased land." The clause in the policy relied on by the defendant, among other things, is: "The entire policy shall be void if the interest of the assured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple, unless otherwise provided by agreement indorsed hereon or added hereto."

Real estate may be sold by parol, and the title is good, as between the parties, unless the statute of frauds is invoked and relied on as a defense, but strangers to the transaction cannot avail themselves of the statute. "Buildings which are sold without the land on which they stand, with the intention of all parties to sever them from the land, pass to the purchaser, with a right to remove them, as personal property, within a reasonable time." Shaw v. Carbrey, 95 Mass. 462. The first exception, therefore, cannot be sustained.

An insurance policy issued with full notice (as was the case in this instance) to the company that the building insured stands upon leased ground is not invalidated by a provision that it shall be void if the subject thereof is on ground not owned by the assured in fee simple. Baldwin v. Insurance Co., 15 N. Y. Supp. 587, 60 Hun, 389.

The defendant's prayer was that, if the jury believed the evidence, they should answer the first issue, "No," and the second, "Nothing." This prayer was refused, and his honor instructed the jury that if they believed the facts as to the lease to be as stated by the plaintiff, Cowell, in his testimony, they should answer the first issue, "Yes," and the second issue, "$1,000." With our view of the law, we see no error in overruling these prayers and exceptions. There was no evidence in conflict with that of the plaintiff, and the judge made no mistake in allowing the jury to act on the plaintiff's evidence. What cause of complaint has the defendant company? The defendant insured a dwelling house, with notice that it stood on leased ground, and what is the difference to the defendant whether it stood on the ground of A. or B.? Knowledge in that particular could neither increase nor diminish the risk of the company. It was immaterial to the defendant whether the land belonged to Fowler or to Daniels. The defendant simply insured the house as "his" (plaintiff's) property, knowing that the plaintiff had no fee in the estate. In the argument the case was put upon the legal proposition that the landowner could not sell the house by parol, and convert it into personal property by such contract. We have shown this can be done by consent of the contracting parties, and we think the defendant has no interest in that question. Our conclusion as to the law seems to lead to a just result. Finding no error in the trial, the judgment of the court below must be affirmed.

LENOIR et al. v. LINVILLE IMP. CO.

(Supreme Court of North Carolina. June 9, 1900.)

INSOLVENT CORPORATIONS—CLAIMS FOR SALARIES—REVIEW ON APPEAL.

1. Where a receiver was appointed to take control and entire management of all the assets of a corporation, it was not liable to an officer for salary during such receivership, since the performance of the contract between the corporation and the officer was rendered

impossible by judicial action, and not by the fault of the corporation.

2. Where a fact is found without any evidence tending to prove it, the finding is reviewable; but when, without excluding any evidence, the court finds there is no evidence to prove an allegation, the finding cannot be reviewed.

Appeal from superior court, Mitchell county; Allen, Judge.

Action by T. B. Lenoir and others against the Linville Improvement Company. From a referee's report disallowing the claim of petitioners, Thomas F. Parker and another, they appeal. Affirmed.

Davidson & Jones and Busbee & Busbee, for appellants. E. J. Justice and D. W. Robinson, for appellee.

DOUGLAS, J. This is an appeal by the petitioners, Parker and Kelsey, claiming, respectively, as president and secretary of the company, the balance of their salaries coming due while the company was in the hands of the receiver. The following is the report of Referee Burwell:

"This cause having been referred to me, I proceeded, on June 29, 1898, at Linville, N. C., to hear evidence upon the matters submitted to me for determination. There were present at such hearing Messrs. Davidson & Jones, attorneys for Thomas F. Parker and Harlan P. Kelsey, petitioners, and E. J. Justice, attorney for the defendant. I send herewith the testimony of the several witnesses who were examined before me, it having been taken down by a stenographer. When the cause was called for hearing before me, counsel suggested that the following issues had been agreed upon as covering the matters in dispute: (1) Is the Linville Improvement Company indebted to the plaintiff Thomas F. Parker upon his claim filed in this case? If so, in what amount? (2) Is the Linville Improvement Company indebted to the plaintiff Harlan P. Kelsey upon his claim filed in this case? If so, in what amount? From the testimony introduced before me by the petitioners and defendant, I find the following facts: (1) On August 21, 1893, an order was made appointing a receiver of the defendant corporation, and this order prescribed the duties of such receiver as follows: 'To take into his hands all the property and effects of the Linville Improvement Company, both real and personal, together with all choses in action, debts, claims, and demands of every kind; to collect all debts due the company; to keep in proper repair the houses and other property; to pay all taxes lawfully assessed against the said company, and to defend and prosecute all suits at law or in equity touching or concerning the said company, and for this purpose to employ counsel at a compensation to be fixed and allowed by the court; to sell and dispose of, for cash, all the property of a personal nature, and especially such as is liable to deterioration, at either public or private sale, and at such times and places as he may elect to sell and dispose of the houses, lands, and tenements of said company, in such quantities, and at such times and places, and upon such terms, as he may deem best, and, upon confirmation of the said sale or sales by the court, to execute deeds conveying such to the purchaser or purchasers.' (2) That, pursuant to this order, J. F. Spainhour was duly qualified as receiver, and immediately thereafter took charge of the property and effects of defendant corporation according to the terms of the order appointing him receiver. (3) That at the time of said appointment of a receiver the petitioner Thomas F. Parker was president, and Harlan P. Kelsey was secretary, of defendant corporation. (4) The charter of the defendant corporation provided that there should be a president and a secretary and a treasurer, who should be elected annually, and should hold their offices, respectively, for one year, or until their successors should be chosen. The charter provided that the treasurer should be elected by the board of directors, and should hold his office for one year, or until his successor should be elected or inducted into office, unless he should be removed by the board of directors, and that he should give bond with good and sufficient surety for the safe-keeping of all moneys that might come into his hands, and for the faithful discharge of all the duties of his office. (5) The by-laws of the corporation provided that the salaries or other compensation of all offices should be fixed by the directors, and might be changed or discontinued at the end of any month. (6) Thomas F. Parker was duly elected president on July 20, 1893, and immediately thereafter, at a meeting of the directors, he was elected treasurer, and as such treasurer he gave bond in the sum of $20,000. (7) At that time (July 20, 1893) Harlan P. Kelsey was duly elected secretary of defendant corporation, and was duly inducted into that office. (8) At a meeting of the directors on July 20, 1893, the compensation of these offices, to wit, president and secretary, was fixed as follows: President, $100 per month; secretary, $25 per month. The secretary and treasurer were both ex officio members of the board of directors that so fixed their compensation. (9) It was always the custom of the defendant company to pay the actual expenses of the directors of the company in attending meetings whenever they made any charge for so doing. (10) That the receiver paid to each of these petitioners the amount due them on account of salary up to September 1, 1893, the date of his qualification as receiver and his taking charge of the property and effects of the company. (11) That, after the appointment of the receiver and his entering upon the duties of his office, the petitioner Harlan P. Kelsey was not called upon or required to perform any service whatever for the company, and did not in fact perform any service on its account, ex-

cept attendance at meetings of the stockholders. (12) That the petitioner Thomas F. Parker, after the appointment of receiver and his qualification, continued to act as president of the corporation as to all matters that seemed to require his attention, and interested himself in the affairs of the company, and in the efforts made by himself and others to extricate the corporation from its financial difficulties. He was recognized as the president of the company at the meeting of the corporation held in 1894, and he aided and assisted the receiver in his care of the affairs of the company. No evidence was introduced before me as to the value of such services as he rendered in this behalf. (13) Thomas F. Parker attended a meeting of the corporation, and at such meeting was recognized as the president of the company, and he expended of his own means in attending such meeting the sum of seventeen and $^{95}/_{100}$ dollars. (14) There was no contract or agreement as to compensation between the corporation and petitioners, or either of them, except such contract or agreement as is contained in the action of the stockholders and directors above set forth electing them to be officers of the company, and fixing their salaries, and inducting them into their offices. From these facts, so found by me, I conclude that the petitioners are not entitled to prove in this action the claims against the corporation set up by them, the appointment of the receiver having had the legal effect of discontinuing their right to salaries from the corporation, and, as they have no claims against the corporation except for such salaries, they cannot recover anything as creditors in this action. I disallow Mr. Parker's claim ($17.95) for expenses, because it is a claim originating entirely after this bill was filed. I therefore answer both issues, 'No.' In arriving at my conclusions of fact, stated above, I have considered all the evidence relied upon by the claimants, notwithstanding the objections of defendant, and have sustained all objections made by the claimants, and excluded all evidence objected to by them."

We do not feel at liberty to review the referee's finding of fact as presented to us in the first and second exceptions. Where a fact is found without any evidence tending to prove it, the finding is reviewable by us; but where, without the exclusion of any evidence whatever, the referee and court find that there was no evidence tending to prove an allegation, how can we review the finding without passing upon the weight of the evidence? If we were to say that the court was in error in saying that there was no evidence, and that there was evidence tending to support the allegation, we could not say that the evidence was sufficient to prove the allegation, as that would be passing upon its weight. Therefore the third exception of the petitioners is all that is properly before us, and it is as follows: "(3) For that the referee erred in his conclusions of law as follows: That the petitioners are not entitled to prove in this action the claims against the corporation set up by them, the appointment of the receiver having had the legal effect of discontinuing their right to salaries from the corporation, and, as they have no claims against the corporation for such salaries, they cannot recover anything as creditors in this action." The court below confirmed the report of the referee in all respects.

We frankly admit that this case has given us much trouble, and to it we have given careful consideration. The authorities on the exact point are not numerous, but they are conflicting, and from courts of the highest respectability. In Spader v. Manufacturing Co., 47 N. J. Eq. 18, 20 Atl. 378, in an able opinion by the chancellor, it was held that claims for damages arising from breaches of contract for services, occasioned by the insolvency of the defendant corporation, were entitled to be paid pro rata out of the funds in the hands of the receiver. After calling attention to the fact that, upon the dissolution of a corporation, all its surplus assets, existing after the payment of debts, are returned to its stockholders, the court says: "It could hardly have been the intention of the lawmakers to distribute the surplus of assets, or, in other words, return capital, to the stockholders of the company (that is, to those who deliberately ventured for gain, and pledged their capital for the security of those who were induced to deal with them), and at the same time disregard those who, dealing with those stockholders upon the faith of that security, became justly entitled to damages for breaches of contracts occasioned by an insolvency and suspension that the very capital relied upon was intended to ward off. Such distribution would be the protection of capital against its just liability. * * * I see no reason under this law for distinguishing between cases where the breach of contract precedes the adjudication of insolvency and cases where the breach follows in consequence of that adjudication. The insolvency, suspension of business, and receivership do not extinguish the corporation's life. The chancellor 'may' declare the charter to be forfeited and void, and 'may' direct a division of the surplus assets among the stockholders; but cases may arise, and do arise, where he should not, and does not, exercise that power, because the assets are sufficient to pay creditors, and justify the discharge of the receiver, so that the company may resume its business. Consequently the rule that when a master dies the contract with his servant is terminated is not potent in this consideration." This is the New Jersey rule, and there is much to commend it. But we think that the average ends of justice would be better and more generally subserved by following the New York rule, as laid down in People v. Insurance Co., 91 N. Y. 174, where the court says,

on page 178: "There was no breach of the contract between Mix and the insurance company by either of the parties. It was in process of continued performance according to its terms, and was unbroken, at the moment when the injunction order was served. That operated upon both parties at the same instant, and perpetuated the then existing rights and conditions. Before its service, the company had done nothing to prevent performance, and we must assume was both ready and willing to perform. It had done no act which amounted to a refusal, or which made it unable to carry out its contract. For aught that appears, it would have done so if let alone. But it was not permitted to perform. The state, by the injunction order operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform, or put the other in the wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and to make it liable for a breach, required action on the part of Mix. As a condition precedent, he was bound to show both ability and readiness to perform on his part. He could do neither. Performance by him had become illegal. It would have been a criminal contempt, and possibly a misdemeanor. There could be neither readiness nor ability to do the forbidden and unlawful acts. So that, from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the state, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the state, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation." Again, in distinguishing a different class of cases, the court says, on page 180: "In all of them the companies stopped payment before any intervention of the law, and this, being done by open and public notice, amounted to a voluntary refusal of performance, and therefore a breach of contract, established before the winding-up orders were made and the liquidators appointed. When the court interfered, it found broken contracts, and a liability for a breach already existing, and dealt with what it found. It did not break what was already broken." The court further distinguishes a certain class of cases where property rights survive the death of the parties. We have quoted at length from this opinion because it expresses so clearly our own view of the law. It is cited and followed by the circuit court of the United States in Malcomson v. Wappoo Mills (C. C.) 88 Fed. 680. This rule applies in the case at bar. The petitioners were elected to their respective offices for the purpose of having the ordinary duties of those officers properly performed. Salaries were assigned to them for the proper performance of those duties, and were paid for the full time that they were performed. The company never refused to perform its part of the contract, nor were the claimants in a condition to perform their part after the appointment of a receiver. It is true they do not appear to have been enjoined from doing so, but that was the practical effect of the order appointing the receiver. He was directed to take control of all the property of the company, and to assume entire management of its affairs. This left nothing for the petitioners to do, as any interference with the duties of the receiver would have been a contempt of court. It makes no difference whether their relations with the company were severed or not. It is probable that if the receiver had been discharged, and the company permitted to resume the management of its own affairs, during the continuance of their terms, or perhaps even if before the election of their successors, they would at once have resumed their offices, with all their duties, powers, and emoluments. But it is certain that during the continuance of the receivership they neither did nor could perform such duties, and that their inability to do so did not arise from any adverse action on the part of the company. As they did not perform those duties, they did not earn the salary attached to their performance, and they cannot recover from the defendant for a breach of contract where the defendant has been guilty of no breach. If the receivership had been only partial, extending only to particular property, and leaving the defendant corporation still in the general, and even partial, management of its affairs, the case would be different. If the petitioners rendered any service to the receiver, we do not see why they should not be paid, but they cannot recover in the shape of salaries for offices that were practically in abeyance. When this case was here before (reported in 117 N. C. 471, 23 S. E. 442), all that this court decided was that the petitioners had a right to be heard upon the facts as well as the law. They have now been heard, and, upon the facts as found by the referee, they cannot recover, in our view of the law. The judgment below is affirmed.

TUCKER v. SATTERTHWAITE.

(Supreme Court of North Carolina. June 9, 1900.)

BOUNDARIES — ESTABLISHMENT — EVIDENCE —INSUFFICIENCY.

The sole evidence of a surveyor that he had seen two old trees marked as pointers at the end of a line sought to be established as

the true line of a survey alleged to have been mistakenly described in a grant, was insufficient to justify submission of the question to the jury, where it was not shown that they were marked contemporaneously with the survey, or that they had been recognized as a corner.

Clark and Douglas, JJ., dissenting.

On petition to rehear. Dismissed.

For former opinion, see 31 S. E. 722.

Jarvis & Blow and A. C. Avery, for petitioner. W. B. Rodman and Ernest Haywood, opposed.

MONTGOMERY, J. This case was before us at September term, 1898 (123 N. C. 511, 31 S. E. 722), and it received a most careful consideration on the part of the court, and at the conclusion, while the judgment of the court below was affirmed, there was a division of the court, two members dissenting. After another argument, with full briefs on both sides, upon the rehearing, we have reconsidered the proposition of law before us at that time, with the earnest purpose to rectify any mistake or error under which we may have then labored, if such error should be pointed out to us, and our convictions and opinions are not changed. It will be seen from a reading of the opinion of the court heretofore delivered, and from the dissenting opinion already referred to, that the sole question in the case depends upon the location of the northern boundary line of the Smith grant. The admissions of counsel on both sides, their arguments, and their briefs are an acknowledgment that that was the sole point in the case. It was agreed on all hands that the starting point of the Smith grant was represented by the letter A on the map. The stations B, C, D, E, F, were all admitted and acknowledged stations. The trouble begins from the call from F station. That call is in these words (from F): "West 290 poles into John Jordan's line." Two hundred and ninety poles west from F station does not reach John Jordan's line, but 299 poles will reach John Jordan's line, and to that line the call must go. Bradford v. Hill, 2 N. C. 22; Cherry v. Slade's Adm'r, 7 N. C. 82; Mortgage Co. v. Long, 113 N. C. 123, 18 S. E. 165. The defendant contends, however, that the northern boundary line of the Smith grant was, through mistake, inserted in the grant as running west 290 poles, and that it ought to be changed so as to run north, 74 west, 420 poles, and that there was evidence to that effect which his honor should have submitted to the jury. The only evidence in the case on that point was that of a surveyor (Taylor) that he had seen at the end of the line contended for by the defendant two old trees marked as pointers. That evidence was not sufficient to go to the jury on the point. If a line of marked trees, marked at the time of the original survey of the Smith grant, had been found along the line contended for by the defendant, although not called for in the grant, that would have been sufficient evidence to go to the jury to have the mistake in the course of the grant corrected and explained; or, if there had been evidence that the trees marked at the end of the line contended for by the defendant showed signs of having been marked contemporaneously with the original survey, and had been recognized as a corner or point of the Smith grant, such evidence would have been competent for the same purpose. Graybeal v. Powers, 76 N. C. 66; Reed v. Shenck, 14 N. C. 65; Cherry v. Slade, supra; Baxter v. Wilson, 95 N. C. 137; Davidson v. Shuler's Heirs, 119 N. C. 582, 26 S. E. 340. If there had been a natural object, known or admitted, at the end of the line from station F on the map to the Jordan line, then no parol evidence could have changed that line. The defendant's counsel again insists that the line which he contends for from station F to the Jordan line can be proved to be the true line by a reversal of the Smith grant from the acknowledged starting point A northward. Such a reversal cannot be made in this case for the reasons: First, that from station A no surveyor could hit the next point northward, for no such point has been identified or admitted, and the call from the next to the last station, in the natural order of the survey, is "to the beginning," without any intimation of course or distance; and, second, because, as we have seen, there is no evidence in the case fit to be submitted to the jury tending to show any uncertainty or mistake in the line from F west 290 poles to the Jordan line. It is not essential to the decision of this case, but the writer of this opinion thinks that a prior or previous line, like the one in this case from F west 290 poles to the Jordan line, could be, under proper evidence, altered and controlled by a line running in reversal from A northward, if it had been shown by competent proof that the call from F west 290 poles to the Jordan line was an uncertain line, and was made through mistake, and that the reverse line would show the true line from F to the Jordan line with greater certainty than the one as it now stands in the grant. Harry v. Graham, 18 N. C. 76; Norwood v. Crawford, 114 N. C. 513, 19 S. E. 349; Graybeal v. Powers, supra. Petition dismissed.

CLARK and DOUGLAS, JJ., dissent.

WILLIAMS et al. v. WEST ASHEVILLE & S. S. RY. CO. (FALLS OF NEUSE MFG. CO., Intervener).

(Supreme Court of North Carolina. June 9, 1900.)

CORPORATION—MORTGAGE — FORECLOSURE — COMPANY'S TORT — DAMAGES — CLAIMANT—INTERVENTION—ERROR.

1. Code, § 685, provides that any conveyance of a corporation's property shall be void as to torts committed by the corporation, provided the person injured shall enforce his claim within 60 days of the registration of the deed. *Held*, that it was error to permit a landowner claim-

ing damages for the flooding of his lands by a dam owned by a corporation to intervene in a suit to foreclose the corporation's mortgage, he not having prosecuted his claim within the limit provided by section 685.

2. Code, § 1255, provides that a corporation's mortgage shall not exempt its property from execution on a judgment for its tort. *Held* not to create a lien on the corporation's lands, but only to preserve the claimant's right against the mortgagee; and the claimant's remedy was to reduce his claim to judgment, and levy execution on the lands.

Appeal from superior court, Buncombe county; Coble, Judge.

Suit by G. W. Williams and others against the West Asheville & Sulphur Springs Railway Company. The Falls of Neuse Manufacturing Company was allowed to intervene. From the order allowing such intervention, plaintiffs appeal. Reversed.

Merrimon & Merrimon and Davidson & Jones, for appellants. Chas. A. Moore, for intervener.

CLARK, J. This was an action by certain bondholders secured by a deed in trust upon the defendant's property, alleging insolvency, asking a decree of foreclosure, and a receiver pendente lite. The action was begun in 1894, a receiver appointed soon thereafter, and a decree of foreclosure at March term, 1895, sale thereunder July 6th for the sum of $10,000, and report confirmed at August term, 1895. At the same term the Falls of Neuse Manufacturing Company was allowed to intervene, and the plaintiff bondholders excepted, which exception is one of the matters which now come up for review. The ground of intervention by said Falls of Neuse Manufacturing Company set out in its petition to intervene is that it is the owner of a valuable tract of land and water power which have been injured by water ponded back upon said tract by a dam built by one Carrier on his own land, which dam the defendant railway company subsequently bought and took possession of, and thereafter continued to pond the water back and overflow the land of said petitioner. It was error to allow the Falls of Neuse Manufacturing Company to intervene, and the exception of the plaintiffs thereto must be sustained. The claim of the petitioners, if valid, is an indebtedness of the defendant which has no right to share in the fund raised by the sale under the mortgage, nor is its assertion a germane matter to this action, whose sole purpose is to foreclose said mortgage and disburse the proceeds among the bondholders. The petitioners rely upon Code, §§ 685, 1255. Section 685 has no application except when the prior creditors assert their rights by action within 60 days after the registration of a mortgage or other conveyance. Section 1255 does not apply, because, as said in Pocahontas Coal Co. v. Henderson Electric Light & Power Co., 118 N. C. 232, 24 S. E. 22, it "neither creates nor provides for the creation of a lien." This case is governed by Railroad Co. v. Burnett, 123 N. C. 210, 31 S. E. 602. There Burnett brought an action against a corporation for personal injuries, recovered judgment, and sued out execution. In the meantime, a mortgage had been foreclosed against the corporation, the property had been sold, and a new company was in possession as purchaser. This court said: "The fact that the plaintiff claims under a sale made under a decree of foreclosure by order of court does not affect the rights of the defendant Burnett. The decree was based on the mortgage, and conveyed no more than was conveyed by the mortgage. It conveyed no more than would have been conveyed by a foreclosure of the mortgage under power of sale contained in the mortgage." And says further: "The principle underlying this decision, and upon which it is decided, is that under section 1255 of the Code the mortgage conveyed nothing as against this claim, and, as it conveyed nothing as against this claim, the purchaser got nothing as against this claim by the mortgage sale." The intervener here was not a party to the foreclosure proceeding, and did not seek to be made a party till after the sale had been made under it. The purchaser stands in the shoes of the original debtor, and bought only such interest as he could mortgage as against the Falls of Neuse Manufacturing Company, and subject to any judgment it might obtain, and the Falls of Neuse Manufacturing Company has no right to share in the proceeds of such sale. It must proceed against its debtor and assert its rights by execution against the property, notwithstanding the foreclosure sale, just as was held in Railroad Co. v. Burnett, supra. The same doctrine was reiterated in Belvin v. Paper Co., 123 N. C. 138, 31 S. E. 655, but there the court after judgment took possession of the property, and, having thus prevented enforcement of the execution, it was held that the judgment creditor should share in the proceeds of sale made under orders of the court. But here, as in Railroad Co. v. Burnett, the judgment for tort was obtained after the sale under foreclosure; and after the property was turned over to the purchaser, and there was no obstruction of the petitioner's execution by any action of the court. As to it, the mortgage and any rights obtained under it, either by bondholders or purchasers, are nonexistent. Hancock v. Wooten, 107 N. C. 9, 12 S. E. 199, 11 L. R. A. 466, which holds that in a creditors' bill the creditors uniting in the action to set aside a fraudulent assignment acquire a preference by way of an equitable lien, has no application in this case. Goldberg v. Cohen, 119 N. C. 68, 25 S. E. 714. There being error in admitting the petitioner to intervene over the plaintiffs' exception, it is unnecessary to discuss the other exceptions subsequently raised, for whatever views might be expressed would be obiter dicta. Error.

RUSSELL v. WINDSOR STEAMBOAT CO.

(Supreme Court of North Carolina. June 9, 1900.)

DEATH — INFANTS — RECOVERY — PERSONAL REPRESENTATIVE—MEASURE OF DAMAGES —LIFE EXPECTANCY—EVIDENCE.

In an action by an administrator to recover for the negligent killing of his 5 months old intestate, under Code, §§ 1498, 1499, authorizing the personal representative of a person whose death is caused by negligent act of another, such as would have entitled the injured person to damages had he lived, to recover such damages as fairly and justly compensate for the pecuniary injury resulting from such death, the measure of damages is the difference between such infant's probable gross income, based on his life expectancy, and the probable cost of his living. The expectancy of the life of a child, when not fixed by statute, is a mattter of evidence.

Faircloth, C. J., dissenting.

Appeal from superior court, Washington county; Coble, Judge.

Action by W. J. Russell, administrator of J. M. Russell, deceased, against the Windsor Steamboat Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Pruden & Pruden and Shepherd & Shepherd, for appellant. H. S. Ward, for appellee.

DOUGLAS, J. This is an action brought by the plaintiff, as administrator of J. M. Russell, deceased, to recover damages for the death of his intestate, alleged to have been caused by the negligence of the defendant. The said intestate was a child five months old at the time of his death, and was the son of the plaintiff. All the issues were found in favor of the plaintiff, his damages being assessed at $1,000. There are no exceptions, other than those to the issue of damages. The following is the case on appeal: "The court submitted the issues set out in the record. There was evidence introduced by the plaintiff tending to show that the death of the intestate was caused by the negligence of the captain of the steamer Mayflower, running upon the defendant's line, in that he overloaded and improperly loaded the said steamboat, on account of which she turned over, as alleged in the complaint. Upon the fourth issue, as to damages, the following was the entire evidence: W. J. Russell testified that he was the father of the intestate; that on June 30, 1899, he took passage on the steamer Mayflower, at Plymouth, about 4 o'clock, with his wife and their two children; that one of the children, the intestate, was drowned; that the said child was a boy 5 months old, and had never been sick. R. M. Russell testified that she was the mother of the child; that she was holding him in her arms when the boat turned over, and remembers nothing after that time; that the child was a boy 5 months old, and had never been sick. The defendant introduced no testimony. The court submitted the issues set out in the record to the jury, which they answered as therein stated. The court charged the jury upon the question of negligence, to which no exceptions were taken. Upon the question of damages the court charged as follows: 'If the jury come to answer the fourth issue, as to damages, then they are instructed that the measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. The burden is on the plaintiff to prove by a greater weight of evidence that he has sustained damage; and if the jury fail to find, under the court's instructions, that the plaintiff has sustained any damages, then the jury will answer fourth issue, "None." But if the plaintiff has proved by greater weight of evidence that he has sustained damages, and in what amount, then the jury will give such sum as their answer to the fourth issue.' To this charge the defendant excepted, and this is his first exception. At the request of the plaintiff's counsel the court charged: 'If the jury come to answer the fourth issue, they shall say whether there was any life expectancy, and should estimate as best they can from their judgment and sound sense what that expectancy is, considering the age and condition of health of the deceased, then find what, in their judgment from all the circumstances, would have been the gross income, and from that gross income deduct what in their judgment would have been the expenditures of the intestate for the entire period of that expectancy; and the present value of the difference between that gross income and the expenditures will be the measure of damages which you should give.' To this charge the defendant excepted, and this is his second exception. The defendant in apt time asked the court to charge: '(1) That, upon all the evidence introduced, the plaintiff is not entitled to recover substantial damages against the defendant; and the jury will, even if they answer issues 2 and 3, "Yes," answer the fourth issue, "Nothing." ' This charge the court refused, and defendant excepted, and this is his third exception. '(2) That, upon all the evidence introduced in this cause, the plaintiff is entitled to recover only nominal damages; and if the jury answer issues 2 and 3, "Yes," they shall answer the fourth issues, "Five cents and the cost." ' This charge the court refused, and this is his fourth exception. The jury answered the issues as shown in the record, and the court gave the judgment as therein set forth." Judgment was rendered for the plaintiff in accordance with the verdict.

This case, as presented to us, raises the sole question whether more than nominal damages are recoverable for the negligent killing of an infant incapable of earning anything, without direct evidence of pecuniary damage other than sex, age, and condition of health of the deceased. In the very nature of things, a child 5 months old has no present earning capacity, and has not reached a sufficient

state of development to furnish any indication of his probable earning capacity in the future, other than the fact of being a healthy boy. This is all we know of him, or ever can know. The real question before us is involved in the defendant's second prayer,—that upon the admitted facts the plaintiff is entitled to recover only nominal damages. If there is no error in its refusal, there is no error in the case. If the plaintiff can recover substantial damages, then his prayers are undoubtedly correct. We have examined a great many authorities, but find that the large majority are based upon local statutes, or predicated upon the parent's right to sue for loss of services. In the case at bar the father does not sue in his own right, but bases his cause of action exclusively upon his right to recover, as administrator, the net value of the child's life, —not what his services might have been worth to some one else during his minority, but what his entire life would have been worth to himself, had he lived. In other words, the plaintiff brought his action as he would have done had his intestate been of adult age. In the first place, we must bear in mind that our statute is not like Lord Campbell's act, which was in fact, as it was entitled, "An act for compensating the families of persons killed by accidents." Our statute does not regard the family relation, but gives the cause of action to the personal representative of the deceased, without distinction as to age. It is as follows: "Whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors, shall be liable for an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death and although the wrongful act, neglect or default, causing the death, amount in law to a felony." Code, § 1498. Suppose that the child had survived, but as a cripple, condemned to a life of dependence, and perhaps of pain, could he not have recovered in a suit by his next friend? If so, cannot his personal representative recover under our statute? We think he can. The position of the defendant is well illustrated by the following extract from the brief of its learned counsel: "'The general rule for the measure of damages in the case of the negligent killing of an infant is laid down in Hurst v. Railway Co., 84 Mich. 539, 48 N. W. 44, and is followed in about every state in which this question has been passed upon: 'In a suit by an administrator of the estate of a deceased infant [23 months old], whose parents are entitled to the damages recoverable under How. Ann. St. § 8314 [similar to the North Carolina statute], for his negligent killing, the measure of such damages, if any are recoverable in such cases, is limited to his prospective earnings until of full age, which damages are special in their character, and must be specially pleaded and established by the evidence.' The following authorities more than sustain this ruling; the courts in some of the states taking cognizance of the fact that the expense of educating and maintaining the child, deducted from possible earnings until majority, would leave nothing, and hence only nominal damages, if that, could be recovered." Its error lies in the assumption that the plaintiff's cause of action is based upon the loss of services, which would legally cease at the majority of the deceased. The plaintiff, as father, would probably have been entitled to his common-law remedy; but, in pursuing it, he would have encountered the very difficulties so clearly pointed out by the defendant, and illustrated by the cases it cites. Such cases, whatever may be their decision, cannot militate against our opinion in the case at bar, but may tend to sustain it, as many of them have allowed substantial damages. Admitting, for the argument, that the services of an infant may be worth nothing after deducting the cost of his rearing, maintenance, and education, it does not follow that his services would be worth nothing to himself in his years of manhood. Education, while requiring a cash outlay more or less heavy, that may not be immediately productive, is none the less a safe investment, from which most handsome profits may be reasonably expected. On the other hand, if the services of an infant have any net substantial value, a fortiori they would be of greater value after the completion of his education, and his attainment to the strength and ability of manhood. In cases like the present the plaintiff is entitled, under section 1499 of the Code, to recover "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." Section 1500 provides that "the amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy"; that is, it goes to the next of kin, as ascertained by section 1478. We see no distinction in the law, nor reason for distinction, between the death of a child and of an adult. The measure of damages is the same, but we frankly admit that the difficulty of its application is greatly increased in the case of an infant. Still, the jury must do the best they can; taking into consideration all the circumstances surrounding the life that is lost, and relying upon their common knowledge and common sense to determine the weight and effect of the evidence. Where life is lost by reason of the actionable negligence of another, the measure of damages is the present value of the net pecuniary worth of the life of the deceased, to be ascertained by deducting the probable cost of his own living from the probable gross income derived from his own exertions, based upon his

life expectancy. This expectancy is fixed by section 1352 of the Code, but must be considered in connection with the "other evidence as to the health, constitution, and habits" of the deceased. The youngest age given therein is 10 years, at which the expectancy is fixed at 43.7. This is probably a misprint for 48.7, as the expectancy at 11 years of age is fixed at 48.1, and it is hardly probable that the expectancy at 11 years would be greater than that of any succeeding age, and yet 5 years greater than that at 10 years of age. Moreover, it appears that the expectancy at 10 years is given by the standard life insurance tables at 48.36 years, being greater than that of any subsequent age. We do not mean to say that the average infant of 5 months has a greater expectancy of life than one of 10 years, if as great, as we believe that medical statistics show a greater proportion of deaths under 2 years of age than at any subsequent period of life. This, not being fixed by statute, is a matter of evidence, like other circumstances of "health, constitution, and habits."

We are not aware of any English case in which damages have been allowed for the death of a child of such tender years as to be incapable of earning wages, but in this country it is well settled by the weight of precedent that in such cases substantial damages may be recovered, even upon a suit for loss of services. 8 Am. & Eng. Enc. Law (2d Ed.) 919; Tiff. Death Wrongf. Act, §§ 164, 165; Thomas, Neg. 466; 5 Rap. & M. Ry. Dig. § 403; Railway Co. v. Barker, 19 Am. & Eng. Ry. Cas. 195, 212, and notes. In that case a judgment of $2,265 for the death of a child 5 years old was sustained. The following cases are cited as a few of the many examples of judgments sustained: In Railroad Co. v. Becker, 84 Ill. 483, $2,000 was given for death of son 6 or 7 years old. In Railway Co. v. Dunden, 37 Kan. 1, 14 Pac. 501, $3,000 was given for boy of 11 years and 8 months. In Strutzel v. Railroad Co. (Minn.) 50 N. W. 690, $2,300 was given for boy 6 years old. In Ross v. Railway Co. (C. C.) 44 Fed. 44, $2,500 was given for boy 5 years old. In Ewen v. Railway Co., 38 Wis. 613, $2,000 was given for boy 8 years old. In Hoppe v. Railway Co., 61 Wis. 359, 21 N. W. 227, $1,000 was given for boy 16 months old. In Schrier v. Railway Co., 65 Wis. 457, 27 N. W. 167, $2,000 was given for boy 18 months old. In Ihl v. Railroad Co., 47 N. Y. 317, 320, the court, in sustaining a judgment for $1,800 for the death of a boy 3 years old, says: "The absence of proof of special pecuniary damage to the next of kin resulting from the death of the child would not have justified the court in nonsuiting the plaintiff, or in directing the jury to find only nominal damages. * * * It cannot be said, as matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived. * * * It has been held by this court in several similar cases that the statute does not limit the recovery to the actual pecuniary loss proved on the trial." In Birkett v. Ice Co., 110 N. Y. 504, 508, 18 N. E. 110, the court says: "In estimating the pecuniary value of this child to her next of kin, the jury could take into consideration all the probable or even possible benefits which might result to them from her life, modified, as in their estimation they should be, by all the chances of failure and misfortune. They have no rule but their own good sense for their guidance, and they were not in this case bound to assume that no pecuniary benefits would come to the next of kin from this child after her majority."

There is another view of the question that forces itself upon our minds, which, perhaps, we are not called on to consider; but, unless forced to do so by the overwhelming weight of authority or the inexorable logic of legal conclusion, we would be reluctant to admit that a human life, however lowly or feeble, had no value, in the contemplation of a common carrier. Even a new-born colt or calf has an actual value, entirely dependent upon its future usefulness or salability. It is matter of common knowledge that during the days of slavery a healthy negro child, even at the breast, was considered as worth at least $100. Let us consider the contrast. A helpless negro baby, lying upon the floor along which he could not crawl, and born to a state of hopeless bondage, was worth to the owner at least $100 as a chattel; and yet another baby, with generations of inherent qualities behind him, and the magnificent possibilities of American citizenship before him, is not worth to himself, or to the country whose destinies he might one day have shaped, even the penny necessary to carry the costs. This view is entirely too incongruous to strike our fancy. Upon the greater and better weight of authority, as well as our own convictions of natural justice and of public policy, we are constrained to hold that the plaintiff can recover substantial damages in the case at bar. In the absence of error in the trial, the judgment of the court below is affirmed.

FAIRCLOTH, C. J., dissents.

BOONE et al. v. PEEBLES.

(Supreme Court of North Carolina. June 7, 1900.)

APPEAL—COMPETENCY OF EVIDENCE—DIVIDED COURT—AFFIRMANCE—PAYMENT—STATUTORY PRESUMPTION—DEFENSE.

1. Where evidence was admitted as competent by the trial court, and the members of the court sitting on appeal are equally divided on the question of its competency, the opinion of the trial court must prevail.

2. A defense based on statutory presumptions of payment or abandonment cannot be maintained as to rents alleged to have been received after Code 1868 went into effect, which Code contains no provision as to presumption of payment and abandonment.

Appeal from superior court, Northampton county; Norwood, Judge.

Action by J. W. Boone and others against R. M. Peebles, administratrix of J. T. Peebles. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

R. B. Peebles, for appellant. T. N. Hill, T. W. Mason, and F. D. Winston, for appellees.

FURCHES, J. This is an action for money received by defendant's intestate from the rent of lands belonging to plaintiffs and wrongfully appropriated to his own use. The defense relied on what seem to be the pleas of presumptions and abandonment. In the courts of the trial, J. W. Boone, a party to the action, was allowed to testify as to his own age and the ages of the other plaintiffs, which knowledge he said he got from the family Bible; that this Bible was in the possession of his sister; and that he had no other knowledge as to the dates of their births. This question and answer were objected to by defendant, objection overruled, evidence admitted, and defendant excepted.

Owing to the relationship of Justice CLARK to one of the plaintiffs, he did not sit in this case; and, the other members of the court being equally divided upon the competency of this evidence, the opinion of the court below must prevail, and the evidence held to be competent. Puryear v. Lynch, 121 N. C. 255, 28 N. E. 210; Town of Durham v. Richmond & D. R. Co., 113 N. C. 240, 18 S. E. 208.

We do not think the defendant can sustain her defense upon the pleas of the statute of presumption and abandonment. The Code went into effect in August, 1868, taking the place of the Revised Code, and the Code now contains no statute of presumptions; and it appears that no part of the rents claimed were received until after 1868, when the Code went into operation. The rights of infants and femes covert are saved under chapter 65, §§ 5, 9, Rev. Code, and also by section 148 of the Code. This action having been commenced the 20th of September, 1883, chapter 113, Acts 1891, has no application. It seems that defendant's intestate was a tenant in common with the plaintiffs of the land from which the rents were collected, and no demand had been made to start a presumption of ouster, which requires 20 years. Shannon v. Lamb (at this term) 35 S. E. 232; Jolly v. Bryan, 86 N. C. 457. But, as there is no such statutory defense, that is the end of the case on this plea. It does not seem that defendant would have been protected by the statute of limitations if it had been pleaded, but, as it was not pleaded, it is not necessary to consider the case in that aspect. And, there being no statutory presumption of payment or abandonment, the judgment of the court must be affirmed, as we can see nothing in the objections made to parties. Some of them, it seems to us, were unnecessary (the administrators), but this will not prevent the rightful plaintiffs from recovering. The judgment of the court appealed from is affirmed.

CLARK, J., did not sit.

WARD v. ODELL MFG. CO.

(Supreme Court of North Carolina. June 9, 1900.)

INJURY TO MINOR SERVANT—INSTRUCTIONS.

An instruction in an action for an injury received by a child of 11 years, that, "if he did not fully realize and know the danger he incurred," he was guilty of no contributory negligence, is not ground for reversal, because of failure to insert the words "if any," where the evidence that he was injured near the place in question is conclusive that there was danger, and the jury were in no respect prejudiced by the omission. By divided court.

Appeal from superior court, Iredell county; Shaw, Judge.

Action by Ebbitt Ward, by next friend, against the Odell Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed by divided court.

B. F. Long and W. J. Montgomery, for appellant. Armfield & Turner and H. P. Grier, for appellee.

CLARK, J. Mr. Justice FURCHES, having been of counsel, does not sit; and, the court being equally divided, the judgment below is affirmed. Boone v. Peebles (at this term) 36 S. E. 193, and cases there cited.

The only error found by the other two members of the court as to this, the second trial below, is the following instruction: "If the jury should find from the evidence that, at the time of the injury complained of the plaintiff was only eleven years of age, and that on account of his tender years, his immaturity and inexperience, he did not fully realize and know the danger he incurred in passing said workbench where wires were being cut, he was guilty of no contributory negligence in so doing." If this instruction had read, "did not fully realize and know the danger, if any, he incurred," it is conceded there would have been no error. But the jury could not possibly have been misled into thinking that the judge meant to decide the issue of fact that there was danger, when he had repeatedly told them that this was a question of fact for the jury. The whole charge must be construed together, and not a detached sentence. State v. Boon, 82 N. C. 637. This is not the case where the judge has given two contradictory instructions as to the law, in which case the jury may well be confused as to which to take. But here the whole charge, taken together, is per-

fectly intelligible and consistent. Juries are presumed to be intelligent and honest, and are as much an integral part of our court system as the judges, and, in their department, probably make as few mistakes in finding the facts as the judges do in finding the law or in applying it. Besides, the fact that the plaintiff was injured and lost his eye at or near that bench is conclusive that there was danger ("Res ipsa loquitur"), and the jury in no aspect were prejudiced by the inadvertent omission of the words "if any." The judge very properly adverted to the immaturity and inexperience of a child 11 years of age employed in a large manufactory filled with dangerous machinery, and told the jury correctly that, if that was the cause of his approaching the danger, he was not guilty of contributory negligence. The humanity of the age has, in very many of the states, placed on the statute books laws forbidding the employment of children under 14 years of age in factories. So far as these statutes are based upon the inhumanity of shutting up these little prisoners 11½ to 12 hours a day (the ordinary factory hours in this state, according to the state's official publications) in the stifling atmosphere of such buildings, or depriving them of opportunity for education, or using the competition of their cheap wages to reduce those of maturer age, these are arguments on matters of public policy which must be addressed solely to the legislative department. But there is an aspect in which the matter is for the courts; that is, whether it is negligence per se for a great factory to take children of such immature development of mind and body, and expose them for 12 hours per day to the dangers incident to a great building filled with machinery constantly whirring at a high speed. The children, without opportunity of education, without rest, their strength overtaxed, their perceptions blunted by fatigue, their intelligence dwarfed by their treadmill existence, are overliable to accidents. Can it be said that such little creatures, exposed to such dangers against their wills, are guilty of contributory negligence,—the defense here set up? Does the law, justly interpreted, visit such liability upon little children? From the defendant's brief it would seem that this child had been put to work in the factory at 8 or 9 years of age, as it states he had been working there over two years when injured. Whether they are thus imprisoned at work too early by the necessities of their parents or not, it is not the consent of the children. It is not law, as the appellant's counsel insists, that the factory company is not liable, because the father hired the child to the company. It is the child's eye which was put out, not the father's. The father could not sell his child, nor give the company the right to expose him to danger. The factory superintendent put these children to work, knowing their immaturity of mind and body; and when one of them, thus placed by him in places requiring constant watchfulness, is injured, every sentiment of justice forbids that the corporation should rely on the plea of contributory negligence. The judge certainly committed no error in leaving it to the jury to find that there was no contributory negligence, if the child incurred the danger which put out his eye by reason of his ignorance arising from his immaturity of years and inexperience. Affirmed.

MONTGOMERY, J. The court is equally divided in opinion,—Justice FURCHES not sitting on the hearing,—and the judgment below for that reason stands. I desire, however, to express my views on the merits of the case. The plaintiff, a minor, brought, through his next friend, this action to recover of the defendant damages for a personal injury which he sustained through the alleged negligent keeping and use of a workbench and tools by the defendant in its cotton mills, where the plaintiff was employed. The room in which the plaintiff was hurt was a very large one, contained nearly 200 looms, and was divided by an imaginary line into two equal sections. Wood was the loom fixer or boss of one section, and Suther of the other. The plaintiff worked under the supervision of Wood,—his work being, in his own language, "to carry quills from the weaver room upstairs to the quiller room to be refilled"; and the workbench at which he was hurt was in the corner of the room, and in the section under the control of Suther. Upon this workbench (about three feet wide by six feet long) tools of various kinds were kept for use in the factory,—for mending anything that broke, and especially for fixing and mending pattern chains and picker sticks. The plaintiff testified that he was, on the day of his injury, sent out of his section by Wood to Suther's section to do the work of the quiller boy in Suther's section, who was sick or absent, and that while engaged in the work assigned him he had to go up an alley to the workbench, and then turn and go down another alley to get quills. He further testified that "Dan Ryan was cutting the wire for pattern chains with a hammer and cold-chisel, and I was passing by the workbench with a turn of quills, and looked up to see what time it was, and just as I looked up a piece or scale of wire struck me in the eye." He further said that he had frequently, before that time, seen Dan Ryan engaged in the same work at the bench. Dan Ryan's testimony was, in substance, that he had been employed by the defendant for seven or eight years, and his duty was that of "rolling beams," and when he put on a warp for Ward he built pattern chains; that, while he was cutting wire for this latter purpose with a chisel and hammer, he saw plaintiff rubbing his eye, and at the same time declaring that something had gotten into it. This witness further said: "I

put wire in vise and struck it with chisel, and it flew off. Wood ordered me to build chains, and I had to take it to the bench to build it. Usually they have wires cut, but none were there this time. The man whose business it was to cut wires had nippers. My regular business was rolling beams. Wood did not tell me to build this, but he told me whenever he was busy to build pattern chains and put them on. The men furnished me no nippers, but when I needed them I went to Wood to get them if he was in there. They kept chisel and hammer there. Wood was not in there at this time." There was other evidence to the effect that the cold-chisel, vise, and hammer were kept on the bench, and used for cutting wire. Wood testified, for the defendant, that he did not send the plaintiff to Suther's section, and that he had never ordered or allowed Dan Ryan to use the bench and tools for any purpose. Suther testified that Ryan never used the bench in work hours, and at no time for the company; that the plaintiff was not in his section during work hours on the day on which he was hurt. This witness further testified that during the dinner hour "Ryan and plaintiff were standing at the work bench. I heard Ryan say to Ward, he had better go away,—'This might fly off and hurt you;' and plaintiff stood there; and I heard the vise snap, and the boy threw his hand up to his face and got down; and I went up to him and asked him what was the matter, and he said, 'Dan Ryan has put out my eye.' I took him by the hand and led him through my section to the door, and met his boss and said, 'Mr. Wood, here is your boy, with his eye hurt'; and he said, 'How?' and I told him he and Ryan were fooling with a top. And I came back upstairs, and saw the same tools always there, and a top, lying on the bench. He was trying to get the head of the screw off. He had a screw in the vise, and it turned up and flew out. Nobody in the mill but one woman in Wood's section. The plaintiff had no business on this section." The jury, whatever may be the justice of the verdict, found those controverted matters for the plaintiff. The instruction which his honor gave to the jury in respect to the relation between Wood and the plaintiff (that is, as to whether Wood and the plaintiff were fellow servants, or Wood sustained the relation of vice principal), and the instruction in reference to the nature and character of the tools and the use made of them by the defendant, furnish the defendant's chief grounds of complaint against the verdict and judgment. As to the first instruction, his honor told the jury that, if they believed the evidence, the plaintiff and Wood and Suther were not fellow servants, but that Wood and Suther were vice principals, and that the plaintiff by his employment did not assume the perils arising from their negligence. On this point it may be well to recite the evidence. The plaintiff testified that: "Wood and Suther were the bosses of the room where I was at work. Wood had control of the upper end of the mill to the right as you go in the door, and Suther the other half. Wood was my boss." He further said: "If I had refused to go in Mr. Suther's department, I would have been discharged." Another witness, J. D. Johnson, a loom fixer, who had worked in the room where the boy was injured, testified that when he worked for the defendant they (Wood and Suther) "were my bosses. I think they had a right to employ hands. Mr. Wood employed me once when I returned from Charlotte. Don't know that they had a right to discharge hands." W. R. Odell testified that: "Mr. Wood and Mr. Suther, in their respective sections, were loom fixers. In each section were about 25 hands. They had no authority to employ or discharge hands from their sections. The superintendent had authority." On cross-examination the witness said: "Wood and Suther directed the hands in their sections. If hands disobeyed, they reported to superintendent and recommended their discharge, which were usually followed." Wood, a witness for the defendant, testified that he had "authority over the hands to keep them at work. No authority to discharge and employ hands. Referred them to superintendent." On cross-examination, witness said: "I was section boss. Hands had to obey. If a hand disobeyed my orders, I reported it to superintendent, and he usually acted on my recommendations. I kept such hands as I could control." Suther testified that: "The bench was for both sections. Hands under my control, and if they did not suit me I reported them to superintendent, and my recommendations as to their discharge would be followed."

Upon a full consideration of the whole of the evidence, we are satisfied that his honor's instruction that Wood and Suther were vice principals was correct. After all that has been written and spoken on the subject, it is still a difficult question to decide who is a fellow servant. In Dobbin v. Railroad Co., 81 N. C. 446, Judge Ashe, for the court, said: "And, so far as we have been able to find, no definition of the relation as a test applicable to all cases has as yet been adopted by the courts, and we do not think can be, so variant are the relations subsisting between master and servant, principal and agent, co-laborer and employé, in the various enterprises and employments, with their numerous and divers branches and departments; the cases frequently verging so closely on the line of demarkation between fellow servants or co-laborers and what are called 'middlemen' that it is difficult to decide on which side of the line they fall. Each case in the future, as heretofore, will have to be determined by its own particular facts." It is further said in that opinion that, "to constitute one the 'middleman,' he must be more than a mere foreman to oversee

a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and, in case of dereliction, report them. He must have entire management of the business,—such as the right to employ hands and discharge them, and direct their labor, and purchase materials, etc. He must be an agent clothed in this respect with the authority of the master, to whom the laborers are put in subordination, and to whom they owe the duty of obedience." In Patton v. Railroad Co., 90 N. C. 455, 1 S. E. 863, Judge Merrimon, for the court, after stating that there seemed to be no well-settled rule classifying the agents and servants of a common employer into such as have authority to stand for and represent the employer in respect to the persons and things with which they are charged, and such as have no authority, said: "Thus, an employer might confer upon a particular laborer, charged to do a particular sort of service, but who simply, by the nature of his employment, would have no authority to represent or bind his principal in any respect, power to employ other like laborers with himself to do the service to be done, to direct and command them when, where, and how to work, to control and superintend them, and to discharge them from employment, in his discretion, although he should labor with and as one of them. And there can be no question that the employer would be answerable for the misfeasance or nonfeasance of such agent in the course of his employment, and in the exercise of the power thus conferred upon him. This is so because the agent in such case would be expressly authorized to represent—act for and in the place of—his employer in the business designated, and within the compass of the power conferred." In the late cases of Mason v. Railroad Co., 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845; Logan v. Railroad Co., 116 N. C. 940, 21 S. E. 959; Shadd v. Railroad Co., 116 N. C. 968, 21 S. E. 554; and Turner v. Lumber Co., 119 N. C. 387, 26 S. E. 23,—the rule seems to have been simplified. In the last-mentioned case the court said, "The test of the question whether one in charge of other servants is to be regarded as a fellow servant or a 'middleman' is involved in the inquiry whether those who act under his orders have just reason for believing that the failure or refusal to obey the superior will or may be followed by a discharge from the service in which they are engaged." That principle is the one announced in the other cases just above referred to. But it is argued by the defendant's counsel that Wood had no power to employ or discharge the hands under his control. It is true that the secretary of the company, Mr. Odell, made that general statement; but he, on cross-examination, and also Wood and Suther, said that the hands were under the direction and control of Wood and Suther, and that whenever they reported a hand to the superintendent, and recommended his discharge, such discharge followed. There was no evidence that the hands under the control of Suther and Wood ever came in contact with or received even the least order from the superintendent, or that he ever put his foot in this room. On this point it was said in Turner v. Lumber Co.: "Though the authority to employ or discharge the laborers subject to him may be evidence to show that the fear of his loss of employment in case of disobedience of the orders of the company is well founded, it is not essential that it should always appear that such authority is expressly given. Mason v. Railroad Co., supra. To concede that is to afford opportunity to evade just responsibility by making the rule (when it never will nor can be carried into effect) that the power to discharge shall be lodged in another than the immediate superior, though the latter's recommendations of dismissal from service are always acted upon favorably. Mason v. Railroad Co., supra. * * * When a servant never comes in direct contact with, or receives orders or instructions from, one higher in position or power than the foreman, he is justified in looking upon the foreman as the very embodiment of the authority of a corporation. Mason v. Railroad Co., supra; Bailey, Mast. Liab. p. 341; McKinney, Fel. Serv. § 14. There is, therefore, no inflexible rule, growing out of the name or term, that a foreman exercising authority over those who work in a manufacturing establishment is or is not a vice principal, but the question whether he is a fellow servant or alter ego of the company depends upon the proof in each case of the relations subsisting between the two. Wood, Mast. & S. § 450."

The most important part of the defendant's establishment was the keeping of these looms in operation. If they ceased to be worked, there could be no product of manufactured goods. Wood and Suther, the loom fixers and bosses, who had control and direction of the looms and hands and of the bench and tools, were the only persons who could be expected or looked to to keep these looms in motion; and they, as we have seen, had power to employ and discharge hands, and to direct and control them in their duties. Wood and Suther, then, were vice principals, and the jury found that the plaintiff was injured by the negligent handling of the bench and tools. The judgment of the court below would be affirmed, therefore, if there was no error in the second instruction given by his honor, in reference to the nature and character of the tools, and the use made of them by the defendant. But there was error in that instruction, and of so serious a nature that the case must go back for a new trial. We might have refrained from deciding the question whether Wood and Suther were vice principals or fellow servants of the plaintiff, but it is the chief question in the case, and the one chiefly argued by the counsel on both sides, and the one they most desire to be decided. Now, as to the second instruction of the court, his

honor, in his charge, had repeatedly, under proper instructions, left to the jury, for their determination upon the facts, whether or not it was dangerous for the plaintiff to go to or be near the workbench at the time the injury is said to have occurred; that is, whether the manner in which the tools were being used at the time of the injury made it dangerous for passers-by, and whether the defendant had knowledge of such danger, or reasonably ought to have had such knowledge. It was a lengthy charge, and that phase of the evidence and the law applicable thereto was dwelt upon over and over. But in the latter part of the charge his honor twice assumed that there was danger in the manner in which the tools were used on the bench at the time of the accident. As I have said before, he had frequently left to the jury to find whether there was danger in the manner of the use of the tools, but we cannot tell what effect the latter part of the charge on that head had with the jury. They might have understood that that matter was left with them, but they might also have thought that when the judge, in the latter part of his charge, assumed that there was danger in the use of the tools, that was the conclusion at which he had arrived, and they might have been influenced from that view. The instructions complained of were in these words: "If the jury should find from the evidence that at the time of the injury complained of the plaintiff was only eleven years of age, and that on account of his tender years, his immaturity and inexperience, he did not fully realize and know the danger he incurred in passing near said workbench, where wires were being cut, he was guilty of no contributory negligence in so doing, and you should answer the second issue, 'No.' If the jury should find from the evidence that the plaintiff had sufficient capacity to know, and did know, said danger, but went in close proximity to same at command or direction of the defendant, he was guilty of no negligence in so doing." When we look over the whole charge, I find it explicit, and covering well the points in the case, and the error I have pointed out must have been an inadvertence. But I cannot say that it had no effect upon the minds of the jury. There was no other error in the case. I think there should be a new trial.

FURCHES, J., did not sit at the hearing of this case.

HOUCH et ux. v. PATTERSON et al.

(Supreme Court of North Carolina. June 7, 1900.)

WILLS—DEVISE CONSTRUED—NATURE OF ESTATE.

Testator devised lands to his three children and their children, to be divided into three lots of equal value, as near as may be, the children to have the entire control and use of lands allotted to each, and, in case either should die and all their children, then their share to revert to the survivor of testator's or their children. *Held*, that the children were seised in fee of the portions of land devised to each, and not as tenants in common with their children.

Appeals from superior court, Caldwell county; McNeill, Judge.

Action by A. F. Houch and wife against S. L. Patterson and others. From the judgment rendered, both parties appeal. Reversed.

Edmund Jones, for defendants.

FAIRCLOTH, C. J. This is a friendly action for partition, brought here for construction of J. C. Horton's will, which is as follows: "I give to my three children and their children, namely, Amelia Ann Cowles, Margaret Rebecca Houch, and James Dickson Horton, all my lands, after the death of myself and wife, to be equally divided into three lots of equal value, as near as may be; my children above named to have the entire control and use of the lands allotted to each one of them; and in case either one of them should die, and all of their children, then, and in that case, their lot or lots of land given under this will shall revert back to the survivors of my children or their children." Each daughter has children living. James Dickson Horton disappeared in 1889, and has not been heard from since. The clerk adjudged that he died without issue. On appeal, his honor adjudged that Margaret Houch and her children are tenants in common and owners in fee of an undivided one-half interest in the lands described in the complaint, and that Amelia Cowles and her children are tenants in common in fee of the other undivided one-half. Appeal by both parties.

The question, then, is, do Amelia Cowles and her children hold as tenants in common, or does Amelia have an estate in fee, and so with Margaret Houch? We have no better rule in construing wills than to find the intention of the testator. In Moore v. Leach, 50 N. C. 88, the devise was "to his daughter and her children," she having children at the date of the will. The court held, nothing appearing in the will to manifest a contrary intention, that the daughter and her children took a joint estate in fee. In the present case we think that by looking at all the parts of the will a different intention is manifest. The direction is that the land be divided into "three lots of equal value"; "my children above named to have control," etc., of the lands allotted "to each one of them," and, in the event of death, the land to revert back to "the survivors of my children and their children." We think the testator's intention was to give his lands to his three children, and, if either of the three should predecease him leaving children, then those last-named children should take the same that their parent would have taken if he or

she had survived the testator. Our conclusion is that Amelia Cowles and Margaret Houch are seised in fee of one-half interest each in the lands described in the complaint. This disposes of the executor's appeal also. This will be certified, so that the parties may proceed according to this opinion. Reversed.

GERMAN LOOKING-GLASS PLATE CO. et al. v. ASHEVILLE FURNITURE & LUMBER CO. et al.

(Supreme Court of North Carolina. June 7, 1900.)

INSOLVENCY—PRIOR ATTACHMENT LIENS—JUDGMENTS—IRREGULARITY—EFFECT.

Where foreign creditors of an insolvent domestic corporation procured judgments in the state of their residence, where the corporation had a place of business, the fact that such judgments were irregular, and were used in evidence in a subsequent attachment suit against the corporation in North Carolina, in which such creditors were decreed to have a lien on the attached property, did not affect the attachment lien so as to require such creditors to share equally with other unsecured creditors in a subsequent suit in equity to subject all the property of the corporation to the claims of its various creditors.

Appeal from superior court, Buncombe county; Starbuck, Judge.

Action by the German Looking-Glass Plate Company and others against the Asheville Furniture & Lumber Company and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Chas. A. Moore and F. A. Sondley, for appellants. T. H. Cobb and W. W. Jones, for appellees.

FURCHES, J. After examining a record of over 300 pages of printed matter, we hope we sufficiently understand the facts of this case to decide the questions of law presented by the appeal. It seems: That plaintiffs and the defendants the First National Bank of Springfield, Ohio, and the Mad River National Bank were creditors of the Asheville Furniture & Lumber Company. That plaintiffs and the defendants the First National Bank of Springfield and the Mad River National Bank all brought suits in the superior court of Buncombe county upon their respective claims. The Ohio banks commenced their action on the 24th of November, 1891, on which day they sued out attachments, which were levied on property of the Asheville Furniture & Lumber Company, and at December term of said court the First National Bank of Springfield, Ohio, recovered judgment against the Asheville Furniture & Lumber Company for $20,726.40, and the Mad River National Bank recovered judgment against the Asheville Furniture & Lumber Company for $7,053.60. And afterwards these two actions, by consent of all parties, were consolidated, and at August term, 1895, of said court these parties in this consolidated action recovered judgment upon their attachment proceedings, condemning the property so attached, and against the Battery Park Bank, the Western Carolina Bank, and the National Bank of Asheville, into whose hands the attached property had gone, and who had intervened in the attachment proceedings, for the sum of $11,000, as the value of the property attached, and $2,488, as damages for the detention, etc., of said attached property. That at March term, 1892, of said court, the East Tennessee National Bank recovered a judgment against the Asheville Furniture & Lumber Company for $5,104.12, upon which, it seems, an attachment was levied on property of the Asheville Furniture & Lumber Company in Swain county. That on the 15th of August, 1895, the German Looking-Glass Plate Company and the Atlanta Paper Company commenced this action as a creditors' bill. In this action plaintiffs asked for an injunction against the Ohio banks, enjoining them from receiving the money recovered on their attachments, and against the Battery Park Bank, the Western Carolina Bank, and the National Bank of Asheville, from paying said money to the Ohio banks; and on the 15th of September, 1898, the injunction was granted, and a receiver appointed, from which order the Ohio banks appealed. The Ohio banks held notes against the Asheville Furniture & Lumber Company, a North Carolina corporation, a part of whose directors lived in Ohio, where it seems to have had an office and place of business, and where some of the indorsers on said notes resided; and it seems that these Ohio banks had sued on these notes in the state of Ohio, and had recovered judgments there against the Asheville Furniture & Lumber Company, as well as against the indorsers. That they had sent transcripts of these judgments here, which were used as evidence in the action of the Ohio banks in their actions, and attachments in Buncombe superior court, in which they recovered their judgments against the Asheville Furniture & Lumber Company and the intervening defendants therein.

There is no suggestion but what the notes given to the Ohio banks were genuine, and that the Asheville Furniture & Lumber Company owed these banks the debts for which said notes were given. But it is contended by the German Looking-Glass Plate Company and the other plaintiffs in this action that there was an irregularity in the proceedings in Ohio by which the Ohio banks procured said judgments in the Ohio court; and the greater part of the arguments in this court were directed to a discussion of that question. It may be that there was such irregularity as that contended for, but we do not say that there was, as it does not become necessary for us to pass upon that question, as we do not think it material to the determination of the case on appeal. The rights of the Ohio banks do not depend upon the regularity by which the Ohio judgments were obtained, but upon the judgments which these banks recov-

ered against the Asheville Furniture & Lumber Company in the superior court of Buncombe county, and the judgment of said banks (in the consolidated action) recovered against the interveners in the attachment proceedings. These are regular, and are still in force and unsatisfied. The Ohio banks would have had a right of action against the Asheville Furniture & Lumber Company on their debts and upon their notes, and the Ohio judgments were only used as evidences of indebtedness in the actions of the Ohio banks against the Asheville Furniture & Lumber Company in the action in the superior court of Buncombe; and the fact that evidence may have been offered on the trial of that action that would have been excluded (if such was the case) cannot make said judgments irregular and void. Indeed, we do not understand that this is contended by the plaintiffs in this action. It was said that some of the parties interested in the Ohio debts—judgments—were stockholders and directors in the corporation, the Asheville Furniture & Lumber Company; but, if this were true, it did not prevent them from dealing with the Asheville Company, nor did it prevent the Ohio banks in which they were interested from dealing with the Asheville Furniture & Lumber Company. Langston v. Improvement Co., 120 N. C. 132, 26 S. E. 644. Then, the judgments of the Ohio banks being regular North Carolina judgments, still in force and unsatisfied, and the attachments sued out by these banks being regular (based upon an allegation of fraud), and levied on the property from which the judgment against the interveners was rendered, the question depends upon the rights the Ohio banks acquired by reason of said attachments,—the attachment liens. The fact that the Asheville Furniture & Lumber Company owed the plaintiffs gave them no lien on its property; and although the plaintiffs have commenced what they claim to be a creditors' bill, and appeal to the equitable jurisdiction of the court, it cannot avail them anything as against the Ohio banks, if these banks have acquired a legal right—a priority to this fund—over the other creditors of the Asheville Furniture & Lumber Company. So, if the attachments gave the Ohio banks the legal right to this fund,—a special lien, a judicial appropriation,—they are still entitled to have it. Equity always recognizes the legal rights of parties, and never displaces them. This is the question, the crucial point in this case, and it seems to be settled against the plaintiffs, the German Looking-Glass Plate Company and the other plaintiffs in this action. By the levy of the attachments the Ohio banks acquired a lien on the property from which this fund was derived, which lien commenced at the date of their levy, on the 24th of November, 1891. McMillan v. Parsons, 52 N. C. 163, 3 Am. & Eng. Enc. Law (2d Ed.) 220.

There was error in the judgment appealed from, in granting the injunction, and it is reversed. But, if it be deemed necessary to have a receiver as to other property and effects not embraced in the judgment of the Ohio banks upon the attachments, that part of the order appealed from may be allowed to stand. The defendants the Ohio banks will recover the costs of this appeal, including the cost of printing the whole record. Error. Reversed.

STUBBS v. STATE.

(Supreme Court of Georgia. June 5, 1900.)

JUSTIFIABLE HOMICIDE—MUTUAL COMBAT.

The provisions of law relating to justifiable homicide where the parties had been engaged in mutual combat, contained in section 73 of the Penal Code, are not applicable to a case where there has been no mutual combat, and where the defense relied upon is that contained in sections 70 and 71 of the Penal Code.

(Syllabus by the Court.)

Error from superior court, Wilkinson county; John C. Hart, Judge.

Henry Stubbs was convicted of murder, and brings error. Reversed.

Allen & Pottle and John W. Lindsey, for plaintiff in error. H. G. Lewis, Sol. Gen., and J. M. Terrill, Atty. Gen., for the State.

SIMMONS, C. J. After having been convicted of the offense of murder, Henry Stubbs made a motion for a new trial. This motion was overruled, and Stubbs excepted. The evidence discloses that there had been no mutual combat, nor any fight of any kind, between the accused and the deceased. According to the evidence of the accused, the deceased was advancing upon him with a drawn knife. The circumstances were sufficient, the accused claims, to excite the fears of a reasonable man that a felony was about to be committed upon him, and, in order to prevent it, he killed the deceased. The trial judge charged the jury properly upon the different grades of homicide, but in charging upon the subject of justifiable homicide, and discussing the doctrine of reasonable fears, erred in the following charge upon that subject, which was given immediately after, and in connection with, his charge upon the subject of self-defense: "Also the danger must seem to appear so urgent and pressing at the time of the killing that, in order to save his own life, it appeared then and there that the killing of the other was absolutely necessary; and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given." This charge was evidently taken in substance from section 73 of the Penal Code, and instructs the jury that the circumstances must seem to the accused so urgent and pressing, at the time of the killing, that it was necessary to take the life of the deceased in order to save his own life. The defense in the case

was predicated upon sections 70 and 71 of the Penal Code, which declare that a man will be justifiable in killing another to prevent the latter from committing a felony upon him. The charge of the court excluded this idea, and virtually instructed the jury that the accused would not be justified unless the danger seemed so urgent and pressing as to make it appear that it was necessary to kill the deceased in order for the accused to save his own life. The accused may not have apprehended that his life was in danger at the time he shot the deceased, but he may have had the gravest apprehensions that it was necessary to shoot in order to prevent the deceased from committing upon him some lesser felony, such as mayhem. The distinction between section 73 and sections 70 and 71 of the Penal Code has been frequently made by decisions of this court. See, upon this subject, Powell v. State, 101 Ga. 11, 29 S. E. 309, and cases cited; Lowman v. State (Ga.) 34 S. E. 1019, and cases cited. It is apparent that the learned trial judge had not had his attention called to these decisions, or else had misconstrued them. No other error appears to have been committed. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

TILLER v. STATE.

(Supreme Court of Georgia. June 5, 1900.)

CRIMINAL LAW—EVIDENCE—GAMING.

A party to a case has the right to introduce all competent, relevant, and material evidence either to prove the main issue involved, or to discredit the evidence of a witness for the opposite party. (a) Where A., B., C., and D. were indicted for gaming, and A. was put upon trial, and the state's witness testified that he had seen A., B., C., and D. all at a certain place, engaged in gambling, it was competent for the accused to introduce evidence to show that B. was not at the place designated, but at another place, at the time specified by the state's witness. This evidence was material to the issue, and was admissible for the purpose of discrediting the state's witness.

(Syllabus by the Court.)

Error from superior court, Hart county; S. Reese, Judge.

Bedford Tiller was convicted of gaming, and brings error. Reversed.

O. Roberts and Jos. N. Worley, for plaintiff in error. R. H. Lewis, Sol. Gen., and Harrison & Bryan, for the State.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

ROBINSON v. STATE.

(Supreme Court of Georgia. June 5, 1900.)

CRIMINAL LAW—NEW TRIAL—BRIEF OF EVIDENCE—LOCAL OPTION.

1. Where, in connection with a motion for a new trial, an order, designed to obtain additional time for filing a brief of evidence, was presented to the judge, with a blank therein, which, upon granting the order, he was to fill with the date fixing the limit within which such brief could be filed, and where, upon so doing, the order and the motion were filed by the judge with the clerk, it became the duty of counsel for movant to follow up the matter, and ascertain what date was actually inserted in the blank; and, having failed so to do, there was no error in dismissing the motion for want of a brief of evidence when it appeared that no brief was filed within the time prescribed in the order as filed.

2. The local option act for Troup county, approved December 24, 1884 (Acts 1884–85, p. 528), is not unconstitutional for any reason specified in the assignments of error.

(Syllabus by the Court.)

Error from city court of Lagrange; F. P. Longley, Judge.

Beatrice Robinson was convicted of crime, and brings error. Affirmed.

Isaac Jackson and D. J. Gaffney, for plaintiff in error. W. T. Tuggle, for the State.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

MERCHANTS' NAT. BANK OF ROME v. CAMP et al.

(Supreme Court of Georgia. May 12, 1900.)

NOTE—PAYMENT—PRESIDENT OF BANK—AUTHORITY.

1. Whether a promissory note, the subject-matter of an action, had or had not, after its execution, been fraudulently altered by inserting after the name of the person therein designated as payee the letters "Pt.," as an abbreviation of the word "President," payment to that person certainly discharged the makers of the note from further liability thereon, when it affirmatively appeared that, even treating the paper as the property of a bank of which he was president, he had, as such, full authority to collect the paper in its behalf.

2. Where the president of a bank had general authority to take, in settlement of a paper due to it, property other than cash, his so doing in a particular instance was binding upon the corporation.

3. Irrespective of other questions made in the record, the application of the above rules to the undisputed facts of the present case made it entirely proper for the court to direct a verdict in favor of the defendants.

(Syllabus by the Court.)

Error from city court of Floyd county; G. A. H. Harris, Judge.

Action by the Merchants' National Bank of Rome against J. L. Camp and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Nat Harris, for plaintiff in error. Dean & Dean, for defendants in error.

COBB, J. The Merchants' National Bank of Rome brought suit against J. L. Camp, J. King, and E. J. McGhee on a promissory note. The defendants Camp and McGhee, among other defenses, set up that the note sued on was originally payable to J. King,

but was fraudulently altered since its execution by making it payable to "J. King, Pt.," and had been paid by the delivery to J. King of certain stock in an incorporated company, which was accepted by him in full payment of the note, and that at the date of such payment King had the right to receive payment and make a settlement of the debt. At the trial it was established by undisputed evidence that the defendants had delivered to King the stock as claimed by them, and that the same was received by him in full payment of the note; that at the date the note was paid the same was held by the plaintiff, King having at some time previous thereto delivered it to the bank, of which he was president, both at the date of the note and the date of the payment; that as president he had full authority in behalf of the bank to make collections, as well as to make any kind of settlement of the notes held by the bank that he saw fit; that the payment was made at the bank of the plaintiff, and the reason the note was not delivered up was that King said it was in the safe, and he could not then get it out. It also appeared that one, and probably both, of the defendants Camp and McGhee did not know at the date the note was paid that it had been delivered to the bank, and that the bank claimed to be the owner of the same. The judge directed a verdict in favor of defendants Camp and McGhee, and plaintiff excepted.

As we view the case, it is immaterial whether the note was payable to J. King, or "J. King, Pt." If it was payable to J. King, and he owned it at the date of the payment, of course the defendants were by the payment discharged from all liability thereon. If, on the other hand, it was payable to "J. King, Pt.," and was the property of the plaintiff, payment to J. King would discharge the defendants from liability; the uncontradicted evidence being that King was president of the bank, and as such had full authority to make any settlement with the makers that he saw fit. To receive the stock delivered to him by the defendants in satisfaction of the note was within the scope of his authority as president of the bank, and the settlement made by him was binding on the bank. This is true notwithstanding at the date of the payment the defendants did not know the bank owned the note, but thought they were dealing with King individually. Payment to one lawfully authorized as an agent to collect is payment to the person represented by such agent, notwithstanding the fact that the debtor may be ignorant that he is dealing with an agent, and thinks that the person to whom the payment was made was acting in his individual capacity. See, in this connection, Peel v. Shepherd, 58 Ga. 365.

It is not necessary to consider the other questions made in the record, as the direction of a verdict in favor of the defendants Camp and McGhee was, for the reason above stated, a proper disposition to make of the case. Judgment affirmed. All the justices concurring.

FISH, J., absent on account of sickness.

MONTGOMERY v. WALTON et al.

(Supreme Court of Georgia. June 4, 1900.)

RELIGIOUS SOCIETIES—LIABILITY OF TRUSTEES.

1. The trustees of a church are not, as such, liable for the price of lumber sold and delivered to the pastor on his individual account, when, in making the purchase, he neither acted as agent of the trustees nor had authority to do so; and this is so though the lumber was, with their knowledge, used in improving the property of the church.

2. Under the facts appearing, the court was right in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Marion county; J. H. Martin, Judge pro hac.

Action by J. L. Montgomery against G. R. Walton and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. B. Short and Simeon Blue, for plaintiff in error. J. E. Sheppard, for defendants in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

CENTRAL OF GEORGIA RY. CO. v. LIPPMAN.

(Supreme Court of Georgia. June 5, 1900.)

CARRIERS—LIMITING LIABILITY — DILIGENCE REQUIRED—PASSENGER ON FREIGHT TRAIN.

1. The liability of a common carrier of goods is that of an insurer, and in cases of loss no excuse avails such carrier, unless occasioned by the act of God or the public enemies of the state. He may not limit his legal liability by a notice to the shipper, but he may, with certain restrictions, make an express contract, and both parties entering into it will be bound by its terms.

2. The liability of a carrier of passengers is not that of an insurer, but such carrier is bound by law to extraordinary diligence to protect the lives and persons of his passengers. This duty he cannot waive or release, even by an express contract. Being one in which the public has an interest, public policy forbids such a waiver or release.

3. A carrier who received a passenger on one of its freight trains is bound by the same standard of diligence as if the passenger were being transported on a regular passenger train. What will amount to extraordinary diligence varies with the character of the train. A passenger who voluntarily seeks to be transported on a freight train takes the risk of the usual and necessary jolts and jars which occur in the operation of such train, but the carrier is not relieved from the use of extraordinary diligence to the passenger to prevent unusual and unnecessary jolts and jars. An express contract entered into by the carrier and the passenger, under the terms of which the carrier is released from all liability to the passenger for

personal injuries received while a passenger on such freight train, is, in effect, a contract by which the carrier undertakes to relieve itself from the consequences of the negligence of itself and servants, and cannot be enforced.

(Syllabus by the Court.)

Error from superior court, Jones county; John C. Hart, Judge.

Action by Philip Lippman against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Dessau, Harris & Birch, for plaintiff in error. Guerry & Hall, for defendant in error.

LITTLE, J. Lippman instituted an action against the Central of Georgia Railway Company to recover damages for injuries which he alleges he sustained while a passenger holding a ticket which entitled him to be carried between two stations on the line of the defendant's railroad, in the county of Jones. A demurrer was filed to the petition, which was overruled, and the case proceeded to trial, and resulted in a verdict for the plaintiff in the sum of $1,500. Exceptions pendente lite were made to the overruling of the demurrer, which were duly certified and entered of record, and an assignment of error thereon is made in the bill of exceptions. After the rendition of the verdict, the defendant made and filed a motion for a new trial, which was overruled, and he excepted. The evidence for the plaintiff made substantially the following case: On the 14th of October, 1907, plaintiff entered a way freight train of the defendant at Gray's station, to be carried to Roundoak, having a mileage ticket entitling him to passage on that train, for which he had paid the price charged by the company. There was no car provided for passengers except the caboose, in which seats were placed. Soon after plaintiff entered the caboose, the train suddenly commenced backing, and then made a violent jerk which threw plaintiff to the floor on his right side. He was rendered unconscious, and was unable to arise until assisted by the flagman. On arriving at Roundoak, he had to be assisted from the car. Evidence was also introduced as to the extent of the injuries sustained by the defendant in error, their nature and effect on his earning capacity, as well as their permanency, and as to the loss of income thereby, his pain and suffering, and the expense occasioned for medicine and nursing. The defendant introduced evidence tending to rebut that of the plaintiff as to the fact of the injury, and that there was nothing unusual in the movement of the cars by which the plaintiff claimed to have been injured. This evidence, however, disclosed the fact that the plaintiff was injured—at least to a certain extent—by his fall, but it was a contested question whether the fall was occasioned by the movement of the cars of the train, or by a sudden attack of sickness occurring to the plaintiff at the time, and also whether the plaintiff was occupying his proper place as a passenger in the car, and whether his fall was attributable to his own or the company's negligence. It is not necessary that further reference to the oral evidence, which is voluminous, should be made, in order that the points decided may be understood. The ticket in possession of the plaintiff at the time he was injured, and under which he claimed the rights of a passenger on said train, and which he introduced in evidence, reads as follows:

"Mileage Ticket No. 3,756. P. Lippman. Macon, Ga., is entitled to travel 1,000 miles on the Central of Georgia Railway Company upon the conditions named in the contract attached and made a part hereof. This ticket will not be duplicated if lost. [Signed] J. C. Haile, Genl. Passenger Agt.

"Not good unless stamped here. [Stamp of the company.]

"Contract. The conditions upon which this coupon mileage ticket is sold by the Central of Georgia Railway Company and purchased by the holder are as follows: * * * (4) That it is good on either passenger or way freight trains, and entitles the purchaser to stop only at stations which by the time card are designated as regular stopping places of the train on which it is presented. (5) That, for and in consideration of being permitted to use this mileage ticket for passage on the way freight trains, I hereby release the company from all liability in case of personal injury, or for loss or damage to baggage, while using said freight trains. * * * (17) This ticket expires one year from date of sale. I have purchased this ticket and agree to use it subject to the above conditions. [Signed] P. Lippman."

On the list of stations there appeared Gray's Station and Roundoak, designated as regular stopping places. A number of grounds, in addition to those assigning as error that the verdict was contrary to the law and evidence, are set out in the motion. After a careful examination of these, read in connection with the evidence and charge of the court applicable to each, we find it necessary only to consider and pass upon those specifically enumerated hereafter. In relation to those grounds of the motion not thus specifically considered, it is sufficient, in a general way, to say that, in our opinion, there was no error in overruling the demurrer which was filed to the petition. The petition does, as we read it, clearly set out that the jerk or sudden stopping of the cars which it is alleged caused the injury was wholly unnecessary, and caused by the negligence of the defendant. Nor can we say that the verdict was contrary either to the law or to the evidence. It was very clearly shown that the plaintiff was severely injured by a fall, while a passenger on the defendant's train. According to his testimony, such fall was occa-

sioned by a very violent and unusual jerk or sudden stoppage of the cars. Whether such jerk or sudden stop did in fact cause the injury which he received, or were occasioned by other causes, and whether the alleged sudden and violent movements of the train were unusual and unnecessary, as well as the extent of the injuries, and the effect of them upon the plaintiff, were questions of fact, and taking the evidence as a whole, including that going to show the character of the injuries sustained, there was sufficient evidence to warrant the verdict. Nor can we say that the verdict is excessive. There was evidence of pain, suffering, and, indeed, of permanent injury and reduction of capacity to labor. The sum returned by the jury was that which was agreed on as compensation for all these elements of damage which in cases of this character fix the measure of recovery, and, in our opinion, it does not necessarily appear to have exceeded the amount which the jury were authorized to fix under the evidence in the case. Nor do we think there was any error in the admission of the evidence of the plaintiff and of the physicians as to the detailed character and effect of the injury received. The allegations of the petition are that the plaintiff was seriously and permanently injured; that he was thrown from his seat, and for a considerable distance, upon the floor, so heavily as to render him unconscious; that he was deprived of the power of locomotion, and could not raise himself from the floor for some time; that he was lifted therefrom by others; that by so being thrown upon the floor he was seriously and permanently injured in his right hip; that the same was shocked and bruised and otherwise injured by the fall; that he has never recovered therefrom, he goes about with great difficulty, and his injuries are permanent. While the injury to the hip and other portions of the body might have been set out more in detail, it is a fact known to laymen, as well as to experts, that injuries to the hip frequently shorten the leg, and, as we understand the evidence objected to, the testimony of the experts was directed to the point where the bones of the leg join the body, which is included, by common parlance, in the general word "hip," when speaking of the human body. For reasons which will appear from the further discussion of this case, there was no error in the refusals to charge, nor in the failure of the court to charge certain legal principles. Taken as a whole, the charge was fair and comprehensive, and embodied, as we think, correct principles of law.

Without further reference to the grounds of the motion to which we have thus generally made reference, we come now to especially consider two of the grounds which are based on the instructions given to the jury, and which embody certain principles as being the law applicable to the facts of the case, the correctness of which is denied by the plaintiff in error: (1) Error is assigned to the following charge of the court: "Counsel upon both sides have insisted on and invoked the construction of the court upon article 5, under the written contract which has been offered in evidence, viz.: 'That, in consideration for being permitted to use the mileage ticket for passage on way freight trains, I hereby release the company from all liability, in case of personal injury, or for loss or damage to baggage, while using said freight train.' The court charges you that the railway company could not stipulate against its own negligence. Should you believe from the evidence in the case that the plaintiff was injured, and that he was injured by the negligence of the railroad company, the court charges you that the article referred to would not release the railroad company from liability." Passing for the present reference to the authorities cited by plaintiff in error, to establish the proposition that a railroad company may contract for exemption from responsibility for injuries to passengers riding on freight trains, we come to consider the meaning and application of the provisions of law which are contained in section 2276 of the Civil Code of this state, which is cited as authority for the proposition that the court erred in charging the jury as heretofore set out. That section reads as follows: "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract and will then be governed thereby." Undoubtedly, if a carrier of passengers is a common carrier, within the contemplation of this section of the Code, and if the term "legal liability" refers to the obligation of the carrier of passengers to exercise extraordinary diligence to protect the lives and persons of the passengers, then, while the carrier may not limit such liability by notice, he may do so by an express contract, in which case the rights of the parties will be governed by the terms of the contract. Such a construction would give the right to a railroad company by express contract to limit its obligation to use extraordinary diligence to protect a passenger. In our judgment, for a number of reasons, no such construction can be placed upon this section of the Code, nor do the provisions contained therein, as we think, apply to a carrier of passengers. Just here it may be well to consider for a moment the question whether certain previous adjudications by this court do not rule a contrary doctrine, as it is claimed they do. The cases referred to are Phillips v. Railroad Co., 93 Ga. 356, 20 S. E. 247; Boyd v. Spencer, 103 Ga. 828, 30 S. E. 841; Railway Co. v. Barlow, 104 Ga. 213, 30 S. E. 732; and Railway Co. v. Ricks (Ga.) 34 S. E. 570. It is very freely admitted that in some, if not in all, of these cases, this court applied the provisions of this section to a passenger carrier; but the question whether the terms of this section had such application was not made in any of them, nor

was that question decided in any one of these cases. While much of the language used, both in the headnotes and in the opinions, seems to directly deal with the section as having application to passenger carriers, we are only to take the rulings made as finally decisive of the issues raised and presented in the several cases. It was assumed by all the parties in the cases referred to that the section did have such application, and, so agreeing, the issues raised and determined were on the facts. In the Phillips Case, supra, the point involved was whether there was an express contract which rendered the undertaking of the company with reference to return transportation conditional upon acts to be done at the completion of the original trip, and before the return trip was entered upon; and this court there ruled that there was no written evidence of such contract, and that, so far as the parol evidence went, it tended to disprove, rather than to prove, the making of any express contract whatever. That was the point on inquiry in that case. The question in the case of Boyd v. Spencer was whether a mere notice on a ticket, to the effect that the ticket expired at a given time, to which the attention of the passenger was not called at the time of the purchase of the ticket, would amount to an agreement between the passenger and carrier that the ticket would be used in that time, so as to become "an express contract," within the meaning of section 2276 of the Civil Code. The question then for decision was stated by Mr. Justice Cobb in the opinion, on page 830, 103 Ga., and page 842, 30 S. E., to be "whether, under the plaintiff's evidence, it has been shown that he is not entitled to recover because a special contract had been made with him limiting the time in which his ticket should be used." No other question was then argued by counsel, discussed in consultation, or intended to be ruled, when that decision was rendered. The opinion must be read in the light of the actual question then under discussion, and any language therein which apparently rules any other question is purely obiter, and is not binding as authority. In the case of Barlow the ruling was that if one entered the train of a carrier, not for the purpose of making the journey called for by the ticket, but for the purpose of being put off so as to make a case for damages, and he is ejected, he is entitled to nominal damages only, and the ruling of the court was distinctly put on the proposition that there was evidence to support this state of facts, and it was therefore error to charge the jury in language which, in effect, deprived the defendant of the benefit of this defense. The case of Railway Co. v. Ricks, supra, was to the effect that one who had purchased a ticket having on its face an express stipulation that it would be good for passage only during a specified period, and who, in consideration of it having been sold at a reduced rate, assented to the stipulation, had no legal cause of complaint against the railway company for ejecting him, after the expiration of the limit of time, on his refusal to pay fare. While, as before stated, some of the conclusions reached, and much of the language used in those cases, are apparently contrary to what is here ruled, yet, as the decision made in none of those cases involved the question which we pass upon here, they are not controlling as to such question.

Resuming consideration of the proposition that the provisions of the section of the Code now under consideration do not apply to a carrier of passengers, it is significant that under this section the carrier who may limit his legal liability by express contract is denominated a "common carrier." These provisions were taken from the common law, and first became a part of our written law by the adoption of the Code of 1863, and are found in section 2041 of that Code in precisely the same language as they appear in the Code of 1895. The Code of 1863 was, under the act of December 9, 1858, compiled by codifiers charged with the duty of preparing a code of laws for this state which should embrace, in a condensed form, the laws of Georgia, whether derived from the common law, the constitution of the state, the statutes of the state, the decisions of the supreme court, or the statutes of England of force in this state. To ascertain the meaning of the section, therefore, reference is not to be had to a legislative intent, because the law there embraced was not the creation of our legislative body. Of course, under the act adopting the Code of 1895, it is made to assume the dignity of written law. But, nevertheless, it cannot, as written law, have any other and different application than it had at common law, because, in incorporating it into the Code, its meaning was not changed, nor the application of the principles it contains extended. The term "common carrier" did not at the common law embrace a carrier of passengers. Neither does it under the definition found in the Code in connection with section 2276. Nor are the liabilities of a common carrier and a carrier of passengers the same, either at common law or under our statutes. A "common carrier" is defined by Bouvier to be "one whose business, occupation or regular calling it is to carry chattels for all persons who may choose to employ and remunerate him." The same author defines another class of carriers, whom he denominates "common carriers of passengers," to be "such as undertake for hire to carry all persons indifferently who may apply for passage, so long as there is room, and there is no legal excuse for refusing." Mr. Hutchinson, in his treatise on the Law of Carriers (section 47), defines a "common carrier" to be "one who undertakes as a business, for hire or reward, to carry from one place to another the goods of all persons who may apply for such carriage." The same

author, in section 497, declares that carriers of passengers, as to the persons of those whom they carry, are not common carriers. Mr. Greenleaf, in the second volume of his work on Evidence (section 211), under the inquiry as to who is a common carrier, says that "the defendant is proved to be a common carrier by evidence that he undertakes to carry for persons generally, exercising it as a public employment, and holding himself out as ready to engage in the transportation of money or goods as a business, and not as a casual occupation." Again, in the same section, he declares that "hackney coachmen and others, whose employment is solely to carry passengers, are not regarded as common carriers in respect of the persons of the passengers." But it is not necessary that we should go further in order to show that at common law the definition of a common carrier was confined to one who transported goods. All the text writers, so far as we know, confine this appellation to such carriers. Indeed, our own Code, in sections 2263 and 2264, defines a "common carrier" to be one who undertakes to transport goods for a compensation, and who pursues the business constantly or continuously for any period of time, or any distance of transportation. These sections were likewise taken from the common law, and in connection with section 2276, the meaning of which we are now considering, were codified and placed together in the Code of 1863; and, to show that a distinction was meant to exist, another provision of the common law in reference to carriers of passengers was placed in immediate connection with them, in the Code of 1863 at the same time, and appears now as section 2266 of our Civil Code, which declares that a carrier of passengers is bound also to extraordinary diligence on behalf of himself and his agents to protect the lives and persons of his passengers. The use of the word "also" in the section of the Code, following the definition of a "common carrier," and declaring that common carriers shall be bound to extraordinary diligence, is clearly indicative of the legal distinctions which existed between common carriers and passenger carriers. If the subject is examined, no possible doubt can remain that at common law the term "common carrier" did not embrace a carrier of passengers. Bouv. Law Dict. tit. "Common Carrier"; Hutch. Car. § 47. See, also, Bouv. Law Dict. tit. "Common Carriers of Passengers." Now, as the provisions of the Code taken from the common law deal separately with the liabilities of common carriers and carriers of passengers, and make a distinction between these carriers by designating a common carrier as a carrier of goods, this common-law meaning given to the words "common carrier" must go with them into the Code, when the meaning of a cognate section, which limits the right to fix liability to common carriers, is to be ascertained. At common law, and under the statute (Code, § 2264), a common carrier was an insurer of the goods which he undertook to transport. Such was his legal liability, and he was made to answer in dollars and cents for the value of goods lost or destroyed, unless such loss or destruction was occasioned by the act of God or the enemies of the king. No such liability extends to the carrier of passengers, and, strange as it may seem, both at common law and under our statute, the responsibility of a passenger carrier for the lives and persons of his passengers is less in degree than a common carrier in the transportation of goods. The former is bound only to extraordinary diligence; the latter, not only to extraordinary diligence, but, if the goods are injured or destroyed, no excuse avails him, unless such injury or destruction was occasioned by the act of God or the public enemies of the state. The reasons are obvious: A box of goods remains where it is placed; a man has locomotion and a will. When a carrier receives the first, he has absolute control; while his control of the passenger is limited to the promulgation of rules, which may or may not be observed. In the days of Chief Justice Marshall, a case came before the supreme court of the United States which involved the determination of the question whether the liability of the carrier which had received for transportation certain negro slaves, some of whom were drowned, was that of a common carrier or a carrier of passengers. Boyce v. Anderson, 2 Pet. 150, 7 L. Ed. 379. It was contended that the liability of the carrier was that of a common carrier. In holding adversely to this claim, the chief justice said: "In the nature of things, and in his character, the slave which was being transported was more like a passenger than a package of goods; that he had volition and feelings, which could not be disregarded; that these properties could not be overlooked in conveying him from place to place; that he could not be stowed away as a common package; that, being left at liberty, he might escape: and that the carrier did not have, and could not have, the same absolute control over him that it had over inanimate matter." In his Treatise on the Law of Notice, Mr Wade, in section 531, treating the subject of notice by carriers limiting their liability, says: "The carriers' notices by which their liability is sought to be limited have reference (1) to the notice by which they endeavor to qualify or restrict their responsibility, imposed by law, as special insurers of the articles committed to their charge; (2) the notice by which their responsibility as carriers is terminated." Section 2276 simply prescribes the common-law rule applicable exclusively to carriers of goods, and the legal liability referred to in the section is the liability which the law imposed on such carriers as insurers of the goods which they undertook to

transport, and did not have, and could not have, from the difference in the nature of the liability of each, any reference to a carrier of passengers. But it may be said that, as by the provision made in the section a common carrier could not limit his legal liability by entry on "tickets sold," it was the contemplation that such an inhibition should apply to passenger carriers because tickets are only sold to and for the transportation of passengers. The reply to this suggestion is that as to the baggage of passengers the carrier is under liability as a common carrier,—that is, an insurer of goods,—while a different rule prevails as to the liability for injury to passengers. Bouv. Law Dict. tit. "Common Carriers of Passengers"; Story, Bailm. §§ 498, 590, 604. It is only on the ground of negligence that the carrier of passengers is held liable. 2 Greenl. Ev. § 222. We take it, inasmuch as the section of the Code confines the power to common carriers, that it has reference to the baggage or personal effects of the passenger which it undertakes to transport when the rule is extended to entries on tickets sold. This view is further strengthened because of the fact that while the carrier cannot limit his liability, as we have seen, for extraordinary diligence to the passenger, he may by express contract relieve himself of the law which makes him an insurer of the baggage of that passenger. By section 2280 of our Civil Code, it is provided that the carrier of passengers is responsible for baggage placed in his custody; and by section 2288 of the same Code it is provided that a carrier of passengers may limit the value of the baggage to be taken for the fare paid, but that in case of loss, though no extra freight has been demanded or paid, the carrier is responsible for the value of the baggage lost. When these sections of the Code are construed together, and in connection with 2276, they will be found to be in entire harmony. This court in several cases has had occasion to make application of the section of the Code now under consideration, and in each instance it has been treated as applying, even with the words "tickets sold" incorporated, to a carrier of goods. In the case of Dibble v. Brown, 12 Ga. 224, this court, through Judge Nisbet, said: "The question is mooted in the books whether such persons, as regards baggage accompanying travelers, are liable as common carriers or as private persons engaging to carry for hire. If the former, they are liable as insurers against loss, except when occasioned by the act of God and the public enemies; and, if the latter, they are bound only to due and reasonable skill and diligence in their undertaking. It is, however, now well settled that they are liable for baggage as common carriers. Without other compensation than the fare for passengers, they are liable for their baggage as common carriers are liable for goods delivered to them for transportation; that is, they are liable for baggage at all events, except when destroyed by the act of God or irresistible accident and the public enemies,"—citing a number of cases. It is therefore not illogical that the Civil Code should provide, as it does in section 2288, that a carrier of passengers may limit the value of the baggage to be taken for the fare paid, because such a carrier of passengers is, as to the baggage of the passenger, a common carrier; and it would seem, under the operation of section 2276, that while this limit of liability cannot be made by a notice given, nor by an entry on the ticket sold to the passenger, it may be accomplished by an express contract made between the passenger who owns the baggage and the carrier who receives it, and that both will be governed by the terms of such contract. In the case of Express Co. v. Newby, 36 Ga. 635, this court ruled that an express company which pursues continuously the business of transporting goods was a common carrier, and, quoting exactly the section of the Code under consideration, declared that "our Code has incorporated the rules of the common law, as expounded in Georgia, in Fish v. Chapman, 2 Ga. 349, and with it we are satisfied." A reference to the case in 2 Ga. will show a very learned and comprehensive treatment of the right of a common carrier to limit his liability by notice. In the case of Express Co. v. Purcell, 37 Ga. 103, Chief Justice Warner, after declaring that the liability of a common carrier is regulated by law on the ground of public policy, and that he could not be permitted by his own act to limit the effect and operation of that law, and thereby defeat that public policy, quotes the section of the Code now under consideration, and declares that "the legal liability of a common carrier as defined by the law is one thing; his legal liability as a common carrier under an express contract made with the shipper is another and quite a different thing. In the latter case his liability will depend upon the terms of that express contract, and will be governed by it." And further on in the same opinion he says: "The common carrier and the shipper may enter into an express contract, outside of the receipt given for the goods, in regard to the carrier's liability, and then, both parties having a fair opportunity to understand the terms of the contract, will be governed by it." Again, in the case of Mosher v. Express Co., 38 Ga. 42, Chief Justice Warner, after quoting the Code of 1863, which is in the exact language of that now under consideration, says: "This section of the Code was considered and construed by this court at the last term in two cases (Express Co. v. Newby, and Express Co. v. Purcell). This provision of the Code is, in our judgment, a wise and salutary provision, intended to pro-

tect the public from imposition and surprise in the hurried transaction of business with these express companies, in the forwarding of small parcels, as well as valuable packages, by all sorts of people, some of whom might not be able to read the printed stipulations annexed to the receipt given for the goods, and, if they could read them, would not be able to comprehend the legal effect thereof."

We have taken much time, and occupied a good deal of space, in endeavoring to show that the provisions of this section of the Code are not applicable to a carrier of passengers. We have done so because the question is an important one, and also because a different ruling would seem to have been made in other cases decided by this court to which reference has been made. But a final and conclusive answer to the proposition that this section does not apply to a carrier of passengers is found in the generally accepted proposition that a carrier of passengers for hire cannot avoid, even by an express contract, his liability for negligence. So far, we do not know that it has ever been doubted in this state that a carrier of passengers could, by contract or otherwise, avoid his liability for the negligence of himself or servants. The compilers of the American & English Encyclopedia of Law declare that such is the well-settled rule by the decisions of the federal court and the great weight of authority in the several states, and for this proposition is cited: Hart v. Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; Abrams v. Railway Co., 87 Wis. 485, 58 N. W. 780; Railroad Co. v. Ashley, 14 C. C. A. 368, 67 Fed. 209; Railroad Co. v. Curran, 19 Ohio St. 1; Libby v. Railway Co., 82 Mo. 292; Railway Co. v. Ivy, 71 Tex. 409, 9 S. W. 346; Piedmont Mfg. Co. v. Columbia & G. R. Co., 19 S. C. 353. In the case of Railroad Co. v. Lockwood, 17 Wall. 357, 21 L. Ed. 627, the supreme court of the United States laid down three propositions on this subject: First, that a common carrier could not lawfully stipulate for exemption from responsibility when such exemption was not just and reasonable in the eye of the law; secondly, that it is not just and reasonable, in legal contemplation, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; thirdly, that these propositions apply to both carriers of goods and carriers of passengers for hire, with special force to the latter. To the same effect, see Railway Co. v. Faylor, 126 Ind. 126, 25 N. E. 869; Railway Co. v. McGown, 65 Tex. 640; Jacobus v. Railway Co., 20 Minn. 125 (Gil. 110). Judge Ray, in his work on Negligence of Imposed Duties ("Passenger Carriers") on page 262, states the general rule to be that "a carrier cannot by contract exempt itself from liability for injuries and damages resulting from its own negligence or negligence of its servants. The public have an interest in the contract, which a private individual cannot waive,"—citing Willis v. Railway Co., 62 Me. 488; Mann v. Birchard, 40 Vt. 326; Squire v. Railroad Co., 98 Mass. 239; Railroad Co. v. Oden, 80 Ala. 38; Grogan v. Express Co., 114 Pa. St. 523, 7 Atl. 134. Mr. Wood, in the third volume of his Law of Railroads (section 425), says: "In most of the states, while the carrier may impose reasonable limitations upon his liability, he cannot by any provision, however explicit or direct, screen himself from liability for loss or injury resulting from his own or his servants' negligence. The principal ground upon which the right of a carrier to limit his liability by contract in any manner he pleases can be denied is that by reason of the public character of his business such contracts are opposed to public policy." And Mr. Fetter, in his treatise on the Law of Carriers of Passengers, in section 389, states, on authority, that the American rule is that common carriers cannot, even by express contract, limit their liability for their own or their servants' negligence in respect to passengers for hire, and that this rule has been adopted in the great majority of the American States as a part of the common law; citing Railway Co. v. Selby, 47 Ind. 471; Doyle v. Railroad Co., 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844; Jones v. Railway Co., 125 Mo. 666, 28 S. W. 883, 26 L. R. A. 718; Railroad Co. v. Chenewith, 52 Pa. St. 382. See, also, Cook v. Railroad Co., 72 Ga. 50; Railroad Co. v. Keener, 93 Ga. 808, 21 S. E. 287; Railroad Co. v. Gann, 68 Ga. 353. While the Georgia cases cited above are mainly applicable to cases respecting the carriage of goods, the principle of an inability to contract against their own negligence is equally applicable, but with greater force, to a carrier of passengers for hire. Even if section 2276 of the Code applied to the carriers of passengers, it would not avail the plaintiff in error anything under the contract which is now being considered. That section refers to the limitation of liability by common carriers. If the contract which was entered into by the plaintiff in error and the carrier in this case were to be given the full effect it is claimed to have, it would not operate as a limitation, but as a complete and full release of liability, not only from the negligence of the company or its servants, but from all other causes as well. The words of the contract are, "I hereby release the company from all liability in case of personal injury * * * while using said freight train." Even if the right to limit his liability by express contract had been given to a passenger carrier, such authority could not be made to extend to an exemption from all liability. We are of the opinion that the contract set up by the defendant in the court below could not have the legal effect of barring the plaintiff's right to recover damages for injuries which he sus

tained while a passenger on the car by reason of the negligence of the servants and employés of the defendant.

2. It is complained that the court erred in charging the jury that "it is extraordinary diligence to which the court especially directs your attention, because the railroad companies are bound to use extraordinary diligence towards the safety of a person traveling upon their cars. Regardless of the mode of conveyance, a common carrier in each case is bound to the exercise of extraordinary care and diligence towards the conveyance of passengers." The specific error alleged is that the charge ignored the written contract, and held defendant to extraordinary diligence, though the plaintiff had contracted in writing that he would not hold the company liable for personal injuries received while he was using the freight train. We see no error in this instruction to the jury. A carrier of passengers is bound to extraordinary diligence, on behalf of himself and his agents, to protect the lives and persons of his passengers. We have endeavored to show that he could not by express contract waive this obligation which the law puts upon him. If the railroad company receives a passenger on one of its freight trains, the character of the train upon which he is received does not fix its liability, but the relation of carrier and passenger establishes it. In the case of Ball v. Mabry, 91 Ga. 782, 18 N. E. 64, this court ruled that the degree of diligence due from a common carrier to a passenger is extraordinary, no matter what means of conveyance may be employed, and that this standard of diligence applies as well where the passenger is carried upon a freight train as it does where he is carried upon a passenger train; and, further, that a passenger who voluntarily takes passage on a freight train takes the risk of the usual and necessary jolts and jars which happen in the making up and running of such train; but, when a carrier takes a passenger on a freight train, he must use extraordinary care in preventing unusual and unnecessary jolts and jars, so as to protect the passenger, just as he is required to do to prevent any jolt or jar on a passenger train which would be likely to injure the passenger. This being true, if the carrier could not waive his negligence in the one case, where the passenger is received on a regular passenger train, he could not in the other case, where the passenger is received on a freight train. We have given to the principles of law involved in this case careful consideration, and, in our opinion, they were properly stated by the trial judge in his instructions to the jury, and, as there was evidence sufficient to sustain the verdict which they rendered, the court did not err in overruling the motion for a new trial. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

SOUTHERN RY. CO. v. WATSON.

(Supreme Court of Georgia. June 5, 1900.)

CARRIERS—LIMITING LIABILITY—NEGLIGENCE—REGULATIONS—VALIDITY.

1. While the section of the Code which denies to a carrier the right to limit his legal liability by a notice or entry on receipts given or tickets sold, but declares that he may do so by express contract, applies only to carriers of goods, yet, under general law, a carrier of passengers cannot limit his legal liability for the consequences of his own negligence by such notice, or even by express contract.

2. A carrier of passengers, however, has the legal right to make reasonable rules and regulations for the conduct of its business in the transportation of passengers. When a regulation is made affixing a limit to the time in which a ticket shall be good, and the time of the limit affords to the passenger ample opportunity to make his journey with safety and convenience to himself, such a regulation, if otherwise reasonable, becomes a part of the contract of carriage, and if, after the expiration of the limit of time specified on his ticket, the passenger tenders the same for his transportation, and for refusing to pay fare is ejected from the train in a decorous and proper manner by the conductor, such ejection affords no cause of action against the carrier.

3. A regulation so limiting the period of transportation, when it embraces a provision for refunding the purchase price of the ticket, or any unused part thereof, if not used within the limited period, is, as a matter of law, held to be reasonable.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Action by I. M. Watson against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Charlton E. Battle, for plaintiff in error. Robt. T. Daniel, W. H. Beck, and G. R. Hutchens, for defendant in error.

LITTLE, J. Watson instituted an action against the Southern Railway Company to recover damages for being wrongfully ejected from one of the cars of the defendant, while a passenger, on June 1, 1897. A trial of the case resulted in a verdict for the plaintiff for $200. Defendant made a motion for a new trial, which was overruled, and he excepted. It appeared from the evidence that the plaintiff lived at Tallapoosa, Ga., which was situated on one of the lines of the defendant's railroad. He desired to go to Columbus, Ga., to which point the defendant also maintained and operated a railroad. Plaintiff consulted the agent of the defendant in Tallapoosa, and informed him that he desired to be in Columbus by 10 o'clock on the next day, and was informed by the agent that there was no train running directly from Tallapoosa to Columbus, but that he could go to Atlanta from Tallapoosa on Friday night, and, leaving Atlanta on the early morning train, would arrive in Columbus by 9 o'clock. The agent also told plaintiff that he could purchase a through ticket from Tallapoosa to Columbus, for which there would

be no reduction in the rate, but would save him the trouble of purchasing another ticket in Atlanta. The agent said nothing to the plaintiff as to the kind or character of the ticket which he would furnish him. After this conversation, plaintiff purchased a through ticket from Tallapoosa to Columbus, and, leaving Tallapoosa at 8:30 o'clock on Friday night, he reached Atlanta about 11 o'clock the same night. The train for Columbus regularly left Atlanta about 5 o'clock in the morning. Plaintiff went to the station next morning at a very early hour, but did not take the train, because, having temporarily left the station, when he returned the train had departed. There was also a train which left Atlanta daily in the afternoon, reaching Columbus early at night. The route to Columbus from Atlanta by the Southern Railway was over its main line to McDonough, and from there over the Georgia Midland Division to Columbus. The cars for Columbus were attached to a train, and carried to McDonough and detached. These cars were then attached to another locomotive, and carried on to Columbus in charge of another conductor. Plaintiff remained in Atlanta on Saturday. On Sunday he went up to Douglasville, and returned to Atlanta, and on the Tuesday morning following boarded the train for Columbus. The conductor on the train between Atlanta and McDonough declined to accept for passage the ticket which plaintiff had purchased in Tallapoosa on the Friday previous, because it was a limited ticket, and the limit of time had expired. This train did not stop at any point between Atlanta and McDonough, and the conductor informed the plaintiff that the conductor from McDonough to Columbus would not accept the ticket for passage. After leaving McDonough, he presented the ticket to the second conductor, who refused to accept it for passage, and when the train reached Griffin the plaintiff was requested to leave the train. He declined to do so, and was ejected. Concerning the manner of ejection, there is no complaint. Plaintiff had frequently purchased tickets over the lines of the Southern Railway since 1896, but testified that he had never inspected any of those tickets to ascertain whether they were limited or unlimited. He did not know at the time it was purchased that his ticket was limited. He knew that it had holes punched in it, because he saw the agent when he made the holes, but did not look to see for what purpose they were made. After arriving at McDonough, plaintiff knew that his ticket had expired, but he thought it was possible that the conductor might pass him on it. He was informed by the second conductor that if he would take the ticket back to Tallapoosa, where it was issued, the amount of money he paid for it would doubtless be refunded. Plaintiff testified further that at the time he was ejected he had sufficient money with which to pay his fare to Columbus, but not enough to pay his fare to Columbus, hotel bill, and return passage. He also testified that the limit on the ticket gave him time to go from Tallapoosa to Columbus. It was shown that the regular fare from McDonough to Columbus was $2.94, and that all local tickets issued by the Southern Railway Company are limited tickets, and good for continuous passage only. The limit is expressed by punching out the date on the margin of the ticket. The sale of limited tickets exclusively began on May 15, 1896. Each ticket shows that it is limited, and the time in which it may be used. Notices of this regulation were posted in the ticket windows and waiting rooms at all of the depots, in plain, legible type, placed in conspicuous places. The ticket which the plaintiff purchased on May 28th was limited as good for use through May 29th. The plaintiff paid regular fare for the ticket. It was also testified that the regulation for the adoption of limited local tickets was made by the railroad in 1896, for the reason that the limited ticket conferred benefits on the passenger and the railway company beyond those afforded by an unlimited ticket. If a passenger should lose his ticket, or have it stolen from him, and it has not been used within the time limited, the railway company refunds the amount paid to the purchaser. Without a limitation no such refunding could be made, because it would be impossible to ascertain when the ticket might thereafter be used. The regulation was beneficial also to the railway company, because it enabled it to more properly check its accounts, which include sales of tickets by agents, as well as their collection by conductors; and it also diminished the opportunity for the fraudulent manipulation of a ticket either to the injury of a passenger or the revenues of the company. It was also testified that 10 or 12 tickets are daily redeemed by the defendant company. The plaintiff testified in rebuttal that he had never seen any of the notices in relation to the limitation of tickets, nor did he know that the ticket he purchased was limited.

There are many grounds set out in the motion for new trial, which, if considered, would require a discussion of many questions which, under the view that we take of this case, are not material to the ascertainment of the rights of the respective parties. After all, the merits of the case must depend on a solution of the question whether one who has paid full fare for transportation between two points on a railway line, and receives a ticket which bears on its face a limitation of the time in which it may be used for passage, is bound by the terms of such limitation, in the absence of any further notice or contract. It is not necessary for the purposes of this case to enter into a discussion of the question whether a ticket purchased by a prospective passenger constitutes the contract of carriage between the carrier and passenger, or whether

it is in law simply a token or receipt that the passage money has been paid. Many apparently well-considered authorities go to the extent of ruling that the terms and conditions printed upon the ticket constitute the contract between the parties. Others, however, entitled to equal weight, declare that the words placed upon a ticket which the passenger receives do not constitute the contract, but that it is simply evidence of the receipt by the carrier of the passage money, and a token that a contract of carriage has been made. The latter view seems to be more in accord with the views heretofore expressed by this court in several cases than the former. It may not be amiss, however, to remark that it is somewhat singular that, admitting the ticket to be only the token of a contract, yet, when that token bears on its face statements that the contract of which it is an evidence is subject to certain limitations and conditions, that the contract is not in any way affected thereby. If in an ordinary business transaction one receives from another a sum of money as a consideration for the performance of a particular act, and as evidence of such payment issues a receipt therefor, containing stipulations as to the character and terms of the performance to be made, such terms and manner of performance, if not binding, in any event are at least prima facie of conditions which are binding on both parties. But, whatever may be the legal status of a ticket with reference to the contract of carriage, a discussion of the question would not be profitable here. The contention made by the plaintiff in error is that when the defendant in error contracted with it to be transported by the Southern Railway Company over its lines from Tallapoosa to Columbus, Ga., it did so on the condition that the passage was to be continuous, and to be made within two days from the time of the issue of the ticket; that the time was ample within which such journey might be made with comfort and convenience; that by reason of certain rules and regulations which the carrier had made in the conduct of its business the passenger could not make his journey, or any part of it, after the expiration of two days from the date of the contract for passage, and that after such limit the ticket was void for passage. To this contention the defendant in error replies that at the time he purchased the ticket he made no express contract with the carrier as to the time in which his journey was to be performed, but that he paid full fare for his passage, that he had no knowledge or notice at the time that he received it that the ticket bore on its face any limitation as to time, and that under the provisions of our law as embodied in section 2276 of the Civil Code the carrier was bound to transport him under the contract from Tallapoosa to Columbus at any time within the period governing the limitation in which such contracts may be enforced. The provisions of this section of the Code are: "A common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold. He may make an express contract, and will then be governed thereby." We do not propose to enter here into a discussion of the proper application of the provisions of law which the section contains. That has been done in the case of Railway Co. v. Lippman (this term) 36 S. E. 202. It is insisted that the rule here announced is applicable to passenger carriers. If that be a correct proposition, then by these words of the Code, as construed by the defendant in error, a passenger carrier would have the right by an express contract to limit his liability (meaning thereby his duty to exercise extraordinary diligence for the safety of the passenger). For the reasons fully given in the discussion of the legal principles involved in the case last cited, supra, it is our opinion that the provisions of this section of the Code do not apply in any way to a carrier of passengers, but they apply exclusively and alone to a common carrier; that is, a carrier of goods. But we go further than the point to which the argument of the defendant in error would lead, and say that, in our opinion, a carrier of passengers cannot limit his obligation to exercise extraordinary diligence for the care of his passengers by a notice or publication, nor can he do so even by an express contract, because such a contract would be void, as being against public policy,—for a discussion of which proposition see case of Railway Co. v. Lippman, supra. If the plaintiff below was entitled to have a recovery against the defendant, that right existed because the railway company invaded some legal right of the plaintiff. If the ejection, which was clearly shown, was unauthorized, it was a tort committed upon the person of the defendant in error. On the contrary, if there was no breach of legal duty on the part of the plaintiff in error towards the passenger, then no right of recovery existed in the latter. We do not understand that the plaintiff in error in this case denies its liability to in any manner limit the duty which the law imposes upon it as a passenger carrier, either by notice or by express contract. It is, however, insisted against the right of the defendant in error to sustain the verdict which was rendered in his favor: First. That all contracts of carriage made by the defendant railway company with a passenger had a time limit, in which the contract of carriage should be performed. Second. That such contract resulted from a rule and regulation which the railway company had found necessary to make for the protection of the passenger and the orderly and successful conduct of its business as a passenger carrier; that, in accordance with such rule and regulation, the contract entered into with the plaintiff below limited the time in which he could be carried from Tallapoosa, Ga., to Columbus, Ga., to two days, and that this was ample time, consulting the comfort and convenience of the purchaser of the ticket, in which the

journey might be made. Third. That this rule and regulation under which the contract of carriage involved in this case was made, and the ticket was issued, was fair and reasonable. This contention necessarily brings us to an inquiry concerning the power of a carrier of passengers to makes rules and regulations for the conduct of its business. It is provided by section 2278 of the Civil Code that a carrier is bound to receive all passengers offered that he is accustomed to carry, upon compliance with such reasonable regulations as he may adopt for his own safety and the benefit of the public. So far as we are informed, both text writers and the rulings made in adjudicated cases are unanimous in support of the proposition that a carrier of passengers may make reasonable regulations as to the conduct of its business. Not only so, but Mr. Hutchinson declares on authority that the passenger takes his ticket always with the understanding that he will conform to the reasonable regulations of the carrier as to the conduct of the carriage, and that obedience to such regulations is a condition of the contract to carry, though not expressed in the contract, or known to the passenger; but that the carrier cannot, by regulations or usages unknown to the passenger, deprive the latter of rights conferred upon him by his ticket, which contained no notice of such limitations. Hutch. Carr. § 587. It was said by Brown, J., in the case of Hibbard v. Railroad Co., 15 N. Y. 455, that such regulations as would enable a railroad corporation to execute its difficult and responsible duties, insure the comfort and safety of its passengers, and protect itself from wrong and imposition, it has an undoubted right to prescribe, provided such regulations are reasonable and just.

It is contended here that rules and regulations limiting the time within which a ticket over its route shall be good for passage may be made by the carrier, and that, when so made, if the time limited be reasonable, the stipulation is good in law. On this subject Mr. Hutchinson, in section 576 of his work on Carriers, says that "the company may lawfully limit the time within which the ticket shall be used," for which proposition he cites Hill v. Railroad Co., 63 N. Y. 101; Elmore v. Sands, 54 N. Y. 512; Rawitzky v. Railroad Co., 40 La. Ann. 47, 3 South. 387; Barker v. Cofiin, 31 Barb. 556. In his treatise on the Law of Railroads (volume 3, p. 1638), Mr. Wood declares that the carrier may impose any reasonable limitation as to time; that a ticket "good only two days after date," or "for this day and train only," ceases to have any validity after that date, although it has never been used; citing Railroad Co. v. Proctor, 1 Allen, 267; Gale v. Railroad Co., 7 Hun, 670. Mr. Elliott, in his Law of Railroads (volume 4, § 1598), declares that "the right of a railroad company to limit the time within which a ticket over its road shall be good is well settled," for which he cites Churchill v. Railroad Co., 67 Ill. 390; Pennsylvania Co. v. Hine, 41 Ohio St. 276; and a number of additional authorities in note 3, p. 2496. We have preferred to take the terse statement of the rule laid down by these text writers, rather than to make quotations from the authorities cited. An examination, however, of the cases which these authors have cited to support the doctrine shows that the rules enunciated are supported by the adjudications made. In the case of Elmore v. Sands, 54 N. Y. 512, quoted by Mr. Hutchinson, supra, it was said in the opinion that: "Railroad companies carrying passengers have the right to make reasonable rules and regulations for conducting their business, and they and their agents incur no liability in enforcing them in a proper manner. * * * He had his option either to pay upon the train, or to purchase the ticket, and exhibit that as evidence of his right to ride. The railroad company was not bound to issue the ticket in advance of the day on which it was to be used, and had the right to insist and provide that it should be used on the day when it was issued." In the absence of any statutory provision which contravenes them, the principles ruled by the authorities to which we have referred, the reasoning adopted by the different courts which reached the conclusion announced seeming to be sound and founded upon clear principles of right, are entitled to great weight, if, indeed, they are not satisfactorily conclusive of the question involved. But it is strongly urged upon us that the decisions of this court heretofore made in the cases of Phillips v. Railroad Co., 93 Ga. 356, 20 S. E. 247, Boyd v. Spencer, 103 Ga. 828, 30 S. E. 841, Railway Co. v. Barlow, 104 Ga. 213, 30 S. E. 732, and Railway Co. v. Ricks (Oct. term, 1899) 34 S. E. 570, are in conflict with the rulings made in the various cases to which we have referred, and opposed to the reasoning of the courts which reached the conclusions expressed. We are aware that much of the language which appears in the discussion of each of these cases will support this criticism, and that in some of these cases the provisions of section 2276 are recognized as applicable to the carriers of passengers. but it must be borne in mind that in none of them was it insisted that the provisions there incorporated applied exclusively to common carriers,—in other words, carriers of goods,—and also that in no one of these cases was the question whether a time limit placed upon a ticket in pursuance of a regulation bound the passenger as a rule of the company governing the contract of passage. On the contrary, in none of them were these questions made or decided, and no court is bound by any adjudication when it is sought to make that adjudication applicable to a question not then made or considered. Because of the defenses made in those cases, we have no criticism to make of the judgments there rendered. The ruling made in the present case is not based on the ground that section

2276 of the Civil Code does not apply to a carrier of passengers. We have in another case endeavored to show that it does not. But, whether it does or not, the rulings here made do not rest on its provisions. A review of the rulings made in these cases is had in the Lippman Case, supra. All the authorities which support the doctrine that a railroad company may, by rules and regulations, limit the time in which a ticket can be used for passage, concur in the view that such regulations must be reasonable, and whether or not a regulation of this character is or is not reasonable is a question to be determined by the court. On this subject, the rule, as we understand it, is that, where the facts are not disputed, the reasonableness of a regulation of a common carrier affecting the transportation of passengers is one of law for the court, and not of fact for the jury. Railway Co. v. Adcock, 52 Ark. 406, 12 S. W. 874; Railway Co. v. Hardy, 55 Ark. 134, 17 S. W. 711; Railroad Co. v. Rhodes, 25 Fla. 40, 5 South. 633; Gregory v. Railway Co. (Iowa) 69 N. W. 582; Chilton v. Railway Co., 114 Mo. 88, 21 S. W. 457. See, also, Central Railroad & Banking Co. v. Brunswick & W. R. Co., 87 Ga. 386, 13 S. E. 520; Railway Co. v. Johnson, 90 Ga. 501, 16 S. E. 49; Railroad Co. v. Moore, 94 Ga. 457, 20 S. E. 640; Railroad Co. v. Bussey, 95 Ga. 591, 23 S. E. 207.

This brings us to the question next in order; that is, whether or not such a rule is reasonable. It has been so often determined that such is a reasonable rule by the authorities cited in the foregoing part of this opinion that the ruling which we make that it is is rendered very much stronger by the sanction of the many eminent jurists presiding in the courts of last resort in very many of the states of the Union. Under ordinary circumstances, when a plain ticket is issued without conditions or limitations to a prospective passenger, that ticket can be made nothing but a receipt or token, and only shows that the person holding it is entitled to be transported between certain named points; and it cannot be questioned that the holder of it may use it at his pleasure within the statutory period for the enforcement of a contract. This right, however, is not without its burdens. If the ticket be lost or stolen, it can as well be used by another as by the one who purchased it. It cannot, from any fair view, we think, be considered unreasonable that the carrier may provide a method by which, if a railroad ticket is lost, or if, for some unforeseen cause, the purchaser is unable to use it within the time limit, if it be limited, that it may be redeemed, or, if the purchaser travels only a part of the distance to which the ticket entitles him to go, that the part remaining unused may be redeemed. Certainly such regulations provide a protection to bona fide passengers, and as to them and to the public there can be nothing unreasonable in such regulations. On the other hand, it is but reasonable that the carrier may prescribe a rule by which he may know how many persons are to travel on a particular train during a given day or time. It is not unreasonable for the carrier to confine the passage contracted for to the person to whom it has contracted to carry, and it is nothing more than reasonable that the carrier should have an opportunity to receive from all persons who have occasion to travel over its lines the compensation which the law allowed it to charge; and, inasmuch as it is able with the limitation of time, taken in connection with the obligation of the carrier, to make a redemption of unused or partly unused tickets when so limited, it is reasonable,—not only reasonable, but just; just not only to the carrier, but to the passenger as well. And such a regulation being, as we have attempted to show, within the limit of the power of the carrier to prescribe, and reasonable, there seems to exist no reason why the rule which was in force and promulgated at the time the defendant in error purchased his ticket for passage should not be maintained. It follows from what has been said that the defendant in error, by reason of the rule adopted by the carrier for the transportation of passengers, was not entitled to use the ticket which had been issued to him after the expiration of the time limit placed upon it. He should have paid his fare, and caused the ticket to be redeemed. As he failed to do so, but insisted on his right to use the ticket for passage, no right of action accrued to him to recover damages for his expulsion from the train in the manner in which it was shown to have been done by the evidence in the case. The court having refused to give in charge to the jury certain requests properly made, which embodied the views of the law which govern the case as herein indicated, the court committed error in overruling the motion for new trial.

It is but a matter of justice for us to say here that, in addition to the very able and comprehensive briefs submitted by the counsel in this case, we have derived much assistance from the excellent briefs of Messrs. Dorsey, Brewster & Howell and Sanders McDaniel, counsel for plaintiff in error in the case of Railway Co. v. Dyson, 109 Ga. —, 34 S. E. 997, in which the leading questions discussed here were made, but in which it was not necessary that they should be decided. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

SOUTHERN RY. CO. v. HOWARD.

(Supreme Court of Georgia. June 5, 1900.)

CARRIERS—EJECTING PASSENGER—FREIGHT TRAINS.

1. No right of action accrues to a passenger upon a railway train for ejection therefrom when it appears that under a reasonable regulation of the company the ticket which he offered as his right for transportation was lim-

ited as to the time in which the carriage was to be performed, and such limit had expired. Railway Co. v. Lippman (March term, 1900) 36 S. E. 202.

2. One who takes passage upon a freight train to a designated city is entitled to carriage thereon only to the point or place in such city or its suburbs at which the run of this train upon its usual and regular schedule is terminated, and cannot demand the right to be transported thereon to a station to which only passenger trains of the company are carried for the discharge of passengers.

3. Applying the rules above announced to the facts of the present case, the verdict in the plaintiff's favor was contrary to law, and ought to have been set aside.

(Syllabus by the Court.)

Error from superior court, Monroe county; E. J. Reagan, Judge.

Action by M. C. Howard against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Dessau, Harris & Birch and Cabaniss & Willingham, for plaintiff in error. Bateman & Gaines, O. H. B. Bloodworth, J. B. Williamson, and Westmoreland Bros., for defendant in error.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

JACKSON v. WARTHEN.

(Supreme Court of Georgia. May 12, 1900.)

SALE OF DECEDENT'S LAND—APPLICATION OF ADMINISTRATOR—CAVEAT OF CREDITOR.

1. It is not a good ground of objection to an application by an administrator for leave to sell lands or stocks in an incorporated company for the purpose of paying debts that the market is depressed, and that for this reason the property will not sell for its full value.

2. Nor does the fact that the claim of the caveating creditor against the estate is disputed afford cause for denying such application.

3. Allegations in a caveat to an application of this kind to the effect that the administrator is fraudulently colluding with the widow of the intestate to sacrifice the property of the estate, and thus defeat the rights of creditors, are without merit when they rest solely upon facts of the nature above indicated.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Application by S. M. Warthen, administrator, to sell land. James U. Jackson, a creditor, files a caveat. From a judgment for the sale of the land, Jackson brings error. Affirmed.

Copeland & Jackson, W. T. Turnbull, and W. W. Brookes, for plaintiff in error. R. M. W. Glenn, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

ROFF et al. v. TOWN OF CALHOUN et al.

(Supreme Court of Georgia. May 12, 1900.)

TOWN BONDS—VALIDATING BY SOLICITOR GENERAL.

A solicitor general has no authority, after the expiration of 20 days from the date of the service upon him of the notice provided for by the act of December 6, 1897, relating to "the confirming and validating of" bonds, to file the petition by this act prescribed, and such a petition, if filed too late, cannot be made the basis of any valid judicial action.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Action by Aaron Roff and others against the town of Calhoun and others. From a judgment declaring the bonds of such town valid, Roff and others bring error. Reversed.

Harkins & Dodd and R. J. & J. McCamy, for plaintiffs in error. Cantrell & Ramsey and Saml. P. Maddox, Sol. Gen., for defendants in error.

LUMPKIN, P. J. On the 6th day of December, 1897, the general assembly passed an act "to provide for the confirming and validating of all bonds which may hereafter be issued for counties, municipalities, or divisions, under paragraphs 1 and 2, section 7, article 7, of the constitution of 1877, and for other purposes." In the first section it is declared, in substance, that whenever, in any county, municipality, or other political division of this state, an election shall be held for the purpose of determining whether or not there shall be an issue of bonds, the authorities charged with the duty of declaring the result thereof must, in case the returns of the election show prima facie that it was in favor of the issuance of bonds, notify the solicitor general of the facts relating to the holding of such election and its result. The next section in explicit terms declares that, "within twenty days from the date" of such service upon the solicitor general, he shall prepare and file in the office of the clerk of the superior court of the county in which the election was held a petition, in the name of the state and against the county, municipality, or other division desiring to issue bonds, setting forth all the facts in the case. Thereupon the judge must issue an order requiring the defendant to show cause why the bonds in question should not be confirmed and validated. The act further provides for the service of such petition, for the making of parties thereto, and for the hearing of the same. See Acts 1897, pp. 82–85. The manifest purpose of this act is to obtain in the cases therein provided for a judicial determination of the question whether in each particular instance the issuance of bonds has been duly authorized. The proceedings contemplated being purely statutory, strict compliance with the provisions of the act is in any given case essential. An election was held in the town of Calhoun for the purpose of determining whether or not

certain bonds should be issued. It was duly declared that the election resulted in favor of the issuance of the bonds, and the notice required by the act was given to the solicitor general. This official filed a petition the object of which was to test the validity of the bonds in accordance with the provisions of the act under consideration. The record, however, affirmatively discloses that this petition was not filed in the office of the clerk of the superior court until after the lapse of more than 20 days from the date of the service upon the solicitor general. At the final hearing the judge of the superior court passed an order declaring the bonds valid, and the case is here for review.

Several questions are made in the bill of exceptions, and were argued here, but, in the view we take of the case, it is controlled by the proposition announced in the headnote. As the solicitor general failed to file the petition within the time prescribed by law, we hold that the entire proceeding and its result should be treated as mere nullities. The only authority conferred upon the state's officer for filing the petition at all was that given by the act, and it was not within his power or discretion to deviate from its terms. The provision requiring him to file the petition within 20 days from the date of service upon him was not merely directory, but mandatory. After the expiration of the 20 days, he had no right or authority to file any petition at all. If he could delay so doing for 1 day after the termination of the limit fixed by the statute, he could as well delay 10 days, or 100 days, 1 year, or any other length of time. The scheme of the act contemplated a speedy determination of the question whether or not the superior court should validate, or refuse to validate, any particular issue of bonds. It results that the judgment declaring the bonds issued in this particular instance valid was itself without validity, and must be set aside.

The question whether the provisions of the act of 1897 must be complied with in every case of an election for bonds in order to give validity to the same is not made, and we do not undertake to decide it. We simply place our judgment of reversal upon the proposition that in the present instance there was no lawful petition upon which any valid or binding judicial action could be predicated. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

ALMAND v. STATE.

(Supreme Court of Georgia. June 4, 1900.)

LARCENY AFTER TRUST—EVIDENCE.

The offense of larceny after a trust is committed only when the bailee has made a fraudulent conversion of the thing intrusted to him. Consequently, when, on a trial for this offense, the evidence shows that the accused had been intrusted at different times with different sums of money, to be appropriated for the benefit of the bailor in purchasing and shipping cotton seed, and that the bailor received from the bailee cotton seed of greater value than the amount of money with which he intrusted the bailee for the purpose indicated, a conviction cannot stand, because of the want of evidence of a fraudulent conversion of the property with which the bailee was intrusted; and this is true, notwithstanding it appears that the bailee devoted some of the money thus in his possession to the reimbursement of one whose money the bailee had used in making the purchases for the benefit of the bailor.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. K. Lumpkin, Judge.

S. L. Almand was convicted of larceny after trust, and brings error. Reversed.

Geo. W. Gleaton, John F. Daniel, and Arnold & Arnold, for plaintiff in error. C. D. Hill, Sol. Gen., and Rosser & Carter, for the State.

LITTLE, J. Almand was indicted for the offense of larceny after a trust delegated. The specific charge was that he had been intrusted by the Gate City Oil Company with certain checks on banks in the city of Atlanta at different times, and for different amounts of money, for the purpose of using the funds represented by said checks in purchasing and shipping cotton seed to the bailor. He was convicted, and made a motion for new trial on a number of grounds. Inasmuch as it is our opinion that the verdict was without evidence to support it, we do not find it necessary to consider and pass upon the other grounds of the motion. While the indictment charges that a number of checks described in that instrument were misappropriated, the state relied for conviction mainly on the appropriation to his own use by Almand of one certain check, for the sum of $250, dated November 29, 1898, which it was shown was delivered to the accused, and disposed of by him in the county of Fulton. It appears from the brief of evidence that Almand had been engaged in business with the Gate City Oil Company, in one way or another, for a number of years; that prior to the year 1898 he was due to that company a considerable amount of money for articles and merchandise furnished to him under an original agreement that such articles and merchandise were to be paid for in cotton seed at a certain price; that at various times during the year 1898 Almand received from the company, and had cashed, a number of checks, which represented quite a large amount of money, for the purpose of buying cotton seed and shipping it to the company in Atlanta; that these checks were charged to him on the books of the company as they were delivered, as were other and different items of merchandise sold to him by the oil company, the whole account thus stated constituting an aggregate indebtedness for money advanced to purchase cotton seed, and for merchandise previously sold to him by the company on credit; that

from time to time during the year the accused made shipments of cotton seed to the company, in varying quantities. It also appears that during this period the accused was acting as the agent of the Marietta Guano Company in collecting notes which had been previously given by farmers in the purchase of fertilizers; that frequently the accused accepted payment for such notes in cotton seed, which was shipped to the oil company,—his plan of operation being, as we gather from the evidence, to ship cotton seed which he obtained by direct purchase, as well as by the collections which he made on the guano company's notes, direct to the oil company, without a special regard to the amount of money furnished him by the company; his shipments sometimes exceeding in value the amounts of money furnished, and being sometimes less in value than such amounts. It was clearly shown that when he received the particular check for $250 he at once went to the office of the guano company, some of whose notes he had collected in cotton seed, and shipped to the oil company, and indorsed the check to such company, and received credit for the amount thereof on his personal indebtedness incurred by reason of the collection of its notes; and, if his conviction be allowed to stand, it must rest on the fact of this misappropriation of the check intrusted to him. The indictment is founded on section 194 of the Penal Code, which declares that "if any person who has been intrusted by another with any money * * * check * * * or any other article or thing of value, for the purpose of applying the same for the use or benefit of the owner or person delivering it, shall fraudulently convert the same to his own use, he shall be punished," etc. There can be no question but that, under the evidence, the check was delivered to the accused for the purpose of purchasing cotton seed for the company; and it cannot be denied that this specific check was delivered by the accused to one of his creditors, and went to pay a personal debt. It must be noted, however, that it takes more than this to constitute the offense with which the accused was charged. Undoubtedly, the check was converted from the use to which it was intended by the owner to have been put, but it is only when a fraudulent conversion has been made that a criminal offense is committed. If nothing more appeared but that the check was intrusted for the designated purpose, and the bailee converted it to his own use, the conversion would be deemed fraudulent. But if the oil company had received in cotton seed the full value of the money which it had given to the accused with which to purchase the seed, how can it be said that its money was fraudulently converted? In other words, if the oil company gave the accused a given sum of money for the purpose of purchasing cotton seed for its use, and the accused, with his own or the money of some one else, purchased and shipped to it cotton seed of the full value of the money furnished, what difference can it make to the company whether the identical money which it delivered, or the money of the accused, paid for the seed? In any event, it had, under the evidence, what it was entitled to demand from the accused in return for its money; and if, in making these purchases, the accused used his own money, or the money of some one else, and furnished the oil company all the seed which it could require of him, the fact that he used the money specifically given for the purchase to reimburse himself or another for the sum which he had paid out for the benefit of the oil company cannot make any difference to that company. While such a proceeding might be a technical conversion, it could in no sense be a fraudulent conversion. In the case of Snell v. State, 50 Ga. 222, this court, in construing the statute now under consideration, declared that, "to make out a case of larceny from the mere use of the article, it must appear that the use was fraudulent,—that it was used under such circumstances as to show an intent to deprive the factor of his property." And in the case of Railroad v. Cubbedge, 75 Ga. 824, this court said: "There is nothing in the proofs offered by the plaintiff which shows any positive fraud or intentional wrong on the part of defendants, and without this there is no embezzlement or larceny after a trust. The conversion must have been wrongful and fraudulent." And in the case of Etheridge v. State, 78 Ga. 340, this court, in defining what was a fraudulent conversion in a case of larceny after trust, declared that it was "a deception deliberately practiced in order to gain an undue and unfair advantage."

In his evidence, the president of the oil company, among other things, testified that: "I cannot say that Mr. Almand appropriated one cent of that money to his own use." And again: "The cotton seed amounted to $767.06. I don't know that the money for these checks did not go to pay for this cotton seed." And in testifying as to the amount of money represented by the checks set out in the bill of indictment, and the value of the cotton seed received from the accused, the president further testifies: "We furnished him $1,275 to buy cotton seed with, and he shipped us $1,900 worth of cotton seed." It may be true that on striking a balance the accused will be found indebted to the oil company, but, if this testimony for the prosecution be true, it cannot be held that the accused fraudulently converted to his own use any of the money which the oil company had intrusted to him with which to purchase cotton seed, because it shows that it received more seed than the money which it gave to the accused would buy. The criminal law is not concerned with the collection of the debt which the oil company holds against the accused. It will not lend

its aid under any circumstances to collect this or any other debt. It is only for a violation of the laws of the state that the accused can be made to suffer punishment. If the oil company sold merchandise to the accused on a credit, the law will aid it to collect its debt, to the extent of giving it a judgment against the property of the defendant, but it will not extend to it the aid of its criminal laws to enforce a settlement. Inasmuch as the state entirely failed to show that the accused fraudulently converted the property of the oil company to his own use, the court below should have awarded a new trial. Refusal to do so was error, and the judgment is reversed. All the justices concurring, except FISH, J., absent on account of sickness.

TUCKER v. CARSON.

(Supreme Court of Georgia. June 4, 1900.)

PLEADING—ANSWER—CONTINUANCE.

1. That the attorney for the plaintiff, in an action upon a promissory note brought in the county court, agreed with the judge thereof before the appearance term of the case, which was also the trial term, to continue the same until the next term, in order that the judge, whose term of office was about to expire, might represent the defendant, afforded no excuse to the latter for failing to file a plea of non est factum at the first term; it appearing that she had another competent attorney by whom the plea might have been filed.

2. When, in such a case, no defense at all was made at the first term, there was no error, when it came on for trial on the appeal in the superior court, in striking, on the ground that it was filed too late, a plea of non est factum filed in the county court after the expiration of the appearance term.

(Syllabus by the Court.)

Error from superior court, Macon county; Z. A. Littlejohn, Judge.

Action by C. F. Carson against S. J. Tucker. Judgment for plaintiff, and defendant brings error. Affirmed.

L. C. Greer, J. W. Haygood, and Jas. K. Hines, for plaintiff in error. Greer & Felton, for defendant in error.

LEWIS, J. Carson brought suit in the county court of Macon county against Tucker upon two unconditional promissory notes. This suit was made returnable to the next monthly term of the county court, which was held on the fourth Monday in May, 1899. It appears from the record that at the time of the institution of this suit Judge Haygood was judge of the county court, and the defendant below desired his services to defend the same. His successor had already been appointed, but, as Judge Haygood's term would not expire at the trial term of the case, he went to counsel for plaintiff below, and requested him to make no point on his representing Mrs. Tucker, and, as he would not get off the bench until after the May term of the county court, that plaintiff's attorney consent to allow the case to stand continued until the June term. To this plaintiff's attorney consented. It further appears from the record that the defendant was then represented by L. C. Greer, who was the first attorney employed in her defense. At the May term of the court, to which the case was returnable and triable, there was no plea at all filed in behalf of the defendant, but after the expiration of this term, to wit, on May 29th, Mrs. Tucker, through her counsel, filed a plea of non est factum to the notes. There was no agreement had between the counsel of parties with reference to deferring the filing of a plea. It was simply agreed that the case be continued. The case was appealed from the county court to Macon superior court, and when the same was called for trial the plaintiff moved to strike the plea filed by the defendant, for the reason the same was not filed at the first term of the county court, the plea being one of non est factum. The court sustained this motion, and upon this judgment error is assigned in the bill of exceptions.

1, 2. Civ. Code, § 3701, provides: "A party may deny the original execution of the contract sought to be enforced, or its existence in the shape then subsisting. In either event, if the contract be in writing and so declared upon, the denial must be on oath and filed at the first term after the service is perfected." Id. §§ 4198, 4204, declare, in effect, that the practice and modes of procedure in the county court, and the effect of its proceedings, records, and judgments, shall be the same as in the superior court. Newman v. Scofield, 102 Ga. 810, 30 S. E. 427; Freeman v. Carr, 104 Ga. 718, 30 S. E. 935. In the latter case it was decided: "There was no error, on the trial of an appeal from a county to a superior court, in refusing to allow the appellant, against whom a judgment had been entered in the lower court, to the rendition of which he had interposed no defense whatever, to file in the superior court a plea or answer to the plaintiff's action." It has been decided by this court that a defendant having appeared at the first term of court, and filed his plea of the general issue, it was competent for him to amend that plea at a subsequent term by filing a plea of non est factum. Hayden v. Cotton-Factory Co., 61 Ga. 245, and authorities cited. But in the same case it was further held: "When there is no plea filed by the defendant at the first term of the court, he cannot file a plea of non est factum at a subsequent term, by way of an amendment to his pleading, because he has no plea to amend by." See, also, Cowart v. Stanton, 104 Ga. 520, 30 S. E. 743; Brown v. Davenport, 76 Ga. 800 (Syl., point 2); Searcy v. Tillman, 75 Ga. 504 (Syl., point 2). In the last case cited the doctrine was even applied to a case in a justice's court which was carried to the superior court by appeal. No plea was filed at the first term, and at the second term after the appeal, the defendant having died, his executrix filed a plea of non est factum. No

cause for the delay being shown, it was held that the plea was properly stricken.

There is no sufficient reason given whatever as to why this plea was not filed at the first term. There was no consent or agreement that the time for filing the plea should be postponed after the first term, and no sufficient cause is given as to why it was not filed at the first term. It is true the attorney upon whom the defendant was relying to defend the suit was then upon the bench of the county court, but it further appears that she had other counsel employed. This being a plea of non est factum filed in the county court after the expiration of the appearance term, and no defense whatever being made to the suit at the first term, it follows from the above that when the case came on for trial in the superior court there was no error in striking the defendant's plea upon the ground that it was filed too late. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

SOUTHERN RY. CO. v. HARBIN.

(Supreme Court of Georgia. May 14, 1900.)

INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE.

1. The Alabama statute, now embodied in section 2590 of the Code of that state, rendering a master or employer liable to a servant for an injury "caused by reason of any defect in the construction of the ways, works, machinery or plant connected with or used in the business of the master or employer," does not prevent the defendant in an action brought under this statute from setting up as a defense that there was contributory negligence on the part of the plaintiff.

2. The evidence in this case demanded a verdict for the defendant.

(Syllabus by the Court.)

Error from city court of Floyd county; G. A. H. Harris, Judge.

Action by J. D. Harbin against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Shumate & Maddox, for plaintiff in error. Fouché & Fouché, for defendant in error.

LUMPKIN, P. J. The plaintiff below was an employé of the Southern Railway Company. While engaged with some of his fellow servants in shoving a loaded push car over a trestle upon one of the company's lines in the state of Alabama, he fell to the ground, and was very seriously injured. He brought an action against the company, alleging that his injuries were occasioned because of the rottenness of a wooden guard rail fastened to cross-ties constituting a part of the trestle in question. His particular complaint was that, because of the defectiveness of this guard rail, it gave way under one of his feet, and in consequence he was precipitated from the trestle. The plaintiff predicated his action upon a statute of the state of Alabama, now embodied in section 2590 of the Alabama Code, which, among other things, declares that: "When a personal injury is received by a servant or employé in the service or business of the master or employer, the master or employer is liable to such servant or employé as if he were a stranger, and not engaged in such service or employment, in the cases following: (1) When the injury is caused by reason of any defect in the construction of the ways, works machinery or plant connected with or used in the business of the master or employer." There was a verdict for the plaintiff, and the defendant filed a motion for a new trial; alleging that the verdict was contrary to law and to the evidence and to the charge of the court. The motion also assigned error upon various rulings made during the trial. We shall not, however, undertake to deal with the special grounds of the motion, because we are clearly of the opinion that upon the merits the plaintiff's recovery is not maintainable.

The evidence for the defendant tended strongly to show that the guard rail in question was sound and free from defect, and that the plaintiff's fall was purely attributable to accident or to carelessness on his part. On the other hand, the evidence introduced in behalf of the plaintiff was fully sufficient to warrant a finding that the guard rail was rotten and defective as alleged. We will therefore assume this to be the truth of the case, accepting as correct the conclusion which the jury evidently reached as to this matter. It further appeared, however, from clear and undisputed evidence, including the plaintiff's own testimony as a witness, that he was fully aware of the condition of the rail, and deliberately stepped upon it with the knowledge, as he himself stated, that it was rotten and apparently unsound. The only fair and reasonable inference deducible from the plaintiff's testimony as to this matter is that he deliberately and intentionally stepped upon a piece of timber which he knew to be rotten, without taking any precaution whatever to test its capacity to sustain his weight. Other evidence at the trial, which was practically undisputed, established the proposition that, in walking over the trestle for the purpose of pushing the car, the hands engaged could walk upon the cross-ties between the iron rails, or upon the guard rail, which was outside of the iron rails and very near to the ends of the cross ties, but that the former was obviously the safer and better way of going over the trestle and doing the work of pushing the car. It also appeared that the plaintiff was nearly 20 years of age, and that he had had some experience in doing such work as that in which he was engaged at the time he received the injuries of which he complains.

The case necessarily turns upon the construction which should be placed upon the Alabama statute as applied to the facts above set forth. It therefore seems entirely

proper for us to follow the decisions which have been rendered by the supreme court of Alabama with reference to this very statute, and so doing leads, we think, to the conclusion that the plaintiff was not entitled to a verdict. In the case of Wilson v. Railroad Co., 85 Ala. 269, 4 South. 701, which was an action for personal injuries by an employé against the defendant company, it was held that "under statutory provisions, as at common law, contributory negligence is a defense to such action." In that case the court, speaking through Judge Clopton, discussed the statute with which we are now dealing, and distinctly held that, notwithstanding its enactment, the plaintiff's right of recovery was defeated by his own negligence contributing to the bringing about of the injury of which he complained. Again, in Railroad Co. v. Walters, 91 Ala. 435, 8 South. 357, the same court ruled that, "in an action for damages against the employer on account of personal injuries received by plaintiff or his intestate while in the performance of the duties of his employment (Code, § 2590), the defense of contributory negligence is available, as in an action at common law." We may therefore take it as established by the decisions of the highest court of Alabama that an employé is not entitled to recover damages for personal injuries when he negligently contributed to the bringing about of the same. Had the plaintiff been an adult, it is clear that his right to a recovery would have been defeated because he voluntarily assumed a dangerous risk, and in so doing did not exercise the diligence which the law requires of every person of full age and sound mind. It would be a strain to hold that this particular plaintiff did not fall within this rule; for, though not quite of age, it appears that he was a stalwart young man, of at least ordinary intelligence, and, in view of his experience, ought to have known, and doubtless did know, fully as well as a man who had attained his majority, that the experiment upon which he ventured was, according to his own version of the transaction, extremely hazardous.

But, aside from this, the defense rests upon another ground. As above stated, it was shown that there were two ways of walking across the trestle and pushing the car, one of which was safer and better than the other, and that this fact was obvious to the plaintiff. He nevertheless voluntarily chose the more dangerous way. In this connection we cite a decision of the Alabama court rendered in the case of Railroad Co. v. George, 94 Ala. 200, 10 South. 145, in which it was held that: "If there are two apparent ways of discharging the required service, one more dangerous than the other, the employé is bound to select the latter, and is guilty of such negligence as will bar an action for damages if he selects the former and is thereby injured; and if the danger is so imminent and apparent, in either way, that a careful and prudent man would not incur the risk, he cannot recover, unless the evidence shows that the injury was caused by the reckless, wanton, or willful negligence of the defendant's employés." To the same effect, see, also, Railroad Co. v. Walters, supra, and Railroad Co. v. Graham, 94 Ala. 545, 10 South. 283.

The superior court ought to have sustained the motion for a new trial on the general grounds contained therein. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

NORTH ROME v. HALL.

(Supreme Court of Georgia. May 12, 1900.)

APPEAL—REVIEW.

There being no error of law committed, and the testimony being sufficient to sustain the verdict, this court will not interfere with the discretion of the trial judge in overruling the motion for a new trial. The writ of error, being palpably without merit, must have been sued out for delay only, and damages are accordingly awarded.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action between Electa E. Hall and North Rome. From the judgment, North Rome brings error. Affirmed.

E. P. Treadaway and Reece & Denny, for plaintiff in error. W. S. McHenry, for defendant in error.

PER CURIAM. Judgment affirmed, with damages.

FISH, J., absent on account of sickness.

MORGAN et al. v. COWETA FERTILIZER CO.

(Supreme Court of Georgia. May 12, 1900.)

SALE OF FERTILIZERS—DEPOSIT OF SAMPLES—ESTOPPEL—NOTICE OF WORTHLESSNESS.

1. Where a purchaser of fertilizers desires to have samples thereof taken and deposited with the ordinary, under section 1571 of the Political Code, and the seller requests the purchaser to take the fertilizers home, promising shortly thereafter to visit him and take the samples, and within a few days he does go to the home of the purchaser and take the samples, and, in company with the purchaser, deposits such samples with the ordinary, he is thereafter estopped to claim that the samples were not taken at the time of sale or delivery.

2. When, in accordance with section 1571, the seller himself takes the samples, he is likewise estopped to claim that they were not properly taken.

3. The notice required by section 1574 is that the purchaser has reason to believe, from the yields of the crop, that the fertilizer was totally or partially worthless. At what time of the year or stage in the growth of the crop the purchaser can properly determine the effect of the fertilizer upon the crop, so as to give notice of such dissatisfaction, is a question for the jury.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Action by the Coweta Fertilizer Company against W. H. Morgan and others. Judgment for plaintiff, and defendants bring error. Reversed.

Fielder & Mundy, for plaintiffs in error. Sanders & Davis, for defendant in error.

SIMMONS, C. J. The record discloses that Morgan and several others purchased from Randall, the agent of the Coweta Fertilizer Company, a quantity of guano. The purchasers wished to have samples taken and preserved as provided by section 1571 et seq. of the Political Code. The agent told them he was busy, and requested them to take the guano to their homes, where he promised to call in a day or two and take the samples. Within two or three days he did go to the home of each, and take samples from the sacks. He and the purchasers then went to the ordinary of the county, and deposited with him the samples, in bottles. They were duly labeled according to the statute, and were retained by the ordinary. Early in September of the same year the purchasers, being dissatisfied with the yield of the crop on which the fertilizers had been used, requested the ordinary to send the samples by express to the state chemist for analysis. The state chemist analyzed the samples, and sent to the ordinary a copy of the analysis, properly certified. About the 1st of September, and also in October and November, the purchasers notified the agent of the fertilizer company that the fertilizers had not produced the results expected, and that they intended to forward the samples to the state chemist for analysis. The note given for the fertilizers became due, the makers refused to pay it, and suit was brought by the company. The defendants filed pleas setting up the above facts, and in addition thereto alleging that the official analysis showed that the fertilizers did not come up to the guarantied analysis. On the trial of the case the official analysis was tendered in evidence, and was, upon objection, excluded by the court. Oral evidence was introduced as to the effect of the fertilizers upon the crops, but, inasmuch as the judge directed a verdict for the plaintiff, it is not necessary to state it here.

1. One of the objections made to the introduction of the official analysis was that the samples had not been taken at the time of sale or delivery, as required by the statute. A reference to the above-stated facts will show that the purchasers, when the fertilizers were about to be delivered to them, requested the agent of the company to take the samples then. He was too busy to do so, and requested the purchasers to take the fertilizers home; promising to call in a few days to take the samples. In two or three days he called, took the samples, and, in company with the purchasers, deposited them with the ordinary. Under these circumstances, we think the company was estopped to raise this objection to the evidence offered. The delay was for the convenience of the plaintiff's agent, and at his request, and it would be wrong to allow the plaintiff to take advantage of the purchasers because they did not insist that its agent should pursue the law strictly.

2. Another objection made to the introduction of the analysis of the state chemist was that the samples had not been properly taken. The evidence on this point was that the agent, after the bags of fertilizers had been opened, used in one case a knife, and in the other a spoon, to take the samples from the bags. He placed the samples in bottles, sealed the bottles, and delivered them to the ordinary. The objection raised was that the samples came from the top, and not from deeper down in the sacks. The law does not prescribe how or in what manner the seller shall take samples. It seems to us that if he took the samples, knowing the object for which they were wanted, without getting any of the fertilizers from the middle of the sacks, and was satisfied with this method of taking them, he cannot be afterwards heard to object to the analysis on the ground that the samples were not properly taken from the sacks. To decide otherwise would be to allow a seller to take advantage of his own wrong.

3. Section 1574 of the Political Code provides that "should said purchaser, after having used such fertilizers upon his crops, have reason to believe from the yields thereof that said fertilizer was totally or partially worthless, he shall notify the seller, and apply to the ordinary to forward the said sample * * * to the state chemist," etc. One of the objections raised to the admission in evidence of the analysis was that the defendants could not tell in September what would be the yields of their crops of cotton, and that therefore the notice was given too early; that at the time it was given they were not able to tell what would be the yield, and an analysis made after so early a notice was not authorized, and was therefore inadmissible in evidence. It will be observed that the statute does not say at what time the notice must be given. It only says that if the purchaser has reason to believe, from the yields of the crops, that the fertilizer was totally or partially worthless, he shall give the seller this notice of dissatisfaction. Inasmuch as the statute does not further prescribe the time when the notice can be given, we think it a question for the jury. It is for the jury to say when a purchaser of fertilizer may reasonably say, from the yield of the crop, that the fertilizer was totally or partially worthless. Whether, in regard to a cotton crop, he can do this in September or in October, we are unable, as matter of law, to determine. As a matter of opinion, we would be inclined to say that a man whose business it was to raise cotton, and to buy fertilizers for it, could make at least a reasonable estimate as to the

effect of the fertilizer upon his crop. Certainly this would be true in some sections of the country, and would possibly not be true in others. All this would be for the determination of the jury. We think that, under this statute, it is not necessary that the crop should have been gathered, ginned, and baled before the yield could be determined so as to give the notice to the seller of the fertilizer. The statute does not require that the notice should be given at any particular time, and this court being unable to determine, as matter of law, when it should be given, it devolves upon the jury to determine in this case whether the notice was given properly and in due time, or was given too early. Inasmuch as it appears that there were no other objections to the admission in evidence of the official analysis, and that the same was in other respects regular, and inasmuch as that analysis differed from the guarantied analysis under which the fertilizers were sold, the judge erred in excluding the evidence offered, and in directing a verdict for the plaintiff. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

SHIFLETT v. CITY OF CEDARTOWN.

(Supreme Court of Georgia. May 12, 1900.)

DEFECTIVE STREETS—NEGLIGENCE—QUESTION FOR JURY.

There being testimony warranting a finding that the municipal authorities had negligently left in one of the principal streets of the city a dangerous hole, and it being, under the evidence introduced by the plaintiff, who fell therein and was injured, a question of fact whether, under all of the existing circumstances, he exercised due diligence in endeavoring to avoid the fall, the case should have been submitted to a jury, and not disposed of by the grant of a nonsuit.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Action by W. S. Shiflett against the city of Cedartown. Judgment for defendant, and plaintiff brings error. Reversed.

Fielder & Mundy, for plaintiff in error. Mr. Sanders and John K. Davis, for defendant in error.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

THURMOND v. CEDAR SPRING BAPTIST CHURCH.

(Supreme Court of Georgia. May 14, 1900.)

RELIGIOUS SOCIETY—ACTION AGAINST.

No action can be maintained against a religious society, when sued as such, when such society has not been incorporated, nor had recorded its name and objects, as provided by law. The members of such society are liable on its contracts as joint promisors or partners.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Action by A. S. Thurmond against the Cedar Spring Baptist Church. Judgment for defendant, and plaintiff brings error. Affirmed.

Fielder & Mundy, for plaintiff in error. Wm. Janes, Jas. A. Blance, and F. A. Irwin, for defendant in error.

LITTLE, J. Thurmond exhibited a petition against the Cedar Spring Baptist Church and others. He alleged that he was a mechanic and contractor; that as such, in 1896, he contracted with the Cedar Spring Baptist Church, by and through its agents and building committee and deacons, Gibson, Richardson, Janes, Howard, Jackson, and Stinson, to erect and build for the Cedar Spring Baptist Church a new church building on a lot owned by said church, for a stipulated price; that he completed the same according to contract, except certain parts, and as to those the building committee failed to furnish material, and otherwise prevented him from doing so, averring his readiness to entirely complete the same according to contract when permitted by said church; that the cost of fully completing it would not exceed the sum of $20, and his failure so to complete was caused by the defendants, who would not allow him to do so. He further shows that he filed his claim of lien against said church building, and the land upon which it was situated, and that the defendants were due him $257 balance. The suit was instituted to enforce his lien against the property. To this petition both a demurrer and an answer were filed in behalf of the Cedar Spring Baptist Church. On the hearing, a motion was made to dismiss the case on the ground that it did not appear that the Cedar Spring Baptist Church was a corporation, and the case was not properly brought against said church. This motion was sustained, and the petition was dismissed; to which ruling the plaintiff in error excepted.

While Gibson, Richardson, and others were named as the building committee and deacons of the church, and while process was prayed against them individually, no judgment was asked against either of these defendants. The allegations of the petition treated these named persons as the agents and building committee, and they are not sought to be made liable to the plaintiff for the debt. The claim of lien filed is on real estate of the Cedar Spring Baptist Church, and alleges that the contract for the erection of said church was made with said persons, who are designated as deacons. Therefore, so far as the petition is concerned, it must be held to be a suit against the Cedar Spring Baptist Church. Further, it is not alleged that the church has been incorporated, which might have been done under section 2351 of the Civil Code, nor that the names

of the trustees or officers had been entered on record, nor that the name, style, and objects of the association had been recorded, as provided in section 2357 of the Civil Code; either of which proceedings would have rendered the church capable of suing and being sued. For aught, then, that appears, the church was a voluntary association of persons for the purpose of divine worship and the observation of religious duty. Josey v. Trust Co., 106 Ga. 608, 32 S. E. 628. And the rule of law is that no association of persons can appear in court as a corporation, unless organized as such in the manner provided by law. Hawes, Parties, § 92; Dicey, Parties, p. 169. It must be borne in mind that none of the members or congregation of the church are sued as such; that it does not appear whether its property is held by trustees or not, but, even if it was, the trustees were not made parties defendant, nor served. In the case of Wilkins v. St. Mark's Church, 52 Ga. 351, this court held that a religious society which is not incorporated according to law, or which has not recorded its name and objects, as provided by the Code, cannot be sued as such. Its members are liable on its contracts as joint promisors or partners. And in the case of Barber v. Albany Lodge, 73 Ga. 474, a demurrer ore tenus was made to the petition when the case was called for trial, which was sustained, and, exception being taken, this court ruled that some person must be sued, either natural or artificial; that no person was sued in the complaint exhibited; and the demurrer was therefore good. This case seems to be conclusive of the question involved, and it must be ruled that the court did not err in sustaining the demurrer and dismissing the petition. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

JONES v. CAMP.

(Supreme Court of Georgia. May 12, 1900.)

APPEAL—REVIEW.

The charges complained of were in substantial accord with the settled rules of law. No material instruction was omitted. There was no error in rejecting testimony, and the evidence fully warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action between J. M. Jones and J. L. Camp. From the judgment, Jones brings error. Affirmed.

G. A. H. Harris & Son, for plaintiff in error. Dean & Dean, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

LEWIS v. DOUGLAS COUNTY CO-OPERATIVE STORE.

(Supreme Court of Georgia. May 14, 1900.)

MORTGAGES—FORECLOSURE—EXECUTION—AFFIDAVIT OF ILLEGALITY.

1. Where one executed and delivered to another two promissory notes and two mortgages, one of which covered described land, and specified that it was given to secure the payment of one of the notes, and the other of which described other land, and specified that it was given to secure the payment of the other note; and where the mortgagee instituted one proceeding for the foreclosure of both mortgages, and thereon obtained a rule absolute; and where, from an inspection of the entire record of that proceeding, it manifestly appears that the plaintiff sought to subject to the satisfaction of each particular mortgage that property only which was therein described, and the rule absolutely, fairly construed, is to this effect, —it was proper for the clerk to issue execution accordingly, and the duty of the sheriff to enforce the execution as issued.

2. In the light of the entire record, the court did not err in holding that the defendant's affidavit of illegality was not well taken.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Action by Douglas County Co-operative Store against W. A. Lewis. Judgment for plaintiff. Defendant brings error. Affirmed.

B. G. Griggs, for plaintiff in error. L. Z. Dorsett and Roberts & Hutcheson, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

MAY v. STATE.

(Supreme Court of Georgia. June 4, 1900.)

LARCENY—NEW TRIAL.

Even if the evidence was sufficient to show that the defendant committed the larceny with which she stood charged, a new trial should nevertheless have been granted, because no proof was made of the value of the article alleged to have been stolen, nor of the time at which the larceny was committed.

(Syllabus by the Court.)

Error from city court of Brunswick; J. D. Sparks, Judge.

Irena May was convicted of larceny, and brings error. Reversed.

Max Isaac, for plaintiff in error. J. T. Colson, Sol. pro tem., and J. W. Bennett, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

SHINGLEUR et al. v. SWIFT et al.

(Supreme Court of Georgia. June 4, 1900.)

PLEADING—PETITION—DEMURRER.

1. A petition wherein separate and distinct causes of action against different defendants

are set forth is demurrable on the ground of multifariousness, and also on the ground of misjoinder of parties, when there are no allegations showing joint liability save loose and general charges of fraud and collusion, which do not state the facts upon which such charges are based.

2. The demurrers to the present petition sufficiently pointed out the objections thereto, which were of the nature above indicated, and the court did not err in holding that these demurrers were well taken, or in dismissing the action.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action by Shingleur & Co. against W. B. Swift and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

G. E. Thomas, Jr., J. M. Chilton, and H. C. McCutchen, for plaintiffs in error. McNeill & Levy, Charlton E. Battle, and Goetchius & Chappell, for defendants in error.

COBB, J. Shingleur & Co. brought suit against Swift, Jenkins, the Georgia Warehouse, Storage & Commission Company (hereinafter referred to as the "warehouse company"), and the Fourth National Bank of Columbus, Ga. (hereinafter called the "bank"). The petition alleged that Swift had been employed by the plaintiffs to purchase and ship cotton for them, and to draw drafts in their name upon the consignees for the price which they had agreed to pay for the cotton. The petition sought to set forth a cause of action against Swift for a failure to account to plaintiffs for the difference which he, as their agent, had paid for the cotton purchased by him, and the amount of the drafts drawn upon the consignees to whom the cotton was shipped. The petition sought to connect Jenkins with these transactions by showing that he was the payee in the drafts drawn by Swift, and the bank by showing that it had collected the drafts, deposited the money, and failed to account to the plaintiffs for the full amount which they claim to be due them. As to the warehouse company, the allegations were that it has now in its possession a certain number of bales of cotton purchased by Swift for plaintiffs, and stored with it, and that it refuses to deliver the same to plaintiffs; but there was no prayer for the specific recovery of this cotton. There were averments in the petition, of a very general nature, that all of the defendants had colluded together for the purpose of defrauding plaintiffs. The prayers were for an accounting between plaintiffs and all the defendants, and a judgment against them for the amounts due by each of them, and for general relief. To the petition the defendants filed demurrers, both general and special, some of the grounds of the special demurrers being that the petition was multifarious, contained a misjoinder of parties defendant, and that the charges of fraud and collusion were too vague and indefinite, and no facts upon which such charges were based were set forth. The court sustained the demurrers, and dismissed the petition, and the plaintiffs excepted.

There was no error in sustaining the demurrers. The petition was clearly multifarious, and contained a misjoinder of parties defendant. The plaintiffs may have a cause of action against Swift for the fraud which it is alleged he perpetrated upon them. They may also have a cause of action against Jenkins and the bank, if they have in their possession any funds belonging to plaintiffs, or if they aided and abetted Swift in defrauding his principals. If the warehouse company has in its possession cotton belonging to plaintiffs, and wrongfully refuses to deliver it up to them, they, of course, have a cause of action against that company. But these three causes of action cannot be united in one petition, and all of the defendants cannot be sued in one action when it is charged in merely loose and general terms that they colluded together to defraud the plaintiffs. No facts upon which such charges were based were set forth, and the averments as to this matter were merely conclusions of the pleader. We will not undertake to determine in the present case whether the plaintiffs have a cause of action against any of the defendants severally, or against any two or more of them jointly. What we do hold is that, upon the state of facts alleged by them, they cannot maintain one action against all of the defendants jointly, or unite in one petition all of the causes of action which they sought to declare upon. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

DAVIS et al. v. SOUTH SIDE MFG. CO. et al.

(Supreme Court of Georgia. May 12, 1900.)

ACTION ON CONTRACT—PLEADING—PRIVITY.

The relief sought in plaintiffs' petition against the defendant being based upon an alleged breach of a contract made by the defendant with another party alleged in the petition to have acted in the transaction for the benefit and in the interest of the plaintiffs, and the petition failing to charge that the defendant had any knowledge that the party with whom it dealt was acting in such capacity, and not charging defendant with notice that any of the plaintiffs had any interest in the contract, or the business pertaining thereto, and it further appearing from the petition that the defendant, in a suit against the party with whom it had contracted, had obtained a judgment against such party individually on account of his violation of the terms of the contract, it was not error for the judge to sustain a demurrer by defendant's counsel to the petition in this case on the ground that it showed no privity of contract between the plaintiffs and defendant.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by B. P. Davis and others against the South Side Manufacturing Company and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Dean & Dean, for plaintiffs in error. Wright & Ewing, for defendants in error.

LEWIS, J. This was an action brought against the defendants by petitioners as ten separate and distinct partnerships, in each one of which G. H. Miller & Son are alleged to be members. The petition alleges that petitioners are respectively partnerships engaged in the business of raising and marketing peaches on their respective partnership orchards, situated in the counties of Gordon and Bartow; that G. H. Miller & Son is a separate partnership, composed of G. H. Miller and John C. Miller, and as such partners they are common partners with said several partnerships. The defendant is a nonresident body corporate, created under the laws of Virginia, with no agent or place of business within the state of Georgia, and owns no property within the state of Georgia, except as set forth in the petition. The defendant brought its suit in the city court of Floyd county against G. H. Miller & Son for the purchase money of the crates which were contracted to be furnished under the contract as set forth in paragraph 5 of the petition, in which cause the South Side Manufacturing Company obtained a judgment against said G. H. Miller & Son on the 15th day of June, 1899, for the principal sum of $1,982.97, besides interest; and that upon said judgment execution will soon issue, and J. E. Camp, as sheriff, will proceed to collect the same, unless restrained by the court. The petition sets forth a statement that the South Side Manufacturing Company is indebted to their respective partnerships in certain sums, the amount of indebtedness to each partnership being stated in figures opposite its name. In the fifth paragraph, above referred to, the petition charges that attachments had been sued out by the several partnerships against the South Side Manufacturing Company, returnable to the July term, 1899, of Floyd superior court, and each of said attachments had been levied by service of summons of garnishment upon G. H. Miller & Son. Declarations had been filed in each of the attachment suits. In these declarations it is alleged by the respective partnerships that under the terms of the partnership contract between the respective partnerships it was the special duty of G. H. Miller & Son, as a member of said respective partnerships, to attend to procuring the packages necessary for shipping the fruit grown on said several partnership orchards, and also to attend to the shipping and sale of said fruit; that in May, 1898, G. H. Miller & Son, in behalf of and for the benefit of said respective partnerships, made a contract with defendant the South Side Manufacturing Company, whereby it contracted to sell and deliver material manufactured for the construction of crates to be used in the shipping of peaches from the said several orchards. In said contract it was agreed that all of said material should be shipped from defendant's factory, beginning June 15, 1898, and that all should be shipped before July 1, 1898. When said contract was made, the petition charges that the defendant knew and was advised by G. H. Miller & Son that said material was to be used for the construction of crates in which to ship peaches grown and maturing in the peach season of 1898 to markets in large cities; and was further advised by Miller & Son that the peaches would be ready for shipment during the latter part of June, and extending into the month of July, 1898; that defendant also knew it was necessary and was contemplated between the contracting parties that said material was to be received a considerable time in advance of the ripening of the peaches, in order that the material might be constructed into crates for distribution and use, and that defendant knew that, "unless said material was received in due time, there would be great and special loss to petitioners on account of ripening and rotting of peaches." The defendant failed to carry out its contract to ship said crate material at the time and as agreed upon, but shipped the same too late to afford an opportunity to construct said material into crates in time to meet the necessities and requirements for the shipment of petitioners' peaches as the same matured. By reason of defendant's failure to carry out its contract, as aforesaid, plaintiffs suffered great loss and damage, which they alleged was particularly set forth in their declarations in attachment. Petitioners bring this suit in aid of their several attachments, alleging they have reason to believe that said Camp, sheriff, will proceed, when execution has been issued on said judgment in favor of defendant against G. H. Miller & Son, to collect the same by levy and sale of the property of said Miller & Son, without regard to the summons of garnishment served upon said Miller & Son, and to pay over said sum so collected to said South Side Manufacturing Company, and the same will be by it carried beyond the state of Georgia. Petitioners pray for an injunction restraining the sheriff from collecting the debt from G. H. Miller & Son, and restraining the South Side Manufacturing Company from proceeding to collect it, and asking that the fund be ordered held by Miller & Son, subject to the order of the court, to await the final determination of said attachment cases; and if the plaintiffs in said attachment cases, or any of them, should prevail, that the same be paid out pro rata, according to the amount of their said several attachment judgments. To this petition a demurrer was filed by the defendants on the general grounds that it did not set forth a cause for injunction as prayed for, and on several special grounds. Among the special grounds are the following: That the petition set forth no privity between petitioners and the South Side Manufacturing Company; that the private duties of Miller & Son under articles of partnership

undisclosed or unknown to the South Side Manufacturing Company cannot bind said company; that the knowledge of the subcontracts to which material is to be applied and used in filling does not make the subcontractors privies with the South Side Manufacturing Company, and liable on the breach of the original contract to said subcontractors; that paragraph 3 of the petition alleges the suit and judgment obtained by the South Side Manufacturing Company against G. H. Miller & Son on this same alleged contract. The defendants in that suit referred to filed pleas for these same special damages, alleging the same breach of contract here alleged, but withdrew them, and allowed judgment to be rendered against them as alleged in the petition. The matters sued on in said attachments are res adjudicata. That a partnership cannot garnish one of its members. A plaintiff cannot garnish himself. The petition alleges that G. H. Miller & Son in said contract acted for and in behalf of petitioners, and therefore Miller & Son, defendants in fi. fa. and in garnishment, are alter ego of petitioners. The garnishees are in privity with and represent the plaintiffs in attachment in the proceedings, and it is contrary to the principles of jurisprudence or good conscience to permit them to charge themselves as garnishees; and petitioners have filed no bond in this behalf to cover damages and costs that defendants may sustain, and have failed to deposit said money due upon said judgment in court, but seek to retain possession of the same. The court sustained this demurrer, to which judgment plaintiffs in error except.

It appears from the above petition that the plaintiffs, as 10 separate partnerships, were engaged in the business of growing and marketing peaches in the counties named, each firm being composed of three members, and Miller & Son being two of the three in each case. It seems by a partnership agreement of each firm Miller & Son were charged with the duty of procuring for the firm each season crates for marketing its fruit, and that in May, 1898, they made with the defendant South Side Manufacturing Company a contract for the purchase of crate material. How many is not stated. It was to be used for the purpose of shipping peaches. While the petition declares that the purchase was made on behalf and for the benefit of the respective partnerships, it is nowhere alleged that the South Side Manufacturing Company knew this fact, nor is it alleged what proportion was intended for each firm, nor that the defendant knew that the material was bought for or to be used by any other persons than Miller & Son themselves. It further appears that the defendant sued Miller & Son on that contract for the purchase money of the material, upon which it obtained a judgment; and that after this these 10 firms brought their 10 several attachment suits against the defendant, and garnished Miller & Son to reach this purchase-money debt in judgment. While the petition is not by any means clear or definite in its allegations, yet we think the above is a fair statement of its purpose. There is not only nothing in it that changes any contract between the defendant and any one of the partnerships suing as plaintiffs in this case, but not even any knowledge or intimation of the fact that the firm of Miller & Son, with whom the defendant did actually contract and deal, were agents for these particular plaintiffs, or were interested with them, or any one else, as co-partners in this business, was alleged. Miller & Son made with the defendant but a single contract in their own name, on their own credit, and for a single purchase. As contended by counsel for defendant in error, this could not be the contract of the 10 firms jointly, for Miller & Son were not partners of them jointly, but of each separately, and it cannot be the contract of each one or of any one of the different partnerships. We think it a fair inference from the pleadings to say that Miller & Son, instead of undertaking to make separate contracts for each of these firms, elected to make in their own right a single contract for the purchase in gross of such a quantity of material as they estimated to be sufficient for these partnerships, and intended to distribute among these firms as their interests might severally require. It is manifest that the defendant's single contract with parties known to it, and for a single transaction by wholesale, could not, without its consent, be split into separate contracts with unknown parties. We think, therefore, that the most obvious ground of the demurrer which the court below was clearly right in sustaining was that the petition upon its face showed no privity of contract between the plaintiffs and these defendants. Even upon this ground alone, then, the court did right in sustaining the demurrer to the petition, and we deem it unnecessary to enter into any discussion of the other grounds in the demurrer. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

FLOYD v. WOODS.

(Supreme Court of Georgia. May 16, 1900.)

SALE—FRAUDULENT REPRESENTATIONS—RELIANCE.

Although, pending negotiations for the purchase of an article of personalty, the seller may knowingly have made false representations as to its character and qualities, yet where such negotiations finally resulted in the making of an express agreement whereby the purchaser undertook to buy the "property entirely upon his own judgment, waiving all defects, either patent or latent," as well as "the implied warranty upon the part of the seller" raised by law, "that he knows of no latent defects undisclosed," such purchaser cannot be heard to set up in defense to an action on the contract

that in point of fact he did not purchase upon his own judgment, but upon the faith of the seller's false and fraudulent representations made pending the negotiations which led up to the sale.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Action by E. Floyd against F. A. Woods. Judgment for defendant, and plaintiff brings error. Reversed.

L. Z. Dorsett and J. F. Golightly, for plaintiff in error. John V. Edge and A. L. Bartlett, for defendant in error.

LUMPKIN, P. J. The record discloses that Woods purchased from Floyd a buggy, giving therefor a promissory note, which also embraced a mortgage upon the buggy. In this instrument was the following clause: "It is expressly understood and agreed that the property for which this note is given is sold without any warranty, expressed or implied, on the part of the seller; and the purchaser buys said property entirely upon his own judgment, waiving all defects, either patent or latent. The purchaser waives the implied warranty upon the part of the seller as contemplated in section 2651 of the Code of Georgia, and agrees not to plead failure of consideration or any other plea to an action that may be founded upon this note." Floyd made an affidavit in due form for the purpose of enforcing the mortgage lien created as above stated, and an execution issued thereon was duly levied. In resistance to this foreclosure, Woods filed an affidavit admitting the execution of the note, but setting up, in substance, the defense that the instrument in question was given for a buggy which the plaintiff falsely represented to be new, whereas it was an old buggy "fixed over, and almost worthless." The issue thus formed came on to be heard in the magistrate's court, when the defendant amended his pleadings by alleging "that the plaintiff perpetrated a fraud on him in this, to wit: Plaintiff represented the buggy to be a new one, which was untrue, the buggy being an old one patched up and painted over, which this defendant did not know at the time of the sale, and deceived this defendant with the paint on the buggy. The plaintiff knew all these facts, and this defendant did not know the defects in the old buggy. Defendant says that had he knew the trouble, and condition of the buggy, he would not have bought the same." The magistrate sustained a motion made by plaintiff's counsel to strike the defendant's "plea," holding that he could file no defense for the reason that he had expressly contracted in writing not to make any defense to any action that might be founded upon the note. A judgment in favor of the plaintiff was thereupon entered, and the defendant filed a petition for certiorari, containing a single assignment of error, viz. that the magistrate erred in holding that the defendant, because of the above-quoted stipulation in the contract, had no right to make any defense to the proceeding instituted by the plaintiff. The superior court sustained the certiorari, and the plaintiff excepted.

Our conclusion is that the right result was reached in the magistrate's court. We do not, however, predicate our decision upon the idea that the defendant was cut off from making a defense because he contracted not to do so, but upon the ground that the defense actually sought to be made was wholly without merit. The gist of it was that although the defendant had freely and voluntarily signed the contract with a full knowledge of its terms, one of which was that he was buying the property "entirely upon his own judgment, waiving all defects, either patent or latent," he was nevertheless misled and deceived by false representations made by the plaintiff pending the negotiations leading up to the purchase. Granting that, as matter of fact, the plaintiff did knowingly make false representations, and that the defendant really placed reliance thereon, it does not follow that, as matter of law, he was defrauded. It is certainly possible for one to purchase an article, taking all the chances as to its value, or qualities; and, if there ever was a case of this kind, it is the one now before us. The defendant not only contracted as just indicated, but he expressly stipulated that the sale to him was "without any warranty, express or implied, upon the part of the seller," and further agreed to waive "the implied warranty upon the part of the seller as contemplated in section 2651 of the Code of Georgia," then of force (now section 3555 of the Civil Code). It is to be noted that under this section the seller, "unless expressly or from the nature of the transaction excepted," warrants that "he knows of no latent defects undisclosed." The defendant does not, in the defense which he sought to make, pretend that he did not fully understand and voluntarily agree to all the stipulations contained in the contract signed by him. In the face of these express stipulations, he cannot be heard to assert that he contracted, not "upon his own judgment," as in his written contract he unequivocally declares, but upon the faith of false and fraudulent representations made by the seller pending the negotiations which led up to the sale. When an agreement freely and voluntarily entered into is reduced to writing, the instrument or instruments evidencing the same must control; for there is a conclusive presumption of law that all previous negotiations are merged into the contract as finally consummated, and extrinsic evidence, whether oral or written, which relates merely to such negotiations, cannot be received to add to, vary, or contradict the writing or writings wherein such contract is contained, if the terms thereof be expressed in language which is plain and unambiguous. If follows that although the seller may, pending such negotiations, knowingly make false representations concerning the ar-

ticle which is the subject-matter of sale, yet if, before the contract is finally consummated, he puts the purchaser upon his guard by insisting that the latter must undertake to buy solely upon his own judgment, viz. to deal at arm's length, he cannot successfully urge in a court of justice that he has been deceived and defrauded, for the simple though abundant reason that under the circumstances he was not warranted in placing any reliance whatever on what the seller may previously have said.

As the magistrate was right in striking the defendant's plea of fraud, it makes no difference upon what reason such action was based, and the superior court erred in setting aside the judgment of the justice's court. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

STALLINGS v. NEWTON, Sheriff, et al.

(Supreme Court of Georgia. May 16, 1900.)

DEED—DELIVERY—REGISTRATION.

1. Delivery of a deed conveying real property is essential to its validity, and is only complete when the deed is accepted.

2. A proper and legal registry of an instrument raises a presumption of delivery sufficient to establish the fact unless rebutted. An unauthorized registry raises no such presumption, and in that case the validity of the instrument is not established until delivery is affirmatively shown.

(Syllabus by the Court.)

Error from superior court, Monroe county; E. J. Reagan, Judge.

Bill by Ida L. Stallings against G. W. Newton, sheriff, and others. Decree for defendants, and plaintiff brings error. Reversed.

John F. Redding, for plaintiff in error. Cabaniss & Willingham and King & Spalding, for defendants in error.

LITTLE, J. Ida L. Stallings exhibited to the judge of the superior court a bill praying an injunction, in which she alleged that she was the widow of C. C. Stallings, deceased; that she was the head of a family consisting of herself and five minor children; that in April, 1880, her husband was largely involved in debt, and voluntarily executed a deed to her, conveying a certain tract of land in Monroe county. She alleges that she had no knowledge of the intention of her husband to make her a deed of gift of said land; that in October, 1880, she repudiated the deed of gift, which she alleged had never been delivered to her, and elected to take a homestead in the land as the property of her husband; that she made application to the ordinary of said county, on the refusal of her husband so to do, and had set apart for the benefit of herself and minor children a homestead in the land, which was described in the deed from her husband to herself. She further alleges that, by intimidation and duress, her husband forced her, subsequent to the setting aside of the homestead, to sign an application to borrow money, giving the said land as security; that she never received any money, and had nothing to do with the transaction, other than to sign the papers presented; that her husband died subsequently, and the debt for the borrowed money was never paid; that the notes given for the same were sued to judgment, and the execution issuing thereon was levied on the land which is included in the homestead, which was duly advertised and sold by the sheriff, and purchased for the plaintiff in execution. She alleges that the sheriff and the attorney for the plaintiff in execution threaten to dispossess petitioner from her homestead, that they are interfering with her tenants, and are seeking to obtain possession and control of said land. She thereupon prays for an injunction to restrain the sheriff, and B. S. Willingham, attorney for Hattie E. Stanley, a nonresident, who was the plaintiff in execution, from interfering further with her in the possession and control of such land, and that such injunction be made permanent. The petition is verified. On its presentation a rule was granted calling on the defendants to show cause why the injunction should not be granted, and a restraining order in terms of the prayer of the petition was granted until the hearing. At the hearing the defendants presented an answer, making substantially the following case: That when the husband of the petitioner made the deed in 1880 he was seised of said land, and had a right to convey the same, and that he did convey it by warranty deed, which was fully executed, recorded, and delivered on the 29th of April, 1880; that under said deed petitioner remained in possession until dispossessed by the sheriff. It is denied that the petitioner repudiated the deed, and denied that she had any right to have had a homestead set apart out of the land described therein. They further aver that, when the notes given for the land by the petitioner were sued on, she appeared and filed various pleas,—among others, the pleas of usury and duress; that the money was borrowed to pay her husband's debt. The jury returned a verdict against her on each and all of said pleas. It is averred that, when execution was issued from the judgment rendered on the notes for borrowed money in favor of Mrs. Stanley, the land was properly advertised and sold, and purchased by the plaintiff in execution, and that afterwards the sheriff, who is one of the defendants, and the attorney at law for Mrs. Stanley, went to the land for the purpose of putting petitioner out of possession; that thereupon she surrendered the possession under an agreement that she might keep the premises until December, 1899, and, failing to give this possession, she was subsequently evicted, but has recently entered upon and forcibly taken possession of the premises, and is now holding the same

without any claim of right or title. The evidence at the hearing was substantially as follows: The petitioner testified that her husband died in 1892; that since his death she had lived upon the land which she claims as a homestead, together with her five minor children, the oldest of which is about 17 years of age; that she is now in possession, and that in April, 1880, her husband made her a deed of gift to said land, which includes the homestead; at that time he was in debt to a number of persons, and, such deed being void as to creditors, she abandoned the same, and made application to have the land described in the deed set aside to her as a homestead, the same being the property of her husband, and he refusing to make such application. She further testified as to the fact of the sale; the attempted interposition of a claim by her; and that the sheriff, one of the defendants, together with the attorney for the plaintiff, came to her house, and moved out her goods, which she immediately removed into another house on the same land, without objection; that she is now in possession, and has been continuously so. The petition for homestead, together with subsequent proceedings, and the approval of the ordinary, all appearing to be regular, were introduced in evidence. The defendants' evidence tended to show the eviction of the petitioner from the land by the sheriff, and by agreement it was shown that, in defense of the suit instituted on the notes given by the petitioner for the borrowed money, she filed the several pleas named in the defendants' answer, and that a verdict was rendered against her on said pleas. There was also introduced for the defendants a deed signed by petitioner conveying to Hattie E. Stanley certain lands in Monroe county for the consideration of $300, reciting that the conveyance was made to secure the payment of $300, with interest thereon; also an instrument signed by the petitioner constituting J. J. Rogers her agent to negotiate a loan for her of $300, to be secured by a mortgage or absolute deed to her farm in Monroe county. Rogers testified that he made the loan to the petitioner; that she spoke to him about it, and signed the application; that when the money came he notified her, and she came to his office and signed the papers, and he paid the money over to her. This evidence was denied to be true by the petitioner in rebuttal. It further appeared that after the sale the sheriff executed a deed to Mrs. Stanley to the property. Defendants also introduced what purported to be a deed from C. C. Stallings to Ida L. Stallings, the material part of which is only referred to. The instrument bore date April 29, 1880. The consideration recited was the love and respect which the grantor had for his wife, Ida Stallings. It then purported to convey to Ida Stallings all the property of the grantor, both real and personal, which the grantor owned, and then specifically named 116 acres of land which it was admitted embraced the land described in the homestead, together with all the crops growing and made on said place during the year 1880. As it appears in the record, this instrument is simply signed by C. C. Stallings, without an attestation clause, and does not bear on its face any recitation or evidence that it was signed, sealed, and delivered by the grantor, nor are the names of any witnesses attached thereto. By an entry it appears to have been recorded on the 29th of April, 1880. The judge refused the injunction, and the petitioner excepted.

Under the evidence in this case, all legal questions save one are easily eliminated. After the judgment had been rendered against the petitioner, it was entirely too late for her to raise the question as to her liability on the notes given for the borrowed money. The questions of usury, duress, and other matters of defense were settled by the judgment against her, which must be taken as final and conclusive of the various facts insisted on in her petition as avoiding her liability, and that judgment created a good and valid lien on all of her property, which it was the plaintiff's right to enforce. The sole question which remains is whether she had title to the land which she conveyed to Mrs. Stanley as security for the debt under the conveyance made to her by her husband. If she had, the injunction was properly refused; if she had not, but held it as the beneficiary of a homestead set aside out of the property of her husband, then the instrument executed by her was of no effect, and the judgment rendered on the notes given created no lien on the land set apart. It cannot make any difference, if the homestead is valid, whether she did or did not, at the time she borrowed the money, represent that the land belonged to her, and that it was unincumbered. In the case of Bank v. Dickinson, 83 Ga. 711, 10 S. E. 446, it was ruled that, where a wife created a mortgage on land which had previously been set apart out of her husband's estate as a homestead, she was not estopped from denying the validity of such mortgage. In the opinion, which was delivered by our present Chief Justice, it is declared that "there is no law which will prevent her from denying her capacity to make this particular contract. She or any one else can claim the protection of the constitutional provision denying her or them the right to make such a contract." If the homestead was legally set apart, then, necessarily, the land which it embraced belonged to the husband. The legal effect of so setting it apart was not to vest the title in her and the other beneficiaries, but to give her and them the use of it, which use could not be defeated by the ordinary debts of the husband. The husband could not alienate the land, nor she the use of it. These are the legal incidents of the homestead estate. If, then, she could not alienate the usufruct

with which the law had invested her, it must follow that this result could not be reached by the application of the doctrine of estoppel. Being forbidden by the law to convey it, the conveyance would not be rendered valid because at the time of its execution she represented that it was her property, and she had a right to convey it.

Not being, then, estopped from denying the validity of the conveyance to Mrs. Stanley, the rights of the latter under that conveyance must depend upon the title which the maker had, and this is to be determined by ascertaining the effect of the deed made by Stallings to his wife, the petitioner, in 1880. This was a voluntary conveyance, the consideration being love and affection, and, of course, is subordinate to the rights of his then existing creditors. In the petition which she exhibited, Mrs. Stallings alleges that she had no knowledge of her husband's intention to make her a deed of gift; that she repudiated said deed of gift in October, 1880, and distinctly alleges that it had never been delivered to her. The allegations made in the petition are sworn to, and thereby were entitled to be considered as a part of her evidence on the hearing. In her affidavit found in the record, she says that when her husband made this deed in April, 1880, he was indebted to a number of persons in various amounts, and because of such fact the deed was no protection to her, and she abandoned the same. If it be true that the deed was never delivered to her, or that she refused to accept the deed and take under it, then it did not have the legal effect to vest the title in her, nor devest that of the husband. A deed to land must not only be in writing and signed by the maker, but it must be delivered to the purchaser, or to some one for him. Civ. Code, § 3599. Delivery of a deed is essential to the conveyance of title thereby. Without delivery, the deed is nothing, and conveys no title. Maddox v. Gray, 75 Ga. 452. Necessarily, delivery by the grantor includes acceptance by the grantee. It was said by our present Chief Justice, in the opinion which he delivered in the case of Beardsley v. Hilson, 94 Ga. 50, 20 S. E. 272: "Delivery of a deed consists of more than the mere handing of the deed to the grantee. Where a grantee retains a deed without objection, acceptance will be inferred. It is a presumption of law that a party accepts whatever is for his benefit; but this presumption may be rebuttted." And, referring to the section of the Code which we have just quoted, he says "that the deed must be accepted. We think this is to be implied from the requirement that the deed shall be delivered; for without acceptance, as we have already said, there cannot be a complete delivery so as to pass title." If, in construing the evidence of Mrs. Stallings, wherein she says that in April, 1880, her husband made her a deed of gift to the land, it be claimed that this implies delivery, we are not prepared to assent to the conclusion. In the case of Buffington v. Thompson, 98 Ga. 416, 25 S. E. 516, it was claimed that a deed there under consideration was not valid for want of delivery. It appeared that the defendant, who was attacking the deed, had by her pleading admitted that the grantor had "executed" the deed in question. The court held that the word "executed," when used with reference to a conveyance, technically comprehended, not only signing and sealing, but delivery also, but that, in a popular sense, it meant signing and sealing; and construed the plea to make only this admission, because it further appeared that the defendant in her plea averred that such deed had never been accepted by the grantee. So that, we think, taking all of the evidence of Mrs. Stallings on this subject together, it amounts to a distinct assertion that she never accepted the deed of gift from her husband. As to whether this be true or not, is a question of fact upon which the allegation and proof that in six months after the date of such deed she applied for a homestead in this land, alleging it to be the property of her husband, sheds some light. If it be said that the deed was admitted to record, and that such record raises a presumption of delivery, the reply is that the evidence of Mrs. Stallings may be considered sufficient to rebut such presumption, in the entire absence of any evidence on the part of the defendants showing delivery.

Another view, however, may be urged on this point. As it appears in the record, the deed has no attestation clause, no witnesses, and it does not bear on its face any recitation of delivery. While it is true that a deed without witnesses is legal and binding between the parties (Johnson v. Jones, 87 Ga. 85, 13 S. E. 261; Howard v. Russell, 104 Ga. 230, 30 S. E. 802), without execution in the presence of witnesses the instrument is not entitled to record. In order to entitle it to record, it must be attested or acknowledged. Civ. Code, § 3620. The registration of the instrument, therefore, was wholly ineffective, and accomplished no purpose. A copy of it could not be read in evidence, nor is it even notice. Rushin v. Shields, 11 Ga. 636; Jones v. Morgan, 13 Ga. 515. The record of the instrument was ineffectual to give it more incidents than it would have if it had not been recorded at all. No presumption of delivery can arise from such record. Taking the case as it stands, we have on one side a deed of conveyance requiring proof by the defendants of execution, which includes delivery, in order to pass title, and an absolute denial on the part of the petitioner that delivery was ever made. The homestead appears to have been regularly and legally set apart. It is unquestioned that the husband owned the land prior to the deed of gift. If such deed for any reason did not convey title to Mrs. Stallings, then the land was the property of the husband at the time the home-

stead was set aside. If it was, then the conveyance to Mrs. Stanley did not operate to carry title, nor afford any security, and, the homestead being legal, the petitioner should not be interrupted in her possession of the land. These, being all questions of fact, are to be determined finally by a jury. On the hearing of an application for an injunction, the judge of the superior court lawfully exercises this prerogative, and if the record contained any evidence showing delivery to and acceptance by the petitioner of the deed in question, we would not disturb his finding; but inasmuch as the record, as it appears here, contains no evidence from which the legal conclusion can be drawn that the deed was delivered and accepted, we are constrained to rule that the trial judge should have granted the injunction. Accordingly the judgment is reversed. All the justices concurring, except FISH, J., absent on account of sickness.

MARSH v. HIX.

(Supreme Court of Georgia. June 4, 1900.)

APPEAL—HARMLESS ERROR — PLEADING — AMENDMENT—EXCEPTIONS TO AUDITOR'S REPORT.

1. Whether an auditor did or did not err in allowing an amendment to pleadings was of no consequence, when his so doing had no material bearing upon the result of his investigations.
2. It is, under the act of December 21, 1897, amending section 5057 of the Civil Code, within the discretion of the trial judge to allow an amendment to an answer without requiring the defendant to make the affidavit by that section prescribed. (a) There was no abuse of that discretion in the present case.
3. There was no error in striking the exceptions to the auditor's report, or in making it the judgment of the court.

(Syllabus by the Court.)

Error from superior court, Chattooga county; W. M. Henry, Judge.

Action by E. W. Marsh against W. H. Hix. Judgment for defendant, and plaintiff brings error. Affirmed.

Lumpkin & Shattuck and Wesley Shropshire, for plaintiff in error. J. N. Bellah and Dean & Dean, for defendant in error.

LUMPKIN, P. J. In September, 1896, E. W. Marsh, being the owner of certain mines in Walker county, containing large quantities of iron ore, contracted with W. H. Hix "to raise, mine, and market said iron ore," and to pay him for his services a stated salary. It was further stipulated between the parties that in connection with the mining operations they would "establish and run a commissary; using, as far as possible, goods for the payment of hands for labor in mining and loading the ore on cars." Hix being without means, Marsh was to furnish the needed capital for carrying on the commissary, while Hix was to conduct and manage the same, receiving as compensation for so doing one-third of the profits derived from the business. The mining operations and the mercantile business were both extensively carried on for a considerable period, and then terminated; Hix delivering to Marsh the unsold goods left on hand in the commissary. Subsequently the latter brought against the former an equitable petition for an account and settlement. Hix filed an answer in its nature merely defensive, and the case was referred to an auditor. When it came on for a hearing before him, Hix was allowed to amend his answer by setting up in general terms that a fair adjustment of the accounts would show a balance in his favor against Marsh, and praying judgment therefor. The hearing proceeded, and the auditor made a report in favor of Hix, to which Marsh filed numerous exceptions. In the superior court Hix was permitted to further amend his answer by alleging specifically the amount of the balance claimed by him against Marsh, it being the same as that found by the auditor. All of Marsh's exceptions were overruled, and the auditor's report was made the judgment of the court. Thereupon Marsh sued out a writ of error.

1. It appears that he demurred to the amendment which the auditor allowed to the answer of Hix on the grounds (1) that it came too late; and (2) was too indefinite in its allegations. It is entirely immaterial whether the auditor did or did not err in permitting this amendment to be made. It in no wise affected either the nature or the scope of the investigation before him, or its result. He was charged with the duty of taking an account between the parties, and ascertaining how they stood. This he did, and the evidence and his calculations thereon were just the same as they would have been if the answer had not been amended before him. In view of the amendment made in the superior court, the action of the auditor now under discussion had no substantial bearing upon the case.

2. But complaint is made that the superior court erred, when the case came on for trial, in allowing the amendment to the answer which was then offered by Hix. We think not. It was, under the act of December 21, 1897 (Acts 1897, p. 35), amending section 5057 of the Civil Code, within the discretion of the trial judge to allow this amendment without requiring the affidavit prescribed by that section, and we are by no means prepared to say he abused his discretion in this particular instance. Allowing the amendment did not necessitate a continuance or a re-reference of the case, or the introduction of further evidence. Had any of these consequences been involved, the question of the propriety of permitting the amendment would be altogether different; but, as it was, the judge very properly reached the conclusion that "the circumstances of the case," and "substantial justice between the parties," required the allowance of the amendment.

3. There was no controversy before the

auditor as to the facts. While the accounts were voluminous and complicated, the figures showing the receipts and disbursements by Hix were agreed on by the parties, and the auditor's task was purely one of calculation. It affirmatively appears that he charged Hix with every cent that came into his hands, and credited him with only such items as it was admitted he had actually paid out, together with the amount of his salary for conducting the mining operations, and his one-third of the profits derived from the commissary. This was certainly the right basis upon which to take the account. With much painstaking we have examined the auditor's calculations, and verified the results thereof as set forth in his report, and find all of the same to be absolutely correct. After careful consideration, we are unable to perceive any merit in any of the exceptions of fact filed by the plaintiff below, and are therefore fully prepared to hold that the trial judge committed no error in striking these exceptions, or in making the auditor's report the judgment of the court. We do not set forth these exceptions and discuss them in detail, for the reason that they present nothing but simple questions of arithmetic. It is not our province to deal with such questions, when, as in the present instance, they involve no legal problem, save to see that in the case under consideration the proper result was reached below. While it was, of course, the right of the plaintiff in error to have this court review the processes by which the auditor arrived at his conclusions, and while it would be our duty to reverse the judgment of the superior court if it committed the error of upholding the results of bad mathematics or inaccurate calculation, we do not feel called upon to fill the pages of our Reports with a lengthy array of facts and figures for the purpose of demonstrating the correctness of our conclusion that no such error was committed. To do this would add no value to this case as a precedent. When we lay down a legal principle or rule of practice, and sustain it by reasoning or authority, the work thus done becomes useful for future guidance, but nothing profitable would be accomplished by a tedious review of elaborate calculations made in a particular case, which could have no application to any other. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

WHITAKER v. ARNOLD.

(Supreme Court of Georgia. May 16, 1900.)

TRIAL—RIGHT TO OPEN AND CLOSE—EVIDENCE—DECEASED WITNESS—NEW TRIAL—CERTIORARI.

1. Before a defendant in a civil action arising ex contractu can demand the right to open and conclude, he must, in his pleadings, admit enough to make out a prima facie case for the plaintiff.

2. Evidence as to what a deceased witness testified on a previous trial is not admissible, when it appears that the issue therein involved was not substantially the same as that in controversy on the trial at which such evidence is tendered.

3. Rejecting testimony offered for the purpose of proving a given fact is not cause for a new trial, when the opposite party, as a witness, admits this fact, and it is manifestly one as to which the parties are not at issue.

4. When, in a trial by a jury in a magistrate's court, no material error of law is committed by the presiding justice, and the evidence demands the verdict rendered, the superior court ought not to sustain a certiorari sued out by the losing party.

(Syllabus by the Court.)

Error from superior court, Heard county; S. W. Harris, Judge.

Action by J. J. Whitaker, administrator, against M. A. Arnold. Judgment for plaintiff was reversed on certiorari, and plaintiff brings error. J. J. Whitaker having died, D. B. Whitaker was made party plaintiff. Reversed.

Frank S. Loftin and D. B. Whitaker, for plaintiff in error. T. B. Davis and W. L. Stallings, for defendant in error.

LUMPKIN, P. J. It appears from the record that M. A. Arnold made and delivered to P. H. Whitaker a promissory note for 1,000 pounds of middling lint cotton, payable on a day named. Subsequently the payee died, and J. J. Whitaker, as administrator upon his estate, brought against Arnold, in a justice's court, an action upon this note. The defendant filed an answer, in which he admitted the execution of the instrument sued on, and that the plaintiff was the legal holder and owner of the same. The case was tried on appeal before a jury, who returned a verdict in favor of the plaintiff. The defendant then sued out a certiorari, pending which in the superior court J. J. Whitaker died, and D. B. Whitaker was made a party in his stead. The certiorari was sustained, and the plaintiff excepted. We will now dispose of the questions involved in the case.

1. The plaintiff in certiorari alleged that the magistrate erred in denying him the opening and conclusion. The magistrate was right in so doing. In order to entitle a defendant in a case like the present to open and conclude, he must, in his answer, admit enough to make out a prima facie case in favor of the plaintiff, so as to relieve the latter from introducing any evidence for that purpose. Abel v. Jarratt, 100 Ga. 732, 28 S. E. 453; Railroad Co. v. Brown, 102 Ga. 13, 29 S. E. 130. As the note sued on was payable in middling lint cotton, and as there was no admission as to the value of such cotton at the time of the maturity of the note, the plaintiff was compelled to introduce evidence showing what such value then was, and accordingly had the right to open and conclude; the defendant having introduced testimony.

2. Prior to the trial of the present case in the magistrate's court there had been a trial of an action by J. J. Whitaker, as administrator of P. H. Whitaker, against M. A. Arnold

upon a promissory note given by the defendant to J. J. Whitaker as such administrator. At that trial Andy Arnold was sworn as a witness. He afterwards died. At the trial of the present case in the magistrate's court the defendant offered as a witness one T. B. Davis for the purpose of proving what Andy Arnold's testimony was on the previous trial. The evidence as to the testimony of Davis was rejected, and complaint of this is made in the petition for certiorari. The magistrate's ruling upon this question was right. It appears from his answer to the certiorari that the question at issue in the former trial was what were the terms of a contract between M. A. Arnold and J. J. Whitaker as administrator, while the contract involved in the present case was one between M. A. Arnold and P. H. Whitaker, made during the lifetime of the latter. Section 5186 of the Civil Code does not make admissible the testimony of a deceased witness given on a former trial unless it was "upon substantially the same issue" as that involved in the trial wherein evidence as to what such testimony was is tendered.

3. It was material to the defense set up by M. A. Arnold to show that he had paid for a certain lot which he had purchased from P. H. Whitaker. With this end in view, the defendant offered in evidence a deed to himself from J. J. Whitaker as administrator. It is alleged as error that the magistrate declined to admit this deed in evidence, it being rejected on the ground that it was irrelevant. Even if the magistrate erred in this ruling, it certainly resulted in no injury to the defendant, because the plaintiff had already testified that M. A. Arnold had paid for the lot in question, and as to this matter there was no dispute between the parties.

4. According to the magistrate's answer, there was not a particle of evidence sustaining the defense set up by the defendant that his promise was conditional only; and, as the plaintiff made out a prima facie case, the verdict in his favor was absolutely demanded. The defense completely broke down because the evidence offered to sustain it was rejected, and, as has been seen, the magistrate rightly refused to allow this evidence to be introduced. As he committed no material error of law, and as the verdict returned by the jury was the only legal outcome of the trial, the superior court erred in sustaining the certiorari. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

SOUTHERN RY. CO. v. HOOPER.

(Supreme Court of Georgia. May 12, 1900.)

RAILROADS—PRIVATE CROSSING—DEFECTS—INSTRUCTIONS—FRIVOLOUS APPEAL.

1. The building and keeping in repair by a railroad company of a bridge over or an approach to a private crossing is such an invitation to the public to use the same as renders the company liable for injuries resulting from defects negligently permitted to exist or remain in the structure.

2. The charges complained of were substantially in accord with the law above laid down. It was not erroneous to fail to charge on the subject of contributory negligence and apportionment of damages; there being no request to charge to this effect, and it affirmatively appearing that no such contention was made at the trial.

3. The law of the case having been settled by a previous decision of this court, and the evidence, though conflicting, warranting the verdict, the writ of error is so palpably without merit as to lead to the conclusion that it was sued out for delay only, and damages are accordingly awarded.

(Syllabus by the Court.)

Error from city court of Floyd county; G. A. H. Harris, Judge.

Action by C. P. Hooper, by his next friend, against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shumate & Maddox, for plaintiff in error. Fouché & Fouché and Robt. Chamblee, for defendant in error.

COBB, J. The evidence in this case was conflicting on many of the material points in issue, but there was evidence to support the finding in favor of the plaintiff. The case upon the question of liability is absolutely controlled by the decision in Railroad Co. v. Robertson, 95 Ga. 430, 22 S. E. 551. The charges complained of were substantially in accord with the law there laid down. There was no error in failing to charge the law in reference to apportioning the damages according to the respective negligence of the parties; there being no request, written or otherwise, to charge on this subject, and it distinctly appearing from the certificate of the judge to the motion for a new trial that no such point was insisted on at the trial. The principles of law stated in the first headnote were well settled. There could be no question as to the applicability of those principles to the facts of this case. The evidence, though conflicting, was amply sufficient to support the verdict. The hope of a reversal under such circumstances could not have been for a moment entertained by one even of the most sanguine temperament. The conclusion that the case was brought here for delay only is irresistible, and damages are accordingly awarded. Ice Works v. Rountree, 104 Ga. 677, 30 S. E. 885; Bailey v. Wilner, 107 Ga. 364, 33 S. E. 434; Collins v. Trading Co., 108 Ga. 752, 32 S. E. 667. Judgment affirmed, with damages.

HARRIS v. STATE.

(Supreme Court of Georgia. June 4, 1900.)

STATUTES—TITLE OF ACT—CONSTITUTIONAL LAW—INDICTMENT.

1. Where the body of a penal statute is broader in its terms than the title warrants, it is unconstitutional, at least in so far as it contains matter not comprehended in the title.

2. Where the title of an act is "An act to prevent the baiting or killing of doves thus baited at said bait in this state, and to provide for the punishment thereof" (Acts 1898, p. 107), and the body of the act makes penal "the baiting or killing of doves thus baited any season of the year," the act is unconstitutional, at least in so far as it seeks to make penal the killing of doves at any place other than at the "bait."

3. An indictment founded upon this statute, charging that the accused did "kill, by shooting with a gun, baited doves," without alleging that the doves were killed at the place where baited, does not set forth any offense against the laws of this state.

(Syllabus by the Court.)

Error from superior court, Houston county; W. H. Felton, Judge.

Eugene Harris was indicted under the statute in relation to killing baited doves. Demurrer to the indictment was overruled, and he brings error. Reversed.

Jere M. Moore, Minter Wimberly, T. B. West, and Marion W. Harris, for plaintiff in error. Robt. Hodges, Sol. Gen., for the State.

SIMMONS, C. J. The accused was indicted under the act approved December 6, 1898 (Acts 1898, p. 107), in relation to killing baited doves. The indictment charged that he did "kill, by shooting with a gun, baited doves." He demurred, on the ground that the indictment did not allege "that the killing of said baited doves was done at said bait"; that the act of 1898 was unconstitutional and void, and its violation not a crime, because it contained matter different from that covered by its title; and on other grounds not necessary here to detail. The trial judge overruled the demurrer, and the accused excepted.

The case is, we think, controlled by paragraph 8 of section 7 of article 3 of the constitution of Georgia (Civ. Code, § 5771), and by the reasoning in the following cases: Conley v. State, 85 Ga. 365, 11 S. E. 659; McDuffie v. Same, 87 Ga. 687, 13 S. E. 596; Crabb v. Same, 88 Ga. 584, 15 S. E. 455; Elliott v. Same, 91 Ga. 694, 17 S. E. 1004; Dempsey v. Same, 94 Ga. 766, 768, 22 S. E. 57; Sasser v. Same, 99 Ga. 54, 25 S. E. 619. The reasons are sufficiently set forth in these cases, and it is, in our opinion, unnecessary to repeat what has been so many times said by this court. It was stated in the argument here that "on one day during the year 1896 or 1897 a party of forty Macon sportsmen (?) killed more than 12,000 doves at Leesburg," and we can see that the legislature might very properly desire to put a stop to such wanton and unnecessary slaughter. At the same time, however, although we may appreciate the wholesomeness of such legislation as was doubtless intended, we cannot sustain the act actually passed, as the same is violative of the constitution of the state as containing "matter different from what is expressed in the title." We must hold that the act under consideration is unconstitutional at least in so far as it seeks to make penal the killing of doves at any place other than the place where they are baited. As to whether it is unconstitutional in whole, it is not necessary here to decide. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

PLUMMER v. STATE.

(Supreme Court of Georgia. June 4, 1900.)

CRIMINAL LAW—CREDIBILITY OF WITNESS—IMPEACHMENT.

Where a grand jury had under investigation a criminal charge, and a witness swore to a certain state of facts material to the issue, and the same witness afterwards, upon the trial of the issue on the indictment found by the grand jury, swore to a different and contrary state of facts concerning the same issue, and that his testimony before the grand jury was false, assigning as the reason for his false testimony before the grand jury that he was at that time a friend of the accused, but was at the time of the trial at enmity with him, it was error for the court to fail to charge the jury that, if a witness willfully and knowingly swear falsely as to a material matter, his testimony ought to be disregarded entirely, unless corroborated by circumstances or other unimpeached evidence. Civ. Code, § 5295; Stafford v. State, 55 Ga. 591; Skipper v. Same, 59 Ga. 63, and cases cited. (a) As there was in this case no corroboration of this witness, it was error for the court to charge that if the witness had been impeached, and restored to the confidence of the jury, they should believe him in preference to the impeaching evidence.

(Syllabus by the Court.)

Error from superior court, Laurens county; John C. Hart, Judge.

H. C. Plummer was convicted of a crime, and brings error. Reversed.

Howard & Armistead, Jas. B. Hicks, and Jas. K. Hines, for plaintiff in error. H. G. Lewis, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

CLAY v. MACON & B. R. CO.

(Supreme Court of Georgia. May 16, 1900.)

RAILROADS—INJURY TO PERSON ON TRACK.

There being some testimony which might have warranted the jury in finding that the plaintiff's husband, while upon the track of the defendant in front of an approaching train, was, either from intoxication or other cause, incapable for the time being of taking the proper care for his own safety, and that the company's servants in charge of the train, being aware of these facts in time to stop it before it struck and killed him, failed to exercise due diligence in this respect, the case should have been submitted to the jury, and the court erred in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Troup county; S. W. Harris, Judge.

Action by Susie Clay against the Macon & Birmingham Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

J. H. Pitman, Frank Harwell, and Hatton & Lovejoy, for plaintiff in error. Longley & Longley and L. F. Garrard, for defendant in error.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

JACKSON v. WARTHEN et al.

WARTHEN et al. v. JACKSON.

(Supreme Court of Georgia. May 14, 1900.)

APPEAL — REVIEW — CROSS BILL OF EXCEPTIONS—ORDINARY—GRANT OF YEAR'S SUPPORT—OBJECTIONS.

1. When a cross bill of exceptions presents a question which is "controlling upon the case as a whole," the supreme court will first consider and dispose of that question; and, if the judgment of the trial court with respect thereto is reversed, the main bill of exceptions will be dismissed.

2. Where the ordinary has duly complied with the statutory requirements as to issuing citation and publishing notice with regard to an application for a year's support, it is too late, after the adjournment of the term of his court to which the citation is returnable, to file objections to the granting of such application. (a) There was, in the present case, no consent to the filing of such objections after the expiration of the time allowed by law for so doing; nor, under the circumstances disclosed by the record, was the applicant for the year's support estopped from so asserting.

(Syllabus by the Court.)

Error from superior court, Walker county; W. M. Henry, Judge.

Application by S. A. Warthen and others for allowance of a year's support. James U. Jackson filed exceptions. On trial there was a verdict for applicant, and Jackson assigns error, and S. A. Warthen and others assign cross error. Judgment on cross bill reversed, and main bill of exceptions dismissed.

Copeland & Jackson, W. T. Turnbull, and W. W. Brookes, for plaintiff in error. R. M. W. Glenn and Payne & Payne, for defendants in error.

LUMPKIN, P. J. Mrs. S. A. Warthen made an application to the court of ordinary of Walker county for the allowance of a year's support to herself and two minor children out of the estate of her deceased husband. The ordinary issued and caused to be duly published a citation calling upon all persons concerned to show cause at the January term, 1899, of his court why the application should not be granted. He also appointed appraisers, who in due time set apart a year's support, and made their report. Before the arrival of the January term, W. W. Brookes, as attorney for James U. Jackson, a creditor of the decedent, requested his administrator, S. M. Warthen, "to let the case go over for the January term of the court." The administrator replied that, if it was agreeable to R. M. W. Glenn, the attorney of the applicant for the year's support, he (the administrator) "would consent for such continuance." After the conversation between the administrator and Brookes just referred to, but on the same day, the latter informed Glenn "that he had seen S. M. Warthen, and he and Warthen had agreed that the case be passed at said January term of the court," to which Glenn replied, "I will see Mr. Warthen." On the first Monday in January, 1899, which was the 2d day of that month, Glenn wrote a letter to Brookes, stating that, though there had been a misunderstanding between the administrator and Brookes, he (Glenn) had consented that the case should go over to the February term. At the time of writing this letter, Glenn supposed that objections to the allowance of the year's support had been filed, and he never at any time consented that the same might be filed after the expiration of the January term. It further appears, however, that on the 12th day of January, 1899, Glenn again wrote to Brookes, inquiring whether or not he intended in behalf of Jackson to file objections to the allowance of the year's support. The court of ordinary met and adjourned on the 2d day of January, 1899, and "the case" was, during the term, marked "Continued." On the 20th day of January, 1899, counsel for Jackson filed certain objections to the allowance of the year's support. At the February term the ordinary passed an order disallowing the objections, and directing that the return of the appraisers be recorded as the judgment of the court. The case then went by appeal to the superior court. On the trial there, counsel for Mrs. Warthen moved to strike the objections on the ground that they were filed too late. On the hearing of this motion the facts above recited were made to appear, and the motion was overruled. Some of the objections filed by Jackson were stricken on demurrer, and on the trial of the remaining objections there was a verdict for the applicant. Jackson sued out a bill of exceptions assigning error on various rulings made during the trial, and Mrs. Warthen sued out a cross bill of exceptions alleging error in the court's refusal to sustain her motion to strike all of the objections on the ground that the same were not filed within the time prescribed by law.

1. As the case is controlled by a proper determination of the question presented by the cross bill, we will deal with that question exclusively. Cheshire v. Williams, 101 Ga. 814, 29 S. E. 191; Jordan v. Railroad Co., 105 Ga. 274, 30 S. E. 748; Lawton v. Hollis, 107 Ga. 102, 32 S. E. 846; Gay v. Gay, 108 Ga. 739, 32 S. E. 846; Smith v. Van Hoose (Ga.) 36 S. E. 76.

2. The court ought to have sustained the motion to strike all of the objections. Section 3467 of the Civil Code, after declaring that the ordinary shall issue citation and publish notice, calling upon all persons concerned to show cause why an application for 12 months' support should not be granted, further provides that, "if no objection is made

after the publication of said notice for four weeks, or if made is disallowed, the ordinary shall record the return of the appraisers in a book to be kept for that purpose." Thus it will be seen that the statute plainly contemplates that, unless objections are duly filed, nothing is left for the ordinary to do but to record the return of the appraisers, which then becomes, in effect, a binding judgment, conclusive upon all persons interested. The vital question, therefore, is, when does the time for filing objections expire? This court, in Parks v. Johnson, 79 Ga. 567, 5 S. E. 243, construed so much of the act of October 9, 1885, as is now embraced in the Code section just mentioned. It was in that case distinctly held that, "where the return of appraisers appointed to set apart a year's support for a widow and her children was filed, and citation was issued by the ordinary, objections could be filed by a creditor at or before the term of court to which the citation was returnable." While the court was not then dealing with the precise question now in hand, that case directly called for a proper interpretation of the statute above referred to, and it was accordingly laid down that objections must be filed before the expiration of the term. With this construction of the law we are quite content, and now hold unequivocally that objections filed after the expiration of the term to which the citation to show cause was made returnable came too late, and cannot properly be considered. Unless objections are duly filed, there is no case in which a trial can lawfully be had; for, in the absence of such objections, there is no issue for determination in the court of ordinary. Even if the applicant could waive the due filing of objections, and in this manner make a case which could be the subject-matter of a continuance and of a subsequent adjudication, we do not think there was such a waiver in the present instance. Upon the facts appearing in the record, it is clear that Mr. Glenn never intended to make such a waiver. His consent to a postponement of the hearing was based upon the supposition that at the time the consent was given objections had been filed. The mere fact that after the expiration of the term he ascertained that no objections had in fact been filed, and then made an inquiry of counsel on the other side as to his intentions in the matter, cannot be held to amount to such a waiver as would give the so-called "case" a standing in court. At that date the time for filing objections had come and gone, Mrs. Warthen's right to the year's support had become absolute and fixed, and the legal status of the matter could not be affected by the noncommittal inquiry which her attorney addressed to counsel for Jackson. The right to file objections having already been lost, the making of this inquiry could not possibly have misled his counsel, or in any manner operated prejudicially to Jackson. Accordingly, it cannot be said that Mrs. Warthen was estopped from insisting that his objections were filed too late, even though his counsel may have been warranted in inferring from Glenn's inquiry that no such point would be raised. This being so, and there being in point of fact no intention on the part of Mrs. Warthen's counsel to waive any of her rights in the premises, we are clearly of the opinion that the court below erred in the ruling of which she complains. Judgment on cross bill of exceptions reversed; main bill of exceptions dismissed. All the justices concurring, except FISH, J., absent on account of sickness.

MORAN v. CHILDS.

(Supreme Court of Georgia. May 16, 1900.)

CERTIORARI TO JUSTICE—SUFFICIENCY—DISMISSAL—FORECLOSURE OF LANDLORD'S LIEN—COSTS—NEW TRIAL.

1. Where a petition for certiorari is properly headed with the name of the state and county, and addressed to the superior court, asking for review of alleged errors committed on the trial of a case in a justice's court of a named magistrate, and such petition has been duly answered by the magistrate, it is not error for the court to refuse to dismiss the same on the ground that the number of the militia district where the court was held was omitted from the petition.

2. The petition in the present case distinctly specifies the errors complained of, and sufficiently sets forth the testimony on the trial below. The court therefore did not err in refusing to dismiss the same for want of sufficient specifications in these particulars.

3. Where an execution issued on the foreclosure of a landlord's lien and a distress warrant in his favor are placed in the hands of a constable, the latter is entitled to retain from the proceeds of a sale of the property of defendant all costs legitimately accruing in executing both processes, although the prosecution of one was abandoned by the plaintiff.

4. Under the record in this case there was ample evidence to authorize the judge to set aside the verdict of the jury in the justice's court, and to direct a new trial in that court on the controlling issue of fact.

(Syllabus by the Court.)

Error from superior court, Monroe county; E. J. Reagan, Judge.

Rule by J. W. Moran against B. F. Childs. Judgment for defendant, and petitioner brings error. Affirmed.

W. M. Clark, for plaintiff in error. Persons & Persons, for defendant in error.

LEWIS, J. Moran brought a rule against Childs, a constable, in a justice's court, for money alleged to have been collected by the constable on a landlord's lien in favor of said Moran against William and Hill O'Neal. On the trial of that case before a jury in the justice's court it appeared from the evidence that Moran had placed in the hands of the constable not only the landlord's lien for supplies, but also a distress warrant for rent, both of which were levied upon the property of defendants. It further appeared that the constable was put to the expense of having the crops gathered and placed in a condition

for sale, and by consent of parties they were sold, and brought the sum of $144. There was a defense filed to the distress warrant by the defendants, and that proceeding was withdrawn by the plaintiff, Moran. It further appeared that the expense incurred by the constable in gathering the cotton and crops under the landlord's lien and distress warrant amounted to $44.37, and that about half this sum arose by virtue of the proceedings under the distress warrant for rent. It is inferable from the record that the parties to the liens sought to be foreclosed in the justice's court had agreed upon some settlement touching the distribution of the funds in the constable's hands. There was evidence to the effect that the justice who issued the warrant for rent and the lien for supplies, after the same were levied and money realized thereon by the constable, defendant in error in this case, passed an order directing him to pay a certain amount thereof to the attorney for the defendants in the lien foreclosures, and that, after receiving such order, he was unwilling to make the payment to this attorney without seeing the plaintiff's attorney; and accordingly the defendants' attorney and the constable called on plaintiff's attorney, submitted the matter and the order of the magistrate to him, and, under their evidence, by his consent, the constable paid to that attorney, out of the fund, $57.36. This left in the constable's hands a balance of $86.64, from which he claimed the right to deduct his costs, above mentioned, of $44.37, leaving a balance in his hands for plaintiff of $42.47. Plaintiff's attorney admitted that the defendants' attorney and the constable came to his office with an order signed by the magistrate who issued the liens, and claims that he told the constable he was willing for him to pay over to defendants' attorney all over $64.06 and the costs, but they did not agree for the constable to pay over so much that there would not be enough left to pay the full amount and costs. The constable testified that he told Moran he did not have enough money left to pay the costs in the landlord's lien and distress warrant cases, and suggested that he make another levy to raise the deficit, and that Moran directed him to hold the execution for what was kept in his hands; that he submitted the bill of costs to Moran and the justice issuing the warrants, and there was no complaint as to their correctness. The jury returned a verdict for the plaintiff for $64.06, and it is quite evident from the testimony that, if this verdict stands, the constable will be deprived of his costs in the distress warrant case. Whereupon the constable, Childs, filed his petition to the superior court for certiorari complaining of the finding of the jury, and alleging certain errors committed in the progress of the trial by the magistrate. The court, after hearing the petition for certiorari and the answer of the magistrate, rendered the following judgment: "The within certiorari having been heard, the same is sanctioned and sustained. It is ordered that the constable's costs which accrued in the distress warrant case of Moran against Wm. & Hill O'Neal, in the justice's court of the 637th Dist., G. M., of said county, be ascertained by the jury in said court, and that said Childs be allowed said cost as a credit on the $64.06; and that said jury find the amount of the constable's cost that accrued in the distress warrant that was withdrawn by Moran, and deduct the amount from the $64.06, and return a verdict for plaintiff for the balance; and, if it appears that no such cost is due him, or the same was ever paid, then the verdict to be for $64.06. It is further ordered that B. F. Childs recover of Moran $—— costs of this proceeding." To this judgment, Moran excepts, and brings the case here for review.

1. One ground of error complained of in the bill of exceptions is that the court erred in failing to dismiss the petition for certiorari on motion of counsel for plaintiff in error on the ground that the petition did not set forth the number of the district and the county where the justice's court was held in which the case was tried. The heading of the petition for certiorari contained the name of the state and county, and was duly addressed to the superior court. The body of the petition set forth the name of the magistrate in whose court the case was tried before a jury, but omitted the number of the district and the name of the county where it was tried. It appears from the record that an answer had been duly filed by the magistrate, the substance of which answer is set forth in the bill of exceptions, which, however, fails to indicate how the magistrate signed the answer. We therefore presume that he properly signed it in his official capacity, giving the number of the district of which he was justice. Upon this answer must have been based the adjudication of the judge's final ruling; and, even if it be necessary that the record should show the jurisdiction of the superior court, if it does not appear from the petition, but does appear from the answer, we do not think the court committed any error in overruling this ground of plaintiff's motion to dismiss the petition.

2. It is further complained in the bill of exceptions that the petition for certiorari did not specifically set out the written evidence offered on the trial in the court below, and did not distinctly allege the errors complained of. Upon examining the petition in the record, we do not think there is any merit whatever in this complaint, and the court did right in refusing to dismiss the petition on these grounds.

3. We think, under the facts of this case, the constable was clearly entitled to whatever costs had been legitimately incurred by the proceedings on the distress warrant for rent. After these costs had accrued, the con-

stable, of course, cannot be deprived of his right to the same simply because the plaintiff in the distress warrant abandoned that suit. That very course would make him legally liable for the costs that had accrued on the warrant up to the time of such abandonment.

4. While there was some conflict in the evidence as to whether the plaintiff's attorney assented to the payment of the amount made by the constable to the defendant's attorney, yet there was sufficient evidence to authorize at least the grant of a first new trial by the judge on the issue set forth in his order above quoted. In fact, the decided weight of the testimony, if not the uncontradicted evidence, shows that the amount found by the jury for the plaintiff only allowed the constable his costs accruing on the foreclosure of the lien for supplies, and ignored his claim of costs on the distress warrant for rent. While there seems to be some conflict in the evidence as to who was responsible for the constable not retaining enough in his hands to meet these costs, and also the amount due on the landlord's lien for supplies, there certainly was no abuse of discretion in the court remanding the case to the justice's court for trial before a jury on this issue. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

In re CONTEMPT BY FOUR CLERKS.

(Supreme Court of Georgia. June 7, 1900.)

CLERKS OF COURTS — DUTIES ON APPEAL — TRANSMITTING PAPERS—TRANSCRIPT —ARRANGEMENT—CONTEMPT.

1. It is the duty of the clerk of a court, the decisions of which are reviewable by writ of error to this court, to transmit to the clerk of this court at the same time both the original bill of exceptions and the transcript of the specified portions of the record, within 10 days from the date of the filing of the bill of exceptions, when the case is one that can be brought to this court on the ordinary writ of error, and within 15 days from the date of service of the bill of exceptions when the case is one which is required to be brought here by a fast writ of error.

2. If such clerk delays the transmission of either the original bill of exceptions or the transcript beyond the time above mentioned, it is his duty to certify on the transcript the true cause of the delay.

3. The transcript of the record must be legibly written or printed on white paper, and, if written with pen or typewriter, the same must be done on only one side of each sheet.

4. The various parts of the transcript must be arranged in order of time; that is, the first document filed shall be foremost in the transcript, and so on to the last order or document filed immediately preceding the transmission of the transcript and bill of exceptions.

5. As against a clerk, an illegible or confused transcript of the record will be treated as no transcript.

6. It is the duty of the clerk to transmit the transcript, notwithstanding the plaintiff in error has neither filed a pauper affidavit, nor paid the costs due the clerk for making out the transcript.

7. The rules against the clerks in the present proceeding are discharged for the sole reason that it appears from the answer of each that they were under a misapprehension of their duty in regard to certifying the true cause of the delay in transmitting records, and it is manifest from each answer that there was no intention on the part of any of them to willfully disregard the rule of court in reference to this matter, or the law in reference to the time of transmission.

(Syllabus by the Court.)

In the matter of contempt by four clerks. Rule discharged.

COBB, J. Rules were issued against four clerks, calling upon them to show cause why they should not be punished for contempt for failing to certify on the transcripts of records, which they had transmitted to this court after the expiration of the time allowed by law, the true causes of such delay. The certificate of the clerk on the transcript in each case was silent as to the cause of the delay. Answers have been filed in response to these rules, in which various reasons are set forth for the failure to transmit the records in time. In each instance the answer in reference to the failure to certify on the transcript the cause of the delay amounts to nothing more or less than either a misapprehension or an ignorance of the law. As it is manifest, however, from each of the answers, that there was no intention on the part of these clerks to violate the law or the rules of this court, no penalty will be inflicted upon them, and the rules will be discharged.

We take advantage of this opportunity to call the attention of the clerks of the courts, the decisions of which are reviewable here, to the requirements of the law and the rules of this court in reference to the transmission of records, and to give notice that hereafter a strict compliance with the same will be expected and required, under penalty: When a bill of exceptions is filed in the office of the clerk of the trial court, it is his duty to make a complete transcript of such parts of the record as are specified in the bill of exceptions, and transmit the same, with the original bill of exceptions, to the clerk of this court, within 10 days from the date the bill of exceptions is filed, if the decision complained of is reviewable here on an ordinary writ of error. Civ. Code, § 5554. If the decision complained of is in a case which is required to be brought to this court by a fast writ of error, the bill of exceptions and transcript of the record must be transmitted within 15 days from the date of the service of the bill of exceptions. Id. § 5540. The bill of exceptions and transcript must both be transmitted at the same time. If, for any cause, the clerk delays transmitting either the record or the bill of exceptions beyond the time above mentioned, it is his duty to "certify to this court on the transcript the true cause of the delay." Rule 8 of the supreme court (Civ. Code,

§ 5607). A failure to transmit either the record or the bill of exceptions within the time prescribed by law, when there is no sufficient excuse for the delay, is a contempt of this court; and a failure to certify upon the transcript the true cause of such delay is also a contempt of this court, notwithstanding there may be a sufficient excuse for such delay. The duty of transmitting within time, and the duty of certifying as to the true cause for the delay, if delay is unavoidable, are not the only duties imposed upon the clerks of the trial courts in reference to the transcripts which they are to transmit to this court. Every transcript shall be plainly and legibly written or printed on white paper, so as to be read without more than ordinary strain or effort. If written with pen or typewriter, the same must be done on only one side of each sheet. The various parts of the transcript shall be arranged in order of time,—that is, the first document filed shall be foremost in the transcript, and so on; matters copied from the minutes, such as verdicts, orders, judgments, etc., being also placed in order according to dates. Rules 10 and 11 of the supreme court (Civ. Code, §§ 5609, 5610). A failure on the part of the clerks of the trial courts to comply with the duties imposed by these rules is also a contempt, and subject to be punished as such; and, as against such clerks, an illegible or confused transcript of the record will be treated as no transcript. Rule 9 of the supreme court (Civ. Code, § 5608). Parties to a case, who are not themselves at fault, and who have exercised due diligence in ascertaining whether the clerk has discharged his duty, and, if not, have with like diligence sought to compel a discharge of such duty, will not be prejudiced by the conduct of the clerk, provided the record reaches the office of the clerk of this court in time to be entered on the docket of the term to which it is by law returnable. Civ. Code, §§ 5555, 5564, 5571; rule 12 of the supreme court (Civ. Code, § 5611). But the clerk who is in default is always subject to be punished for contempt. It is to be noted in this connection that that part of section 5571 of the Civil Code which provides that, under certain circumstances, a case reaching this court after the cases from the circuit to which it belongs have been disposed of, shall be entered on the docket of the next term, has been declared to be unconstitutional. See Davis v. Bennett, 72 Ga. 762.

In the answer of one of the clerks it appeared that the delay in transmission was due to the fact that the costs due him for making out the transcript had not been paid. In the case of Rutherford v. Jones, 12 Ga. 618, it was held that "the clerk of the superior court is not entitled to demand the costs for making out the transcript of the record, before transmitting the same to the supreme court." Under the law as it existed at the time that decision was rendered, the clerk had no right to demand his costs at all until after the final termination of the case; but the law now provides that when the clerk transmits a record to the supreme court, except in cases where an affidavit of inability to pay the costs is filed, he may make out a bill of the costs for such transcript, and when presented to the judge of the court, and found by him to be correct, the judge shall award judgment in favor of the clerk for such costs. Civ. Code, § 5400. While the clerk has no right to demand payment of the costs as a condition precedent to transmitting the transcript, he has, under the law just referred to, a right to have an execution issued, which would be a remedy available to him to collect his costs in the event the plaintiff in error had failed to file the affidavit of inability to pay costs and was solvent. In addition to this, if the plaintiff in the case is the plaintiff in error and is a nonresident of the state, the clerk has a remedy by application to the judge to require him to make a deposit additional to that which is required at the beginning of the suit. Id. § 5399. Rules discharged. All the justices concurring, except FISH, J., absent on account of sickness.

BARKER et al. v. STEWART.

(Supreme Court of Georgia. May 16, 1900.)

NEW TRIAL—MISCONDUCT OF JUROR—APPEAL.

That an attorney for one of the parties in a case on trial suggested to one of the jury, while on the street, and suffering from an ailment, that a dose of medicine of a particular kind would benefit him, and also, at his own expense, procured and furnished the medicine to the juror, will not require the setting aside of a verdict in favor of the client of this attorney when it affirmatively appears that the attorney did not know the person to whom he furnished the medicine was on the jury trying the case, that the juror took the medicine not as a gift, but under the impression that he was to pay for it himself, and that counsel for the other party witnessed all that occurred, and made no complaint of it before verdict. Under such circumstances there was nothing in the conduct of either counsel or juror which necessarily militated against the purity of jury trial; and if, in the exercise of a sound discretion, and upon sufficient evidence, the trial judge found that the occurrence resulted in no injury to the losing party, his finding will not be disturbed.

(Syllabus by the Court.)

Error from superior court, Heard county; S. W. Harris, Judge.

Action by C. H. Stewart against W. Z. Barker and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Felix N. Cobb, F. S. Loftin, and Reese & Gordon, for plaintiffs in error. Sidney Holderness, for defendant in error.

LEWIS, J. The only question argued in the present case, or upon which a decision of this court was invoked, is that dealt with in the headnote. One of the grounds in the mo-

tion for a new trial is as follows: "Because during the progress of the trial of said case H. L. Samples, one of the jurors impaneled and sworn to try the same, and while acting as said juror, and before the rendition of the verdict in said case, without permission of the court, and without the knowledge or consent of defendant or their counsel, was treated by Col. Sidney Holderness, of counsel for plaintiff, in the drug store of Dr. W. A. Ware, at Franklin, Georgia, by said Holderness giving to said Samples a glass of Seidlitz powders mixed with sugar and other ingredients unknown to movants, which was ordered by said Holderness for said Samples, and paid for by said Holderness; that this fact was not known to movants or their counsel until after the rendition of the verdict in said case." On the hearing of this ground of the motion it appeared from some of the affidavits introduced in evidence that during a recess of the court, and pending the trial of this case, F. N. Cobb, of counsel for plaintiffs in error, was standing at a drug store, and that Holderness, counsel for defendant in error, walked up, and they engaged in common conversation; then Samples, the juror, came up, and customary greetings were exchanged. Samples, in reply to an inquiry, "How do you do?" complained of a headache. Remedies were suggested, Holderness suggesting Seidlitz powders, accompanying this suggestion with a statement that he had just started to take one for the same trouble. Samples, the juror, said he would try the remedy, and they stepped inside the door of the drug store. Holderness ordered the Seidlitz powders, one for himself, and also one for Samples, which were accordingly furnished by the clerk. They were produced, and the juror asked Holderness to show him how to take his, saying that he had never taken one before. Holderness showed him how, by pouring out the contents of one powder (the soda) in one glass with a little water, and the contents of the other package (acid) in another glass with water and a little sugar. Samples then picked up the two glasses from the counter, mixed and drank quickly, and then walked out of the store without saying a word. Holderness then, in the absence of the juror, took his powder, then handed the clerk a piece of silver, and received from him his change, putting it in his pocket without counting it. There was some evidence that Cobb, one of counsel for plaintiffs in error, heard the conversation that occurred between the juror and Holderness. There was also evidence in behalf of plaintiffs in error to the contrary. There was undisputed proof, however, that Holderness did not reside in the county where the case was being tried, and was a comparative stranger there, not knowing the people generally of the county. He did not know Samples, had never seen him before, and in the course of the transaction with reference to the Seidlitz powder he did not know that Samples had been selected as a juror in the case, the trial of which had proceeded. It further appeared from the evidence that Samples did not know that Holderness was treating or intended to treat him with a Seidlitz powder, but expected the same would be charged to him on the books of the store, and afterwards asked a friend to pay that amount for him, and did not know that it had been paid by Holderness until several days after the adjournment of court. There is nothing in the evidence to indicate that Holderness intended the medicine which he advised Samples to take as a treat from him to the juror. After hearing all the evidence, the court overruled the motion for a new trial, and we are called upon by counsel for plaintiffs in error to reverse the judgment on account of this alleged misconduct on the part of counsel for defendant in error with one of the jury impaneled to try the case.

We think that a simple statement of the facts above given was amply sufficient to authorize the judge in overruling this ground of the motion. There is nothing in the facts developed to indicate even a possibility of the juror having been in the least affected by the acts of civility and courtesy shown him by the counsel of defendant in error, and the facts in this case are not akin to those where this and other courts have ruled that new trials will generally be granted when jurors eat and drink at the expense of a prevailing party. It has never been applied to acts of common courtesy or ordinary civility, but, as applied to drinks or treats, it generally carries with it the idea of conviviality and good fellowship. We are not aware of a decision of any court where an act of simple common humanity in administering to the wants of one suffering physical pain has been construed as improper conduct for an attorney or party in a case when administered to one who happens to be upon the jury engaged in the trial of a cause. It was accordingly held by this court in the case of Railroad v. Wiggins, 91 Ga. 208, 18 S. E. 187: "It is no cause for a new trial that one of the jurors took the plaintiff by the arm, and assisted him downstairs in the court house during a recess of the court after the trial was commenced and before it was concluded. It is not apparent or probable that this act of civility on the part of the juror was or might have been prejudicial to the defendant, although the cause of action on trial was an injury to the plaintiff's spine and nerves, which, as he contended, disabled him from walking without crutches or other assistance." We think, if there is any difference in principle in the case above mentioned and the one under consideration, that difference is in favor of the contention in behalf of the defendant in error in the case at bar; for here the attorney, in suggesting a remedy for the juror's physical complaint, performed not only nothing but an act of common humanity, but it seems he was entirely ignorant of the

fact that Samples was a member of the jury which had been impaneled and sworn to try this case, and the juror himself was ignorant of the fact that the attorney intended to treat him. If counsel for the opposite party had not been present in this case, had not thus been made aware of the conduct between opposite counsel and this juror before the verdict, this conduct, as developed by the testimony, does not necessarily militate in the least against the purity of jury trials. There was evidence, however, that one of the counsel for plaintiffs in error was present and witnessed what occurred; and, while there was a conflict of testimony on this point, there was sufficient evidence to authorize the trial judge to decide the issue in favor of the respondent to the motion. We think that, in the exercise of a sound discretion, and upon sufficient evidence, the trial judge found that the occurrence resulted in no injury to the losing party, and his finding, therefore, will not be disturbed by this court.

It is unnecessary to consider the other grounds in the motion for a new trial, as none of them were insisted upon or argued as cause for a reversal of the judgment below. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

COOPER v. RALEIGH & G. R. CO. et al.

(Supreme Court of Georgia. May 16, 1900.)

CARRIERS—LIABILITIES—DAMAGE TO PROPERTY—SHIPMENT OF LIVE STOCK—LIMITING LIABILITY—UNLOADING.

1. A common carrier of goods is excused from liability for loss of or damage to such property only in the event loss or damage results from the act of God or of the public enemy.

2. While a common carrier of goods, who also transports live stock, is, as to the latter property, a common carrier, certain exceptions have grown up in his favor, exempting him from liability for loss or injury caused by the nature and propensities of the animals.

3. In the trial of an action brought against a carrier of live stock to recover damages for loss of or injury to stock which he had undertaken to transport, after proof of loss or injury there is a presumption of law that he was at fault, and the burden rests upon him of showing that he is not liable, by reason of the happening of some cause which the law recognizes as an excuse.

4. A carrier of live stock may by special contract so limit his liability for loss or damage that he will be liable only in the event he is guilty of "gross negligence."

5. When, in such a contract, it was provided that the shipper should "unload [the] stock, with the assistance of the company's agent or agents, at his * * * own risk," it is the duty of the shipper either to be present himself, or have some one representing him present, at the unloading of the stock; and, in the trial of a suit in which the carrier relied on such a contract as a defense, it is not error to so charge the jury, if they are also instructed that a failure of the shipper to be present, or have some one present in his behalf, would not defeat a recovery by him unless it appeared that the damages claimed resulted from such failure.

(Syllabus by the Court.)

Error from city court of Athens; Howell Cobb, Judge.

Action by C. W. Cooper against the Raleigh & Gaston Railroad Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

Henry C. Tuck, for plaintiff in error. Erwin & Brown, for defendants in error.

COBB, J. The plaintiff brought an action against the defendants to recover damages on account of injuries which it was alleged had been inflicted, by the negligence of the servants of the defendants, on certain live stock which they had undertaken to transport for the plaintiff from Atlanta to Athens. See Cooper v. Railroad Co., 105 Ga. 83, 30 S. E. 731. The petition set forth two elements of damage. It was alleged first that one mule worth a stated sum had been rendered practically worthless by having one leg broken; this injury resulting from the mule getting its foot hung in the open latticework forming the side of the car in which the stock were shipped. The other element of damage was alleged to have arisen from the conduct of the defendants in unloading the stock at Athens, after the hour of midnight, into an open pen or inclosure, while the weather was very cold, and a strong, biting wind or blizzard was blowing, in which inclosure the stock remained the balance of the night, and from such exposure they contracted distemper, and on account of this were injured and damaged in a stated sum. The defendants answered, denying the material allegations of the petition. The case went to trial, and a verdict was returned in favor of the defendants. The plaintiff's motion for a new trial having been overruled, he sued out a bill of exceptions to this court, complaining of the refusal of the court to grant him a new trial.

Under the common law, a common carrier was liable absolutely and at all events to deliver the property which it had undertaken to carry safely to the consignee or owner, and was excused from liability only when the loss or injury was caused by an act of God or the public enemy, or the shipper's negligence. 6 Am. & Eng. Enc. Law (2d Ed.) p. 263; Fish v. Chapman, 2 Ga. 349; Cooper v. Berry, 21 Ga. 535. The statute of this state is to the same effect. Civ. Code, § 2264. The transportation of live stock over land was, however, unknown to the common law, and consequently the liability of carriers of live stock is not to be determined by the strict common-law rule. Railroad Co. v. Spears, 66 Ga. 485; Pardington v. Railway Co., 38 Eng. Law & Eq. 432; 2 Ror. R. R. pp. 1301, 1302. By statute (17

& 18 Vict. c. 31, § 7), carriers of live stock were in England made liable as common carriers. While there has been some doubt as to whether carriers of live stock were common carriers, it seems to be well settled now that they are. Hutch. Carr. §§ 217, 218; 5 Am. & Eng. Enc. Law (2d Ed.) 428; and cases cited in each.

2. While carriers of live stock are common carriers, certain exceptions have grown up in their favor, arising from the nature of the property transported. Among these exceptions are the natural death of the animals, the vicious and uncontrollable nature of the stock, and similar exceptions. Such causes are within the principle which excuses common carriers from loss or damage resulting from the act of God. They are causes which arise from the nature and propensity of the animals, and which could not be prevented by foresight, vigilance, and care. Hutch. Carr. § 216a; 5 Am. & Eng. Enc. Law (2d Ed.) p. 448. Such exceptions as these were clearly recognized in the case of Railroad Co. v. Spears, cited above; holding that carriers of live stock were common carriers.

3. It being settled that a carrier of live stock is a common carrier, and entitled to the privileges of, and, with the exceptions just referred to, subject to the penalties imposed on, such a carrier, the question arises as to whether, under our law, in a case like the present, the burden of showing negligence is on the plaintiff, or whether it is incumbent on the carrier to show that the failure to deliver the stock in good order was attributable to some cause which the law recognizes as an excuse for such failure. The Code declares that "in case of loss the presumption of law is against [a common carrier], and no excuse avails him unless it was occasioned by the act of God or the public enemies of the state" (Civ. Code, § 2264), and also that "a railroad company shall be liable for damage done to persons, stock or other property of such company, or for damages done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company" (Civ. Code, § 2321). It would follow that in a suit against a railroad company, acting as a common carrier of live stock, for damages alleged to have resulted from the way in which the stock were transported, when the plaintiff has shown a delivery of the stock to the company, and loss of or injury to the stock while in the possession of the company, the law would raise a presumption that such loss or injury resulted from the defendant's negligence, and the burden would be upon the defendant to show that the loss or injury was the result of some cause which would, under the law, be an excuse for a failure to deliver the stock in good order. The defendants contend, however, that, even if the charge of the judge on the subject of the burden of proof was erroneous, it was harmless, for the reason that the defendants actually assumed the burden of showing that they were without fault. But, even if this is true, harm might have resulted from the judge's charge. It is impossible to tell from the jury's verdict whether they based the same on the testimony for the defendants, which, it is claimed, established they were without fault, or on an opinion which they entertained that the plaintiff had failed to successfully carry the burden which the court had improperly placed upon him. Under the judge's charge, if the jury believed that the plaintiff did not by his testimony show the defendants in fault, a verdict for the defendants would naturally result, even though they introduced no evidence whatever. We think, therefore, that the error of the judge in improperly placing the burden of proof was of such a character as to require a new trial.

4. Carriers of live stock may limit their liability by a special contract, which will be enforced if based upon a sufficient consideration, and if not unreasonable, immoral, or contrary to public policy. Railroad Co. v. Spears, 66 Ga. 485; Railroad Co. v. Bryant, 73 Ga. 722; Railway Co. v. Disbrow, 76 Ga. 253; Banking Co. v. Reid, 91 Ga. 377, 17 S. E. 934; Hutch. Carr. § 225 et seq.; 5 Am. & Eng. Enc. Law (2d Ed.) pp. 288, 441. In the present case the defendants introduced in evidence a contract of shipment entered into between them and the plaintiff, whereby the plaintiff agreed to release the defendants from liability in case of loss or injury to the stock by reason of a number of named causes, "and from all other causes incidental to railroad transportation, and which shall not have been caused by the fraud or gross negligence of said railroad companies." Under this contract the defendants were required to exercise only slight diligence, and were liable only for gross negligence, and an instruction to the jury to this effect was not erroneous. In Railroad Co. v. Spears, supra, it was held that a contract almost identical in language with the one now under consideration was enforceable, as it was "neither impossible, unreasonable, nor illegal." The contract under consideration in that case was also held to be based upon a sufficient consideration; the consideration being a reduction in freight, and a free passage to the owner. This was also the consideration of the contract involved in the present case. Of course, a common carrier cannot make a valid contract exempting him from liability altogether when the damage is caused by his own negligence. Berry v. Cooper, 28 Ga. 543; Purcell v. Express Co., 34 Ga. 315. But this is a different thing from limiting by contract his liability for damage caused by his gross negligence only. Hutch. Carr. § 229, and cases cited. There was therefore no error in the charge com-

plained of, and the defendants may excuse themselves by showing that they exercised the degree of diligence the contract requires. The provisions of sections 2313 and 2314 of the Civil Code, which prohibit common carriers from enforcing or requiring consignors of live stock "to contract for a liability less than the actual value of such animals in case of loss or injury to the same resulting from the negligence" of the carrier, and declaring that all such stipulations in contracts of shipment shall be void "unless the shipper shall voluntarily assent to" such stipulations, have no bearing upon the present case, for the reason that, so far as the present record discloses, there was no effort to recover any amounts larger than those stipulated in the contract of shipment. But, even if there had been, there was evidence tending to prove that the shipper voluntarily assented to all the stipulations in the contract of shipment. The fact that there was in the present case a special contract would not take it out of the rule that, after the plaintiff has proven that the stock were lost or injured while in the possession of the defendants, the law would raise a presumption that the defendants were at fault. Such a presumption would in such a case arise, and the burden would be then placed upon the defendants to show that they had exercised the degree of diligence which the contract required. Railway Co. v. Kennedy, 78 Ga. 653, 3 S. E. 267.

5. The contract entered into between the plaintiff and the defendants provided that the plaintiff should "unload said stock (with the assistance of the company's agent or agents) at his or their own risk, and feed, water, and attend the same at his own expense and at his own risk while in the stock yard of said company, or at the transfer points, or where it may be unloaded for any purpose." The court charged the jury that it was the duty of the plaintiff, under the contract, to have been present at the unloading of the stock, and this is assigned as error. There was no error in this charge. See Banking Co. v. Reid, 91 Ga. 377, 17 S. E. 934. Of course, the failure of the plaintiff to be present would not of itself prevent him from recovering, but, if the loss or damage was the result of his not being present, he could not recover.

The foregoing deals with all of the assignments of error which are of sufficient importance to be discussed at length, or which relate to matters which will probably arise at another trial. As the case goes back for another hearing, no opinion on the evidence is expressed. If the defendants fail to overcome the presumption of law that they were guilty of gross negligence in the way in which they transported, took care of, and delivered the stock, which presumption would arise as soon as the plaintiff shows that the stock were injured while in the possession of the defendants, a recovery in behalf of the plaintiff for the damage he has sustained would not be unwarranted. If, on the other hand, the defendants should show by evidence that they have exercised all that care and diligence which their contract of shipment required of them, the plaintiff would not be entitled to recover. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

RAY v. CAMP.

(Supreme Court of Georgia. May 14, 1900.)

APPEAL—HARMLESS ERROR—WITNESS—COMPETENCY—OBJECTION TO EVIDENCE.

1. Error in admitting secondary evidence of the contents of a lost writing, the execution of which had not been proved, is cured when, during the further progress of the trial, the execution of such writing is duly established.

2. Though one may be a party defendant to and interested in the result of a case instituted by the personal representative of a deceased person, such defendant is not incompetent to testify to what was said in a conversation had in his presence between the plaintiff's intestate and another, such conversation being neither a "transaction" nor a "communication" between the witness and the deceased.

3. An objection made generally to the introduction of specified evidence as a whole is not well taken when some of it is admissible. The proper practice is to point out the inadmissible portion, and object to it separately.

4. Excluding immaterial evidence is not cause for a new trial.

5. As a general rule, a party's reasons for failing to subpœna a particular witness are not a proper subject-matter of investigation.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Action by L. R. Ray against W. H. Camp. Judgment for defendant, and plaintiff brings error. Affirmed.

Lavender R. Ray and J. H. McLarty, for plaintiff in error. J. S. James and Roberts & Hutcheson, for defendant in error.

LUMPKIN, P. J. An action was brought by Ray, as administrator of Matthew Read, against J. G. Camp, for the recovery of land. While the same was pending the defendant died, and W. H. Camp, administrator upon his estate, was made a party in his stead. The trial resulted in a verdict for the defendant, and the plaintiff brings here for review a judgment overruling his motion for a new trial. It was admitted that the title to the premises in dispute was at one time in Matthew Read, the plaintiff's intestate. The defense was that Read had bargained the land to one Lane, giving him a bond for title; that Lane had transferred this bond to J. G. Camp; and that he had paid Read the purchase money in full, and therefore had a perfect equity in the land as against Read's legal representative. There was sufficient evidence to warrant a finding that the defense thus set up was the truth of the case, and whether there should or should not be a new

trial depends upon whether or not certain rulings complained of in the motion for a new trial were correct.

1. The court, over objection of counsel for the plaintiff, allowed the defendant to introduce parol evidence of the contents of the bond for title from Read to Lane. This evidence was objected to on the ground that it was inadmissible without proof of the actual execution of the bond. There was, at the time the objection was made, already before the jury some evidence tending to show that Matthew Read had actually executed and delivered the bond in question to Lane. Without, however, passing upon the sufficiency of this evidence to render admissible secondary evidence of the contents of the bond, it is sufficient to say that during the further progress of the trial the execution of the bond by Read and its assignment by Lane to J. G. Camp were affirmatively established, and as to these matters there was practically no dispute between the parties. So, whether the parol evidence referred to was properly admitted or not is an entirely immaterial matter.

2. The plaintiff in error further complains that the court erred in allowing the defendant, W. H. Camp, to testify that Matthew Read admitted in the presence of the witness to J. G. Camp that the latter had made certain payments on the purchase money of the land. The objection was that, Read being dead, W. H. Camp was incompetent to testify to the admissions in question, he being a party to the case, and also, as heir at law of his intestate, interested in its result. We do not think W. H. Camp was incompetent to testify to these admissions. He was not disqualified, either by reason of his being a party or because of his interest in the case. If, therefore, he was incompetent, it was under paragraph 1 of section 5269 of the Civil Code, which declares that: "Where any suit is instituted or defended by a person insane at the time of trial, or by an indorsee, assignee, transferee, or by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the insane or deceased person, as to transactions or communications with such insane or deceased person." It was argued that, as the action had been instituted by the representative of Matthew Read, a deceased person, the opposite party, W. H. Camp, could not lawfully testify to the admissions in question, because they related to "transactions or communications" between the witness and the plaintiff's intestate. In point of fact this is not true. W. H. Camp was not testifying to any transaction or communication between himself and Matthew Read. The evidence does not disclose that there ever was any transaction or communication between these parties with reference to the subject-matter of the present action. There is nothing in the law rendering W. H. Camp incompetent to testify to conversations between Matthew Read and J. G. Camp which the witness happened to hear. As has been frequently ruled, this court is not at liberty to extend by construction the statutory provisions relating to the competency of witnesses, but is under the duty of following and enforcing them literally. We therefore hold that, as to the particular matter now in hand, the court committed no error.

3. Mrs. Camp, the widow of the deceased, also testified to certain conversations between Matthew Read and her deceased husband, occurring in her presence, in the course of which Read admitted that her husband had made certain payments on the land. This witness also testified to a conversation between herself and Read in which similar admissions were made. The evidence of Mrs. Camp was objected to as a whole, counsel for the plaintiff insisting that none of it was admissible, for the reason that Read was dead, and that Mrs. Camp, as heir at law of her deceased husband, was interested in the result of the case. If our ruling as to the testimony of W. H. Camp, discussed above, is correct, it follows that the testimony of Mrs. Camp relating to the conversation between her husband and Read was admissible. We are inclined to think that her testimony as to conversations had directly between herself and the deceased, Read, was not admissible, since it related to a direct communication between herself and the plaintiff's intestate. As a party to the case, she could not properly be allowed to testify to this communication; and, under paragraph 4 of the above-cited section of the Civil Code, the same disqualification attached to her as a person interested in the result of the suit. The difficulty, however, is that the plaintiff objected to evidence "in bulk," some of which was admissible, and some of which was not. He ought to have pointed out and objected separately to the portion which could not properly be received. Having failed to do so, his exception to the admissibility of the testimony as a whole is not good. See Harris v. Lumber Co., 97 Ga. 465, 25 S. E. 519, cited approvingly in Ellis v. Poe (Ga.) 34 S. E. 567, wherein reference is also made to other pertinent decisions of this court.

4. Complaint is made in one ground of the motion for a new trial that the court erred in refusing to admit testimony to the effect that J. G. Camp had never paid a promissory note given by him to Lane in consideration of the assignment of the bond for title hereinbefore referred to. This was a matter of no consequence, for the real and only substantial controversy between the parties to the case on trial was whether or not J. G. Camp had paid Matthew Read the purchase money of the land in dispute.

5. Counsel for the plaintiff, while the witness W. H. Camp was under cross-examination, asked him why he did not have present

one Bomar to testify in the case. Complaint is made that the court refused to require the witness to answer this question. Certainly, there was no error in this. There was not even a hint in the record why it was not as much incumbent upon the plaintiff as upon the defendant to procure the testimony of Bomar, if deemed relevant or material to the issues involved. In no view of the matter could it be fairly said that the defendant was any more responsible for the absence of Bomar than was the plaintiff himself. This being so, the defendant's reason for failing to subpœna Bomar as a witness was totally irrelevant. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

BASS v. WEST.

(Supreme Court of Georgia. May 16, 1900.)

ADJOINING LANDOWNERS — EXCAVATIONS — OWNER OF LEASEHOLD — EVICTION — DAMAGES—TRANSFER OF LEASE—TRESPASS.

1. The owner of land adjoining that of another has a right, on giving notice of his intention to do so, to make all proper and needful excavations for purposes of construction, even up to the line, but he must use ordinary care and take reasonable precaution to sustain the land of the adjoining owner.

2. The owner of a leasehold estate may maintain an action against any one who wrongfully interferes with his possession.

3. In case of a tortious eviction from leased premises, the measure of the lessee's damages would generally be the value of the premises for rent during the remainder of his term.

4. Where the lessee conducted an established business on the leased premises, the value of the good will of the business and the loss of profits occasioned by the eviction, if ascertainable with a reasonable degree of certainty, may be considered in estimating the value of the premises for rent.

5. A lessee cannot, without the consent of his landlord, transfer his lease; and the transferee in such a case would be a mere intruder, and subject to be summarily ousted by the landlord.

6. Bare possession of real estate gives a right of action against any one wrongfully interfering with such possession.

7. The principles above announced control the case. In the light thereof, some of the charges of the court were erroneous, and a new trial should be had.

(Syllabus by the Court.)

Error from city court of Floyd county; G. A. H. Harris, Judge.

Action by Walter B. West against James L. Bass. Judgment for plaintiff, and defendant brings error. Reversed.

Dean & Dean, for plaintiff in error. Fouché & Fouché, for defendant in error.

COBB, J. Walter B. West brought suit against James L. Bass. The plaintiff's petition was, in substance, as follows: On July 23, 1898, petitioner was doing business in the name and style of the "West Cycle Company," and was in possession of a storehouse and lot fronting on Broad street, in the city of Rome, which lot was joined on one side by a storehouse and lot owned by the defendant. Petitioner's tenancy and right of possession does not expire until May 1, 1899. "On or about the —— day of ——, 1898, defendant removed the building from his lot, and, by way of preparing to rebuild thereon, dug down under and by the side of the northeast wall of the building occupied by petitioner, and said wall, being thereby undermined and deprived of its lateral support, collapsed and fell, and the building was thereby ruined, and petitioner was compelled to vacate the same." Defendant neglected and refused to repair the building of petitioner, and in August, 1898, in total and wanton disregard of petitioner's rights, entered upon said premises, and totally destroyed and removed said building, and evicted petitioner from the premises, and refuses to restore or repair the building, and the lot is now vacant. The storehouse occupied by petitioner was centrally located, on the most public street of the city, and was very valuable and profitable as a place of business, and especially so for the business carried on by petitioner. This business consisted of the buying, selling, renting, repairing, and mending bicycles, which business was very profitable; petitioner clearing the sum of $50 per month therefrom. The destruction of the building has entirely broken up the business, and petitioner was thereby damaged in the sum of $225. Petitioner was compelled to vacate the building suddenly and without warning, and has thereby been damaged in the sum of $125 for costs of moving and breakage and destruction of his stock, tools, furniture, and fixtures. The building was near a steam plant, from which petitioner procured power free of charge to run a steam engine that is necessary for the proper and effectual conduct of his business. By reason of the removal, he will be compelled to purchase an electric motor at an expense of $50, and pay the sum of $9 per month to run the same, by reason of which facts he has been damaged in the sum of $150. Petitioner had established a trade and good will in his business, which was worth the sum of $500, and petitioner has been damaged that sum by the removal.

The defendant filed demurrers, both general and special, to the petition. The special demurrers were: (1) The allegations as to loss of profits are too remote and speculative, and are not proper charges against defendant; (2) the allegations as to cost of removal and breakage and destruction of stock, etc., are too general; (3) in reference to the loss of the use of the power from the steam plant, plaintiff fails to allege that he has been damaged thereby, or that he has sustained any damage; (4) the allegations as to loss of good will are too remote and speculative, and do not constitute a proper charge against the defendant.

The plaintiff amended his petition to meet the second and third grounds of the demurrer, and, this having been done, the court overruled the demurrers. To this ruling the de-

fendant excepted pendente lite. The defendant thereupon answered, denying the material allegations of the petition, and averring that in preparing to rebuild upon his lot he in no way disturbed or undermined the foundation of the building occupied by plaintiff, and that the building did not fall by reason of the lateral support having been taken therefrom; that plaintiff voluntarily removed therefrom, and defendant permitted him to occupy a large and well-equipped storeroom in another part of the city free of rent for several weeks, and afterwards rented it to him at a very low rental; that the latter store is a much more desirable location for plaintiff's business than the place from which he removed; that the building was not removed by defendant until after plaintiff had abandoned it, and not until the city authorities had condemned it; that in removing the building defendant acted by and with the consent of the agent of the owner; that the building did not fall, but only gave way a little, and plaintiff could have repaired the same by the expenditure of a small sum; that, if plaintiff is entitled to recover anything, he should recover only an amount equal to that necessary to have repaired the building; that the damages claimed by plaintiff are too remote, and are not capable of proof. The case went to trial, and, after evidence introduced, the jury returned a verdict in favor of the plaintiff for $180. The defendant filed a motion for a new trial, which was overruled, and he excepted.

1, 2. According to the allegations of the petition, the plaintiff was in possession of the premises in question as a tenant for a term of years of the owner. He alleges that the defendant dug down and undermined the wall of the building, and deprived it of its lateral support, and that it collapsed and fell; and, further, that the defendant some time thereafter totally destroyed and removed the building, and evicted petitioner therefrom. As against a general demurrer, the petition sets forth a cause of action. Any wrongful interference with the possession of a tenant of real estate gives to him a right of action against the wrongdoer. 1 Sedg. Meas. Dam. 69; 3 Suth. Dam. § 1012. What duty did the defendant owe the plaintiff in respect of the matter in question? Section 3048 of the Civil Code provides: "The owner of adjoining land has the right, on giving reasonable notice of his intention so to do, to make proper and needful excavations even up to the line for purposes of construction, using ordinary care and taking reasonable precautions to sustain the land of the other." Under this section, before making any excavations at all the defendant should have given the plaintiff notice of his intention to do so; and, even after notice given, it was incumbent on the defendant to have used ordinary care in the prosecution of the work, and to have taken reasonable precautions to prevent the plaintiff's wall from falling. The petition does not allege failure to give notice, and does not in terms allege a failure to use the care required by the statute after having given the notice, but it does allege that the wall was undermined and deprived of its lateral support. If the averments of the petition are construed to mean that the defendant actually "undermined" the wall,—that is, dug under the wall into the adjoining lot,—then no allegation as to want of ordinary care in the way the work was done would be necessary; for such conduct would make the defendant a trespasser, and liable as such, no matter what degree of care he exercised. If, on the other hand, the petition be construed to mean that the wall was undermined in the sense that the defendant dug away the lateral support by making an excavation on his own land, then the plaintiff should have distinctly alleged that the defendant failed to exercise a proper degree of care in the execution of the work; and, had the point been made by special demurrer that he did not do so, it would have been well taken, but as against a general demurrer the allegations are sufficient. Moreover, the petition alleged that the defendant, after the collapse of the wall, instead of repairing the damage already done, entered upon the premises, and totally destroyed and removed the building, and evicted the plaintiff. There was certainly no warrant in law for such a proceeding as is in the petition alleged. The averments therein make a case of wanton destruction of the building, and of a willful and deliberate deprivation of the plaintiff's right of possession.

In this connection we refer to so much of the evidence as relates generally to the cause of action. The evidence showed that the sill on which the supports of the building on the side the excavation was made rested was rotten; that the dirt from the side of the sill for several feet was removed, and the rotten sill plainly exposed to view; that it either was, or could easily have been, seen by the defendant, who himself superintended the excavation; that, notwithstanding the condition of the sill, the defendant took no precautions to support the wall, and prevent it from falling, but continued the excavation, when some of the supports slipped off into the ditch being dug by the defendant, which caused the roof to sag down in the middle, and some of the plastering on the side to fall. The plaintiff, being apprehensive that the building would collapse, immediately and hastily removed himself and his property from the building. We think this evidence warranted a finding that the defendant failed to take reasonable precautions and to exercise ordinary care, in making the excavation, to prevent injury to the building occupied by the plaintiff. We think, also, that the plaintiff was justified in abandoning the premises at the time he did. The case of Harrison v. Kiser, 79 Ga. 589, 4 S. E. 820, holding that an owner is not liable

for the negligent work of an independent contractor in making an excavation, unless such owner gave the contractor express directions as to the manner of doing the work, or knew how it was done, knew it was calculated to injure the property of the adjoining owner, and ratified the work, is not applicable to the present case. Here the owner himself superintended the work, and knew, or ought to have known, of the condition of the sill, and of the failure to use proper care in prosecuting the work after the condition of the sill became known. Counsel cite that case, also, on the measure of damages; but that was a case where the owner was suing for injury to the freehold, and it was held that the measure of his damages was the amount it would take to put the property in the condition it was before the injury. This, of course, cannot be the rule where a tenant is suing for injury to his possession, as we shall hereafter see.

3, 4. With two exceptions, the special grounds of the demurrer were met by appropriate amendments. Those necessary to be dealt with raise the question that loss of profits and the good will of a business cannot be considered in estimating the damage in a case like the present. In case of a wrongful eviction of a lessee, he can recover of the wrongdoer for the injury he has sustained. In such a case the general rule is that his measure of damage is the value of the premises for rent during the remainder of the term. If a person is wrongfully deprived of the use and occupancy of premises in which an established business is being carried on, he may recover damages for the injury done his business. He cannot, however, even in such a case, recover for loss of profits and the value of the good will of his business as such, but evidence as to these may be introduced to throw light on the value of his leasehold estate. Where the amount of the profits lost and the value of the good will of the business can be ascertained with a reasonable degree of certainty, they should be allowed in estimating the value of the lease for the purpose for which it was being used. In cases, however, where these elements are merely speculative and conjectural, and cannot be ascertained with reasonable certainty, no allowance should be made therefor. This does not mean that the amounts of these elements of damage should necessarily be reduced to an exact calculation before a recovery could be had, but there must be sufficient data to enable a jury with a reasonable degree of certainty and exactness to ascertain the loss.

These views are in harmony with prior decisions of this court. In Sturgis v. Frost, 56 Ga. 188, it was held: "The average profits which a tradesman was making when his entire stock was seized may be considered in estimating his damage for the time, before suit, during which his stock was detained from him, and his business thereby wholly interrupted. Although the profits, as such, would not be recoverable, yet their amount, as a fact, may be considered in estimating the magnitude of the alleged outrage by defendant." The same ruling was made in Juchter v. Boehm, 67 Ga. 534. In Pause v. City of Atlanta, 98 Ga. 92, 26 S. E. 489, it was held that the holder of a lease of a house for business purposes could recover damages from a municipal corporation resulting to his business from the construction of a public improvement along the street on which the leased house was situated. In reference to the measure of the lessee's damages, Mr. Justice Atkinson says: "The measure of her damages is the injury to her property which is injuriously affected by the public improvement. * * * In such a case the profits of the business are not recoverable by way of damages, but evidence that the business was profitable is admissible to illustrate and throw light upon the value of the premises for rent." It is true that in such a case as the one just referred to the city would not be a trespasser, and the eviction would not be tortious. That decision rested upon the ground that a leasehold interest was property, and that the holder thereof could not be deprived of it by its appropriation to a public use without just compensation. But the measure of compensation was held to be substantially the same with reference to the question of the loss of profits as that in cases of a tortious eviction, and followed substantially the rulings made as to this matter in the cases above cited, which were cases of tortious eviction. The cases of Smith v. Eubanks, 72 Ga. 280, and Stewart v. House Co., 75 Ga. 582, were suits for breaches of contracts of lease, and in such cases "profits which are the immediate fruit of the contract" may be recovered as such, being capable "of exact computation," and not too remote. Civ. Code, § 3798. On the general subject of recovery for lost profits, see 1 Sedg. Meas. Dam. (8th Ed.) § 188; 8 Suth. Dam. (2d Ed.) § 1029; 8 Am. & Eng. Enc. Law (2d Ed.) p. 625, note 3.

Applying the foregoing to the present case, we think the special demurrers were properly overruled. It was proper to allege and prove, if it could be done with that degree of certainty which the law requires, the amount of profits lost, and the value of the good will of the business, and similar elements of damage. While, as stated, they could not be recovered as such, they were nevertheless proper matters of allegation and proof in estimating the injury which the plaintiff had sustained.

5. It is contended, however, that there was no evidence from which the jury could find that the plaintiff was a tenant of the premises, and that, being a mere trespasser himself, he cannot recover for the injury done to his possession. The plaintiff undertook to prove that he was a subtenant of the original tenant of the premises. The evidence does show clearly that the original tenant trans-

ferred his lease to the plaintiff, but there was no sufficient evidence to show that the landlord assented to, or had knowledge of, the transfer. The landlord was absent from the state when the transfer was made, and his agent appointed to manage the property testified positively that he had no knowledge of the transfer, either at the time it was made or before the injury to the building. Taking the evidence most favorably for the plaintiff, we do not think it warranted a finding that the plaintiff was a subtenant with the consent or knowledge of the agent of the landlord. Without such consent, the tenant had no right to transfer his lease, and the transferee would be a mere intruder, subject to be summarily ousted by the landlord. McBurney v. McIntyre, 38 Ga. 261; Stultz v. Fleming, 83 Ga. 14, 9 S. E. 1067 (Opinion, point 4). Such being the case, the plaintiff could not recover for loss of future profits, the value of the good will of the business, or for anything which was dependent upon the future for its value, for the reason that it could not be ascertained how long the landlord would suffer him to remain a trespasser on his premises. 3 Suth. Dam. (2d Ed.) § 1012.

6. It by no means follows, however, that the plaintiff is cut off from recovering any damages whatever. "The bare possession of land authorizes the possessor to recover damages from any person who wrongfully in any manner interferes with such possession." Civ. Code, § 3876. The possession of the plaintiff was actual and exclusive, and "such possession is sufficient to support the action of trespass. Even though this possession may have been illegally acquired, it is sufficient." 26 Am. & Eng. Enc. Law (1st Ed.) p. 582, and numerous cases cited in notes. See, also, 8 Sedg. Meas. Dam. (8th Ed.) § 931, and cases cited; 3 Suth. Dam. (2d Ed.) § 1012. The defendant was himself a trespasser. He had no more right to interfere with the possession of the plaintiff than the plaintiff had to the possession. For such wrongful interference the plaintiff can recover, but his measure of damages would be the injury to his possession and such damage as was the immediate result of the eviction. For whatever damages he sustained growing directly out of the eviction he can recover, and only those.

7. The foregoing disposes, in effect, of all the questions made in the case. The court erred in charging upon the hypothesis that the plaintiff was a tenant of the premises, for the reason that there was no evidence to warrant it, and also erred in submitting to the jury the consideration of the value of lost profits, good will of the business, and the value of the steam privilege. Let the case be tried again. If on another trial it should appear that the plaintiff was in fact a tenant with the consent of the landlord, then his measure of damages would be as above indicated. If the evidence is substantially the same as the present record discloses, he can recover for nothing except the injury done to his possession, which was for no fixed time, and liable to be terminated at any moment, and for the expenses directly incident to the tortious eviction. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

MAYOR, ETC., OF CITY OF MACON v. HUGHES et al.

(Supreme Court of Georgia. May 12, 1900.)

CONSTITUTIONAL LAW—TITLE OF ACT—ELECTION—INJUNCTION.

1. Where an act was entitled "An act to amend the charter of" a named city by incorporating as a part thereof certain described contiguous territory, to define the duties and powers of the municipal authorities in the annexed territory, "and for other purposes," any legislation could constitutionally be embodied in the act which was germane to the general subject of amending the charter of the city.

2. Equity will enjoin municipal authorities from holding an election to determine whether a given territory shall be annexed to the city, when the ordinance calling the election was plainly ultra vires, and there was no warrant in law for holding the election.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Suit by D. G. Hughes and others against the mayor and counsel of the city of Macon. Judgment for plaintiffs, and defendants bring error. Affirmed.

Park & Gerdine, Jere Moore, Minter Wimberly, Hall & Wimberly, John P. Ross, M. W. Harris, and M. P. Callaway, for plaintiffs in error. M. G. Bayne, Hardeman, Davis & Turner, Guerry & Hall, and Dessau, Harris & Birch, for defendants in error.

COBB, J. 1. On November 21, 1893, the general assembly passed an act creating a new charter for the city of Macon. Acts 1893, p. 240. The eighty-seventh section of that act declared "that territory contiguous to the corporate limits of the city of Macon may be incorporated as a part of said city by the consent of the mayor and council of the city of Macon and of a majority of the persons residing in the said territory qualified by law to vote for members of the general assembly of this state," and provided for the manner in which the election should be conducted and the result declared, and the terms upon which the territory should be annexed, if the result of the election was in favor of annexation. In 1897 the general assembly passed an act having the following title: "An act to amend the charter of the city of Macon by incorporating as a part of said city a portion of the territory of North Macon, the same being a portion of the lands recently connected with the city by the Spring street bridge crossing the Ocmulgee river, and containing about —— acres, and more fully described by metes and

bounds in said act, to define the powers and duties of said mayor and council in said territory so incorporated, and for other purposes." Acts 1897, p. 271. The first section of that act provided for the incorporation within the limits of the city of Macon of the territory referred to in the title. The second section provided that it should be unlawful to sell liquor within the territory thus brought within the limits of the city. The third section declared "that the charter of the city of Macon appearing in the act approved November 21, 1893, be amended as follows, to wit: That section eighty-seven of said act, which reads as follows, be taken from said act, and said entire section be, and the same is, hereby repealed,"—the section thus declared to be repealed being quoted in full. The authorities of the city of Macon have passed an ordinance providing for an election under the eighty-seventh section of the act of 1893, and certain property owners of the territory sought to be annexed filed a petition praying that the election be enjoined. Certain persons who are residents and taxpayers of the city of Macon, and who are owners of property within the territory sought to be annexed, were made parties to the petition, and united in the prayers of the original petition. The judge, after a hearing, granted the injunction, and error is assigned upon this ruling.

One ground upon which the injunction was sought was that the mayor and council of the city of Macon had no authority to call the election; for the reason that the eighty-seventh section of the act of 1893 was no longer of force, having been in terms repealed by the act of 1897. The reply of the defendants to this position was that the third section of the act of 1897 was inoperative, for the reason that it contained matter different from what was expressed in the title of the act. Is there any language in the title of the act of 1897 which would be sufficient to authorize the incorporation into the act of the third section therein contained? This question is answered in the affirmative by the application to the facts of this case of the former rulings of this court. The constitutional provision prohibiting the passage of laws containing matter different from what is expressed in the title appears for the first time in the constitution of 1798 in the following language: "Nor shall any law or ordinance pass containing matter different from what is expressed in the title thereof." Const. 1798, art. 1, § 17; Cobb's Dig. p. 1114. In Mayor, etc., of Savannah v. State, 4 Ga. 26, 88, Judge Lumpkin refers to the history of this clause in the following language: "I would observe that the traditionary history of this clause is that it was inserted in the constitution of 1798 at the instance of Gen. James Jackson, and that its necessity was suggested by the 'Yazoo Act.' That memorable measure of the 17th of January, 1795, as is well known, was smuggled through the legislature, under the caption of 'an act for the payment of the late state troops,' and a declaration in its title of the right of the state to the unappropriated territory thereof 'for the protection and support of its frontier settlements.'" In Martin v. Broach, 6 Ga. 21, it was held: "Where the title specifies some of the objects for which the statute was passed, and contains this general clause, 'and for other purposes therein contained,' portions of the act not specially indicated in the title are, nevertheless, good, under this general clause." The constitutionality of two acts of the general assembly, one of them approved December 15, 1810, was called in question in that case. The title of the act of 1810 was in the following words: "An act for the more effectually securing the probate of wills, limiting the times for executors to qualify and widows to make their elections, and for other purposes therein mentioned." Prince's Dig. p. 239. Section 8 of the act provided that the court of ordinary should have authority, upon complaint made by the security of any guardian or administrator that his principal was mismanaging his estate, to pass an order requiring such administrator or guardian to show cause why the security should not be discharged, and the administrator or guardian compelled to give new security, or their administration or guardianship revoked; and that upon the revocation of such administration, or upon the revocation of any letters testamentary as provided by law, and granting administration de bonis non, suits brought by or against the former administrator should not for this cause be abated, but, the removal of such administrator or executor being suggested of record, a scire facias might issue to make the administrator de bonis non a party to the record. It was held that the title was sufficiently broad to authorize the enactment of the section just referred to. In reference to this clause of the constitution, Judge Lumpkin in the opinion says: "This clause does not require that the title should contain a synopsis of the law, but that the act should contain no matter variant from the title. Now, the titles to each of these statutes, after enumerating certain objects for which they were passed, adds, 'and for other purposes therein mentioned.' This was sufficient to prevent surprise,—to induce the members either to call for the reading of the whole of the bill, or to look into it, during its progress through the legislature." There was nothing in the title of the act of 1810 which in terms put any one on notice that legislation in reference to administrators or guardians was in any way contemplated. The language of the title indicated that the legislation proposed was to refer to wills, executors, and the rights of widows to make an election. The eighth section related to a subject-matter entirely different from any

thing indicated by the title, and in order to uphold this section of the act it was absolutely necessary that the words, "and for other purposes," should be given sufficient significance to include the matter dealt with in that section. The court, as has been seen, so held. It is to be noted that at the time of the passage of the act of 1810 there was no provision in the constitution prohibiting the passage of laws relating to more than one subject-matter. As many different subjects-matter could be embraced in one bill as the general assembly desired, provided the title of the act was sufficiently broad to embrace them. The effect, therefore, of the decision just referred to was to hold that if one object of legislation was stated in the title, and this was followed by the words, "and for other purposes," the incorporation into the body of the act of any law within the constitutional power of the legislature was authorized. It is neither profitable nor desirable for us to question the soundness of this ruling. This construction of the constitutional provision has been acquiesced in and followed as a precedent for more than 50 years. Many laws have, doubtless, been enacted upon its authority, and rights have grown up thereunder which ought not now to be disturbed. If there ever was a case where the doctrine of stare decisis should be applied, this is certainly one. That such a construction may impair seriously the beneficial results intended to be accomplished by the framers of the constitution is, perhaps, true; but it is too late to urge this as a reason for adopting a different construction, and one apparently more in consonance with the purpose for which the provision was adopted. Four constitutions have been adopted by the people of the state since the decision referred to, which readopt in identical language this provision of the constitution of 1798. It must be presumed that this provision in the subsequent constitutions was placed there with a full knowledge of, and subject to, the construction which had been placed by the court upon the same language in the constitution of 1798. Had any of the conventions which adopted these constitutions intended to change the construction which had been placed upon these words, different langage would certainly have been employed. See, in this connection, Hill v. State, 64 Ga. 470, 471. In Prothro v. Orr, 12 Ga. 36, certain parts of two acts were declared unconstitutional on the ground that they contained matter different from what was expressed in the titles. Judge Lumpkin says, arguendo, in the opinion: "Had the title been general, as, for instance, an act in relation to the public officers, or for the particular objects designated, 'and for other purposes,' the construction would have been different. But here the title is definite, and therefore necessarily limited. And to permit other and totally different matter to be incorporated would be to let in the very mischief intended to be prevented, and thus render the constitution of none effect."

There appeared for the first time in the constitution of 1861 the provision that no law should pass referring to more than one subject-matter. This provision was contained in the same section which readopted the law in reference to the title of acts, and the section was in the following language: "Nor shall any law or ordinance pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof." A provision in the same language is embodied in the constitutions of 1865, 1868, and 1877. See Code 1861, § 4936; Code 1868, §§ 4930, 5139; Civ. Code, § 5771. The effect of adding this provision in reference to subject-matter simply requires the general assembly to deal with one subject of legislation at a time. It can in no way be construed to affect or change the interpretation placed by the court upon the provision as to what shall be contained in the title of an act, except, of course, that the title must not refer to more than one subject-matter. Prior to the constitution of 1861, the words, "and for other purposes," would authorize legislation upon any subject with which the legislature could constitutionally deal. Since 1861 these words will not authorize legislation upon any subject save one which is germane to the general subject embraced in the title. Such we understand to be the construction placed upon the constitutional provision since the incorporation of the clause relating to subject-matter. See Board v. Barlow, 49 Ga. 232. In Black v. Cohen, 52 Ga. 621, it was held: "Where the title of an act specifies some of the objects for which it was passed, and contains the general expression, 'and for other purposes,' portions of the act not especially indicated in the title are nevertheless valid." The title of the act then under consideration was "An act to authorize the mayor and council of the city of Rome to subscribe not exceeding $100,000 to stock in the Memphis Branch Railroad upon certain conditions, and for other purposes." Act Oct. 14, 1870. The fourth section of the act provided that the mayor and council might subscribe for a like amount of stock in any other railroad that might be projected, which had its terminus in the city of Rome, provided the question be submitted to, and approved by, the qualified voters of the city. The foregoing act was amended, the title of the amendatory act being "An act to amend an act to authorize the mayor and council of the city of Rome to subscribe not exceeding $100,000 of stock in the Memphis Branch Railroad upon certain conditions, and for other purposes." Act Dec. 1, 1871. The second section of the amendatory act declared that all of the provisions and stipulations of said amended act, and the amendments thereto, be of full force in relation to the subscription of the city of

Rome of $100,000 to the North & South Railroad. Chief Justice Warner, in referring to the clause of the constitution prohibiting the passage of a law containing matter different from what is expressed in the title, says: "This court held, in Martin v. Broach, 6 Ga. 21, that where the title of the act specifies some of the objects for which the act was passed, and contains this general clause, 'and for other purposes,' portions of the act not specially indicated in the title are nevertheless good under this general clause, and we adhere to this ruling of the court in construing these words in the constitution of 1868, so far as it regards the title of the act. The title of the act under consideration, and the amendment thereto, contains the words, 'and for other purposes,' and therefore it is not void because it contains matter different from what is expressed in the title thereof." This ruling is certainly very broad. There is absolutely nothing whatever in either act to indicate that the subject of subscription to stock in any other railroad than the Memphis Branch Railroad was to be dealt with in the act; but, construing the title to relate generally to the subject of subscription to stock in railroads, it was held that the words, "and for other purposes," were sufficient to permit legislation authorizing the mayor and council to subscribe for stock in an entirely different railroad from that named in the title. In Butner v. Boifeuillet, 100 Ga. 743, 28 S. E. 464, the question arose as to whether a title in the following words: "An act to amend the charter of Macon, relating to the law now governing board of public works, the police commission, the fire commission; to provide for deficiencies in the revenue of the city; to provide for compensation of the board of health; and giving authority to the mayor and council providing for the paving of streets, alleys and sidewalks of said city, and for other purposes," —was sufficient to authorize the incorporation into the act of a section which repealed section 32 of the act of 1893, providing a new charter for the city of Macon. Section 32 was in the following language: "The police force of the city shall consist of a chief of police, two lieutenants, and such other officers and men as the mayor and council may by ordinance prescribe." It was held that the title was sufficiently broad for this purpose. Mr. Justice Atkinson in the opinion says: "It will be seen by reference to the title of the act, which is hereinbefore set forth, that it was designed to be an act to amend the charter of Macon in certain parts therein stated, and, generally, 'for other purposes.' The office of chief of police, as we have seen before, was a distinctive municipal office existing under the charter of the city of Macon. It could not fall properly within either of the particular subjects specified in the title of the act, and the objection that the act is unconstitutional, in so far as it undertakes to abolish the office of chief of police, is well founded, unless it is met by the use of the words, 'for other purposes,' expressed in the title. Different opinions may prevail elsewhere as to the value of these words as descriptive terms in the title of an act of the general assembly. They have in this state a fixed legal significance, and the courts, in passing upon the constitutionality of the acts of the general assembly, are not authorized to disregard it. As early as the year 1849, in the case of Martin v. Broach, 6 Ga. 21, this court, in considering the constitutionality of an act, held, in dealing with an objection that the body of an act contained matter different from that expressed in the caption: 'Where the title specifies some of the objects for which the statute was passed, and contains this general clause, "and for other purposes therein contained," portions of the act not specially indicated in the title are, nevertheless, good under this general clause.' There has been no substantial departure from this construction of the constitutional provision in question, and it was distinctly recognized and reaffirmed in the case of Black v. Cohen, 52 Ga. 621, as well as in numerous other cases, which it is not necessary to cite here; and this, notwithstanding the apparently conflicting view presented by Judge Trippe in delivering the opinion of the court in the case of Board v. Barlow, 49 Ga. 232. Such words may well include and render constitutional incidental provisions which are germane to, and bear a generic relation to, the general subject expressed in the title." In Burns v. State, 104 Ga. 544, 30 S. E. 815, it was ruled: "Provisions germane to the general subject-matter embraced in the title of an act, and which are designed to carry into effect the purpose for which it was passed, may be constitutionally enacted therein, though not referred to in the title otherwise than by the use of the words, 'and for other purposes.'" The act dealt with in that case was entitled "An act to prescribe the method of granting license to sell spirituous or intoxicating liquors in the county of Screven, and to increase the fee for said license to ten thousand dollars, and for other purposes." It was held that the title was sufficiently broad to authorize the incorporation into the act of a section making it an indictable misdemeanor to sell in the county named any spirituous or intoxicating liquors without having first obtained a license from the proper authorities. The case was distinguished from Sasser v. State, 99 Ga. 54, 25 S. E. 619, in that the title of the act involved in the latter case did not contain the words, "and for other purposes."

Applying the principle of the decisions cited to the case now under consideration, but one conclusion can be reached, and that is that the general subject stated in the title of the act of 1897 was the amendment of the charter of the city of Macon, and that under the words, "and for other purposes," occurring

in the title, any legislation germane to this general subject could be enacted, notwithstanding this general purpose was apparently limited by other words in the title. The third section of the act of 1897 is not subject to the objection made to it in the present case, and the eighty-seventh section of the act of 1893 is no longer of force.

2. It is contended that the court below was without jurisdiction to grant the injunction prayed for, for the reason that a court of equity will not enjoin the holding of an election which is a political and ministerial function, and consequently not controllable by the courts. The general rule undoubtedly is that courts of equity will not interfere in matters of elections. To say that this rule is without exception seems to be purely arbitrary. Why should not such an election as the one now under consideration be enjoined? It is not an election in which a public office is involved, the right to hold which may be easily and effectually tested by the writ of quo warranto, but it is an election to determine whether or not given territory shall be annexed to the city of Macon. The city authorities have no power to call the election, their ordinance attempting to do so is absolutely void, and any election held thereunder would be likewise void. Some of the petitioners are residents and taxpayers of the city of Macon, and they predicate their right to the injunction on the ground that illegal expenses will be incurred by reason of the election, of which expenses they will be required to bear their proportionate part. This was a sufficient ground for the granting of the injunction at their instance. They have no adequate remedy at law to protect themselves from this unlawful expense, and it is inconceivable that they have no standing in a court of equity to enjoin an ultra vires act which will result in imposing upon them this unlawful burden. It is no reply to this, as was insisted in this case, that an amount necessary to defray the expenses of the election had been raised by private subscription. It may be that the money is at this time in the hands of the city authorities to be used for this purpose, and doubtless they would have so applied it; but, while this is true, it is also true that between now and the election something might happen to render inadvisable this use of the money, and the same be refunded to the contributors. The safer and better rule in such a case is to deal with the parties, not so much on the theory of what they may or will do, but on what they can do.

While the above is a sufficient answer to the question of jurisdiction, and the injunction was properly granted, irrespective of the rights of the property owners of the district proposed to be annexed to have the writ issued, there would seem to be no good reason why, on principle, they alone could not have maintained the petition. Why should they be required to wait until they have been treated by the city as its citizens, and subjected to taxation as such, and to all of the other burdens imposed upon the citizens. If they resist, they do so at the risk of having their persons and their property seized. Their property may be seized for taxes, and their persons may be seized for a violation of some penal ordinance of the city. A multiplicity of suits would thus arise, and irreparable damage might be done. While equity will not enjoin the action of a municipal corporation while proceeding within the limits of its well-defined powers, it has jurisdiction to restrain it from acting in excess of its authority, and from the commission of acts which are ultra vires. 2 High, Inj. § 1241. See, also, Wells v. Mayor, etc., 43 Ga. 67; Keen v. Mayor, etc., 101 Ga. 588, 29 S. E. 42; City of Chicago v. Collins (Ill.) 51 N. E. 907; 1 Pom. Eq. Jur. p. 347, § 260. It is said, however, that the calling of an election which is ultra vires stands upon a different footing. But if a court of equity will enjoin a municipal corporation from issuing bonds or erecting buildings and similar acts, when they are unauthorized, why may it not enjoin the holding of an election for which there is not warrant in law? No satisfactory reason has been suggested and none occurs to us. In the recent case of Layton v. Mayor, etc., 23 South. 99, the supreme court of Louisiana held that equity would enjoin the holding of an unauthorized election called for the purpose of ascertaining the popular will on the subject of annexation of territory to the city, and this, too, at the instance of an owner of property in the territory proposed to be annexed. That this decision and the one we now make is against the weight of authority is perhaps true, but nevertheless we think it right on principle. An examination of many of the decisions will show, however, that they were dealing with elections which appeared to be authorized by law, and there were merely some irregularities in the manner in which they were called or were being conducted. In such cases, we also agree that equity ought not to interfere. A number of decisions of this court were referred to in the briefs of counsel, but we think none of them rule anything to the contrary of what is said above. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

HOLMES et al. v. LANGSTON et al.

LANGSTON et al. v. HOLMES et al.

(Supreme Court of Georgia. May 16, 1900.)

BAIL TROVER—BOND—MEASURE OF DAMAGES —JUDGMENT—RES JUDICATA—LIABILITY OF SURETIES — CONVERSION — PLEDGE — AUTHORITY OF AGENT—CROSS BILL—EXCEPTIONS.

1. An obligation entered into by a defendant in a bail-trover action and two persons described therein as securities, in which it is agreed that defendant and such securities shall be bound for the eventual condemnation money in the case, no amount being named as a pen

alty, conditioned that if the defendant should "deliver to the said plaintiffs, their agents or assigns, the notes described in their petition and the subject-matter of their suit, or produce the same to answer in the judgment that may be entered in the said case, or pay the eventual condemnation money that may be awarded against him in the final trial of said case, or his sureties do so for him," is in substantial compliance with the requirements of section 4605 of the Civil Code.

2. Where the subject-matter of an action of bail trover was promissory notes which had been pledged by the defendant as collateral security for a debt due by the latter to the former, and afterwards placed in the defendant's hands for collection, and the plaintiff had in a former suit recovered judgment on the debt thus secured, the measure of the plaintiff's damages was the amount due on the judgment rendered in the former suit at the date of the trial of the trover action, provided the value of the collaterals equaled or exceeded that amount; and, if such value was less than the amount due on the judgment, the measure of damages was the value of such collaterals; and the defendant could not, under such circumstances, lessen the amount of the plaintiff's recovery by going behind the judgment rendered in the former suit, and showing that it was for too large a sum.

3. The sureties on a bond given in an action of bail trover of the character above referred to cannot, after the plaintiff has announced his election to take a money verdict, free themselves from liability by tendering a portion of the property for the recovery of which the action was brought, offering to pay the money value of another portion which it is admitted has been converted by the defendant, and accounting for the balance claimed by plaintiff by setting up a state of facts which could have been pleaded by the defendant as a defense to the former suit of plaintiffs.

4. If one, after delivering, in pledge to secure a debt, promissory notes, has the same intrusted to him by the pledgee for collection for the account of pledgee, makes an assignment for the benefit of his creditors, and embraces therein as his absolute property such notes, disregarding the interest of the pledgee therein, and delivers the same to the assignee, or knowingly permits the assignee to take charge of and deal with them as assets for the payment of other creditors, such conduct, as against the rights of the pledgee, amounts to a conversion of the property, if at the time there remained any amount due the pledgee on the principal debt.

5. Property pledged to secure a debt evidenced by a promissory note may be resorted to for the purpose of enforcing payment of a draft upon a third person given by the maker to the pledgee to be applied in discharge of the note, and which the drawee has failed to pay, when there was no express agreement that the draft should be taken in payment of the note.

6. If a "general agent" to collect money receives in payment property other than money, the creditor, so far as the debtor is concerned, is bound thereby; but this does not preclude the principal from refusing to accept the property from the agent, or from holding him liable for the amount of the debt, if the reception of the property as money was in violation of instructions.

7. When the effect of a judgment by this court "is to leave the case to be again tried in the court below," questions raised in a cross bill of exceptions filed by the defendant in error, relating to such matters as will probably arise at the next trial, will be decided; in other cases the cross bill will be dismissed.

(Syllabus by the Court.)

Error from superior court, Monroe county; E. J. Reagan, Judge.

Action by Langston & Woodson against J. O. Holmes and others. Judgment for plaintiffs, and defendants bring error, and plaintiffs assign cross error. Judgment on main bill of exceptions affirmed, and on cross bill reversed.

Stone & Williamson and Persons & Persons, for plaintiffs in error. Jas. S. Boynton and Cabaniss & Willingham, for defendants in error.

COBB, J. Langston & Woodson brought an action of bail trover against J. O. Holmes to recover certain promissory notes alleged to be the property of plaintiffs, and averring that defendant had converted the same to his own use. The defendant as principal, and R. H. Holmes and C. J. Zellner as securities, entered into an obligation reciting that they were bound unto plaintiffs for the eventual condemnation money in the case, the condition thereto reciting that the plaintiffs had brought an action of trover against the defendant to recover certain promissory notes, and that defendant had been served with the petition and bail process, and concluding in these words: "Now, should the said J. O. Holmes deliver to the said plaintiffs, their agents or assigns, the notes described in their petition and the subject-matter of their suit, or produce the same to answer in the judgment that may be entered in the said case, or pay the eventual condemnation money that may be awarded against him in the final trial of said case, or his sureties do so for him, then this bond to be void; else of full force and effect." The defendant answered, denying all of the material allegations of the petition, and setting up that the notes originally belonged to him; that they were deposited with plaintiff as collateral security, and were delivered back to him for collection; that he was no longer liable on the principal debt to plaintiffs; and therefore, in dealing with the property as his own, he had not converted to his own use the property of plaintiffs. The case coming on for trial, after the parties had announced ready, the plaintiffs stated "to the court they would elect to take a money verdict for the securities sued for." At this stage of the case the securities in the bail bond appeared, and asked leave to file an intervention, which was, in substance, as follows: They had signed as securities what purported to be a bail bond in this case, in which they undertook "to deliver to said plaintiffs, their agents or assigns, the notes described in said petition, and the subject of their suit," and now, as such securities, before the trial of the case and pending the hearing of the same, in compliance with the terms of their undertaking, they in open court tender to plaintiffs all the notes described in the petition, except such as have been collected by their principal under the direction of plaintiffs, and paid over to them, and in lieu of certain of the

notes they tender $225 lawful money of the United States collected in payment of the same since the filing of this suit and execution of the bond, and except certain notes to the amount of $612.50, which were collected by defendant as trustee for plaintiffs in cotton which was destroyed by fire without fault on the part of defendant, thus causing the loss to fall on plaintiffs. The prayer was that, if plaintiffs do not accept the tender, the court take charge of the notes tendered, and pass an order discharging interveners from liability on the bail bond, and, if the facts alleged by the interveners be contested by plaintiffs, that an issue be made up between plaintiffs and interveners, and submitted to a jury for determination. The court declined to allow the securities to intervene in the case, and ordered their petition stricken. To this ruling the securities excepted pendente lite.

The case has been twice tried, each time resulting in a verdict in favor of plaintiffs. At the last trial it appeared from the evidence introduced in behalf of plaintiffs that defendant had been engaged in selling fertilizers on commission for plaintiffs. The agreement between the parties, which was in writing, was, in effect, that the defendant should give the plaintiffs his note for all fertilizers consigned to him at a given rate per ton. His commission was to be all realized in excess of that rate, and all notes taken by defendant for the purchase price of fertilizers were to be turned over to plaintiffs as collateral security for the note of defendant, and were to be returned to the defendant in the fall for collection. On April 15, 1893, defendant gave to plaintiffs a note for $1,379.18, which was due November 15, 1893; the consideration of the same being fertilizers consigned to him under the agreement above referred to. There was also another note of defendant's, the consideration of which was fertilizers consigned to him under the agreement, which was paid in part, and defendant, in satisfaction of the balance due, on December 15, 1894, gave to plaintiffs a draft for $133.71 on O. G. Sparks, Jr., payable on demand, which was duly presented, but never paid. In accordance with the agreement, defendant sold the fertilizers, took the notes of the purchasers, and turned them over to plaintiffs. These notes were duly returned to the defendant for collection, and the present action is brought to recover certain of the notes which were deposited with plaintiffs as collateral security for the two notes of defendant above referred to. On January 1, 1895, plaintiffs brought suit on the note for $1,379.18, and on August 29, 1895, recovered judgment against defendant for $585.53 principal and $106.88 interest, being the balance due on the note at that date. On January 11, 1895, plaintiffs brought suit on the draft above referred to, and on August 29, 1895, recovered judgment against defendant for $133.71 principal and $8.60 interest. On January 21, 1895, defendant made an assignment for the benefit of his creditors, and embraced therein as his property certain of the notes sued for in the present case. In the list of creditors attached to the assignment appeared the names of plaintiffs, followed by the words, "by note, $585.73;" "by draft, $133.71." The defendant has paid to the plaintiffs $56.42, which should be credited on the second judgment above referred to. Nothing more has been paid on either judgment. Before the present suit was brought a demand was made in behalf of plaintiffs for the notes sued for, and the defendant refused to deliver the same. The notes sued for were worth more than the amount due plaintiffs on the two judgments.

From the evidence introduced in behalf of defendant it appeared that various sums were paid by defendant to plaintiffs prior to the rendition of the two judgments, which it was claimed were not credited on the note and draft upon which the judgments were based. Cotton of the value of $612.50 was collected on some of the collateral notes. This cotton was held by defendant for the benefit of plaintiffs, and was, without fault on the part of defendant, destroyed by fire on September 28, 1893. The balance of the notes were worth much less than the amount due on plaintiffs' judgments,—not more than $325. No demand was ever made on defendant for the notes before the present suit was brought. The jury returned a verdict in favor of the plaintiffs for $400. Plaintiffs filed a motion for a new trial upon numerous grounds, and the court granted a new trial upon three of the grounds therein contained, which was the second grant of a new trial in the case. The case is here upon a bill of exceptions filed by the defendant and his securities, in which error is assigned by the former upon the decision of the judge granting a new trial, and by the latter upon their exceptions pendente lite hereinbefore referred to; and upon a cross bill of exceptions filed by the plaintiffs assigning error upon the refusal of the judge to base his decision granting a new trial on all the grounds of the motion, it being alleged that there was in each ground a sufficient reason for granting a new trial.

1. When the plaintiff in an action of trover requires bail, and has made the affidavit prescribed by law, it is the duty of the officer serving the process "to take a recognizance payable to the plaintiff or complainant, with good security, in double the amount sworn to, for the forthcoming of such personal property to answer such judgment, execution, or decree as may be rendered or issued in the case, and such security shall be bound for the payment of the eventual condemnation money, for which judgment may be signed up against the defendant and said security, and execution had thereon without further proceeding." Civ. Code, § 4605. The obligation entered into by the defendant and

his securities in the present case, while not literally conforming to the terms of the section quoted, was in substantial compliance therewith. There was no penalty stated in the bond, but the parties thereto expressly bound themselves to pay to the plaintiffs "the eventual condemnation money." When the defendant has entered "into bond with good security for the eventual condemnation money," the sheriff is authorized to release him from custody. Id. § 4606. The provision requiring the penalty in the bond to be twice the amount sworn to is merely directory, and the failure to insert such a penalty will neither vitiate the bond, nor prevent the same from being treated as a statutory bond, when it clearly appears from the terms of the obligation that it was the intention of the obligors to bind themselves to pay the eventual condemnation money in the case. But it is contended that the condition in the bond is essentially different from the condition required by the statute; that the undertaking of the obligors was "to deliver to the said plaintiffs, their agents or assigns, the notes described in their petition and the subject-matter of their suit, or produce the same to answer in the judgment that may be entered in the said case, or pay the eventual condemnation money"; and that, such a condition not being in the statute, the obligation is a mere voluntary undertaking, and not a statutory bond. The language of the bond is peculiar and unusual. The statute requires a bond "for the forthcoming" of the property "to answer such judgment, execution, or decree as may be rendered or issued in the case," and then declares that the securities in such a bond "shall be bound for the payment of the eventual condemnation money." The language of the bond clearly indicates that the obligors intended to enter into an undertaking to have the property forthcoming to answer whatever judgment was rendered in the case, and to pay the eventual condemnation money if required. This was all that the statute required. The bond was, in effect, a statutory bond, and there was no error in so holding.

2. The plaintiff in an action of trover may, at the trial of the case, say whether he will accept an alternative verdict for the property or its value, or demand a verdict for damages alone, or for the property alone, with its hire, if any, and the court is required to instruct the jury to render their verdict in such form as the plaintiff elects. Civ. Code, § 5335. When the plaintiff elects to demand a verdict for damages alone, and the proof shows a conversion, and that the plaintiff was at the date of the conversion the absolute owner of the property, the measure of damages shall be, at the option of plaintiff, either the highest proven value of the article between the date of the conversion and the time of trial, or the value of the article at the date of the conversion, with interest. Id. § 3917; Barnett v. Thompson, 37 Ga. 335, 339; Central Railroad & Banking Co. v. Atlantic & G. R. Co., 50 Ga. 444; Tuller v. Carter, 59 Ga. 395; Jaques v. Stewart, 81 Ga. 82, 6 S. E. 815. If, however, the proof shows that the interest of the plaintiff in the property is less than that of absolute ownership, the measure of damages will be the value of plaintiff's interest therein, whatever it may be. Russell v. Kearney, 27 Ga. 96 (Syl., point 4); Bigelow v. Young, 30 Ga. 121 (Syl., point 5); Horne v. Manufacturing Co., 74 Ga. 791; Bradley v. Burkett, 82 Ga. 255, 11 S. E. 492. It follows, therefore, that when the article converted is property pledged to secure a debt, and the person guilty of the conversion is the pledgor, the measure of damages will be the value of the pledge, provided that such value is a sum less than the debt secured; and, if the pledge be of equal or greater value than the debt, the measure of damages will be the amount due on the debt at the time of trial; and, if the debt has been discharged in full pending the action, the measure of damages will be such a sum as nominal damages as will be sufficient to carry the costs. See, in this connection, Cole. Coll. § 12. When, as in a case like the present, the property alleged to have been converted consists of promissory notes pledged as collateral to secure notes of the pledgor, the amount of the liability of the pledgor on the principal debt becomes a material question. The amount of this liability may be established in different ways,—by parol, if there is no other or better evidence; by a writing, if there is written evidence; or by a record, if the debt is evidenced by a judgment of a court of competent jurisdiction. Whatever character of evidence is relied on is subject to be met only by such evidence as will in other cases be allowed to overcome the evidence introduced. If a judgment is relied on to establish the amount of liability, the defendant will not be allowed to go behind the judgment, and show that the amount thereof, although apparently due, was in reality not due. "An adjudication of the same subject-matter in issue in a former suit between the same parties, by a court of competent jurisdiction, should be an end of litigation." Civ. Code, § 3741. "A judgment of a court of competent jurisdiction is conclusive between the same parties and their privies as to all matters put in issue, or which, under the rules of law, might have been put in issue, in the cause wherein the judgment was rendered." Id. § 3742. See, also, Id. §§ 5233, 5348.

Applying these rules to the present case, the judgments rendered in the former suits of plaintiffs against defendant conclusively determined the amount of the debt due by defendant to plaintiffs at the dates of such judgments. The defendant, therefore, so far as the amount of his debt to plaintiffs is concerned, was precluded from pleading or prov-

ing any matter which was or could have been placed in issue in the former suits. The answer, to the extent that it set up such matter as a defense, should have been stricken, and the evidence admitted to sustain that part of the answer should have been ruled out. Upon another trial the jury should be instructed that, if they find that there has been a conversion, they must ascertain the value of the property converted, and, if such value is equal to or more than the amount due at the date of the trial on the judgments of plaintiffs against defendant, they should return a verdict in favor of plaintiffs for the amount due on the judgments; that if, on the other hand, the value of the property converted is less than the amount due on the judgments at the date of the trial, the verdict in favor of plaintiffs should be for the value of the property converted.

3. The relation of the securities on a bail bond in an action of trover to the suit is peculiar. They are bound by the judgment against their principal, but they do not become parties to the case until judgment is entered. If there is any law authorizing such securities to be heard in the case, we are not aware of its existence. Their liability is absolutely fixed by the judgment against their principal, and they must stand or fall by the result of his defense, such being the express undertaking in the bond. If judgment has been rendered against him by a court of competent jurisdiction, they are absolutely bound by it, and will not be heard to impeach or attack it in any way for causes which were or could have been matter of defense by their principal. See Jackson v. Guilmartin, 61 Ga. 544. After becoming securities on the bond, they must remain silent witnesses to the conflict between the parties to the suit, standing ready to fulfill at the end of the litigation the obligation they have undertaken,—to pay the judgment if the plaintiff elects to recover a money verdict, or deliver the property or pay damages in lieu thereof if an alternative verdict is rendered. The securities have no right to tender to the plaintiff the property sued for at any time pending the suit, and especially would no such right exist at the trial when the plaintiff had in due time elected to take a verdict for damages in lieu of a finding for the property. The right of the defendant to make such tender expires at the first term, and does not exist at all if there has been a previous demand and refusal. Civ. Code, § 3897. The securities in the present case sought to discharge themselves from liability by doing three things—First, delivering to plaintiffs such of the property as was still under the control of the defendant; second, paying for a portion of the same which it was admitted had been by the defendant converted to his own use; and, third, by accounting for the balance claimed by plaintiffs by showing a state of facts which could have been pleaded by the defendant in the former suits of plaintiffs. Even if the securities could be heard at all, they could not set up any matter other than such as would be available to the defendant as a defense. As has been seen, the defendant could not go behind the judgments rendered in the former suits, and, after an election by the plaintiffs to take a money verdict, the defendant could not defeat such election by tendering at the trial the property sued for, either in whole or in part. While the securities were not parties to the former suits, the defendant was. Neither are the securities parties to the present case. If the plaintiffs recover, they become parties to the judgment; but, if the plaintiffs fail to recover, they never become parties even to the judgment in the case. The fact that a bail bond with securities was given does not make the present case and the former suits controversies between different parties. There was no error in striking the intervention filed by the securities on the bail bond.

4. If the defendant knowingly embraced, in an assignment made for the benefit of his creditors, any of the notes which were intrusted to him for collection by the plaintiffs, thereby intending that the same should be treated as his absolute property to the exclusion of any interest of the plaintiffs in such notes, and delivered the notes to the assignee for that purpose, or knowingly permitted the assignee to take possession of the notes, collect the same, and apply the proceeds to other purposes than those for which they were intrusted to the defendant, such conduct would amount to a conversion of such of the notes as were embraced in the assignment, if at the time there was anything due by the defendant to plaintiffs on the debt the notes were pledged to secure. "The action of trover being founded on a conjunct right of property and possession, any act of the defendant which negatives, or is inconsistent with, such right, amounts, in law, to a conversion." Liptrot v. Holmes, 1 Ga. 381. See, also, in this connection, Phillips v. Taber, 83 Ga. 565, 10 S. E. 270.

5. If at another trial it should appear that the parties agreed when the draft on Sparks was taken that the same should be in discharge of all liability on the note, and that plaintiffs would thereafter look to the draft alone, then all liability on the note would cease, and the notes deposited to secure the same would not be liable to the payment of the draft. If, on the other hand, there was no express agreement that the draft should be treated as a payment of the note, the debt represented by the note would not be discharged until the draft was paid. Civ. Code, § 3720. As long as the debt represented by the note was unpaid, property pledged to secure payment of the same could be resorted to for that purpose, and it would be immaterial whether the suit to enforce liability was brought upon the notes or upon the draft.

6. If defendant was the general agent of the plaintiffs to collect the notes delivered to him, the receipt by him of property as money

would, so far as the debtors were concerned, bind the creditors. Civ. Code, § 3717. But, if such conduct was in violation of instructions, the plaintiffs could, as against the defendant, refuse to accept the property, and require him to pay the amount due in money. It was therefore error to refuse to allow the plaintiffs to prove that defendant had no authority to receive cotton in payment of notes payable in money, to admit evidence that such payments were made, and to charge, in effect, that such payments bound the plaintiffs as against the defendant.

7. The court did right in granting a new trial upon the grounds stated in the order, but as there were other grounds relating to matters which will arise at the next trial, and which would, under the view we have taken of the case, have required the granting of a new trial, the judgment on the cross bill of exceptions must be reversed. Civ. Code, § 5527. Judgment on main bill of exceptions affirmed; on cross bill, reversed. All the justices concurring, except FISH, J., absent on account of sickness.

FOUCHÉ et al. v. MERCHANTS' NAT. BANK OF ROME et al.

MERCHANTS' NAT. BANK OF ROME et al. v. FOUCHÉ et al.

(Supreme Court of Georgia. May 16, 1900.)

CORPORATIONS — LIABILITY OF STOCKHOLDERS—ENFORCEMENT — EVIDENCE — KNOWLEDGE OF OFFICERS — UNPAID SUBSCRIPTIONS.

1. Where, in a suit by creditors of a corporation against a shareholder for an unpaid subscription to stock, the defendant pleads that he was not the owner of such stock, as alleged at the time the creditor contracted his debt with the corporation, a contract made and entered into by such defendant, indicating on its face that he was a stockholder at a certain time, and which, when taken in connection with other evidence introduced and admitted on the trial, tends to contradict his answer as to the time when he claims to have ceased to have been a stockholder by a sale and transfer of his stock to another, is not irrelevant testimony, and the court erred in rejecting the same.

2. A mere recital in a stock certificate that the shares therein specified are full-paid and nonassessable will not protect the person named in the certificate as the owner of such stock from liability for an unpaid subscription thereon, if he in fact purchased this stock with knowledge that the subscription was due.

3. The knowledge of a president of a bank that certain stock had not been fully paid up is imputable to the bank, if he, acting for it and in its behalf, accepted a transfer of the stock to it, and it thereunder retained the same.

4. In order to enable a creditor of a corporation to recover from one alleged to be a stockholder therein, and as such liable upon an unpaid stock subscription, it must appear that the defendant was in fact such a stockholder at a time when he was in law so liable. The testimony in the present case did not authorize the judge to conclude, as matter of law, that the defendant Armstead was not such a stockholder at the time the services of plaintiffs to the corporation issuing the stock, the basis of this suit, were rendered.

5. A party may introduce in evidence relevant portions of the minutes of a corporation, without being required to introduce all of its minutes relating to the matter under investigation, the right, of course, being in the opposite party to introduce other portions of such minutes as are pertinent to the issue.

6. It is not erroneous to allow a witness, who professes to know the fact, to testify that certain securities had never been delivered to a corporation; and this is so irrespective of what may appear with reference to this matter upon its minutes.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by R. T. and J. S. Fouché against the Merchants' National Bank of Rome and others. Judgment of nonsuit, and plaintiffs bring error, and defendants assign cross error. Judgment on main bill of exceptions reversed; on cross bill, affirmed.

Fouché & Fouché, W. S. McHenry, and J. Branham, for plaintiffs in error. Neel & Neel and Nat Harris, for defendants in error.

LEWIS, J. R. T. and J. S. Fouché, as partners under the firm name of Fouché & Fouché, brought suit in the superior court of Floyd county against the Rome Electric Light Company, the Merchants' National Bank of Rome, Ga., and T. M. Armstead. The petition makes substantially the following case: The Rome Electric Light Company is a corporation chartered by the superior court of Floyd county on July 19, 1892; its capital stock being fixed at $50,000 divided into shares of the par value of $100 each. The Merchants' National Bank of Rome, Ga., is a corporation under the laws of the United States, with its principal place of business in the city of Rome; and said Armstead is a citizen of the state, residing in Fulton county, Ga. The $50,000 of capital stock in the Rome Electric Light Company was subscribed about July 19, 1892, and soon thereafter said company was organized under said charter, commenced the business for which it was chartered, and became indebted to divers persons. This company, its officers and agents, neglected and refused to call for and collect the subscriptions to its capital stock, and the same remain wholly unpaid. The company became insolvent and unable to pay its debts. All its visible property had been seized and sold, together with its franchises, the officers conveying to the Rome Lighting Company, a new corporation, all its property, assets, and its franchises; and it has ceased to do business, and exists in name only. The Merchants' National Bank of Rome, Ga., is the owner and holder of 190 shares, and T. M. Armstead is the owner and holder of 58 shares, of the capital stock of said Rome Electric Light Company. Said shares are wholly unpaid, and are still due to said company, by reason of the neglect and refusal of said company and its officers and agents to call for and collect the same. On September 21, 1897, petitioners, in

the city court of Floyd county, obtained a judgment against said Rome Electric Light Company for $2,000 principal and $100.10 interest to that date, with costs of suit; and execution was issued on said judgment September 29, 1897, and placed in the hands of the sheriff of Floyd county, who, after diligent search, was unable to find any property on which to levy the execution, and on June 23, 1898, made a return of nulla bona thereon. The petition, after a prayer for process against the defendants, prayed that the Merchants' National Bank of Rome, Ga., and T. M. Armstead be decreed to pay into court the amount of money due or unpaid on the shares of stock of the Rome Electric Light Company held and owned by them, respectively, or a sufficiency thereof to pay off and discharge plaintiffs' debt. There was also a prayer for general relief. To this petition the bank and Armstead filed separate answers. Among the allegations in the answers was one, in substance, to the effect that said stock was subscribed for and entirely paid in accordance with the legal advice furnished by the firm of Fouché & Fouché, plaintiffs in this case, and that plaintiffs, with full knowledge of the condition of said stock, permitted it to be transferred and placed in the hands of innocent purchasers as full-paid and nonassessable stock. The bank denied that it was the owner and holder of 190 shares of stock in the Rome Electric Light Company. It alleged: That 100 shares of said stock, of the par value of $10,000, were conveyed by J. King to it in part settlement of a very large indebtedness owed by King to the bank. That plaintiffs were the legal advisers of King in the transaction, and advised and assisted in the settlement of the transactions between the bank and King, by which King was relieved of the amount of $10,000 of his large indebtedness to the bank in consideration of the transfer of said 100 shares of stock. That the bank received the stock from the hands of King,—he acting under the advice of his counsel, Fouché & Fouché,—believing it to be fully paid up stock, with no knowledge or notice that it was not fully paid, or that any part of the original subscription due from King remained unpaid. Ninety shares of the stock on July 5, 1895, were by King, under the advice and direction of his attorneys, placed in the hands of the defendant bank as collateral security only, and title to said stock never vested in the bank. Plaintiff's action, if any they have, is against their client, King, on said 90 shares of stock. The answer further averred that the stock, before its transfer to the bank, was fully paid by the original holders; that defendants were innocent purchasers for value, without notice of any right or claim in favor of the plaintiffs or any person against the stockholders or corporation; and that plaintiffs were estopped by laches from prosecuting their claim. Armstead, in his answer, denied that he was the owner and holder of 58 shares of stock in the Rome Electric Light Company. On the contrary, he averred that he did not own or hold one share of said stock, and has not held any of the same since plaintiffs' claim accrued against said company. He admitted that he acquired certain stock by purchase in the open market long after the same had been issued, having bought the same as fully paid up, in the utmost good faith, for a valuable consideration, and without any notice that the same had not been fully paid up. He had nothing to do with the organization or management of the company, was not an original subscriber to the capital stock, came into possession of the stock in due course of business, and had parted with the same, duly transferring and assigning it to J. L. Bass, prior to the filing of the suit by plaintiffs on which their judgment was rendered, and, as informed, prior to the rendition of the service on which their claim for recovery was based.

We cull from the voluminous record the following condensed statement of such facts as we deem essential to a clear understanding of the issues involved: One J. S. Lawrence subscribed for 478 shares of the capital stock of the Rome Electric Light Company; the same to be paid for in full by a conveyance and delivery to the company of first mortgage bonds of the Rome Street-Railroad Company, of the par value of $25,000; an incandescent electric light plant, of a certain capacity; 1,000 incandescent lamps; 25 arc lamps; station equipment for incandescent plant; 2⅝ miles of line construction; all expenses in putting up machinery and running line construction to be borne by said Lawrence. It appears from the testimony that none of these bonds of the Rome Street-Railroad Company mentioned were ever received by the Rome Electric Light Company on this payment of stock, and that all the property received from Lawrence did not amount to over $2,500. The evidence also tends to show that none of the other stock subscribed for was ever paid to the company. A certificate of 100 shares of stock, dated July 12, 1894, to the Merchants' National Bank, and a like certificate to said bank for 90 shares of stock, dated July 5, 1895, were introduced in evidence. At the top of each certificate, along its margin, appear the words, "Full-paid and nonassessable." Also, a contract, signed by J. King, to the effect that the 90 shares of stock should be held by the bank as security for any and all indebtedness of King to said bank, as principal, indorser, or security. This contract was dated July 5, 1895. The cash book of the Merchants' National Bank of Rome, under date of April 25, 1895, showed an entry of stocks and bonds in the Rome Electric Light Company, $10,000; street-railway company, $5,600; aggregating $15,600. The minute book of the Rome Electric Light Company of

date May 22, 1897, introduced in evidence, showed a meeting of the stockholders of that company, from which it appears that J. L. Bass, as president of the Merchants' National Bank, represented 189 shares of stock, and that J. E. Dean, proxy for T. M. Armstead, represented 58 shares of stock. The minutes showed that on the same day a meeting of the directors was had, at which the president and secretary were directed to sign a deed "conveying all the property of the Rome Electric Light Company to the Rome Lighting Company." The resolution asserted that the deed was made in conformity with a certain decree in the United States circuit court for the Northern district of Georgia. It substantially appears from the testimony of J. King: That he was president of the Merchants' National Bank of Rome during the year 1894, and held that office until the suspension of the bank, some time in June or July, 1895. That the bank became the owner of the 100 shares of stock in the Rome Electric Light Company on July 12, 1894, and also, afterwards, the owner of the 90 shares. That this stock was originally owned by King, and was transferred by him to the bank while he was president thereof; the 90 shares being transferred as collateral security for King's indebtedness to the bank. During the transaction of this transfer, he testified, he dealt with himself as an officer of the bank; he being at the time its president. That plaintiffs had nothing to do with the organization of that company, or with the issuing or distribution of its stock. Plaintiffs had not, up to that time, represented the company, and their services as attorneys for the company began some time in the year 1896. A transfer to the bank was made on account of King's obligations to it, and the certificates were issued some time before the employment of plaintiffs. King never had consulted with plaintiffs about his affairs with the bank. This witness thought that plaintiffs, or at least the older member of the firm, R. T. Fouché, knew before his employment that the stock subscribed to the electric light company had not been paid up. He stated that Fouché frequently told him that the stockholders were liable for the payment of that stock. It further appears from his testimony that nothing was paid on this stock to the company, except property worth about $2,500 by Lawrence, on his subscription of $50,000. When King took credit for the $10,000, as shown by the books of the bank, he transferred to it the 100 shares of stock and $12,000 of bonds of the Rome Electric Light Company. It further appeared from his testimony that when stock was sold by one person to another the old certificate held by the original subscriber for the stock was taken up, and a new one issued to the transferee, and that this was placed upon the minutes or books of the corporation. R. T. Fouché testified: That his firm had nothing to do with the organization of the Rome Electric Light Company. That they were first retained by that company about July 1, 1895, and prior to that time they had nothing to do with it or its affairs. He supposed he ascertained after the employment of his firm by the company as attorneys that it did not have any $50,000 in stock paid up. On April 3, 1896, a settlement was had between this company and the bank, and he likewise had a settlement for the fee due by the company to his firm up to that date; certain bonds of the Rome Electric Light Company being deposited with him for fees amounting to $1,200 or $1,500, which were afterwards settled for $600. After this settlement, plaintiffs continued to represent the company until they brought suit and recovered a verdict for the sum of $2,000, besides interest. His firm had no connection with this company at the time this stock was issued, knew nothing about it until after they were employed as attorneys, and only knew in a general way that this stock had not been paid up. Plaintiffs knew nothing of King's financial condition until after the bank suspended, and advised him that he was liable for his unpaid stock. King never told plaintiffs anything about the details of the stock, but simply about Lawrence's conduct. Before the settlement in April, 1896, witness knew that the stock of the company had not been paid, and that it had issued 500 shares. Plaintiffs only sued the Merchants' National Bank as the owner of 190 shares, and Armstead as the owner of 58 shares. Did not sue the other stockholders, because the other stock was owned by Sam King, and he was always willing to pay his share of what they owed plaintiffs. He has not paid, but they could have settled with him at any time. Plaintiffs had nothing to do with the transfer of the stock or bonds to the bank. Never heard of it until after it was done. Never saw the stock book of the Rome Electric Light Company until the summer of 1896. Never noticed the words, "Full-paid and non-assessable," until it was brought to his attention by exhibiting a certificate to him as a witness in this case. These words were so arranged on the margin that he had never noticed them before. In October, 1895, he thinks, he knew of the condition of the subscription to the stock. This, doubtless, referred to the $50,000 subscribed by Lawrence, and it was to be paid in property and bonds of the Rome Street-Railroad Company. He had never had any consultation with Armstead at all about anything. He never saw the stock book or certificate of stock until the day on which he testified, and knew nothing about the issuing of the bonds, or the transfer of the stock to the bank.

After the introduction of testimony in behalf of plaintiffs, counsel for defendants moved for a nonsuit on the following grounds, which are briefly but substantially stated: (1) On account of the entry on the certificate of stock of the words, "Full-paid and non-

assessable," there could be no recovery by the plaintiffs unless the proof showed the stock was never paid, and that this fact was known to the defendants at the time it was transferred to them. (2) Because the plaintiffs cannot recover if it appears that at the time they extended credit the stock was not paid up, and that was not known to the present holder, he not being an original stockholder, and that at the time of extending the credit the creditor, plaintiffs in this case, did know of its nonpayment. (3) The burden is on the plaintiffs to prove nonpayment of stock, and notice to the transferees thereof. This is an equity case, and the equity of the bank and Armstead is greater than that of plaintiffs. Where plaintiffs permit a transaction to proceed, they cannot afterwards take advantage of it, having knowledge of it, against a party who did not have knowledge of it at the time. They are estopped by their action. The court sustained the motion for a nonsuit, to which judgment plaintiffs in error except. The bill of exceptions also assigns error on the judgment of the court excluding from the testimony a certain contract, tendered by plaintiffs' counsel, entered into by the bank and by Dean & Dean, as attorneys for Armstead, which contract is set forth in the record.

1. It appears from the record that the plaintiffs offered to read in evidence a certain contract made on February 14, 1896, between Dean & Dean, as attorneys for T. M. Armstead, of the first part, and the Merchants' National Bank of Rome, Ga., of the second part, by which the parties of the first part, as stockholders in the Rome Electric Light Company, agreed to abandon their proposed attack on the validity of certain bonds issued by said company, so far as $12,000 worth of said bonds were concerned, that were held by the bank. As to these bonds, the same would be recognized as valid and bona fide obligations of said Rome Electric Light Company. They further agreed to recognize and acknowledge that the party of the second part held obligations to the amount of $1,600 principal, with interest thereon from the date of the contract at 8 per cent. per annum, against the electric light company, independent of said bonds; and they agreed that said last-named indebtedness shall remain as an obligation against said Rome Electric Light Company, or against the property thereof or the proceeds thereof, and shall be paid thereby or therefrom, regardless of any new combination that may arise with reference to said Rome Electric Light Company or its property. The said attorneys further agreed to represent the interests of the party of the second part in connection with the interest of their client, for the purpose of carrying out the terms and object of the contract, without compensation, further and beyond the consideration flowing to them through this agreement. It was further agreed: That the party of the second part should have an interest in the Rome Electric Light Company, either in bonds or stock, or in the net proceeds from the sale of the property in the proportion of $^4/_{20}$ to the party of the first part, and $^{12}/_{20}$ to the party of the second part; it being understood that the additional $^4/_{20}$ interest in said property is not dealt with in the agreement, for the reason that the same may or may not be owned by third parties. If third parties owned it, the same shall be issued to them. If not owned and controlled by third parties, it shall be divided between the parties at interest, preserving the proportion of the parties hereto as $^4/_{20}$ is to $^{12}/_{20}$. The coupon notes on $12,000 of bonds, due October 1, 1895, and April 1, 1896, shall be owned between the parties to the contract in the proportion of $^4/_{20}$ to $^{12}/_{20}$. It was further agreed: That the interest of the parties to the contract in the Rome Electric Light Company should be combined, and each should endeavor to bring about a reorganization of the company upon a basis that would cancel all obligations of the company, except the $12,000 of bonds owned by the bank, and interest thereon, and the $1,600 due the bank. It failing to maintain the validity of the bonds, the contract should become void; the court expenses and necessary disbursements to be borne by each party in proportion to their relative interests in the company. The contract should apply only between the parties, and no third person shall have any interest or benefit thereunder, except by agreement after it is made. Armstead denied in his answer that he was the owner and holder of any shares of stock in the Rome Electric Light Company. He admitted that he had once bought some, but states, upon information, that he transferred the same prior even to the rendition of the service on which plaintiffs' claim for recovery was based. We think the court erred in ruling out this contract on the ground of irrelevancy. It was admissible, at least, to show that, at the date of the contract, Armstead was a stockholder in the Rome Electric Light Company. As above indicated, there were introduced proceedings of the meeting of the stockholders of the Rome Electric Light Company of date May 22, 1897, at which meeting the minutes show that T. M. Armstead was represented by J. E. Dean, proxy for 58 shares of stock. Taking that testimony in connection with the contract, the evidence tends to show that Armstead was the owner of stock, at least, from February 14, 1896, just before plaintiffs commenced their last service, for which they recovered judgment against the company, down to May 27, 1897, after this service, probably, was completed. This testimony could be considered in reply to Armstead's answer, and we think the court erred in not admitting the contract. It was argued by counsel for plaintiffs in error that it was an effort to bring about reorganization, so as to defeat the stock and claims of all persons except themselves; to divide the

stock and bonds of the company, or the net proceeds of the sale of its property, among themselves, to the exclusion of all other persons,—and that such a written contract is material evidence in a suit against said persons to compel them to pay up stock held by them for the benefit of creditors of the company, when it is apparent that the debt sought to be collected was incurred in resisting the wrecking of the corporation by its stockholders. We think there is some force in the contention of counsel that perhaps the contract is admissible for the purpose of throwing light upon the scheme of these defendant stockholders, who were parties to that contract. It was certainly admissible for the reasons above indicated, and should not have been rejected.

3, 4. It is a general principle of law, well recognized both upon authority and reason, that the transferee of shares of stock in a corporation is not only subrogated to all the rights and interests of the original subscriber and transferror of such stock, but such transferee also incurs the liability originally upon the subscriber to the stock for any nonpayment or dues that may exist on the subscription. This is not merely an arbitrary rule of law fixed by courts in adjudications upon this subject, but is really founded upon solid reason. When an original owner of or subscriber to stock transfers the same, and the name of the transferee is entered upon the books of the company as the owner and holder of the stock, the original subscriber thereby, as a general rule, becomes discharged from all obligations to the company by virtue of his subscription, and his transferee necessarily takes his place, by an implied undertaking to assume those obligations and duties. It is equally well settled that creditors of an incorporated company, who have exhausted their remedy at law, can, in order to obtain satisfaction of their claims, especially if in judgment, proceed against the stockholders to enforce their liability to the company for the amount remaining due upon their subscription. This principle was decided in the case of Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; and it was there further held that the stockholder was liable to the creditor, although no account was taken of the other indebtedness of the company, and the other stockholders were not made parties, though by the terms of their subscriptions the stockholders were to pay for their shares "as called for" by the company, and the latter had not called for more than 30 per cent. of the subscriptions. The first proposition, that the transferee from the original stockholder succeeds to such liability, is also well established by authority. In the case of Webster v. Upton, 91 U. S. 65, 23 L. Ed. 384, it was decided: "The transferee of stock is liable for calls made after he has been accepted by the company as a stockholder, and his name registered on the stock books as a corporator; and, being thus liable, there is an implied promise that he will pay calls made upon such stock while he continues its owner. A purchase of stock is of itself authority to the vendor to make a legal transfer thereof to the vendee on the books of the company." In the opinion in that case is approvingly quoted the doctrine in Ang. & A. Corp. § 534, as follows: "When an original subscriber to the stock of an incorporated company, who is so bound to pay the installments on his subscription from time to time as they are called in by the company, transfers his stock to another person, such other person is substituted, not only to the rights, but to the obligations, of the original subscriber, and he is bound to pay up the installments called for after the transfer to him. The liability to pay the installments is shifted from the outgoing to the incoming shareholder. A privity is created between the two by the assignment of the one and the acceptance of the other, and also between them and the corporation; for it would be absurd to say, upon general reasoning, that, if the original subscribers have the power of assigning their shares, they should, after disposing of them, be liable to the burdens which are thrown upon the owners of the stock." Numerous authorities are cited in the opinion of Mr. Justice Strong, clearly sustaining the views of the court.

It is contended, however, in the answer of the bank in this case, that it was not owner of the 90 shares of stock, inasmuch as they were transferred to it by King simply as collateral security for a debt due by him to the bank. It is a well-established principle of law that such a transfer of property, even though made solely as collateral security for the payment of a debt, conveys the title to the transferee. This principle has likewise been decided by the supreme court of the United States in the case of Bank v. Case, 99 U. S. 628, 25 L. Ed. 448, where it was announced: "A party who, by way of pledge or collateral security for a loan of money, accepts stock of a national bank, which he causes to be transferred to himself on its books, incurs immediate liability as a stockholder; and he cannot relieve himself therefrom by making a colorable transfer of the stock, with the understanding that at his request it shall be retransferred." The same principle was also decided in Pullman v. Upton, 96 U. S. 328, 24 L. Ed. 818, where it was held that the transferee of stock, who caused the transfer to be made to himself on the books of the corporation, although he holds it as collateral security for a debt of his transferror, is liable to the company or its assignee for the balance due on his original subscription. See the able opinion of Mr. Justice Strong in that case, on pages 330, 331, 96 U. S., and page 819, 24 L. Ed., giving the reasons for such liability on the part of a transferee, even though he holds the stock

simply as collateral security. Authorities might be multiplied upon this subject, but we deem it unnecessary, as we do not understand that there is any contest between counsel in this case as to the correctness of the principles above announced. See, in this connection, Bank v. Brobston, 99 Ga. 801, 27 S. E. 790; McDougald v. Bellamy, 18 Ga. 411.

It is contended, however, by counsel for defendant in error, that under the facts disclosed by this record the plaintiffs, when they extended credit to the Rome Electric Light Company, had knowledge of the fact that the stock subscribed thereto had not been paid, and that therefore they are estopped from instituting proceedings to recover their debt from the present defendants, who were simply the transferees from the original stockholders; that, when credit was extended by plaintiffs to this company, it was not with any idea on the part of plaintiffs to look to these shareholders for the payment of their debt, or that faith for the solvency of the debt was at all based upon the liability of these shareholders. A forcible argument is presented on this branch of the case, and authorities cited which at first blush may seem to give some plausibility for the contention of counsel. We think, upon a comparison of the authorities relied upon with the facts in this case, and upon a fair and just discrimination in construing the views of courts and learned law writers, it will be found that they have no application to the present case. Section 829 et seq., 2 Mor. Priv. Corp., is relied upon to sustain the action of the court below in granting a nonsuit upon this particular point. It is there stated: "Persons contracting with a corporation may expressly or impliedly waive their right to compel the shareholders to contribute the full amount of the company's capital in discharge of the corporate obligations. If a person should contract with a corporation, or voluntarily give it credit, knowing that its capital had not been fully paid up, but was declared to be fully paid up for the purpose of discharging the shareholders from further liability, the evident intention of both parties would be to make the agreement subject to these conditions; and there would be no equity in charging the shareholders with any further liability on account of the obligation so incurred by the company." But we think there is nothing in the record to authorize the judge, in the trial of the case below, to assume that the plaintiffs, when credit was extended to this company, knew that the stock of the company had been declared to be fully paid up for the purpose of discharging the shareholders from further liability, and that it was the evident intention of both parties to make the agreement subject to these conditions. On the contrary, after a careful review of the testimony, we find nothing which would authorize the judge, as a matter of law, to conclude that the plaintiffs had any such knowledge. R. T. Fouché testified, in effect, that he had no connection with issuing this stock, nothing whatever to do with the transfer of the same to these defendants, and never even knew until the trial of this case in the court below that the certificates which the bank held had printed thereon the words, "Full-paid and nonassessable." It is true, there is some evidence tending to show that he knew or had notice that this stock had not been paid up by the subscribers or the holders and owners of the same, but it also appears in the testimony that he several times contended that the holders of this stock were liable to the company for its payment. A bare knowledge of the fact on the part of a creditor, when he extends credit to a corporation, that its subscribers to stock or the owners of stock had not fully paid into the company the subscriptions thereto does not, by any means, necessarily imply that the company regarded the stock as fully paid up for the purpose of discharging the shareholders. He could not have had such an idea when dealing with this company in behalf of his firm, because it would have been entirely inconsistent with his repeated declarations, and opinion expressed, that the stockholders could be held liable for the payment of this money. We can readily see how credit can be extended to a corporation with full knowledge of the fact that its capital stock had not been paid in; but at the same time the credit could be based upon the idea that the stockholders, or their transferees, could be made liable for its payment if the company became insolvent, and the only way in which its creditors could recover anything on their debts would be by proceedings against shareholders for the amount due on unpaid subscriptions to stock. For instance, in this case the services rendered were simply those of attorneys at law. The company at the time of employment was actively engaged in business, and it could naturally have been inferred that such incidental expenses as fees incurred during its operation would be met by income realized by the company in the conduct of its business. But it does not follow that the creditor thus impliedly waived any right the law gives him to call upon the shareholders to discharge their legal duties to the corporation, when he discovers that is the only means by which he can procure payment of its indebtedness to him. Certainly there was sufficient testimony in behalf of plaintiffs to submit the issue to the jury as to whether the plaintiffs made any contract with the company either expressly or impliedly waiving their right in law against the stockholders on account of unpaid subscriptions to stock. The fact that subscribers to stock in the corporation entered with the company into any device or contrivance for the purpose of relieving themselves from liability for full payment of the shares for which they subscribed cannot be insisted on in any court of law, or pleaded against the rights of creditors who are not parties to such transactions, and who are entitled to protection for the trust arising under the law in their favor,

and to require payment in good faith to the full amount of capital stock subscribed to the company. This principle has been decided in Camden v. Stuart, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363, where it was held, "The trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith." See the able opinion of Mr. Justice Brown on page 113 et seq., 104 U. S., page 588, 12 Sup. Ct., and page 366, 36 L. Ed. See, also, on same line, Potts v. Wallace, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135, and the opinion of the court on page 703, 146 U. S., page 200, 13 Sup. Ct., and page 1140, 36 L. Ed., where it is said, "So that, even if the company and the defendant had then agreed that the latter should then be exonerated from his liability to the company, such an agreement would have been void as against the creditors of the insolvent company." See, also, Richardson's Ex'r v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516, and the opinion of Mr. Justice Lamar in that case, on page 45, 133 U. S., page 285, 10 Sup. Ct., and page 522, 33 L. Ed., and following. It seems in that case that Richardson, a director in the corporation, was also a stockholder therein, and that he made some arrangement with the company, in the course of his dealings, that he should never become liable upon any assessments for his subscription to stock. The court says: "We have seen that all the acts of Richardson as director, stockholder, chairman of the executive committee, and treasurer, all of which offices he held at one time, had their origin in this bonus stock. After having exercised all the privileges and powers of a stockholder in the corporation, it cannot be seriously contended that he is to be held exempt from liabilities which would attach to a bona fide shareholder who has taken shares purporting to be paid up, but which in truth are not paid up. Citing the case of Scovill v. Thayer, 105 U. S. 143, 153, 154, 26 L. Ed. 973, the following is quoted from the opinion of Mr. Justice Woods: "The stock held by the defendant was evidenced by certificates of full-paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. * * * But the doctrine of this court is that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that, when their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full."

But it is further contended in this case that, as these certificates of stock issued to the bank had printed thereon words indicating that the stock had been fully paid up and was nonassessable, the burden of proof was on plaintiffs to show: First, that they had not been paid; and, secondly, that the bank, as transferee, must have had knowledge of that fact,—before it could be liable by a creditor of the corporation suit of this character; that a bona purchaser of stock of this sort, without notice of its nonpayment, would be p ed. So far as proof of the nonpaym concerned, the evidence is positive and uncontradicted that nothing had been upon the stock held by the defenda this case; and so far as knowledge c fact by the bank, when it took a tr of this stock, is concerned, the evide uncontradicted that it knew this fact th its president, J. King,—he, in makin transfers, dealing with himself as pre and authorized agent of the bank to into such transactions for it. This was subsequently held by the bank. pears from the record that it availed of the privileges of this ownership, by represented through another president it seems, succeeded King in the office meeting of the stockholders of this con It, no doubt, when it received the considered it valuable, and that the pany would conduct a prosperous bu Having so received it, and thus re all the advantages and interest held original stockholder, it also assumed bilities growing out of a subscription t stock, as hereinbefore indicated, and chargeable with the knowledge of agent and president that the subscript this stock had never been paid. The the doctrine applicable to innocent pu ers of stock purporting on its face to been paid cannot apply to this case. transferee of stock for value should the same under the impression or belie the subscription has been fully paid company, we do not think this would sarily relieve him from liability to ors if the subscription for the same ha in point of fact, been paid. By rec the same, he acquires title thereto, a comes a stockholder in the company tled to all benefits and advantages gi out of such a possession; and the la charges him with knowledge of th that he receives the stock subject same liabilities as the person to wh was originally issued. For his own tion, then, it would be a natural cour fore acting upon such a presumption, due diligence in investigating the sta the stock, and whether or not anythin due thereon. Certainly, for any fail do so, or any laches on his part in i such investigation, a creditor who had ing to do with the transfer, or crea wrong impression upon the transferee's should not suffer. This principle see be recognized in Upton v. Tribilcock, S. 45, 23 L. Ed. 203. It was there d "Representations by the agent of a co tion as to the nonassessability of its beyond a certain percentage of its constitute no defense to an action

the holder of the stock to enforce payment of the entire amount subscribed, where he has failed to use due diligence to ascertain the truth or falsity of such representations. The word 'nonassessable,' upon the certificate of stock, does not cancel or impair the obligation to pay the amount due upon the shares, created by the acceptance and holding of such certificate. At most, its legal effect is a stipulation against liability from further assessment or taxation after the entire subscription of one hundred per cent. shall have been paid." If that principle applies to one as an original subscriber to stock in a corporation, who makes a trade or contract with the governing powers of the corporation, by which he is assured he will not be called on, except for a certain per centage of his subscription, we do not see why it would not with equal force apply to a transferee from an original subscriber, and why such transferee would not be called upon to exercise due diligence in making inquiry as to the payment of the stock, even where representation has been made to him that it has been paid.

It is further contended by counsel for defendants in error that this record shows no notice to the bank, charging it with a knowledge of the nonpayment of this stock when it received the same as transferee and owner; that the knowledge of King, its president, was not chargeable to the bank, for the reason that King, in this transfer, was acting in his own interest, which was antagonistic to that of the bank. This is really the vital question in this case, and the writer confesses, in the patient investigation he has endeavored to give it, that its correct solution is not without difficulty. We recognize the principle that when stock of this character passes into the hands of a transferee, who occupies the position of an innocent purchaser for value, and who accepts the same on the faith of a stipulation, printed on his certificate of stock issued to him, that the same has been fully paid up and is nonassessable, has no notice to the contrary, and could not have ascertained the contrary by the exercise of ordinary diligence, he could not be held liable, even upon a suit by a creditor for an unpaid balance due on the subscription by the original subscriber. We recognize, further, that there is authority of weight, from distinguished law writers on this subject, which does not seem to impose the duty upon the transferee of stock, containing upon its face indications of its being fully paid up, of instituting further investigation to determine whether or not this is the truth, and that when he is sought to be held liable by a creditor the burden of proving the stock was not paid up, and that the transferee had notice of this fact, is upon the creditor. Accordingly, it is stated in 3 Thomp. Corp. § 2934, "Where a corporation issues shares as paid up, treats them as such, and as such puts them on the market, a person who innocently purchases them under the belief that they are paid up will not become chargeable with a liability to the creditors of the corporation in case the representations of the company should turn out to be false." In section 3716 the author further places the burden of proof on the creditor to show that the purchaser had notice of such false representations when he bought. We also recognize some exceptions, sustained by authority of weight, to the general rule which imputes the knowledge of an agent or officer of a corporation, acquired by virtue of his employment as such about matters relating to his employment, and over which he has supervision as the agent or officer for the company, as the knowledge of the corporation itself. A general exception to this rule is that it usually has no application where the agent is acting for himself, in his own interest, and adversely to that of his principal. In 4 Thomp. Corp. § 5206, it is substantially declared that, where a corporate officer acts avowedly for himself in a transaction with the corporation, he is regarded as a stranger to the corporation, and any uncommunicated knowledge he may have in respect of the transaction will not be imputed to the corporation. To charge notice on the corporation in such cases, affirmative evidence must be given that the officer has made disclosure thereof to other and disinterested officers of the corporation, whose knowledge may properly be said to be that of the corporation. In applying this rule, we find there is a conflict of authority in adjudications outside of this state by courts of last resort, some of them recognizing that there are exceptions to this general exception, upon principles which we think would be applicable to the facts of this case, while there are other decisions which seem to forcibly sustain the contention of counsel for defendants in error. We have examined several of these authorities, but we deem it unnecessary to consume time and space by comparing them, or criticising the conclusions reached by their authors. Suffice it to say that our conclusions in this case are reached by the recent adjudications of this court in its decision of principles which we think not only are in entire accord with the view herein entertained, but under which we feel bound. In the case of Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350, it appears that the president and cashier of a bank were also members of a partnership composed of themselves and another person, to the capital stock of which they had, under partnership articles, agreed to contribute a given sum. Without the knowledge or consent of the other person, who was a member of the partnership, this president and cashier executed and delivered to the bank a promissory note, in the name of the partnership, for the purpose of raising the money they had so agreed to put in the partnership business. The transaction was evidently for the

private benefit alone of the two members of the partnership who were the president and cashier of the bank. It was in no sense for the benefit of the partnership itself, nor could it have been for the benefit of the bank. In that case this court, by a unanimous decision, held that the knowledge of the president and cashier of the facts above given was the knowledge of the bank itself, and neither the partnership, as such, nor the remaining member, was liable to the bank upon the note in question. Following this decision is an able opinion by Justice Lumpkin, now presiding justice, in which he cites several authorities to sustain the principle upon which the decision is based. Unquestionably, to our minds, the president and cashier of the bank in that case were as much interested for themselves individually in the transaction they were negotiating with the bank as was Mr. King in this case, when, as president of the bank, he received a transfer of the stocks and bonds of the Rome Electric Light Company to the bank. This principle has been followed by a more recent decision of this court in the case of Morris v. Banking Co. (Ga.) 34 S. E. 378. It was there decided: "Where an individual has an interest in a promissory note which he knows was given without consideration, and such individual, as cashier of a bank, having full authority and control of the discounts of the bank, without reference to or consultation with any other officer of the bank, discounts such note with the funds of the bank, the latter is not a bona fide purchaser of the note, without notice. If it ratifies the act of its officer, and claims title to the note, it must take it subject to the knowledge which the officer who discounted it had at the time." It appears in that case, then, that this cashier was interested individually in the note; and it presents, to say the least of it, certainly as strong a case to show that when he cashed this note out of the funds of the bank he was acting as much in his individual interest as was the president of the bank in the case at bar when he transferred his stock to the defendant bank in this suit. We call special attention to the able opinion written by Mr. Justice Little in that case. In the course of that opinion reference is made to many adjudicated cases which seemingly support the contention of the defendants in error as to the exception to the general rule under which they claim that the banking company was entitled to hold the note of Ragland free from any implied notice of Cassin's fraud, if such there be. But a distinction was drawn in these cases between the exception and the rule. It was conceded in that opinion to be a sound proposition of law that where an officer or agent of a corporation, as the party at interest, for himself deals with the corporation, the latter is not charged with notice of the information possessed by such officer or agent so dealing; but it is because in such a transaction the assumed agent is in the adverse party, and is not to be t in so dealing, as an agent of the corp at all. But it was further observed opinion, "And many, if not a majority, cases which announce the doctrine that the agent has an interest in the tran which would be prejudiced by the dis of the information, the presumption communication does not prevail, found to be where the agent or offic in his individual capacity, and treat some other officer or agent of the c tion." It was accordingly held that th ciple involved in the cases referred not apply to a case where one party, knowledge of the invalidity of the p which he is the individual owner, di it in a corporation of which he is th authorized agent, and is himself th actor for the corporation. A number thorities are cited in that opinion, wh course, we do not deem necessary to in this connection. There is no preten King, as president of the bank, was n charged with the duties and powers ed by him in his official capacity in th tiations with reference to this pa stock. The decision of this court in t of Trust Co. v. Hartridge, 73 Ga. 2 sidered in the light of its facts, is not harmony with what is above laid do is true that the cashier of the ban from Hartridge the note upon which tion against him was based, but it a pears that this very note was exec pursuance of a contract or arrangem tween the cashier and Hartridge whi in violation of the rules of the ban that Hartridge knew it. He aided the officer in doing an improper and u act, and on this state of facts it w that the bank was not bound by the c between the cashier and Hartridge u had notice of the same, and autho or in some way ratified it, and that not bound by the knowledge and rati of the cashier alone. The effect of ing was that under these peculiar stances the bank was not so bound cluded by the knowledge and conduc cashier as to be cut off from its against Hartridge on the note. To ha otherwise would have been to allow take advantage of his own wrong. certainly in no position to set up aga bank a defense, the maintenance of would have led to just this result. T sion against Hartridge can safely re the idea, and the language used in th notes and opinion should be interpre understood with reference to the fac before the court. It should not be gi versal application, or be regarded as ty binding upon the court in a case present, which differs so widely from which this language was used. This action was ratified by the bank in its

stock, having the same entered on
s, and its name enrolled upon the
the company in which the stock
as one of its stockholders, and in
itself of the privileges of such a
ler. We do not see how it could
e advantages and privileges of this
n and ownership without becoming
le with the notice of the burdens it
wise assumed, of which it had
ge, through its president, when it
ame the owner of this property. We
erefore, the court clearly erred in
a nonsuit as to the bank.

think granting the nonsuit as to the
t Armstead is apparently better sup-
an it is in the case of the bank. It
appear from the testimony when or
became a stockholder,—whether he
original subscriber, or a transferee
original subscriber. No certificate
ock was introduced, and it does not
rom the testimony that his certifi-
the words thereon indicating that
had been fully paid up. It does
owever, that he was a stockholder
bruary, 1896, until May 22, 1897,
ntradicts the impression sought to
yed by his answer as to when the
of plaintiffs were rendered the com-
d plaintiffs having shown he was a
ler in May, 1897, would not this be
o raise the presumption, in the ab-
anything to the contrary, that he
stockholder? It is true that Arm-
y have a valid defense, if he is able
ttorily prove that he was an inno-
chaser without notice of nonpay-
this stock; but, under the facts in
rd, we do not think the court should
h a presumption in his favor, and
nent of the court granting a nonsuit
h defendants should be reversed.

defendants in error filed a cross bill
tions in this case, in which excep-
aken to the ruling of the court in
, over objection of defendants'
testimony of those parts of the min-
the Rome Electric Light Company
ppear on pages 34 and 35 of said
in regard to the subscription and
of the stock. The ground of said
was that the evidence offered was
l statement of the minutes on these
of subscription and payment, but
art only; pointing out that other
the minutes, especially pages 1 and
parts of the same transaction, and
e introduced with the portions offer-
s court has in several cases recog-
e right of parties litigant to intro-
y a portion of a record in his case,
is distinctly specified what part is
That was done in this case. Jones
ham, 80 Ga. 472, 5 S. E. 764; Hen-
. Francis, 75 Ga. 178; Dowling v.
2 Ga. 559-567. In the last case cit-
s held that: "Where a plaintiff of-
fered in evidence an incomplete return of an administrator as an admission, and it had folded in it various receipts, accounts, etc., referred to as vouchers, he was not compelled to put them in evidence along with the returns. That was the right of the defendants, if they could show that the inclosed were either a part of the admission or connected therewith." Refusing to compel the plaintiffs in this case to introduce other portions of the minutes insisted on by defendants' counsel could not have affected them injuriously, for the reason that they had the privilege of introducing such other portions if they threw any light upon the issue under investigation.

6. It was further objected in the cross bill that the court erred in permitting, over the objection of defendants' counsel, the witness J. King to answer the following question propounded by plaiutiffs' counsel: "I see here, Mr. King, the subscription made by J. S. Lawrence, to be paid by first mortgage bonds of the Rome Street-Railroad Company, of the par value of $25,000. Did the company ever get these bonds?" Defendants objected on the ground that all this matter was in writing, and called the court's attention to the minutes on page 6, to the receipt of J. S. Lawrence for 478 shares of stock, and some other entries upon the minutes throwing light upon the transaction. It does not make any difference what the minutes of this company show. This witness was asked a question upon his personal knowledge, and claimed to have personally known the facts about which he testified, without reference to any memoranda or record copied in the books of the company. There was no error for the court to admit this testimony.

Judgment on main bill of exceptions reversed. Judgment on cross bill affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

NATIONAL BANK OF ATHENS v. EXCHANGE BANK OF ATHENS.

(Supreme Court of Georgia. May 16, 1900.)

MORTGAGE—ASSIGNMENT OF NOTE—RIGHTS OF ASSIGNEE—JUNIOR MORTGAGE—DECLARATIONS BY ASSIGNOR.

1. Even before the passage of the act of November 22, 1899, "to provide for the more full and complete transfer of rent notes, mortgage notes," etc., the assignee of a promissory note secured by mortgage was, in equity, entitled to all the benefits of the security thus afforded, though there was no assignment to him of the mortgage itself.

2. In such a case the assignee of the note had the right to base upon the mortgage, although not foreclosed, an equitable claim to a fund in court arising from a sale of the mortgaged property under a lien of higher dignity, such fund being the balance left after satisfying that lien; and the fact that the payment of the note was further secured by an indorsement thereon was not, of itself alone, sufficient to subordinate a claim of this kind to that of a contesting claimant, over which, in the absence

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of such additional security, it would, in equity, have been entitled to priority.

3. The equitable claim of such a transferee to a fund realized in the manner above pointed out is superior to the claim of another, based upon the foreclosure of a junior mortgage, which, together with the execution issued thereon, had been duly assigned to the latter.

4. No right of the assignee of a promissory note with respect thereto can be injuriously affected by a declaration or admission made by the assignor after he had parted with title to the paper.

(Syllabus by the Court.)

Error from superior court, Clarke county; R. B. Russell, Judge.

Action between the National Bank of Athens and the Exchange Bank of Athens. From the judgment, the national bank brings error. Affirmed.

Jno. J. Strickland, for plaintiff in error. T. S. Mell, for defendant in error.

LUMPKIN, P. J. The controlling questions involved in this case are those indicated above.

1. Section 3684 of the Civil Code declares that "the transfer of notes secured by a mortgage or otherwise conveys to the transferee the benefit of the security." The word "conveys" is of vital significance. The employment of it necessarily makes this section mean that the transferee of a promissory note secured by mortgage is, without more, to have all the substantial benefits of the security thus afforded. The legislative intent that this result should follow the mere assignment of the note is so plainly and clearly expressed that it will not do for the courts to say it shall not follow unless there be also an assignment of the mortgage. Without such assignment, the legal title to the mortgage remains in the mortgagee. Section 2822 of the Civil Code declares that "all liens provided for in this chapter may be assigned in writing and not otherwise." The "chapter" here indicated is chapter 8, under title 4. At the beginning of this chapter it is declared that "the following liens are established in this state," and the enumeration which follows includes "liens in favor of mortgagees." See Civ. Code, § 2787. These two sections were originally codified from the lien act of 1873 (Acts 1873, pp. 42–47). In Bank v. Prater, 64 Ga. 612, Jackson, J., said, "Mortgages are provided for in that act;" and there are numerous decisions of this court to the effect that the legal title to a mortgage cannot be passed otherwise than by a written assignment. It cannot, however, be seriously doubted that under the provisions of section 3684 the transferee of a promissory note secured by a mortgage, even without an assignment of the mortgage, is, with reference to obtaining the benefit of the security it affords, in as good a position to assert in equity a claim to the proceeds of the mortgaged property as he would occupy if the assignment had covered both the note and mortgage. To hold otherwise would render the section nugatory. While an assignee of a note, who was not clothed with the legal title to a mortgage securing the same, might not, by virtue of the law embraced in that section, be entitled to foreclose the mortgage in his own name, yet we see no reason why he could not, in equity, assert a claim based upon the ground that he was, by reason of having taken a transfer of the note, entitled to claim in an equitable proceeding the benefit of the security afforded by the mortgage. This case originated and was disposed of in the trial court prior to the passage of the act of 1899, referred to in the first headnote, and must, of course, be decided here accordingly; but it is worthy of note that this act made a broad and sweeping change in the law. Under its provisions the transferee of a promissory note secured by a mortgage may, by virtue of the transfer of the note alone, and without an assignment of the mortgage, foreclose it in his own name. See Acts 1899, p. 90.

2. If the proposition laid down in the first headnote is sound, such a transferee has the same right to base upon the unforeclosed mortgage an equitable claim to a fund arising in the manner pointed out in the second headnote as the original mortgagee would have. We may, therefore, for our present purpose, deal with such a transferee as if he held the legal title to the mortgage. Indeed, it appears from the record of this case that the Exchange Bank, which was claiming under an unforeclosed mortgage, had acquired title thereto before coming into court and applying for the fund, but it did not get the assignment of the mortgage when it took the transfer of the note; and its right, under the facts appearing, depend upon how far that transfer operated to invest it with the benefit of the security. This court, in Sims v. Kidd, 55 Ga. 626, decided that the holder of an unforeclosed mortgage might base upon it an equitable claim to a surplus in court realized from the sale of the mortgaged property, if the mortgagor was insolvent, and that in such a case the mortgagee would be entitled to the fund if his equity thereto was superior to that of another claiming the money. In Baker v. Gladden, 72 Ga. 469, it was held that "the holder of an unforeclosed mortgage cannot claim at law the balance of a fund arising from the sale of the property covered by the mortgage, after paying the judgment under which it was sold, and which was older than the mortgage, but he can make such a claim in equity; and this could be done on a money rule, with proper allegations showing the insolvency of the debtor, and that the mortgage creditor would be without remedy unless such fund were awarded to him." The rule thus announced was applied as follows: "Certain property having been sold under a judgment, which was the oldest lien thereon, after satisfying it the balance of the money

from the sale should have been paid
nforeclosed mortgage, in preference to
udgments, under proper pleadings to
." Again, in Ennis v. Harralson, 101
, 28 S. E. 839, this court strongly in-
that the holder of an unforeclosed
e might claim the proceeds of the
the mortgaged property, if he showed
e reasons entitling him to do so,
which it would be necessary for him
that the mortgagor was insolvent.
nciple established seems to be that
n court may be claimed upon an un-
ed mortgage when the holder has a
equitable right to the fund, and is
se without remedy. It was earnestly
in the argument here that such a
ee is not remediless if the note secured
nortgage is further secured by the in-
nt of a solvent person other than the
or. We cannot assent to the correct-
this proposition. If, in a contest be-
mortgage holder and another cred-
he mortgagor, such holder is, relative-
e proceeds of the property of the com-
otor, without remedy except by a re-
the mortgage lien, this is enough to
im to prevail, provided, as between
claimants, viewed solely with refer-
such proceeds, he has the superior
We have not overlooked the equi-
le that a creditor holding two liens,
orcement of either of which would re-
the satisfaction of his claim, may, at
ance of another creditor of the same
be compelled to make his money out
roperty covered by one of the liens,
e will not thereby be injured, and
is is essential to the protection of
r creditor. This rule, however, ap-
ly where the two securities held by
itor first mentioned both cover prop-
the common debtor. It cannot be so
d as to force a creditor who, besides
a lien on property of such debtor, is
secured by an indorsement made by a
rson, to abandon his lien and look to
r security in order that another cred-
y realize upon his claim. This is so
if the indorser should be compelled
he debt, he would, in equity, become
tely subrogated to all of the rights
reditor whose claim he satisfied.
e principle announced in the third
e is fully sustained by the decision in
. Gladden, supra, and the reasoning
Justice Blandford in support of the

e fourth headnote rests upon the fa-
ule that one who sells property to an-
nnot thereafter, by any admission or
ion, prejudicially affect the purchas-
hts in the premises. Accordingly,
he holder of a promissory note sells
nsfers it to another, the seller cannot
er defeat the purchaser's right to col-
y falsely representing to a third per-
son that the note had been paid. The person to whom such a representation is made, in acting upon it, does so at his peril. If, in subsequent litigation between himself and the assignee of the note, it becomes essential to establish, as matter of fact, that the note was paid, the third person is, of course, at liberty to do so, by competent evidence; but he will not be permitted, in attempting to establish such fact, to put in evidence against the transferee the mere sayings or declarations of his vendor, made after the latter had parted with all title to and interest in the note. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

DE VAUGHN v. BYROM.

(Supreme Court of Georgia. June 4, 1900.)

APPEAL — BILL OF EXCEPTIONS — PARTIES — EXECUTION SALE—DISTRIBUTION OF PROCEEDS—JUSTICES OF THE PEACE—JURISDICTION—CHATTEL MORTGAGE — FORECLOSURE —LEVY OF EXECUTION.

1. A levying officer, ruled for money, and who is manifestly a mere stakeholder, with no interest in the result of the case, is not a necessary party to a bill of exceptions sued out by one of the contestants for the fund.

2. When property is sold under execution, and the purchaser at first refuses to comply with his bid, but after a second sale of the property, at which he again becomes the purchaser, he pays the amount of his bid at the first sale, as such, and brings a rule against the officer claiming the money under a process in his favor against the person whose property was sold, and the holder of the process under which the sale was had becomes a party to the proceedings, and claims the amount in the officer's hands as the proceeds of the first sale, neither of the parties setting up any claim to the fund under the second sale, as between these parties the right to the fund will be determined as if the second sale had not taken place.

3. A justice of the peace has no authority to foreclose a chattel mortgage when the principal of the debt secured by the mortgage exceeds $100, and an execution issued by such an officer upon an affidavit which recites that fact is a nullity.

4. The issuing of an execution is essential to a complete foreclosure of a chattel mortgage. The making of the affidavit required by law will not, alone, constitute a foreclosure.

5. An unforeclosed mortgage cannot be the basis of a claim for money on a rule to distribute, unless it be shown that the holder of the mortgage would otherwise be remediless.

6. When property which is subject to a mortgage which has not been foreclosed is levied on by other process, the lien of which is junior to that of the mortgage, "the entire estate" cannot, under such levy, be sold, so as to allow the mortgagee to claim the proceeds of the sale, unless the mortgagor, the mortgagee, and the levying creditor consent.

7. The judgment rendered in awarding the fund in controversy in the present case was consistent with the rules above announced.

(Syllabus by the Court.)

Error from superior court, Dooly county; Z. A. Littlejohn, Judge.

Rule by De Vaughn against Bowen, as constable. W. T. Byrom became a party by intervention, claiming the fund. Judgment

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for claimant, and De Vaughn brings error. Affirmed.

Thomson & Whipple, J. W. Haygood, and Jas. K. Hines, for plaintiff in error. J. M. Du Pree and Greer & Felton, for defendant in error.

COBB, J. De Vaughn brought in the justice's court a rule against Bowen, as constable; claiming a fund in the hands of the latter. Byrom became a party to the proceeding by intervention, and set up a claim to the fund. The case was by consent appealed to the superior court, where the issues involved were submitted to the decision of the judge without the intervention of a jury. At the hearing the following facts appeared: On June 18, 1896, Sam Rowell executed and delivered to De Vaughn a mortgage upon a mule to secure a debt of $150, and on January 7, 1897, executed and delivered to Byrom a mortgage upon the same property to secure a debt of $131. On December 28, 1897, Byrom made an affidavit that there was due on his mortgage the sum of $56 principal and $2.90 interest, and upon this affidavit a mortgage execution was issued by a justice of the peace. The property described in the mortgage was seized under this execution, and was, after being duly advertised, sold on a regular constable's sale day to De Vaughn for $65; he being the highest bidder. On the day of sale De Vaughn placed in the hands of the constable a mortgage execution for $106 principal and $11.31 interest, which had been issued by a justice of the peace on an affidavit that there was due on the mortgage above referred to "the sum of one hundred and six dollars and $^{88}/_{100}$ interest to date." There was no agreement between the parties interested that the "entire estate" in the property be sold, but Byrom knew that the mortgage execution of De Vaughn was in the hands of the constable when the property was sold. Both the mortgagees were present at the sale and bid on the property. De Vaughn at first refused to comply with his bid, and the property was readvertised and sold a second time under the mortgage execution of Byrom, as well as an execution in favor of Gabe Lippman, and also an execution which had been issued by the county judge upon the foreclosure of the mortgage held by De Vaughn. De Vaughn became the purchaser at this sale at the sum of $45, but in his testimony he says that he "afterwards paid the money into court that the mule first brought at the first sale, to wit, sixty-five dollars," and the allegations in his petition for the rule distinctly set up a claim to the $65 as the amount of his bid at the first sale, it being, in substance, alleged that the execution in his favor issued by the justice was placed in the hands of the constable, that "the entire interest" in the mortgaged property might be sold; that he would not have bid at all if the equity of reden tion only had been sold; that $65 is the value of the property, and, as his mortg is older in date than the one held by rom, he was entitled to "the amount of bid, to wit, sixty-five dollars," under mortgage execution issued by the cou judge subsequently to the sale; that claimed the fund as the proceeds of the f sale. Byrom, in his intervention, set that he objected to the second sale, and same was had over his protest; that he no connection therewith and claimed noth thereunder; that under the first sale o the equity of redemption was sold, as mortgage of De Vaughn had not been t legally foreclosed, and there was no ag ment between De Vaughn, Rowell, and h self that the entire interest in the prope should be sold. The judge awarded the f to the mortgage execution in favor of Byr and to this ruling De Vaughn excepted.

1. When the case was called in this c a motion was made to dismiss the writ error for the reason that the constable not made a party thereto. It does not app from the record that the constable is at interested in the result of the case. He mere stakeholder. Under such circumst ces the constable is not a necessary party the writ of error. Civ. Code, § 5562; C v. Webb, 70 Ga. 188; Moore v. Brown, Ga. 10, 6 S. E. 833 (Syl., point 2). The ca of Bird v. Harris, 63 Ga. 433, and Brow Wylie, 64 Ga. 435, were decided before passage of the act now embodied in the tion of the Code above cited.

2. It is unnecessary to determine w would be the rights of the parties at inte in this case under the second sale had un the mortgage execution in favor of Byr De Vaughn, in his petition for a rule aga the constable, distinctly sets up a claim the money as the proceeds of the first s and Byrom, in his intervention, in terms pudiates all claim under the second sale, expressly asks that the fund be distribu as the proceeds of the first sale. As no else interested in the matter is before court, the case will be decided upon the sues as made in the pleadings of the par and, as such issues relate exclusively to first sale, they will be determined as if a ond sale had never taken place.

3, 4. A mortgage on personal property is foreclosed until the mortgagee, his agent attorney, makes affidavit of the amount principal and interest due on the mortg annexes such affidavit to the mortgage, the same with an officer authorized to is an execution thereon, and has an execu duly issued. Civ. Code, §§ 2753, 2760. making of the affidavit alone does not stitute a foreclosure. Such being true, mortgage held by De Vaughn was not a f closed mortgage at the date of the first s the execution issued by the justice of

the affidavit thereto annexed being as it appeared on the face of the hat the amount of the principal due ortgage exceeded $100. Even if the had been in other respects regular, ition would have been a nullity, for n that the justice had no jurisdiction atter. See Id. § 2760.

general rule is that an unforeclosed cannot be used as the basis of a money which is in court for dis- Thornton v. Wilson, 55 Ga. 607. tion to this rule is when it appears nortgagee would otherwise be reme- ee National Bank of Athens v. Ex- ank of Athens (Ga.; March term, 3. E. 265, and cases cited. There is n the present case to bring it within tion, and the general rule must be

n property which is subject to a which has not been foreclosed has ed on by other process, the lien of junior to that of the mortgage, the he levy is to seize the equity of re- only, and this interest in the prop- be all that will pass to the pur- See Harwell v. Fitts, 20 Ga. 723; fg. Co. v. Oglesby & Meador Grocery a. 542, 21 S. E. 63. The sale may, be converted into a sale of the en- est in the property by the concur- ent of the mortgagor, mortgagee, ing creditor, and in such case the of the sale will be applied to the of the unforeclosed mortgage accord- s priority. Civ. Code, § 2759. In ce of such consent only the equity ption will pass to the purchaser. e placing of the mortgage in the the levying officer will not dispense necessity of having the three persons o make an express consent that the erest in the property be sold. See Colquitt, 65 Ga. 113; Hynds Mfg. lesby & Meador Grocery Co., supra. as no consent in the present case entire interest in the property be for this reason De Vaughn could the fund in court on his mortgage, as unforeclosed at the date of the The rights of the parties are to be ed as they existed on the day of , as on that day the mortgage of hn was unforeclosed, a subsequent e will not be allowed to place De n any better position, or in any way re with the rights of Byrom as they stablished by the transaction that e on the day of sale.

e being no evidence that Byrom in misled De Vaughn as to his rights, t would be inequitable for him to his strict, legal, technical rights in r, the judge did not err in award- fund to him. Judgment affirmed. stices concurring, except FISH, J., account of sickness.

DEBNAM v. SOUTHERN BELL TEL. CO.

(Supreme Court of North Carolina. June 7, 1900.)

REMOVAL OF CAUSES — FOREIGN CORPORATIONS—ACTIONS AGAINST—FEDERAL QUESTIONS—CONSTITUTIONAL LAW.

1. The refusal to permit a foreign corporation which has become a domestic corporation, in pursuance of Pub. Laws 1899, c. 62, to remove an action against it for personal injuries to a federal court, does not abridge its privileges and immunities as a citizen of the United States, or deprive it of its property without due process of law, and of the equal protection of the laws, as guarantied by the United States constitution.

2. The state court cannot be deprived of its jurisdiction by the mere filing of a petition regular in form for removal to a federal court, but the petition for removal, taken in connection with the complaint, must show a prima facie right of removal, and, if defendant does not show a prima facie right, the state court may retain the cause for further proceedings.

3. Pub. Laws 1899, c. 62, § 1, provides that every foreign telephone company desiring to do business in North Carolina shall become a domestic corporation by filing with the secretary of state copies of its charter and by-laws, duly authenticated. Section 3 provides that, when such corporation has complied with such act, it shall immediately become a corporation of the state, and shall enjoy all the privileges and be subject to the liability of state corporations, as if it had been originally created under the state's laws, and may sue and be sued in the state courts. *Held*, that a foreign telephone company, on compliance with such act, becomes a domestic corporation, and not a mere licensee to do business in the state.

4. A foreign corporation, which has become a domestic corporation by compliance with Pub. Laws 1899, providing the manner in which foreign corporations may become domestic corporations, cannot remove the cause to the United States circuit court when sued by a citizen as a North Carolina corporation on a cause of action which discloses no federal questions.

Faircloth, C. J., and Furches, J., dissenting.

Appeal from superior court, Durham county; Brown, Judge.

Action by Walter K. Debnam against the Southern Bell Telephone Company. From an order denying its petition for removal to the circuit court of the United States, defendant appeals. Affirmed.

Robert C. Strong, for appellant. Boone, Bryant & Biggs, for appellee.

DOUGLAS, J. This is an action brought to recover damages sustained by the plaintiff through the alleged negligence of the defendant. In apt time, and without filing an answer, the defendant filed its petition for removal to the circuit court of the United States. The complaint alleges "that the defendant is a corporation duly organized and is doing business in North Carolina, and has become and is a domestic corporation under the laws of said state." There is no other allusion, express or implied, in the complaint as to its having ever been incorporated in any other state.

The affidavit upon which the petition is

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based is as follows: "O. A. Dozier, first being duly sworn by me, maketh oath that the Southern Bell Telephone & Telegraph Company is a corporation under and by virtue of the laws of the state of New York, and that none of its incorporators, stockholders, or directors are residents or resident of the state of North Carolina, or citizens or citizen of said state of North Carolina, nor are any citizen or citizens of the state of North Carolina interested in said company. Further, that none of said incorporators, or their successors or stockholders or directors, have ever been citizens or citizen or residents or resident of said state of North Carolina, nor have any citizen or citizens of North Carolina ever had an interest in said corporation. (2) That having very valuable property in North Carolina at the present time, and at and before and after the meeting of the general assembly of North Carolina, during the year A. D. 1899, it was forced, for the protection of its said property, which it had built and constructed in said North Carolina under authority of its laws, to file its charter under the direction of 'An act to provide a manner in which foreign corporations may become domestic corporations,' ratified by said general assembly on the 10th day of February, A. D. 1899; further, that it submits that the filing of its said charter, as aforesaid, did not operate to make it a citizen of the said state of North Carolina. O. A. Dozier, Manager."

The act referred to is chapter 62, Pub. Laws 1899, ratified on the 10th day of February, 1899. The essential features of said act are as follows:

Section 1 provides that every telegraph, telephone, express, insurance, steamboat, and railroad company organized under the laws of any other state or government, desiring to carry on any business in this state, shall become a domestic corporation by filing in the office of the secretary of state copies of its charter and by-laws, duly authenticated.

Section 2, that all parts of charter or by-laws in contravention of the laws of this state shall be null and void in this state.

"Sec. 3. That when any such corporation shall have complied with the provisions of this act above set out, it shall thereupon immediately become a corporation of this state, and shall enjoy the rights and privileges and be subject to the liability of corporations of this state the same as if such corporation had been originally created by the laws of this state. It may sue and be sued in all courts of this state and shall be subject to the jurisdiction of the courts of this state as fully as if such corporation were originally created under the laws of the state of North Carolina.

"Sec. 4. That on and after the first day of June, eighteen hundred and ninety-nine, it shall be unlawful for any such corporation to do business or to attempt to do business in this state without having fully complied with the requirements of this act."

Section 5 provides the penalty for violating any provision of this act and the method of its collection.

"Sec. 6. No such foreign corporation is allowed to sue in the courts of this state unless domesticated.

"Sec. 7. No such foreign corporation mentioned in the preceding section of this act, shall be allowed to enter into a contract in the state of North Carolina on or after the first day of June, eighteen hundred and ninety-nine, nor shall any such contract heretofore or hereafter made or attempted to be made and entered into by such corporation in the state of North Carolina be enforced by such corporation unless such corporation shall on or before the first day of June, 1899, become a domestic corporation under and by virtue of the laws of North Carolina."

Section 8 prescribes the penalty for any foreign corporation doing business in this state without domestication.

The court below denied the defendant's motion to remove on the grounds "(1) that the petition is defective on its face; (2) that, considering the affidavit aforesaid filed by defendant along with its petition, the defendant is a corporation of the state of North Carolina."

The defendant excepted, and appealed, assigning, among other errors, including that of citizenship, the following: That the "opinions, conclusions, and adjudication of the court below were erroneous, (a) the same being repugnant to article 1, § 8, of the constitution of the United States," as well as various statutes enumerated; "(b) also repugnant to article 14, § 1, of the constitution of the United States, in that the state of North Carolina, in enforcing the said 'An act to provide a manner in which foreign corporations may become domestic corporations,' abridges the privileges and immunities of this defendant, a citizen of the United States, and deprives this defendant of its property without due process of law, and deprives it of the equal protection of the laws; wherein was drawn in question the validity of the said statutes and authority exercised thereunder, and the validity of a statute of said North Carolina, on the ground of repugnancy to the constitution of the United States; and also the construction of above-named clauses especially, and other clauses of said United States constitution and said United States statutes."

The question of diverse citizenship is the only one presented by the record, but we will briefly notice the remaining contentions.

Article 1, § 8, Const. U. S., is a very comprehensive section, and, as the particular repugnancy was not pointed out to us on the argument, we are at a loss how to answer it further than to say we see no merit in the defendant's contention. We cannot

nd how a refusal to permit a do-
orporation to remove an action for
injury "abridges the privileges and
ies of this defendant" as "a citizen
Inited States." We are equally un-
admit that a trial in the courts of
e ipso facto "deprives this defend-
ts property without due process of
deprives it of the equal protection
aws." We presume that these as-
ts of error are intended to be taken
ction with those that follow, and are
legal inferences from the alleged
removal. The questions argued
se arising from alleged diverse citi-
and the supposed existence of such
l question as would prevent our
upon the legality of removal.
ut just to say that they were ably
both orally and by brief. The de-
contends that, while the cause of
oes not raise a federal question in
, the petition for removal does raise
l question, to wit, the right of re-
which, of itself, ousts the jurisdiction
tate courts. In other words, that,
er what may be the nature of the
defendant can absolutely stop all
proceedings in the state courts by
petition for removal, and that the
urts cannot pass, even in the first
upon their own jurisdiction, provid-
that the petition is regular in form,
r how apparent may be its essential
validity.
nnot think that this is the law. No
s a right to abandon its own lawful
ion when properly invoked, any more
has to infringe upon the exclusive
ount jurisdiction of another tribunal.
e court clearly has original jurisdic-
the action at bar, subject to be de-
y the defendant's right of removal,
right exists. Such existing right of
may be waived by the defendant, or,
t is lost if not claimed in apt time
trict accordance with the terms of
ute. The petition, taken in connec-
the complaint, must show a prima
ht of removal; in which event it
luty of the state court to grant
r of removal, and stay all further
ngs. If the defendant does not show
facie right, it is the duty of the state
retain the cause for such further
ngs as may be proper. It is not a
of discretion for either tribunal,
of absolute right, involving the vital
jurisdiction; and the relinquishment
iction by one, or its assumption by
r, would not confer the right of re-
it did not already exist. It would
at, for the purposes of the motion,
facts are properly determinable by
ral courts; but the principle is fully
ed by the supreme court of the
States that "the state court is not
to let go its jurisdiction until a
case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right." Removal Cases, 100 U. S. 457, 474, 25 L. Ed. 593; Amory v. Amory, 95 U. S. 186, 24 L. Ed. 428; Yulee v. Vose, 99 U. S. 539, 545, 25 L. Ed. 355; Stone v. South Carolina, 117 U. S. 430, 462, 6 Sup. Ct. 799, 29 L. Ed. 962; Howard v. Railway Co., 122 N. C. 944, 953, 954, 29 S. E. 778; Bradley v. Railroad Co., 119 N. C. 744, and Appendix, 918, 26 S. E. 169. It has also been held that "the circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim." Tennessee v. Bank of Commerce, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511. In this case occurs the following significant words, on page 462, 152 U. S., page 657, 14 Sup. Ct., and page 514, 38 L. Ed.: "The change is in accordance with the general policy of these acts, manifest upon their face and often recognized by this court, to contract the jurisdiction of the circuit courts of the United States."

If the state court wrongfully denies the petition, the defendant can remain and defend himself in the state court without losing his right of removal. He can appeal from such denial, and can eventually take his writ of error to the supreme court of the United States, where the question will be finally determined. Until such determination we cannot be required to surrender what appears to us to be our rightful jurisdiction. What, under such circumstances, may be the rights and duties of the parties in the federal courts it is not for us to determine.

In the case at bar there are really no disputed facts, the only question being the construction of the said act of February 10, 1899. We must therefore determine (1) whether said statute has the effect of making the defendant a domestic corporation as distinguished from a mere licensee; and (2) what is its further effect under the United States statutes of removal. It is well settled that a corporation, being a mere creature of the law, has no legal existence outside of the sovereignty that created it, except in so far as it may be recognized by the so-called "law of comity." The rule of comity —for it is nothing more than a rule—is of such general acceptance as to carry with it the presumption of its existence; but this is a mere presumption, which may be rebutted by any act of the legislative power which may amount to its express of implied repudiation. Foreign corporations may be entirely excluded by any state, or may be admitted upon any terms and conditions that are not repugnant to the constitution and laws of the United States.

The nature and status of a foreign corporation are so well stated in Paul v. Virginia, 75 U. S. 168, 19 L. Ed. 357, that our own

views can best be expressed by an extended quotation. The court says on page 180, 75 U. S., and page 360, 19 L. Ed.: "But the privileges and immunities secured to citizens of each state in the several states, by the provision in question, are those privileges and immunities which are common to the citizens in the latter states under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other states by this provision. It was not intended by the provision to give to the laws of one state any operation in other states. They can have no such operation, except by the permission, express or implied, of those states. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other states to their enjoyment therein be given. Now, a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in Bank v. Earle, 13 Pet. 519, 10 L. Ed. 274, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence, even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely. They may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion. If, on the other hand, the provision of the constitution could be construed to secure to citizens of each state in other states the peculiar privileges conferred by their laws, an extraterritorial operation would be given to local legislation utterly destructive of the independence and the harmony of the states. At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises could be exercised in other states without restriction, it is easy to see that with the advantages thus possessed the most important business of those states would soon pass into their hands. The principle business of every state would, in fact, be controlled by corporations created by other states."

This able opinion, coming, without dissent, from the court of last resort, clearly lays down the underlying principles originating and governing the statute now under consideration. The dangers therein pointed out have become too fully realized to be longer ignored, and are greatly aggravated by the open policy adopted by certain states of chartering corporations with almost unlimited powers for the sole purpose of transacting business in other states. So far has this gone that we have merchants in this state who, having failed as a partnership, subsequently incorporated under the laws of another state, and immediately resumed their same old business, at the same old stand, in the state of their life-long residence, with all the privileges and immunities of a foreign corporation.

It seems to be well settled that while a state can, in its discretion, absolutely prohibit a foreign corporation from transacting any business within its borders, it cannot impose conditions that are repugnant to the constitution and laws of the United States. Such would be any provision requiring a foreign corporation to surrender or agree to waive its right of removal to the federal courts as a condition precedent to obtaining license. Nor can a state forbid a foreign corporation, as such, from removing its causes when otherwise entitled to do so. Insurance Co. v. Morse, 20 Wall. 445, 456, 22 L. Ed. 365; Pacific Co. v. Denton, 146 U. S. 202, 207, 13 Sup. Ct. 44, 36 L. Ed. 377; Barron v. Burnside, 121 U. S. 186, 200, 7 Sup. Ct. 931, 30 L. Ed. 915, and cases therein cited.

Construing the act of February 10, 1899, now under consideration, as a North Carolina statute, it is clear to us that the legislative intent was not to grant a mere license under which foreign corporations might do business in this state, but to require all such corporations to become domestic corporations, either by reincorporation or adoption. Whatever the process may be called, the intent of the act, as well as its legal effect, was to make all corporations complying with its conditions domestic corporations of the state of North Carolina. Its effect was to charter, and not to license.

But it is argued that the act has attempted to create a domestic corporation, not out of natural persons, but out of a foreign corporation, that has no natural or legal existence in this state. This is only partially correct. Whatever may be the wording of the act, its effect, as well as legal intent, is to create a domestic corporation out of the stockholders

oreign corporation. Perhaps it would er to say that it enables the stock- of a foreign corporation to become stic corporation, with the same capi- ck and identical powers, privileges, ligations.

n, it is said that the act requires a corporation to file its foreign charter -laws; but this is done, not as recog- the legal validity of such charter, but itely ascertain the powers to be con- which can never exceed those per- by the constitution and laws of this In fact, as a foreign corporation, hav- legal existence in this state, can never thing more than a licensee, express or , it would seem that it could become stic corporation only by some form of n. Because, in building a house, a ay use some timbers hewn by some e, he is none the less the builder of use; and the defendant is none the North Carolina corporation because vs permit it to use its New York char- l by-laws simply for the purpose of ing the extent of its powers acquired ue of our incorporation.

ay be said that this is an artificial ction, but so is the entire existence rporation. In Railroad Co. v. Wheeler, , 286, 297, 17 L. Ed. 130, Chief Jus- aney, speaking for the court, says: true that a corporation by the name yle of the plaintiff appears to have hartered by the states of Indiana and clothed with the same capacities and , and intended to accomplish the same , and it is spoken of in the laws of tes as one corporate body, exercising ne powers and fulfilling the same du- both states. Yet it has no legal ex- in either state, except by the law of te. And neither state could confer on rporate existence in the other, nor add liminish the powers to be there exer- It may, indeed, be composed of and nt, under the corporate name, the same persons. But the legal entity or per- hich exists by force of law, can have stence beyond the limits of the state ereignty which brings it into life and it with its faculties and powers."

ashua & L. R. Corp. v. Boston & L. ., 136 U. S. 356, 373, 10 Sup. Ct. 1004, Ed. 363, the court said: "Identity of powers, and purposes does not create ntity of origin or existence, any more ther statutes, alike in language, passed erent legislative bodies, can properly l to owe their existence to both. To tatute, and to the corporation created there can be but one legislative pater-

ourse, all such chartered rights are the will of the legislature, and under 8, § 1, Const., "may be altered from time or repealed." A mere license is admittedly revocable at any time, not reaching the dignity of a charter.

Having thus decided that the act in question does not license, or pretend to license, but in legal intention and effect creates, a domestic corporation, we come to the final question, whether a corporation so domesticated can remove an action into the federal courts solely by virtue of its prior incorporation by some other state. In the case at bar the defendant voluntarily took advantage of the act, and became a domestic corporation, certainly as far as that act could make it so. It held itself out to the people of North Carolina as a domestic corporation, in order to obtain their business, and at the same time evade the penalties attaching to the transaction of any business by a foreign corporation after all comity had been withdrawn by legislative authority. The plaintiff has sued the defendant as a domestic corporation of this state, and in that capacity only, and states a cause of action that presents no element whatsoever of a federal question. He simply seeks to recover damages for personal injuries inflicted upon him by the defendant's servants, who dropped an iron bar upon his head while he was walking the public streets of an incorporated city. Admitting that the defendant exists in a dual capacity as a corporation under the laws of New York as well as of North Carolina, the plaintiff elected to sue it in the latter capacity. In fact, we do not see how he could well have sued it in any other capacity. Forbidden by law to do any business as a foreign corporation, and holding itself out as a domestic corporation, was not the plaintiff forced to presume that he was injured by the defendant in the transaction of its business as a domestic corporation? Is it not a legal presumption that the defendant was acting in that capacity in which alone it could lawfully transact any business? It seems that if the defendant had, as plaintiff, been seeking to enforce a lawful cause of action, it might have brought suit in the federal courts by electing to sue as a New York corporation. We do not see how it could have sued in the federal courts as a domestic corporation, nor could it have brought suit in the state courts as a foreign corporation, because, as a purely foreign corporation, it has now no legal existence in the state of North Carolina.

Recognizing the fact that this is a question whose ultimate determination rests with the supreme court of the United States, we have carefully examined its reports, and have endeavored to reconcile our decision with its opinions. We think they are entirely consistent. The facts in the case at bar seem identical with those in Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. Ed. 518. The headnote of that case, written by Mr. Justice Gray, who also wrote the opinion, is as follows: "The Memphis &

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Charleston Railroad Company is made, by the statutes of Alabama, an Alabama corporation; and, although previously incorporated in Tennessee also, cannot remove into the circuit court of the United States a suit brought against it in Alabama by a citizen of Alabama." The opinion says, on page 585: "The defendant, being a corporation of the state of Alabama, has no existence in this state as a legal entity or person, except under and by force of its incorporation by this state, and, although also incorporated in the state of Tennessee, must, as to all its doings within the state of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States,"—citing Railroad Co. v. Wheeler, 1 Black, 286, 17 L. Ed. 130; Railway Co. v. Whitton, 13 Wall. 270, 283, 20 L. Ed 571.

If this be the law, then, we are compelled to hold in the case at bar that the defendant, being a corporation of the state of North Carolina, has no existence in this state as a legal entity or person, except under and by force of its incorporation by this state; and, although also incorporated in the state of New York, must, as to all its doings within the state of North Carolina, be considered a citizen of North Carolina, which cannot, when sued by another citizen of North Carolina, remove the cause into the courts of the United States. It is rare that a precedent so exactly fits that the case under consideration can be decided by the adoption of a single sentence from the opinion of the cited case with a mere change of names. Has that case been overruled or modified? Not so far as we can see; certainly not in express terms, nor by necessary implication, in any case that has been cited to us or that we have been able to find. On the contrary, it has been expressly cited with approval in numerous cases, including Railway Co. v. James, 161 U. S. 545, 559, 16 Sup. Ct. 621, 40 L. Ed. 802, and Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 581, 19 Sup. Ct. 817, 43 L. Ed. 1081, so strongly relied on by the defendant. The last case, which is the latest utterance of the supreme court upon the subject, was written by Mr. Justice Gray, who also wrote the opinion in Memphis & C. R. Co. v Alabama, supra. Th's learned judge surely would not have expressly cited his own opinion with approval if he had intended to overrule it by implication. On page 562, 174 U. S., page 821, 19 Sup. Ct., and page 1087, 43 L. Ed., he says: "This court has often recognized that a corporation of one state may be made a corporation of another state by the legislature of that state, in regard to property and acts within its territorial jurisdiction,"—citing Railroad Co. v. Wheeler, 1 Black, 286, 297, 17 L. Ed. 130; Railroad Co. v. Harris, 12 Wall. 65, 82, 20 L. Ed. 354; Railway Co. v. Whitton, 13 Wall. 270, 283, 20 L. Ed. 571; Railroad Co. v. Vance, 96 U. S. 450, 457, 24 L. Ed. 752; Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Ct. 432, 27 L. Ed. 518; Clark v. Ba 108 U. S. 436, 451, 452, 2 Sup. Ct. 878, Ed. 780; Stone v. Trust Co., 116 U. S 834, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed Graham v. Railroad Co., 118 U. S. 16 6 Sup. Ct. 1009, 30 L. Ed. 196; M Adm'r v. Railroad Co., 151 U. S. 673, 6 Sup. Ct. 533, 38 L. Ed. 311. And aga the same page: "But this court has rep ly said that, in order to make a corpo already in existence under the laws state a corporation of another state, 'th guage used must imply creation or ad in such form as to confer the power u exercised over corporations by the st by the legislature, and such allegiance state corporation owes to its creator.' mere grant of privileges or powers to it existing corporation, without more, do do this."

This clear and concise statement of th would meet our unqualified approval, if it had come from a different source plying this rule in its strictest form, clearly of opinion that the act now unde sideration does not pretend to be a grant of privileges or powers," but is, gal intent and effect, "a creation or ad in such form as to confer the power u exercised over corporations by the st by the legislature, and such allegiance state corporation owes to its creator.' act says, in express terms, "that ever phone * * * company incorporate ated and organized under and by vir the laws of any state or government than that of North Carolina, desiring t property or to carry on business or to cise any corporate franchise whatsoe this state, shall become a domestic corpo of the state of North Carolina by filing "that when any such corporation shal complied with the provisions of this act set out, it shall thereupon immediately b a corporation of this state and shall the rights and privileges and be subj the liability of corporations of this st same as if such corporation had been inally created by the laws of this Acts 1899, c. 62, §§ 1, 3.

The distinction between the case following the opinion in Memphis & Co. v. Alabama, and the case of Lou N. A. & C. Ry. Co. v. Louisville Tru seems to be that in the last case the co ant, being a corporation of the state diana by original creation, even if also poration of Kentucky by adoption, ele sue in its former character. If it had to sue as a Kentucky corporation, or so had elected to sue it in such capacity, could not have been brought in the courts within the state of Kentucky seems to appear from the opinion of th on page 563, 174 U. S., page 821, 19 S and page 1087, 43 L. Ed., where the fo language is used: "But a decision

whether the plaintiff was or was
rporation of Kentucky does not ap-
this court to be required for the dis-
of this case, either as to the jurisdic-
as to the merits. As to the jurisdic-
being clear that the plaintiff was first
a corporation of the state of Indiana,
it was afterwards created a corpora-
he state of Kentucky also, it was and
l, for the purposes of the jurisdiction
ourts of the United States, a citizen
na, the state by which it was orig-
eated. It could neither have brought
a corporation of both states against
ation or other citizen of either state,
d it have sued or been sued as a cor-
of Kentucky, in any court of the
States."

ase of Memphis & C. R. Co. v. Ala-
so completely "on all fours" with
e at bar, and has been so often
recently approved, that further cita-
em unnecessary; but the same prin-
clearly enunciated in Martin's Adm'r
oad Co., 151 U. S. 673, 14 Sup. Ct.
L. Ed. 311. There the court says on
, 151 U. S., page 535, 14 Sup. Ct., and
, 38 L. Ed., that "a railroad corpora-
ated by the laws of one state may
n business in another, either by vir-
being created a corporation by the
the latter state also, as [citing cases],
irtue of a license, permission, or au-
granted by the laws of the latter
act in that state under its charter
e former state [citing cases]. In the
ernative, it cannot remove into the
court of the United States a suit
against it in a court of the latter
a citizen of that state, because it is
n of the same state with him [citing
s & C. R. Co. v. Alabama]; in the sec-
rnative, it can remove such a suit, be-
is a citizen of a different state from
ntiff."

leading text writers take the same
the question. Thompson, in his elab-
ork on Corporations (volume 6, §
says: "We have several times had
to examine into the constitution of
cies of corporation, with the conclu-
t it is a domestic corporation in each
tates by whose legislation, in concur-
ith that of other states, it has been
This being so, when it is sued in a
any one of such states by a citizen
it is not entitled to remove the cause
rt of the United States on the ground
se state citizenship." To the same
re Clark, Corp. §§ 36-38; Mor. Priv.
999, 1001; Desty, Fed. Proc. p. 321;
Dill. Rem. Causes, § 101.

are many other cases sustaining the
we have taken, but those above cited
arefully considered and ably written,
ch full citation of authority, that fur-
aboration by us seems useless. We
he opinion that as the defendant has
become a domestic corporation of the state of North Carolina, and in contemplation of law a citizen thereof, and as the plaintiff has sued the defendant as a North Carolina corporation upon a cause of action which discloses no federal question whatever, the case cannot be removed into the circuit court of the United States. Therefore the judgment of the court below is affirmed. Affirmed.

FURCHES, J. It is with hesitation that I dissent from the well-considered opinion of the court, especially so when, personally, I have no objection to the conclusion arrived at. And it may appear strange that I dissent for the reason that I have an entirely different conception of the case from that of the court. If I agreed with the court as to who the defendant is, I would agree with the court in its conclusion.

I do not propose to enter into a discussion of the case, but simply to state my position, and some of the reasons for my not agreeing with the court; and it is to be regretted that a case of so much importance as this should be presented in such a way as to leave any doubt as to the very question upon which I think the appeal depends.

Is the New York corporation or the North Carolina corporation the defendant? The summons does not say which is the defendant. The complaint does not say in direct terms whether it is the New York corporation or the North Carolina corporation. But it seems to me that by direct implication it does say that it is the New York corporation. It says "that the defendant is a corporation duly organized and is doing business in North Carolina, and has become and is a domestic corporation under the laws of said state." It is plainly stated that the defendant is a corporation, and that it (the defendant) has become a domestic corporation under the laws of North Carolina. So the thing sued existed before it became domesticated. It is not the thing created by domestication that is sued, but the thing that existed before, and has become domesticated. But, if there was any doubt as to this, it seems to me to be made plain and certain by the affidavit of O. A. Dozier, which was received and considered by the court in passing upon the motion to remove. He says "that at the time said suit was begun and at the present time the defendant was and still is a corporation chartered by, and existing under and by virtue of, the laws of the state of New York." And the court in passing upon the motion to remove says "that considering the affidavit aforesaid (Dozier's) filed by the defendant, along with its petition, the defendant is a corporation of the state of North Carolina." These facts stated in the affidavit were not denied, were considered by the court, and must be taken as true. These facts being true it seems to me settles the question, and shows that it was the New York corporation which was sued. In other words, there was a latent ambiguity (two

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John Smiths), and the affidavit showed it was the New York John which was sued. But, as it has become domesticated under the act of 1899, the judge held, as a matter of law, that the New York corporation was not entitled to have the case removed, because it had become a domestic corporation. In this I think he was in error.

It is stated in the opinion of the court that it must have been the North Carolina corporation which was sued, as it is admitted that the defendant was doing business in North Carolina at the time of the injury, and that the New York corporation had no right to do business in North Carolina after the act of 1899 went into effect. I submit that this must be an error. It is true that this act did take from the defendant and all other foreign corporations their comity,—their right to engage in business in this state,—unless they complied with that act by becoming domesticated. But when they did this their right of comity was restored, and the conclusion of the court is incorrect.

I agree that a foreign corporation may become a North Carolina corporation by complying with the act of 1899. Indeed, there must be a foreign corporation before this act can operate. It is then made a North Carolina corporation, not by creation, but by adoption. But this new corporation has a new and distinct entity from the New York corporation. It does not bring the New York corporation into North Carolina; it cannot do this, because a corporation can have no legal existence or authority outside of the state that gives it corporate life, except by the law of comity. My opinion is that, had the plaintiff sued the North Carolina corporation, it would not have been entitled to removal, based on diverse citizenship. But, as the plaintiff chose to sue the New York corporation, the defendant was entitled, as I think, to an order of removal.

FAIRCLOTH, C. J., also dissents.

FAISON v. GRANDY et al.

(Supreme Court of North Carolina. June 7, 1900.)

USURY—REFEREE'S REPORT—CONSTRUCTION—PAYMENT TO PAYEE—ALLOWANCE AGAINST INDORSEE—PAYOR'S AGREEMENT—EFFECT.

1. Where a referee's report shows a certain excess claimed by a payee of a note over the amount which the payor conceded to be due to have consisted of "improper charges," and a claim for money paid the payor's creditor above what was actually paid, and the payor, having paid the excess, alleges usury, and such excess is not otherwise explained, except as a usurious charge growing out of the payor's necessities, the report will be treated as a finding of usury.

2. Code, § 3835, provides that receiving, reserving, or charging an illegal rate of interest shall be deemed a forfeiture of the entire interest of the debt. Acts 1895, c. 69, allows a party charged with usurious interest to plead the fact as a counterclaim. *Held*, that a payor paying interest to his payee which was in fact usurious was entitled to have the same ... lowed to him on an accounting with the ... dorsee of the note, notwithstanding the pay... acquiesced at the time in the amount claim... by the payee, for the purpose of getting t... indorsee to take the note.

Appeal from superior court, Northampt... county; Brown, Judge.

Action by F. S. Faison against C. ... Grandy and others for an accounting. Fr... a judgment in favor of defendants, plaint... appeals. Modified.

R. B. Peebles and MacRae & Day, for ... pellant. T. N. Hill, R. O. Burton, and Prud... & Pruden, for appellees.

FAIRCLOTH, C. J. The transactions ... of which this litigation comes originated ... 1872, when the plaintiff borrowed mon... from Arps and secured its payment; and s... claim became the property of the Farme... Loan & Trust Company in 1873, with ... agreement to advance money and suppl... to the plaintiff. In 1881 the trust compa... transferred its claim to Ann D. Grandy a... William Selden, and in 1885 and 1893 ... latter named parties transferred their clai... to the defendants Grandy & Sons, they p... ing the face value of the same. During th... transactions numerous payments, advanc... and charges were made; and on March ... 1893, the plaintiff instituted this act... against defendants for an account of ... aforesaid dealings with Grandy & So... There was a reference, and the referee, ... consent, was to pass on the issues raised ... the plea of usury, and report his findi... and rulings on the same with his accou... In his report the referee finds that in Mar... 1876, the books of the trust company show... that the plaintiff was due $14,421.74 for ... vances, supplies, money, and interest a... per cent, "but in fact the said Faison o... owed the said company $13,782.81; the dif... ence being made up of improper charg... and the amount advanced to pay said A... debt being charged at more than was ... vanced,"—the difference being on March ... 1876, $638.95. The final judgment appea... from, in favor of defendants, was $12,234... with interest from August 1, 1897, and t... the plaintiff is the owner in fee of the la... described in the pleadings, subject to ... aforesaid lien of defendants. The refe... finds that in March, 1876, there was a c... troversy between the plaintiff and the tr... company as to the true amount due the c... pany,—he claiming that he was charged ... much; and, after a futile attempt to a... trate, the plaintiff agreed to pay the s... sum of $14,421.74 for the purpose of gett... the defendants "to protect him in the p... ment of said amount found to be due." ... referee also finds that the defendants Gra... & Sons knew of this controversy, and of ... settlement and agreement finally reach... and that the defendants had no interest ... the amount due by the plaintiff to the tr...

company. His honor approved the findings of facts as reported by the referee. One of the plaintiff's exceptions is that several facts are found without any evidence to support them. This exception required a close examination of much of the evidence, and, after making the examination, we are unable to sustain the exception and say there was no evidence in support of the facts found. The referee fails to find, in terms, whether the difference between the amount due and the amount claimed and received by the trust company was usury, but calls it "improper charges," and an amount paid Arp more than was advanced. From the issue of usury raised in the pleadings, the findings of the referee, and the arguments by brief, we are driven to the conclusion that said difference of $638.93 was a usurious charge. The amount paid Arp and the trust company over the amounts in fact due are unexplained, except as a usurious charge growing out of the necessitous situation of the plaintiff.

His honor adjudged that, under the facts found, the plaintiff is precluded from setting up the plea of usury as against said $10,000 note. In this conclusion he was in error. Prior to our statute in Code, § 3835, and repeated in the Acts of 1895, c. 69, a usurious contract worked a forfeiture of both the interest and the debt; and it was stated in Coor v. Spicer, 65 N. C. 401, that, under the operation of such a statute, innocent and meritorious holders were obliged to suffer, and so all the authorities agree. Our statutes at present declare that taking, receiving, reserving, or charging an illegal rate of interest shall be deemed a forfeiture of the entire interest of the debt; and the Acts of 1895, c. 69, expressly allows the party charged with usurious interest to plead the fact as a counterclaim. The forfeiture now is the interest only, whereas before 1876 the forfeiture was the interest and the debt, because the contract was void. The forfeiture of interest is the declaration of the law, and it accompanies the debt, into whosesoever hands it may come. The injured party is not estopped or precluded from making his plea by reason of any agreement made under the stress of bad weather, because the lawmaking power has declared otherwise on the subject of charging interest. The forfeiture is the decree of the law. This question has been considered and decided heretofore in the following cases, where the reasons and authorities are collected: Ward v. Sugg, 113 N. C. 480, 18 S. E. 717, 24 L. R. A. 280; Bank v. McNair, 116 N. C. 550, 21 S. E. 389; Smith v. Association, 119 N. C. 249, 26 S. E. 41. The plaintiff is entitled to be credited with the difference in the matters between the plaintiff and the trust company, as shown in the referee's report, with interest thereon. In all other respects the judgment is affirmed. As the case is retained for further directions, no judgment will be entered in this court. Error.

WHEELER v. GIBBON.

(Supreme Court of North Carolina. June 5, 1900.)

JOINT NEGLIGENCE—PROXIMATE CAUSE—INSTRUCTIONS—ORDINARY CARE—REVIEW.

1. Plaintiff, in attempting to cross a city street in a violent storm, held his umbrella at his side, pointing down the street in the direction from which the storm was coming, thereby obstructing his view in that direction, and was knocked down and injured by defendant driving rapidly up the street with his oilcloth up in front of his buggy. *Held* that, the jury having found joint negligence, the question whether the defendant, by exercising ordinary care, might have avoided the injury, was one of fact for the jury, and hence a refusal to instruct that plaintiff's negligence was the proximate cause of the injury was proper.

2. The question as to whether defendant, by the exercise of ordinary care, might have seen plaintiff in time to have avoided the injury, being one of fact, a finding in plaintiff's favor thereon under proper instructions cannot be reviewed.

Appeal from superior court, Mecklenburg county; Coble, Judge.

Action for injuries by W. M. Wheeler against R. L. Gibbon. Defendant appeals. Affirmed.

Burwell, Walker & Cansler, for appellant. Jones & Tillett, for appellee.

CLARK, J. The plaintiff started to cross Tryon street, in Charlotte, at a crossing. A violent storm of wind and rain suddenly sprang up. He looked down the street just before crossing, in the direction from which the storm was coming, and saw "no moving thing." He placed his umbrella on that side to keep off the rain, and tried to cross. While his view was thus obstructed, and when he had almost reached the opposite sidewalk, the hoof of the defendant's horse, which was being driven up the street, going in the same direction as the storm, shot forward under the umbrella as he held it down, striking him on the knee, and immediately after the front wheel of the buggy struck him. The jury, in response to the first issue, found that the plaintiff was injured by the negligence of the defendant, and, in response to the second issue, that plaintiff was guilty of contributory negligence. This disposes of much of the argument that was submitted, and clearly justifies the submission of the third issue (Baker v. Railroad Co., 118 N. C. 1015, 24 S. E. 415, and cases cited), to which defendant excepted: "Could the defendant, by the exercise of ordinary care, have avoided the injury to the plaintiff, notwithstanding the negligence of the plaintiff?" This was the crucial issue of fact, and was peculiarly for the consideration of the jury, for we cannot agree with the appellant that the court could instruct the jury that on such a state of facts, in law, the proximate cause of injury was due to the plaintiff. That is the very fact which the jury, not the court, must de-

termine. The negligence may have been concurrent, or the last negligence may have been the plaintiff's, or, notwithstanding the negligence of the plaintiff, the defendant could, with the exercise of ordinary care, have prevented his horse striking, and his conveyance running over, the plaintiff. The jury, and the jury alone, were competent to determine the fact, for there was evidence for their consideration. The plaintiff was crossing, with his head tucked behind his umbrella. This was negligence. The defendant was driving rapidly,—"ten miles an hour, or at top of his speed,"—and with his oilcloth up in front of the buggy, and this was negligence. He was driving in the same direction with the storm, and was in a vehicle, and therefore could keep a better lookout. Then his horse and vehicle could do damage to a foot passenger (and did), while the foot passenger was not likely to run into him and do damage, and the defendant should have kept a lookout correspondingly careful to avoid injury. This is not like High v. Railroad Co., 112 N. C. 386, 17 S. E. 79, where it was not negligence for the engineer to suppose that a woman, even though wearing a poke bonnet, would hear and see the train, and get off the narrow railroad track; but here the defendant could not suppose that the plaintiff, crossing a street in a heavy storm, with his head behind his umbrella, would see or hear his buggy in time to get out of the way. He had no right to act on that presumption, as the engineer was justified in doing in High's Case. The train had the superior right of way. The defendant had not. The jury, under proper instructions, have found that if the defendant, himself driving negligently, had used ordinary care, he could have seen the plaintiff negligently crossing the street in a pelting storm, with his head hid behind his umbrella, in time to avoid running over him. This was a pure question of fact, and the court cannot review it. Citation of cases, far and near, more or less analogous, would throw no light upon the solution of the question of fact so plainly and so clearly set forth in the third issue for the jury to answer. No error.

STATE v. CHESTNUTT.

(Supreme Court of North Carolina. June 5, 1900.)

ASSAULT — VERDICT OF CONVICTION — VACATION BY ORDER — RESCISSION DURING TERM—RULING NOT REVIEWABLE.

Where a trial court sets aside a verdict convicting defendant of an assault, and afterwards, and at the same term, rescinds the order, and leaves the verdict as found by the jury, such action is not reviewable, in the absence of a showing of gross abuse of discretion, the first order not having the effect of discharging the defendant.

Appeal from superior court, Duplin county; Bryan, Judge.

Alston Chestnutt was convicted of an assault, and he appeals. Affirmed.

James O. Carr, for appellant. The Attorney General, for the State.

FAIRCLOTH, C. J. At September, 1899, term of Duplin superior court, the defendant was convicted of an assault, and the verdict was set aside, and a new trial ordered. Afterwards, during the same term, the order setting aside the verdict was stricken out, and the verdict left as found by the jury, to which the defendant excepted, and a motion was again made to set aside the verdict. The motion was continued to the following December term, when the court refused to set aside the verdict, and the defendant appealed.

A court has power during the term to correct, modify, or recall an unexecuted judgment in either criminal or civil cases. State v. Warren, 92 N. C. 825. The proceedings of a court are in fieri until the close of the term, and the judge may modify or vacate any order made during the term, and his action is not reviewable unless it appears that he has grossly abused his power, resulting in oppression. This is not only the rule, but it is reasonable, and often corrects mistakes made without full information. We think it is common practice, after verdict and judgment in criminal cases, to change the judgment as may seem just to the court. Allison v. Whittier, 101 N. C. 490, 8 S. E. 338; Gwinn v. Parker, 119 N. C. 19, 25 S. E. 705. These authorities refer to the power and control of the court over its own judgments. We can think of no reason or principle why the rule is not equally applicable to orders and entries made during the term of the court. The first order did not have the effect of discharging the defendant. The second order only corrected what his honor thought was bad discretion, caused, no doubt, by misinformation, and left the verdict as the jury had rendered it. The other exceptions were to matters of discretion. No error.

BROWN et al. v. NIMOCKS et al.

(Supreme Court of North Carolina. June 5, 1900.)

RIGHT OF APPEAL—FINAL JUDGMENT.

Clark's Code, § 548, authorizes an appeal from every judicial order, on a matter of law or legal inference, which affects a substantial right, determines or discontinues the action, or grants or refuses a new trial. *Held* that, since an appeal could only be granted where the exceptions would present the whole case for review, an appeal from an order dismissing an attachment against an insolvent, and directing that plaintiff's claim be ascertained, and that all preferred creditors in the assignment and certain judgment creditors be made parties, with leave to file pleadings, etc., could not be entertained; such order not constituting a final judgment.

Appeal from superior court, Cumberland county; Robinson, Judge.

on by Brown & Co. against R. M. ks and others. From an order dis- g an attachment against an insolvent, recting the ascertainment of plaintiffs' with right to other creditors to inter- plaintiffs appeal. Dismissed.

nson & Shaw, for appellant. H. L. nd N. A. Sinclair, for appellees.

RCLOTH, C. J. On May 19, 1897, the ant Nimocks made an assignment of operty to W. S. Cook in trust for his rs, in classes. On May 27, 1897, the ffs sued out an attachment on some of roperty, on the assumption that the as- nt was void. On appeal this court . C. 417, 32 S. E. 743) held that the as- nt was not void, and ordered a new At May term, 1899, the plaintiffs ten- a judgment to be signed for the amount r debt, which was not disputed, and ch judgment be declared a valid lien assigned estate, and that certain other in the second class were of equal with that of the plaintiffs. This ed judgment was refused, and his entered judgment as follows: That signment is valid, that the attachment olved and set aside, and that an issue mitted to the jury to ascertain the ants' damages, if any, by reason of achment. To this judgment, and the of his honor to sign the tendered nt, the plaintiffs excepted. The court dered that all the preferred creditors assignment and certain judgment cred- e made parties defendant, with leave pleadings, and that summons issue ac- ly. A motion by the defendants to their schedule, also to amend their , was continued. The plaintiffs ap- from the said refusal and judgment ders, and in this court the defendants to dismiss the appeal on the ground is premature.

k's Code, § 548, allows an appeal from judicial order, upon a matter of law l inference, which affects a substantial or determines the action, or discon- the action, or grants or refuses a new Many decisions have been rendered s section of the Code. The intent and of the statute, as we construe it, are n appeal to this court should present view the exceptions taken and ques- f law arising upon the whole case, and ppeals presenting the exception and questions in piecemeal will not be en- ed, when no substantial right is put ardy by such refusal. Any other rule confuse litigation and vex litigants, as s increase costs. It would be incon- t for each preferred creditor, in a case is, to prosecute his appeal when other of the same dignity have not been The plaintiff can preserve his rights ing his exceptions noted in the record, and bringing them forward on the final hearing. It is true the plaintiffs' claim is admitted to be correct by the present defendants, but when the other preferred creditors are in they will have the right to litigate inter se, and to prorate in case of a deficiency of assets. The plaintiffs have no more or better lien than the others of the same class. The order and judgment of his honor were quite proper. No final judgment has been entered, and none could be, in the present condition of the case. The numerous decided cases will be found in Clark's Code, § 548, notably Hines v. Hines, 84 N. C. 122; Clement v. Foster, 99 N. C. 255, 6 S. E. 186; and Welch v. Kinsland, 93 N. C. 281. Appeal dismissed.

HYGIENIC PLATE-ICE MFG. CO. v. RALEIGH & AUGUSTA AIR-LINE R. CO.

(Supreme Court of North Carolina. June 5, 1900.)

RAILROADS—NEGLIGENCE—FIRES — PARTICULAR ENGINE—EVIDENCE—OTHER ENGINES.

Where a fire was alleged to have been caused by sparks emitted by a particular engine, it was error to admit evidence of other fires caused by sparks from other engines, and of fires caused by passing trains in fields past which another railroad ran, without showing the condition of the engines or the attending circumstances.

Douglas, J., dissenting.

Appeal from superior court, Wake county; Brown, Judge.

Action by the Hygienic Plate-Ice Manufacturing Company against the Raleigh & Augusta Air-Line Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

MacRae & Day, J. D. Shaw, J. B. Batchelor, W. H. Neal, G. F. MacRae, and R. T. Gray, for appellant. Ernest Haywood, F. H. Busbee, Simmons, Pou & Ward, and Armistead Jones, for appellee.

FAIRCLOTH, C. J. This is an action for damages to plaintiff's property alleged to have been caused by defendant's negligence. The trial resulted in a verdict and judgment in favor of the plaintiff, and an appeal by defendant. For the purposes of this opinion, the facts are as follows: The plaintiff's ice factory was located on the defendant's right of way, two or three hundred yards west of the Union Depot, in the city of Raleigh. On August 29, 1893, between 8 and 9 o'clock,—about 8:30,—the plaintiff's ice factory was discovered to be on fire, and was partially consumed. About 20 minutes before the fire the defendant's engine No. 228, called the "Atlanta Special," pulled out from the Union Station, going west, and passed the plaintiff's factory, emitting sparks, and soon thereafter the factory was discovered to be burning. The plaintiff alleged and proved the passing of said engine and fire at the time above

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stated, and there is no allegation or proof in the record that any other engine of the defendant passed by said place recently before or soon after the time the fire occurred. Carefully reading the record shows clearly that the contention at the trial centered on the question whether the damage was caused by said engine No. 228.

There was much evidence and many exceptions to the admission and exclusion of evidence and to instructions given to the jury by the court. During the trial the plaintiff offered, and was allowed, over the defendant's objection, to introduce the evidence of several witnesses to show that at several times, both before and after this fire, and at other places on defendant's line, other engines of defendant had, by sparks emitted, set fire to and burned the property of other persons; one witness testifying that it was a common occurrence for these trains to set the fields on fire, but he did not know whether it was done by the defendant's trains, it being proved that at those points another railroad runs parallel with, and in a few feet of, the defendant's track. This testimony was heard by the jury without any evidence of the condition of these engines, and without any explanation of the attending circumstances. Another witness said that in 1894 the remains of said factory building caught on fire directly after the defendant's freight train passed, and constantly before and since, and that the old field caught on fire in March, 1894, two or three times, near the bridge. This evidence of fires at various times, and at other places, caused by sparks from other engines, both before and after August 29th, we must hold to be incompetent, as it does not tend to prove the condition of engine No. 228, nor to throw any light on the question directly before the jury. It was well calculated to divert the minds of the jury, and lead them to an unsafe verdict. The principle which governs in such cases was brought to the attention of the court in February, 1891, in the case of Grant v. Railroad Co., 108 N. C. 462, 470, 13 S. E. 209. The plaintiff was injured by derailment of defendant's train, and on the trial he offered to show that a similar accident occurred soon before and afterwards at other places, to a train run by the same engineer and conductor. The court said: "The condition of the defendant's railroad track at places other than that at which the accident in question happened could not prove or disprove the condition of the track at the latter place," and that such evidence would certainly tend to mislead the jury. In October, 1891, the same question was before the court in Pennsylvania, and is on "all fours" with the case before us. It was Henderson v. Railroad Co., 144 Pa. St. 461, 22 Atl. 851, 16 L. R. A. 299. After able and elaborate arguments, the court held: "(1) In an action for a loss by fire, caused by sparks from a locomotive engine of a railroad company, the burden is on the plaintiff to prove that the fire was communicated by some engine of the defendant company, and also to prove negligence in the construction or management of the engine. Such facts, however, may be established by circumstantial evidence. (2) When the fire is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition, management, and practical operation of that engine, and testimony tending to prove defects in other engines of the company is irrelevant and inadmissible. (3) If, however, the offending engine is not clearly or satisfactorily identified, it is competent for the plaintiff to prove, in support of the allegation that the fire was caused by the defendant's negligence, that the defendant's locomotives generally, or many of them, at or about the time of the occurrence, threw sparks of unusual size, causing numerous fires on that part of its road. (4) This class of testimony is exceptional in character at the best, and is admissible only because direct evidence is impracticable. The examination, therefore, will be confined to the negligent operation of the engines at and about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to make such proofs practicable." We have quoted freely from this case, because it covers several practical points of this subject, and because it seems unnecessary to cite other cases of a similar bearing. The principle is not only supported by authority, but it appears to our minds to be correct, and a just rule to be applied in jury trials. There are some decisions modifying this rule, and perhaps seem inconsistent with it; but the reasoning in some of them is not satisfactory, and we do not cite or discuss them. What we have said shows error, and requires a new trial. At the next trial it is probable that many of the other exceptions will be eliminated, and we will not, therefore, discuss them at present. Venire de novo.

DOUGLAS, J. (dissenting). I cannot concur in the judgment or opinion of the court. The only ground for granting a new trial appears to be the admission of testimony as to the condition of other engines. Under the circumstances of this case, I am inclined to think that the admission of such testimony was competent in any view, but, whether this is so or not, it is clearly admissible in rebuttal of the defendant's evidence. The defendant had previously introduced Parish, foreman of its roundhouse, who testified, on direct examination, that he did not remember anything about the particular time of the fire or the particular engine, but that he did not permit any engine to go out of the roundhouse without being in thorough repair. The object of his testimony clearly was to prove that this particular engine, of which he had no recollection, must have been in good repair at

that time, because all the engines were constantly kept in repair. The plaintiff simply answered this by showing that the other engines were not always kept in perfect repair, because they had set fire to property in such a way as could not have happened if they had been equipped with spark arresters such as described by the defendant's witnesses. Such evidence was strictly in rebuttal. But it may be said that the plaintiff's counsel, on the cross-examination of Nowell, a witness for the defendant, asked him about some engines that had been burned, and thus opened the door to the defendant. It seems a very little crack to open so wide a door. But, admitting it to be so, the defendant did not shut the door, but opened it still wider. If it was left wide open by the defendant, why could not the plaintiff enter? But another view suggests itself. In Neal v. Railroad Co. (at this term) 36 S. E. 117, this court has held, in effect, that all the testimony of the plaintiff's witnesses, whether given on direct or cross examination, is the plaintiff's testimony. Why is it not so as to the defendant?

BATTERY PARK BANK et al. v. LOUGHRAN.

(Supreme Court of North Carolina. June 5, 1900.)

VENDOR AND PURCHASER—SUIT FOR PRICE—PLEADING—BOND FOR TITLE—NOTES—FAILURE OF CONSIDERATION.

1. Where, in an action on notes given for the price of land purchased at auction, defendant pleaded that plaintiff's assignor announced that the balance of the price should be secured by notes, and that he would execute to the purchaser a bond for title on payment of the notes when due, and that defendant purchased the land, and executed the notes sued on, but that plaintiff's assignor failed to execute the bond, such plea did not allege that the assignor was to deliver the bond only when the purchase price was paid, but raised an issue as to whether he was not bound to deliver the bond on the execution and delivery of the notes.

2. Where defendant purchased lots at auction under an agreement that one-fifth of the price should be paid in cash, and that the vendor should give a bond for title on receiving notes for the balance, and the vendor failed to deliver the bond, and thereafter conveyed the lots to another, and assigned the notes after maturity to plaintiff, plaintiff was not entitled to recover thereon, since the consideration for which the notes were given had failed.

Appeal from superior court, Buncombe county; Coble, Judge.

Action by the Battery Park Bank and others against J. H. Loughran. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

T. H. Cobb, for appellants. W. W. Jones, for appellee.

MONTGOMERY, J. This action was commenced originally for the recovery of the amount due by the defendant on six promissory notes, three of them payable two years from date, and three of them three years from date, which he, with two others, had executed to the plaintiff Bostic, and which Bostic had assigned as collateral security to the plaintiff bank for a debt which he owed it. Afterwards Bostic made an assignment of his property, including his equitable interest in these notes, to the other defendant, J. G. Merrimon, as trustee. The consideration upon which these notes were executed was not stated in the complaint. The defendants, in their answer, admitted the execution of the notes, averring that the consideration therefor was the purchase price of three lots of land situated in Asheville, sold at public auction by Bostic, and bought by the defendant. Three defenses were set up by the defendant in his answer: (1) That while the sale of the lots was going on Bostic made to the defendant false and fraudulent representations in respect to the manner in which the sale was to be conducted, viz. that there would be no by-bidding, when in fact Bostic had procured by-bidders who fraudulently ran up and increased the price of the lots greatly in excess of their true value; (2) that, after the notes were executed, Bostic sold the lots, without the consent or authority of the defendant, to various persons, and thus disabled himself from executing proper deeds to the lots to the defendant, and that the plaintiff bank had full knowledge of the defendant's equitable defense; and (3) that Bostic did not have a good title to the property at any time since the sale, and therefore that he could not give a good title to the same. The statute of limitations was also pleaded in defense. In the first trial there was a judgment for the defendant. Upon appeal to this court by the plaintiff a new trial was ordered. 30 S. E. 17. Afterwards, in the superior court, the defendant amended his answer, in which he introduced new matter as a defense, and which new matter raised another issue. That part of the amended answer to which we particularly refer is in these words: "That at the time of the sale of the lots mentioned in the original answer, as a further defense, the said Bostic announced or caused to be announced at the sale that the balance of the purchase money for the lots should be secured by the promissory notes of the purchasers, and that, in consideration of the said purchases and execution of said notes, he (Bostic) would execute to the purchasers a good and sufficient bond for title in fee simple with warranty, upon the payment of the notes when they became due; that this defendant, with one Millster and one Cleary, purchased certain lots mentioned in the original answer, and executed and delivered to Bostic their said notes, but that Bostic failed and refused to execute to said purchasers a sufficient and legal bond for title to the lots." The defense set up in the amended answer was not thought of in the

original answer, nor on the first trial. It turned out to be, however, the main and only defense which he had, for in the trial before the referee, the cause having been referred to W. P. Brown with all the issues to report the evidence, his findings of fact and conclusions of law, the defendant offered no evidence showing fraud in the sale, and he did not appeal from the findings of law by the referee that the debts were not barred by the statute of limitations. The referee, in his second finding of fact, reported that at and before the sale of the lots there was an agreement between the defendant and Bostic that the defendant should pay one-fifth of the purchase money in cash, and execute to Bostic nine notes, to be paid in the future, and that, in consideration of the payment of the money and the execution of the notes, Bostic would execute and deliver to the defendant "a good bond for a title to the three lots to secure to James H. Loughran a deed in fee simple for the lots above referred to, when the defendant Loughran should comply with his part of the contract by the payment of one-fifth of the purchase money and the making and delivering of the said notes above mentioned for the payment of the remainder of said purchase money." The referee also found that Bostic did not comply with his part of the agreement by executing and delivering to the defendant the bond for title, and that on the 26th of October, 1892, Bostic sold the lots to the highest bidder for cash,—to J. A. Burross, L. A. Farinholt, and Natt Atkinson; that the money was paid; and that Bostic and his wife executed fee-simple deeds for the lots to the purchasers, with covenants of warranty. Upon these findings of facts the referee concluded as matters of law that Bostic, not having complied with his contract by making and delivering the bonds for title, was not entitled to take anything by reason of his action, and that the notes had no consideration to support them. Those parts of the report of the referee were sustained by his honor in the court below. The counsel of the plaintiffs, in his argument and in his brief filed, contended that the amended answer raised no issue; that upon its face it was a sham plea, and an absurd one; and that, notwithstanding the finding of the referee that Bostic had failed and refused to deliver the bonds for title, and that his honor sustained that finding, the plaintiffs were entitled to a judgment because of the failure of the amended answer to raise the issue of the delivery of the bonds for title. The contention of the plaintiffs' counsel was that the natural and proper construction of the amended answer was that Bostic was to deliver the bonds for title when the whole of the purchase money should have been paid by the defendant, and that that was an absurdity, and contrary to the implied admissions on the question of delivery in the original answer. The argument might have some force if we should be bound by a strict grammatical construction, and should apply that to the first part of the amended answer. But it loses its entire weight when the whole of the amended answer is taken into consideration, for the latter part of section 2 clears up the full meaning of the section. The amended answer then raises the issue as to the delivery of the bonds for title to the defendant, and the referee, under his power, passed upon that issue, and the court below sustained him, most probably on the ground that there was some evidence to support the finding. It seems to us that the great weight of the evidence was the other way, but with that we can have nothing to do. This is not a case like that in which the vendor of land by parol, seeking to recover notes given by the purchaser for the price, tendering at the same time a good and sufficient deed, is met by the debtor with the plea of the statute of frauds. The plea would not avail the debtor Taylor v. Russell, 119 N. C. 80, 25 S. E. 710. Nor is it like a case where the vendor did not have a good title to land at the time he made a contract to convey upon the payment in the future of the purchase money, but who afterwards acquired title before he demanded of the purchaser the purchase money, or before he is called upon to make title. In such a case the purchaser would be bound. Bank v. Loughran, 122 N. C. 608, 30 S. E. 17. The notes were past due at the time when the other plaintiffs acquired their interest in them, and they took the notes subject to all proper defenses of the defendant against the original payee, Bostic. It is not necessary to discuss the other exceptions of the plaintiffs. Affirmed.

CONRAD et al. v. WEST-END HOTEL & LAND CO. et al.

(Supreme Court of North Carolina. June 5, 1900.)

DEDICATION—MAPS—COURT—EXPENSES—NECESSITY.

1. Where an improvement company opening up land for city lots laid out an open space of land surrounded by streets, which it called "Grace Court," and filed a map with the register of deeds of the county, showing the land as laid out, and sold lots fronting on the court to complainants by deeds which referred to the map, such acts constituted an irrevocable dedication of the streets and court, and the company and its grantees could not build on the court for private purposes, or narrow or close the streets surrounding it, though the lots were bought under another map, in which the court was reserved, and made subject to future disposition.

2. That the public authorities of the city or county had not formally accepted the dedication of the court was immaterial, since, plaintiffs having been induced to buy under the map, the continuation of the streets and court formed a part of the consideration for the purchase of the lots.

Douglas, J., dissenting.

l from superior court, Forsyth coun-
w, Judge.
by S. F. Conrad and others against
st-End Hotel & Land Company and
o enjoin the erection of buildings on
From a judgment in favor of plain-
fendants appeal. Affirmed.

n, Buxton & Watson, for appellants.
Patterson and Glenn & Manly, for
s.

GOMERY, J. In the year 1890 the
nt the West-End Hotel & Land Com-
as the owner and in possession of a
land situated and lying on the west-
northern boundaries of the city of
. The defendant company, with the
opening up the tract of land as
of the city, laid off the same into
be sold for homes, public buildings,
ares, with streets and avenues. Im-
y at the western end of Fourth street
city there was an open space of
ar-shaped, which the company called
Court." The company extended
street along the southern edge of
ourt, and turned it towards the north
he western edge of Grace court, and
an avenue along the northern edge
ourt, to Fourth street. On the west-
of the street, lying on the western
Grace court, was a piece of land on
he company was to build the Zinzen-
tel. A map, with the outlines which
described, was made by a competent
in the employment of defendant
y, and by its direction registered in
ce of the register of deeds of For-
unty, in Book 35, p. 136. Afterwards
ntiffs each purchased from the de-
company one of the lots so laid off,
long the southern edge of Fourth
s it ran along Grace court. In the
which were executed by defendant
y to the plaintiff purchasers, refer-
as made to the plat which had been
the register's office, which plat, as we
en, contained the square called "Grace
and the streets surrounding and ad-
Several of the lots have been built
homes. Since the execution of the
o the plaintiffs, the defendant com-
as sold and conveyed by deed a part
e court to the defendant W. B. Taylor,
endeavoring to sell other parts of the
The plaintiffs claim that the registra-
the plat of the land of defendant
y, and the reference made in its deed
plaintiffs to that plat, is a dedication
e court to their use, and to the use
ublic, as an open court, and cannot be
y the defendant, or any persons claim-
ler it, by the erection of buildings
or by any other means. This action
ought for a perpetual injunction re-
g the defendant hotel and land com-
om disposing of the court or any part
thereof for private purposes, or for otherwise depriving the plaintiffs of their enjoyment of the court as a public open ground, and from narrowing and closing up the streets surrounding the same, and that the defendant Taylor be forever restrained from erecting any building or placing other obstruction on any part of Grace court, or from using the same for any private purpose. The defendants set up as a defense the averment that, notwithstanding the registration of the plat by the defendant company heretofore described, the plaintiffs, in truth, bought their lots, not by the plat registered, but under a certain lithographic map shown to the plaintiff purchasers at the time they bought, and in which Grace court and other squares were reserved as the property of the defendant company, and subject to its future disposition. The evidence of the defendants tending to show their contentions was rejected by the court as incompetent, and the court instructed the jury, if they believed the evidence, to answer the issues in favor of the plaintiffs.

We agree with his honor that as the defendant company, in the execution of its deeds to the plaintiffs, referred therein to the plat and map which they had caused to be registered, and not to the lithographed map, they were concluded thereby, and that no evidence to the contrary was admissible. If the owner of land lays it off into squares, lots, and streets with a view to form a town or city, or as a suburb to a town or city, certainly, if he causes the same to be registered in the county where the land is situated, and sells any part of the lots or squares, and in the deed refers in the description thereof to the plat, such reference will constitute an irrevocable dedication to the public of the streets marked upon the plat. Meier v. Railway Co., 16 Or. 500, 19 Pac. 610, 1 L. R. A. 856. We think the same principle would apply to those pieces of land which were marked on such a plat as squares or courts or parks, and that streets and public grounds designated on such a map should forever be open to the purchasers and to the public. Grogan v. Town of Hayward (C. C.) 4 Fed. 164; Church v. City of Portland (Or.) 22 Pac. 528, 6 L. R. A. 259; Price v. Inhabitants of Plainfield, 40 N. J. Law, 608.

It is immaterial whether the public authorities of the city or county had formally accepted the dedication of the court. The plaintiffs had been induced to buy under the map and plat, and the sale was based, not merely on the price paid for the lots, but there was the further consideration that the streets and public grounds designated on the map should forever be open to the purchasers and their assigns. Grace court, as laid off on the plat, was not within the curtilage of the hotel, and therefore to be used in connection with it, but it was outside of the lot reserved for the hotel, across a very wide street, and surrounded by lots laid off on the streets adjacent to it. The word "court,"

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when used in connection with such a piece of land, is synonymous in law with the words "park" and "square."

The exception made by the defendants to the refusal of his honor to submit an issue as to the rights of the plaintiff Hanes is not of any consequence; for, if the streets and court are for the benefit of the other plaintiffs and the public, he necessarily must share therein as a consequence. No error.

DOUGLAS, J., dissents arguendo.

BROWN v. MORISEY.

(Supreme Court of North Carolina. June 5, 1900.)

DOWER—DAMAGES FOR DETENTION—MEASURE.

Where a widow is adjudged entitled to dower, she is also entitled to damages for detention of dower equal to one-third in value of the rents and profits of her deceased husband's lands from the date of her demand for dower.

Furches and Clark, JJ., dissenting.

Action by Dicey Ann Brown against D. G. Morisey to compel allotment of dower. From a judgment in favor of defendant, plaintiff appealed. The judgment below was affirmed at a former hearing (32 S. E. 687), and plaintiff's petition for a rehearing was afterwards granted. Reversed on rehearing.

FAIRCLOTH, C. J. This case was decided in favor of the defendant at February term, 1899, and is reported in 124 N. C. 292, 32 S. E. 687. It was reheard at February term, 1900. After reargument and further consideration, the court is of the opinion that the plaintiff is entitled to have dower assigned to her out of the land described in the complaint, and the first opinion is overruled. The reasoning and ground of our present opinion will be found in the dissenting opinion, as reported in 124 N. C., at page 297, where the authorities are cited, and it seems that it is unnecessary to repeat them here. In addition to those, we refer to Pinner v. Pinner, 44 N. C. 475; Frost v. Etheridge, 12 N. C. 80. These fully recognize the principle of this opinion, with some excellent reasoning by Taylor, C. J. The plaintiff, being entitled to dower, is also entitled to damages from her demand for dower equal to one-third in value of the rents and profits of the land. Spencer v. Weston, 18 N. C. 216. These will be adjusted by the court below, if the parties do not agree to some arrangement among themselves. This will be certified to the court below, to the end that the court may proceed according to this opinion. Error.

FURCHES, J. I dissent to that part of the opinion of the court which adopts the dissenting opinion when the case was here before, and I adopt the opinion of the court then filed as my dissenting opinion to that part of the opinion filed at this term. Brown v. Morisey, 124 N. C. 292, 32 S. E. 687.

CLARK, J. I concur in the dissenting opinion of Mr. Justice FURCHES. There is no scintilla of evidence that the defendant claims under the heirs at law of the husband, and what would be the plaintiff's right to dower as against them or their assignee is not before us. There is no evidence how defendant entered,—whether under deed from the husband or without. See statement of facts (124 N. C. 292, 32 S. E. 687), but probably under a deed possibly since lost, as the widow living in same county has not stirred till now. All that appears is that plaintiff's husband had a deed to the land in 1855; that he and his wife went to Wilmington in 1856; that in a few days she returned to the county (Duplin) where the land lies, and soon thereafter the defendant took possession, and has been in exclusive possession, cultivating and using it as his own ever since, over 40 years. Nothing else appearing, the defendant's title is good against the world. The fact that it is further shown that the husband went South, and died intestate, prior to 1861, leaving no children, cannot affect defendant's title. The statute, which began running against the husband in his lifetime, was not suspended at his death, even as to minor heirs, and, of course, not as to his widow. She can only recover dower by showing that her husband, if living, would be entitled to recover the land in which she claims dower. Otherwise, she would be taking dower in defendant's land, not in her husband's. If dower had been allotted to plaintiff when disseised, she would be barred in 7 or 20 years, like any one else, and she is not entitled, even in that aspect, to longer time under our statute law, because she neglected to have dower allotted.

McCARTY et al. v. IMPERIAL INS. CO.

McCARTY v. SCOTTISH UNION & NATIONAL INS. CO.

(Supreme Court of North Carolina. June 5, 1900.)

INSURANCE—REPRESENTATIONS IN APPLICATION—BURDEN OF PROOF.

1. Act 1893, c. 299, §§ 8, 9, provide that in contracts of insurance statements or declarations in the application or policy shall be deemed representations, and not warranties, and no misrepresentations, unless material or fraudulent, shall prevent a recovery on the policy. *Held*, that a failure to disclose in the application a trust deed on the insured premises, which included other property sufficient to satisfy the incumbrance, which omission was not found to be fraudulent, did not vitiate the policy.

2. The burden of proving the fraudulent intent of insured, or the materiality of a misrepresentation in failing to disclose an incumbrance on property, is on the insurer.

Appeal from superior court, Buncombe county; Starbuck, Judge.

by C. C. McCarty and others against
rial Insurance Company and C. C.
against the Scottish Union & Na-
urance Company on policies of insur-
om judgments in favor of defend-
ntiffs appeal. Reversed.

on & Merrimon, for appellants. F.
y and T. H. Cobb, for appellees.

, J. The plaintiff's house was in-
the defendant companies, and was
by fire. Concurrent insurance was
, and policies in both these compa-
issued to the plaintiff by the same
he companies had full notice of the
nce to the building and loan asso-
nd it is mentioned in the policies
provision "payable as their interests
ar." The defense is that there was
ncumbrance in favor of McBrayer,
vhich was not made known to the
agent; and there was a provision
icies that they should be void "if the
f the insured be not truly stated
In Insurance Co. v. Chase, 5 Wall.
Ed. 524, it is said, "Whether the
of interest was material to the
rred, and would have enhanced the
is always a question of fact for
' And our statute (Acts 1893, c.
h was in force when this policy was
, and which, therefore, enters into
s a part of the contract, provides:
: "All contracts of insurance, the
n for which is taken within this
ll be deemed to have been made
is state and subject to the laws
Section 9: "All statements or de-
in any application for a policy of
, or in the policy itself, shall be
and held representations and not
s; nor shall any misrepresentation,
aterial or fraudulent, prevent a re-
the policy." There is no fraud-
epresentation found, and it is clear
re to inform the company of the Mc-
ust deed was not material, and did
ıy wise enhance the risk, for the
d embraced another tract of land,
ıs alone sufficient to discharge it.
the building and loan association,
the policy as the primary benefi-
he insurance, had no knowledge of
ayer trust deed. In Albert v. Insur-
122 N. C. 92, 30 S. E. 327, it is said
95, 122 N. C., and page 328, 30 S.
ruing the above-cited statute (Acts
99): "This law applies to all pol-
nsurance, both of fire and of life;
ss such misrepresentations materi-
ibute to the loss, or fraudulently
payment of the increased premium,
not vitiate the policy. Ordinarily,
questions of fact for the jury, and
he court." The burden of proving
ulent intent or the materiality of
presentation is upon the company,
who, after receiving the premium, must pay the loss, unless it shows good ground for its release from the discharge of the obligation it assumed. Bank of Tarboro v. Fidelity & Deposit Co. (at this term) 35 S. E. 588. The evidence would seem to indicate an inadvertent and unintentional omission by the plaintiff in stating the incumbrances upon the property. The referee found that the insured, when he took out the insurance, did not know that the trust deed to McBrayer covered the lot on which the insured building stood, and that he did not fraudulently conceal its existence from the defendant's agent, but acted honestly, and in good faith. The court, upon exceptions to the referee's report, overruled that finding of fact, but expressly refrained from passing upon "the plaintiff's intent, deeming it immaterial." And neither does he find that the omission of reference to the McBrayer trust deed was material; in fact, his other findings in effect indicate that it was not. In the absence of any finding that there was a fraudulent or material omission in the application, it was error to give judgment for the defendant. The wise and just provisions contained in the above sections 8 and 9 of chapter 299 of the Laws of 1893, were repealed, together with all previous legislation upon insurance, in adopting a codified system, by chapter 54 of the Acts 1899. The omission to re-enact said sections 8 and 9 was doubtless an inadvertence on the part of the legislature. The protection given by those provisions against technical forfeitures of policies taken out without fraudulent or material misstatement of facts in the application will doubtless be restored when the matter is properly called to the attention of the general assembly. The repeal does not affect this insurance which was taken out while the law was in force. The findings of fact being insufficient, the judgment is set aside. New trial.

CANSLER v. PENLAND.

(Supreme Court of North Carolina. June 5, 1900.)

On petition for rehearing. Petition dismissed. For former opinion, see 34 S. E. 683.

MONTGOMERY, J. This case was first before the court at September term, 1899, and the decision is reported in 125 N. C. 578, 34 S. E. 683. It was reheard upon petition of the plaintiff at this term. One reason assigned in the petition to rehear is that the decision was made to turn wholly upon the legality or illegality of the written contract between the plaintiff and defendant, which is set out in the answer of the defendant by way of counterclaim. The petitioner did not complain of that part of the decision, but, on the other hand, admitted that it was void under section 2084 of the Code. But it is fur-

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ther stated in the petition that the petitioner was advised that the court did not consider the fact that the action was not brought by the plaintiff upon that contract. It may be true that the court considered fully, in arriving at its decision, the illegal contract set up by the defendant in its answer as affecting the contract upon which the plaintiff brought his action, and we see no error in that manner of the treatment of the case. If it should be conceded, for the sake of the argument, that the contract upon which he declared was a valid one, yet he, on the investigation before the referee as to the account between him and the defendant, himself introduced the contract which the defendant set up as a counterclaim, and insisted that the defendant owed him a balance under the provisions of that very contract. However, upon a careful reading of the decision in the reported case, it appears that the case was decided upon the contract upon which the plaintiff brought his action. It showed that the plaintiff had been appointed tax collector for the county of Macon for the years 1891 and 1892, and that he placed in the defendant's hands, not a part of the tax duplicates, but the entire list, and that he took a bond from the defendant, with sureties, in which it was recited that it was given to secure the collection of the taxes of Macon county,—state, county, poor, school, and special taxes. It is true, the plaintiff called the defendant his "deputy," but there is nothing in the name in this case. As a fact, he turned over absolutely into the hands of defendant the entire tax lists of the county, which had been confided to him specially to collect and to account for. He reserved no control of the tax lists. There could not be a clearer case of farming out a public office than the one before us. In this respect the contract upon which the plaintiff sued was as clearly tainted with illegality as the one which the defendant set up in his answer. The plaintiff's bond as tax collector was a security to the county for the collection and payment by the plaintiff of the taxes. The commissioners of the county were and are required to keep these bonds in a safe and solvent condition, and renewed at stated times; and, so far as we see from the record, the county is not interested in this action. Petition dismissed.

CLARK, J. (dissenting). The plaintiff, tax collector of Macon county, sued his deputy for money collected on the tax lists turned over to him, and for the execution of which duty the defendant had given bond as "deputy tax collector" September 7, 1891, and September 24, 1892. There is and could be no objection to this transaction. The sheriff or tax collector may collect his entire tax list by deputy. It can make no difference whether the entire tax list is collected by one or by several deputies. The referee found the amount due by defendant on plaintiff's cause of action, after allowance of commissions, and there is no exception by either party to the amount reported by him. The defendant pleaded as a counterclaim that the plaintiff on a day previous to that on which the deputy gave aforesaid bond, to wit, in August, 1891, agreed that the defendant should have the collection of the entire tax list, and set up as counterclaim constructive commissions on certain taxes collected by the plaintiff himself. This agreement in August, 1891, was illegal, for the reasons given on the former hearing of this case (125 N. C. 578, 34 S. E. 683). Code, § 2084; Basket v. Moss, 115 N. C. 448, 20 S. E. 733. But the effect of that illegality, palpably, would be to disallow the defendant's counterclaim for the "constructive" commissions claimed by him under such illegal contract, and could not affect the valid claim of plaintiff for public moneys collected for plaintiff by defendant, as his deputy, under a valid contract and bond executed at a different time. But the referee treated defendant's counterclaim as valid, and allowed his "constructive" fees, to which there is no exception by plaintiffs. It is true, being contra bonos mores, these fees might be disallowed here; but that would increase the plaintiff's recovery, and could not possibly authorize the dismissal of his action. The defendant, however, claimed that, under a proper construction of the contract which is the foundation of his counterclaim, and which has been held illegal, he could recover "constructive" costs for certain tax sales made by the sheriff. Aside from the adjudged illegality of that contract defeating defendant's claim, the terms thereof (if legal) did not embrace "costs for tax sales," and the referee properly so held, and was affirmed by the judge. From the refusal to allow the constructive "costs on tax sales," and on that ground alone, the defendant appealed to this court. There was a clerical error of $60.34 made by the referee in addition, but that was corrected by the judge, and was already deducted before the appeal. It should seem plain, therefore, that the defendant's exception should be disallowed, both because the constructive "costs on tax sales" are not within the terms of the contract, if it were valid, and, further, because, if within its terms, the contract (in August, 1891) upon which the counterclaim is based is invalid. There is no ground for dismissal of plaintiff's action to recover public moneys collected by defendant as his deputy. On the contrary, the court should, ex mero motu, reform the judgment by disallowing the counterclaim which the referee allowed defendant for "constructive commissions" upon a contract which the court has held illegal.

DOUGLAS, J., also dissents.

RRING et al. v. PUGH et al.

Court of North Carolina. June, 1900.)

—DISOBEDIENCE OF COURT'S OR-CEEDINGS TO PUNISH—JURISDIC-IVER — APPEAL — PROCEEDINGS IN OURT.

Code, § 558, providing that an ap-all proceedings in the court below gment appealed from, but the court d on any other matter included in and not affected by the judgment om, where, in an action for the re-n office after final judgment, which from, the relators, without legal l against defendant's consent, take of the books and papers belonging e, the trial court, on motion, may titution thereof.

er in a proceeding for the recovery e, compelling relators, without no- hearing, to deliver the books and he office of which they had taken without legal process, is not in-lepriving relators of their private ithout due process of law, as such papers are not their private prop-

anting of a rule to show cause for or disobeying an order is not de-ause of failure to serve respondents of the order on which the contempt here they appeared at the hearing empt rule, and declined to obey the

ge outside the judicial district in ondents reside, and in which an al-mpt was committed, may hear and the contempt, where the respond- and answer the rule, and make no o the jurisdiction.

dents do not purge themselves of disobeying a court's order by an-iming any intention to commit a where they refused to obey the or-it was in their power to obey.

rs, in a proceeding to recover an ot relieve themselves of contempt ing a court's order to deliver the e office to defendants on the ground s complained of were not such as to rights of defendants, where their s in willful disobedience of a law-f the court.

C. J., and Douglas, J., dissenting.

rom superior court, Sampson coun-Judge.

y A. R. Herring and others against and others for the recovery of an m an order adjudging complain-ntempt for failure to comply with o deliver the books and papers of they appeal. Modified.

& Beasley, Marion Butler, and Geo. for appellants. Allen & Dortch, and E. W. Kerr, for appellees.

OMERY, J. This was a proceed-tempt heard before Judge Bryan ne. on the 25th of July, 1899. The s, A. R. Herring, R. A. Ingram, and rcloth, were elected in 1897 mem-e board of education of Sampson a term of three years. W. J. A. Bissell, and L. L. Mathis were by the general assembly of 1899 of the county board of school di-rectors, to enter upon the duties of their office immediately upon their qualification. The new board (the board of school directors) were in charge of affairs after their qualification, on the 20th day of April, 1899, when the respondents in this proceeding brought an action for themselves, in the name of the state, against Pugh, Bissell, and Mathis, for the recovery of their office. The case was heard before Judge Timberlake at May term, 1899, of the superior court, a jury trial having been waived, and the court being authorized to find the facts and all the issues involved therein. It was adjudged by the court that the relators in that action, the respondents here, Herring, Ingram, and Faircloth, recover of the defendants the office of county board of school directors, together with all the books and papers in the custody of the defendants, or within their power, belonging to the office. The defendants appealed from this judgment. Afterwards, and while the appeal was pending the superior court, and while the defendants were still in possession of the office and exercising the duties thereof, the relators in that action, the respondents here, got possession of the room in which the sessions of the board were held, and also of the books and papers of the office, and of the key of the room, against the consent of the defendants and without legal process. The defendants then, by a motion in the original cause based upon affidavits, procured an order from the Honorable O. H. Allen, resident judge of the Sixth judicial district, in which the relators, Herring, Ingram, and Faircloth, were restrained from exercising any function or power, or from performing any duty as members of the board of school directors, or of the board of education of Sampson county. The relators were also ordered to appear before Judge Bryan, presiding judge of the Sixth judicial district, at Newberne, on the 25th day of July, 1899, to show cause, if any they had, why the order should not be continued until the final determination of the action. Afterwards, another order upon affidavits was procured from Judge Allen, in which it was recited that, while the plaintiff relators were not actively exercising the functions of the office, they still had the key and books and papers in their possession, and were obstructing the proper administration of the public school affairs of the county, and the relators were ordered to forthwith deliver the room, key, books and papers, and reports to the defendants. And the relators were further ordered to appear before Judge Bryan, at the same time and place, there to show cause, if any they had, why the order should not be continued until the final hearing of the case, as mentioned in the first order. The relators, upon the making of the last-mentioned order by Judge Allen, filed a paper in the cause in which they declined to obey the order to deliver the papers and books and key to the new board. That fact having been made known to Judge Allen, a motion was made by the

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defendants' counsel for a rule upon the relators for contempt in declining to obey the order of Judge Allen commanding them to deliver the books and papers to the defendants. It was ordered that the relators appear before a judge of the superior court, and show cause, if any they have, why they should not be held guilty of contempt, and punished therefor for a willful disobedience of Judge Allen's order, in which they were commanded to deliver the books and papers to the new board, and the order was made returnable before Judge Bryan at the same time and place mentioned in the former orders,—at Newberne, on the 25th day of July, 1899. The relators appeared, and answered the rule declining and refusing to obey the order of Judge Allen to deliver the books and papers and key; whereupon Judge Bryan, in a judgment in which the facts were found, inflicted upon the relators the extreme penalty of the law, a fine in the sum of $250 each, and imprisonment in the common jail of Sampson county until they complied with the order of Judge Allen; that is, until they should deliver the books, papers, etc., to the defendants, or be otherwise discharged according to law.

It appeared in the proceedings that the relators had received a circular letter from C. H. Mebane, superintendent of public instruction, addressed to the county superintendent of schools, in which the following language was used: "I have frequent inquiries as to effect of the recent decision of Judge Timberlake in the case of the Sampson county school board, and also inquiries as to the effect this will have as to the county boards throughout the state, if said decision is sustained by the supreme court. I write this letter to say, in reply to the first inquiry, that the decision of the Sampson county case does not affect any county board of education except the county board of education in Sampson county. I recognize the old county board of education of Sampson county because the superior court of said county has so ordered, and I obey this order until it is passed upon or otherwise ordered by the supreme court." And that the relators had also seen a letter, written after Judge Timberlake's judgment, from the attorney general, directed to Street Brewer, superintendent of public schools, which letter was in the following words: "In reply to your letter of recent date, I will say that it is your duty to recognize the de facto school officers. An officer de facto is one who is in actual possession of the office, in the exercise of its functions and discharge of its duties. From the facts stated by you, I am of the opinion that the old school board are the rightful officers until the supreme court shall decide otherwise, and should be recognized by you. 8 Am. & Eng. Enc. Law, 786."

From the judgment of Judge Bryan the relators appealed to the supreme court, and assigned the following errors: "(1) For that the court had no jurisdiction to entertain a motion in the cause after final judgment. (2) For that the court had no jurisdiction to issue any restraining order after final judgment and the perfecting of the appeal to the supreme court, and any order made therein is absolutely void. (3) For that the court had no power to issue a restraining order to compel the plaintiffs, without notice, before a hearing, to deliver the room, books, and papers to defendants; and such order was void because it was contrary to article 1, § 17, of the constitution of North Carolina, and of article 14 of the constitution of the United States, in that it deprived the plaintiffs of their private property without due process of law. (4) For that it appears from the facts found that the first and second restraining order, upon which the motion for contempt is based, has not been served upon the plaintiffs, and it was error in the court to grant the rule to show cause for contempt. (5) For that the matters involved in their motion were res judicata. (6) For that his honor, Henry R. Bryan, has no jurisdiction to hear and determine this proceeding for contempt against the plaintiffs in the county of Craven, the same being outside of the Sixth judicial district, and outside of the county of Sampson, where the said contempt, it is alleged, was committed; the same not being in violation of any order issued by his honor, Henry R. Bryan. (7) For that the plaintiffs purged themselves by answer of any intents whatever to commit any contempt of court, and it was error in the court to so find and hold. (8) For that his honor failed to find the facts at the time of the trial and before judgment, and spread the same upon the minutes of the court; in fact, no facts were found until after respondents served their case with assignments of error, which were attempted to be answered by the finding of facts. (9) For that the acts complained of are not such as tended to defeat, impair, or prejudice the rights or remedies of the defendants in any action pending in the supreme court."

The first two assignments of error may be considered together. The counsel of the respondents (relators in the original action) cited numerous authorities going to show that the effect of an appeal from a final judgment is to remove the cause into another jurisdiction,—that of the appellate court,—and to make the affirmation of it therein a final and complete disposition of the controversy involved in the action. That is certainly the general rule. Manufacturing Co. v. Buxton, 105 N. C. 76, 11 S. E. 264; Isler v. Brown, 69 N. C. 125; Ellison v. Raleigh, 89 N. C. 125; Green v. Griffin, 95 N. C. 52. But there are powers of the court in which the judgment was originally rendered, in the nature of auxiliary agencies, that can be exercised in furtherance of the object of the suit. In Hinson v. Adrian, 91 N. C. 372, there was a final judgment for the distribution of an amount of money in the hands of the clerk, from which judgment there

appeal to this court. No order or concerning the safe-keeping or in- of the money pending the appeal made, and under the view that ment below had been vacated by the nd the whole case transferred to urisdiction, one of the persons in- n the distribution of the money notion in the supreme court for an the intermediate disposition of This court said, in substance, that was a misconception of the legal the appeal; that the fund was not n from the protection of the supe- t, but that it remained there until decision of the appeal had been and that meanwhile the court be- t make a proper order concerning y or investment of the fund. In the court said further: "It is only ect-matter involved in the judg- t is thus placed beyond interfer- d not those incidental matters ing to jurisdiction, and often neces- ecuring the full fruits of the judg- at may be rendered in the appel- ." And, besides, section 558 of the tself in language too plain to ad- doubt that the court in which the was rendered still retains juris- o hear motions and grant orders, uch as concern the subject-matter it. The statute reads: "Whenever l is perfected, as provided by this tays all further proceedings in the low upon the judgment appealed upon the matter embraced therein; ourt below may proceed upon any tter included in the action and not by the judgment appealed from." ubject-matter of the suit out of ew the proceedings now before us office of school director of Sampson The books and papers, which were s of performing properly the duties ice, were taken from the new board members of that board had per- eir appeal bond, and while they l holding and executing the duties office. Clearly, then, the judge had by a motion in the cause to order ion of the books and papers. Such did not touch the subject-matter of n, which was the office itself. The g was in the nature of a manda- unction, and such injunctions are d under the law in such cases Jur. § 1359.

ird assignment of error cannot be . The books and papers were not erty of the appellants. They were erty of the county of Sampson, to by its school board of education for c good, and the new board, during ency of their appeal, was entitled until the case should have been de- in the supreme court, at least.

s no force in the fourth assignment of error, for the respondents appeared at Newberne on the 25th day of July, 1899, the day mentioned for the hearing of the contempt rule, and answered in form, declining and refusing to surrender the books and papers.

The fifth assignment is answered in the consideration of the first and second.

As to the sixth assignment of error, the question is not presented as to whether a judge could by an order compel the attendance of a person outside of the judicial district in which he lives and outside of the county where the action was tried to answer a rule for contempt. The order of Judge Allen requiring the respondents to appear at Newberne, outside of the judicial district in which the respondents lived, was served on the respondents, and they appeared, as we have said, at the time and place mentioned in the order, and they not only appeared, but they answered the rule, and declined, in the presence of the judge, to obey the order to deliver the books and papers. They did not stand on their rights to have the contempt order heard in Sampson county, where the original judgment was had. It was not a question of jurisdiction. It was a question of venue, and the respondents consented to have the matter heard outside of their district and county. There was no positive consent entered in writing, but there was no objection ever entered until the case on appeal was prepared for this court. In Godwin v. Monds, 101 N. C. 854, 7 S. E. 793, it is held that a judgment could not be set aside by a judge outside the county in which it was rendered, unless it was done by common consent, and that that consent should appear in writing, or the judge should set out the consent in the order which he makes in the cause, or such consent should appear by fair implication from what appeared in the record. See, also, Ledbetter v. Pinner, 120 N. C. 457, 27 S. E. 123; Fertilizer Co. v. Taylor, 112 N. C. 145, 17 S. E. 69. In Godwin v. Monds, supra, the court said "that it did not appear that the plaintiffs or their counsel were present at the hearing of the motion, and did not object; thereby implying such consent." But in the case before us, as we have said, the respondents were present with their counsel, and answered the rule, and made no objection. They therefore consented to the venue by fair implication.

The seventh assignment of error cannot be sustained. It is true that the respondents in their answer denied all purpose to commit any contempt of the court, but they refused to obey the order of Judge Allen commanding them to deliver the books and papers to the new board. The contempt is the refusal to obey the order of the court. They had it in their power to do so. Paine v. Paine, 80 N. C. 322; Boyett v. Vaughan, 89 N. C. 27.

The eighth assignment of error is without merit, and is based upon the misapprehension of the facts. Judge Bryan in his judg-

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ment recited the facts which constituted the contempt, and they were also set out in the last order of Judge Allen.

The ninth assignment of error cannot be sustained. The conduct of the respondents was in willful disobedience of a lawful order of Judge Allen, who had jurisdiction of the question.

Because of the serious nature of the matters involved in this proceeding, matters in which were involved not only the property, but also the personal liberty of three citizens of the state, we have given the case a most careful consideration, and our conclusion is that Judge Allen had jurisdiction of the matters mentioned in his orders; that the books and papers and key should have been returned to the new board under the last order of Judge Allen, as the remedy sought by the new board was a proper one; that the appearance at Newberne, outside of the district and county in which the original judgment was had, and in which the respondents resided, and their answer to the rule at that place and time, their counsel being present and aiding them, and no objection having been entered against the hearing of the contempt rule at Newberne, constituted a consent to have the contempt rule heard at the time and place when and where it was heard; and that, therefore, the judgment of Judge Bryan must be affirmed.

Of course, as the main action, for the recovery of the offices by the plaintiffs (who are the respondents here), has been decided at the last term of the court in favor of the plaintiffs (the respondents), that part of the judgment of Judge Bryan as to the imprisonment of the respondents is vacated. They are now entitled to keep the books, papers, and key, and any other belongings to the board of school directors of Sampson county, under the decision of this court above referred to.

This case is, in its effect upon the respondents, one of great and peculiar hardship. There appears to have been no purpose on their part to do anything except to claim and to avail themselves of their legal rights as they were advised by their counsel. They were confirmed in their course, also, by the letters of the state officers from which we have quoted. By the decision of this court, too, they have been declared entitled to the offices which were the subject-matter of the main action, and to the possession of the books and papers pertaining thereto. We can afford them no relief, however, but must sustain the order and judgment of his honor, Judge Bryan, because of the reasons given in this opinion. Yet it may be that relief might be sought successfully through another source (executive clemency); for, under the provisions of the constitution of the state (article 3, § 6), such power is given to the governor. A contempt of court is an offense against the state, and not against the judge personally. The constitution of the United States (article 2, § 2) invests the president of the United States with the same power as to offenses against the United States, with the same exception, in cases of impeachment. Ex parte Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911. The same power has been exercised by the governor of other states. State v. Sauvinet, 24 La. Ann. 119; Ex parte Hickey, 4 Smedes & M. 751. Modified and affirmed.

DOUGLAS, J., dissents.

FAIRCLOTH, C. J. (dissenting). My objection to the opinion is that the orders were made without authority; that is, that the judge had no jurisdiction. We know that the superior court judges hold the courts in the several judicial districts successively, called "rotation." Code, § 911. We know that the fall term, 1899, of the courts in the Sixth judicial district began July 1st and continued until December 31st. Acts 1885, c. 180, § 8. We also know that the resident judge of the Second district was the presiding judge of the Sixth district during the fall term, 1899. The first order in this contempt proceeding, upon motion in the original action, was made July 8, 1899, the second on the 12th of July, and the third on the 19th of July. These orders were made, not by the presiding judge of the district, but by the resident judge, who was then the presiding judge of another district. The order to show cause, etc., thus made, was returnable before the presiding judge, then at Newberne, in the Second district, who made the final order adjudging the plaintiffs in contempt in failing to obey the order made in the Sixth district by another judge. "Jurisdiction" is a term frequently used, and sometimes without an accurate understanding of its precise application. Jurisdiction of the court is essential, and without it any judgment is a nullity. As to the scope of the term "jurisdiction" there was for a time some controversy, but "the rule now supported by high and abundant authority and excellent reason is that the court must not only have jurisdiction over the person and the matter, but authority to render the particular judgment." 7 Am. & Eng. Enc. Law (2d Ed.) 36. The only acts constituting contempt in North Carolina are specified by statute; all other acts recognized at common law as such are repealed and annulled. Code, § 648. The action in which this motion was made is quo warranto for the office of the board of education of Sampson county, and it had been adjudged by the superior court that the plaintiffs were entitled to the office, from which judgment the defendants appealed to this court, where the judgment was affirmed. Pending said appeal, the plaintiffs peaceably entered the office, and took possession of the key and the school books. They were ordered to deliver the books and key to the defendants. They de-

do so, on the ground that they were
o keep them, and on the ground
order was made by a judge who
out authority to do so. This re-
alleged to be a violation and con-
court as defined in Code, § 648,
. The language of that section is,
lisobedience of any process or or-
lly issued by any court." It will
that the order must be "lawfully
and that involves the question
the order was issued by a court
risdiction and authority to render
cular judgment. It is argued that
n appeal the court may make inci-
ders not affecting the matter in the
ch as making new parties, requir-
r security for the costs, and pro-
ny property in custodia legis, and
I concede all that. But what
judge can make even these inci-
ders? Are they not to be made at
by the judge then presiding in that
Can any other judge make such
will, out of term time? That is
nderstanding of the practice hereto-
ppose A. sues B., both living in
county, and one notifies the other
r before the presiding judge, who
n Cherokee county, to show cause,
ccurs to me that the inconvenience
ractice is a sufficient reason for re-
uch orders to be made returnable
e district and county where the par-
and where the action is pending.
otation was allowed, each judge
y in his district, except by special
on. During that period the gov-
ed a commission to the judge of the
trict to hold court in the Third dis-
kindred question came to this court,
ourt said: "A superior court judge
uthority to vacate injunctions or to
attachments regularly granted, ex-
causes pending in his own district
understand, means when he is on
his own district]. * * * Judges
ange districts by the consent of the
for a whole riding or a series of
ke the place of each other for all
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nor requires a judge to hold a term
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istrict, the authority of the judge
l. The jurisdiction of the proper
the district is superseded by that of
ituted judge in that county during
ied term, but not elsewhere, nor for
ime. The substituted judge has, in
o all cases pending in the specified
uring the specified term, all the
f the proper judge of the district."
ohen, 65 N. C. 511, 515. "A district
ge is not authorized to dissolve in-
or to punish parties for a contempt
ying an injunction, except in his
rict, unless he has been duly as-
hold the court in the county where
the original process is returnable." Morris v. Whitehead, 65 N. C. 637. "The resident judge of a district has no other powers within such district in vacation than any other judge of the superior court. Each judge of the superior court has general jurisdiction only in the judicial district to which he is assigned by the statute, except in cases of exchange," etc. State v. Ray, 97 N. C. 510, 514, 1 S. E. 876. The statutes authorize any judge to issue a restraining order for 20 days, but that order must be returnable before the resident or presiding judge, as the case may be. There is a scarcity of authorities on the main question, probably from the fact that such a question is seldom presented. Reasoning by analogy from the above authorities, it seems to me that when the term of a presiding judge, fixed by statute, begins, he is the only judge who can adjudge important and grave questions in that district during his term. If it be true, then upon the facts before us the order to deliver up the key and books, and the order to show cause, etc., were made by a judge without authority or jurisdiction, and, of course, all subsequent proceedings are void, including the final judgment for contempt. I cannot for a moment consider the possibility that the executive will or may exercise his pardoning prerogative, if he has the power to do so. I have written briefly, to avoid the just inference from my silence on this important question.

IMPERIAL PORTRAIT CO. v. BRYAN.

(Supreme Court of Georgia. June 7, 1900.)

SALE BY SAMPLE—WARRANTY.

1. A sale of goods by sample carries an implied warranty that the bulk of the goods purchased will correspond with the sample, but, in order to constitute such a sale, something more must appear than that at the time of the sale a sample was exhibited, viz. that when the exhibition was made it was mutually understood and intended that the sample was a reliable representative of the bulk of the goods purchased.

2. When, in such a case, the contract is expressed in a writing embracing the entire agreement, and the same contains no reference to a sample, "it is clear that conformity of the bulk to the sample is not an agreed term."

3. The evidence in this case failed to show a sale by sample.

(Syllabus by the Court.)

Error from superior court, Greene county; J. B. Park, Jr., Judge pro hac.

Action by the Imperial Portrait Company against R. F. Bryan. Judgment for defendant, and plaintiff brings error. Reversed.

Jos. P. Brown, for plaintiff in error. S. H. Sibley, for defendant in error.

LITTLE, J. The plaintiff in error instituted an action in a justice's court to recover a judgment against Bryan for a bill of goods, amounting to $17.75. The defendant pleaded

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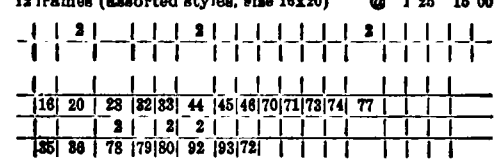
that goods similar to those named in the account attached to the summons were shipped to him, but they wholly failed to come up to samples, and were immediately rejected by defendant and returned to plaintiff. The jury returned a verdict for the defendant. The plaintiff presented a petition for certiorari, which was sanctioned, and on the hearing was overruled, and the plaintiff in error excepted to such judgment.

The order for the goods was as follows:

"Imperial Portrait Co., Chicago, Ill.: Please ship the undersigned, at your earliest convenience, the following goods, at 30 days, net cash, from date of shipment:

1 Crayon and ink portraits, S. S., size 16x20,	@	$1 25	$1 25
1 Water-color tint " " " " "		1 25	1 25
Extra faces in portrait extra	@	50	
Full figure		75	
12 frames (assorted styles, size 16x20)	@	1 25	15 00



500 handbill, with business card		
500 $10.00 punch cards, with frames, at $3.15		
100 circular letters (black)		Free.
2 show cards		
1 punches, @ 50 cts.		
Total		$17 50

"Terms:

"On frames, 30 days, net cash.

"On portraits (after 1st order), 10 days, net cash.

"Notice. The Imperial Portrait Co. agrees to furnish guarantied portraits, as ordered, for each of above frames, at regular prices, as shown by above. The two sample portraits in this order may be exchanged at any time for other portraits. By shipping goods released, the freight charges will be but one-half the usual rates, but the consignee assumes all risk of damage while in transit.

"Guaranty. Portraits to be correct copy of small picture, and, when not satisfactory to owner, are to be taken out of frame and returned for correction, and then, if not satisfactory, to be credited at full price. There is no other agreement, except what is written or printed hereon.

"Please ship as above directed.

"Salesman: E. M. Prithett.

"Order No. 127.

"[Signed] R. F. Bryan.

"Post office: Union Point, Ga.

"Shipping point: Union Point, Ga., via ——.

"Dated at Union Point, Ga., Dec. 8, 1896."

It was also shown for plaintiff that the goods were shipped from Chicago December 23, 1896, consigned to the defendant at Union Point, Ga. The defendant testified in his own behalf that: A salesman exhibited frames, and he made selection and signed contract. Frames did not come up to samples. Were inferior in workmanship and finish. Knew them to be unsalable, and returned them. The salesman who made the contract carried a small, leather case, and the samples consisted of varied-colored selections and corners of picture-frame molding. He carried no whole frames. Witness understood when he bought that it was from samples, though it was not put in the contract. It was also shown that the defendant reshipped the picture frames to the plaintiff in error on 27th of March, 1897, and that it required from 8 to 10 days for goods to reach Union Point, shipped from Chicago, and the same length of time for the return, except in busy seasons, when it required a longer time. A letter from the defendant was also introduced, giving as a reason why the draft for the goods was not paid that the parties, through their salesman, offered to place goods with only one man in town, but broke the contract; hence the goods were returned. Other evidence was introduced, to which reference is not necessary.

The sole question in the case is whether the presiding judge erred in overruling the certiorari. In our opinion, he did. Giving to the testimony of the defendant its full weight, it fails to establish the fact that he bought the goods by sample. The implied warranty which arises from a sale of goods by sample is that the quality of the bulk is equal to that of the sample. Mr. Benjamin, in his treatise on Sales (section 649, Bennett's 7th Ed.), says, on authority, that: "It must not be assumed that, in all cases where a sample is exhibited, the sale is a sale by sample. The vendor may show a sample, but decline to sell by it, or the buyer may decline to trust to the sample and the implied warranty,"—and cites a number of cases to support the text. Mr. Tiedeman, in his work on Sales (section 188), citing a number of authorities, says: "In order that the implied warranty of correspondence of the bulk with the sample may be claimed, it must be a veritable sale by sample. It is not sufficient that the sample is exhibited. It must be exhibited with the intention and understanding of the parties that the seller assures the buyer that the sample is a reliable representative of what the bulk of the goods is. If the facts of the case do not support the presumption that the seller intended to warrant the correspondence of the bulk with the sample, the mere production of the sample will not raise the implication of the warranty." To the same effect, see Burd. Sales, p. 95; Newm. Sales, § 334. It will be noted that the defendant himself, in giving an account of the purchase, said: "Salesman exhibited frames. I made selection and signed contract." Besides, the contract for the purchase of the goods was in writing; and it plainly appears by it that the defendant ordered 12 frames, of assorted styles, of a particular measurement. There was no reference in this order, which contains certain terms of contract, that these frames were purchased by sample.

as no reference of any character from
could be determined that the order
erwise than a purchase of certain
herein described, and among the con-
mbraced in this order is one declar-
"there is no other agreement, ex-
at is written or printed hereon."
er constituted a contract to purchase.
the number, the size, and the style
ames intended to be purchased. It
d a guaranty as to the portraits
ere to accompany the frames. It
prices and terms of payment, and
on its face to be the full and entire
Treating of sales by sample, Mr.
further says: "If the contract has
mitted to writing, and no reference
to a sample, it is clear that conform-
e bulk to the sample is not an agreed
We are of the opinion, therefore,
evidence of the defendant was of it-
sufficient to show that the sale of the
as made by sample, and that the
red in overruling the certiorari.
t reversed. All the justices concur-
ept FISH, J., absent on account of

DANIEL v. STATE.

ne Court of Georgia. June 5, 1900.)

VAGRANCY—EVIDENCE.

evidence was not sufficient to warrant
ct, and the trial judge erred in refus-
ant a new trial.
us by the Court.)

from city court of Griffin; E. W.
d, Judge.
ny Daniel was convicted of vagrancy,
gs error. Reversed.
W. Thurman, for plaintiff in error.
Boyd, for the State.

ONS, C. J. In the city court of Grif-
hony Daniel was tried on a charge
ncy. The jury found him guilty of
se. The trial judge refused to grant
ial, and exception was taken to this
The record shows that the indict-
arged the accused with vagrancy on
10, 1899. The evidence showed that
pring of that year the accused cut
ed 25 cords of wood; that he "chop-
acres of cotton for one man, at 50
acre, hoed cotton for two days for
and received therefor $1, and cut
eat and oats for another,—how much
g disclosed. The chopping of the cot-
the cutting of the grain must have
May or June of the year 1899. The
also disclosed that the accused was
nan, and spent a good deal of his
that occupation. Whether he sold
he caught, or consumed them him-
s not shown. It was shown that he
work regularly, and that he was idle
erable portion of his time. How long
it took him to cut and cord the 25 cords of wood, did not appear; nor how long it took him to chop the cotton or cut the grain. Taking the evidence in its entirety, we think it did not sustain the verdict finding the accused guilty of vagrancy. The law does not say how many days in a month a man shall devote to labor. The statute was enacted to prevent men able to work from idling and wandering about the community, and becoming drones or thieves or charges upon the public. If a man is able to work, but is idle and has no means of support, there is a great temptation to steal, in order to relieve his hunger and supply his bodily necessities. It is to keep him from this temptation that the law commands him to work for his own support. According to the evidence in the present case, the accused must have been at work for several months prior to August, 1899, when he is charged with having been a vagrant, and must have earned a sufficiency for his support during that period. The accused, in his statement, claimed that he had always made his living by his labor, and detailed some of the persons for whom he had worked during the year. Taking the evidence as a whole, we think the verdict was not warranted, and the trial judge should have granted a new trial. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

KIEVE v. FORD.

(Supreme Court of Georgia. June 5, 1900.)

CERTIORARI—JURISDICTION—CITY COURTS.

1. Since, under the constitution, the writ of certiorari can issue only upon the sanction of a judge of the superior court, such a writ issued upon the sanction of a city court judge, and all proceedings thereon, are void.

2. So much of the act of December 16, 1897 (Acts 1897, p. 408 et seq.), establishing the city court of Albany, as undertakes to confer upon the judge thereof authority to sanction petitions for certiorari, or to entertain jurisdiction in certiorari cases, is unconstitutional.

(Syllabus by the Court.)

Error from city court of Albany; C. B. Wooten, Judge.

Action between R. Kieve and Melia Ford. From the judgment Ford brings certiorari, and from the granting of the writ Kieve brings error. Reversed.

Wallace W. Bacon, Jr., for plaintiff in error. Walters & Wallace, for defendant in error.

LEWIS, J. It appears that this suit originated in a justice's court in Dougherty county. The same was a suit upon a forthcoming bond in that court, and the party against whom the magistrate decided excepted to his judgment, and sought to review and reverse it by petition for certiorari to the judge of the city court of Albany for Dougherty county. Under the constitution of this state embodied

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in Civ. Code, § 5846, in treating of the jurisdiction of the superior courts, it is declared: "They shall have power to correct errors in inferior judicatories, by writ of certiorari, which shall only issue on the sanction of the judge." The judge therein referred to evidently means the judge of the superior court. The constitution, therefore, expressly declares that a writ of certiorari cannot issue except on the sanction of a judge of the superior court. The action of the judge of the city court in this case in sanctioning the writ of certiorari is clearly contrary to the express provision of the constitution which we have above cited. If the sanctioning of the writ was void, the subsequent proceedings had upon the petition for certiorari, and the answer of the magistrate thereto, in which the judge sustained the petition for certiorari, are absolutely void. This proceeding was doubtless based upon the provision in the act approved December 16, 1897 (Acts 1897, p. 409, § 2), establishing the city court of Albany. Under that act it is declared "that the city court shall have concurrent jurisdiction with the superior court of all appeals and certioraris from all inferior courts in said county except the court of ordinary, said appeals and certioraris to be had under the same rules governing such remedies in the superior court. The city judge is hereby given authority to sanction petitions for certiorari returnable to said city court." Under the view above expressed as to the provision of the constitution upon the subject of certiorari, we think this provision in the act establishing the city court of Albany is clearly unconstitutional. The city court of Albany, therefore, instead of hearing and entertaining jurisdiction of this petition for certiorari, should have dismissed the same for want of jurisdiction. We feel, therefore, constrained to reverse the judgment of the court below, because the court erred in entertaining any jurisdiction of the case. He should have granted an order dismissing the petition for certiorari for want of jurisdiction, and direction is accordingly given. Judgment reversed, with direction. All the justices concurring, except FISH, J., absent on account of sickness.

LOWERY v. YAWN.

(Supreme Court of Georgia. June 6, 1900.)

COVENANTS—WARRANTY OF TITLE—BREACH—NONSUIT.

1. The plaintiff, in an action for breach of warranty of title to land, makes out a prima facie case when he proves that he yielded to an adverse claimant whose title was paramount to that of the defendant; and more especially is this so when it further appears that the defendant, with notice of the adverse claim, acquiesced in its superiority, advised the plaintiff so to do, and was himself a party to an agreement whereby the plaintiff was permitted to retain possession by paying to the adverse claimant a specified sum.

2. In view of the evidence appearing in record, the court erred in granting a nonsui

(Syllabus by the Court.)

Error from superior court, Telfair cou

C. C. Smith, Judge.

Action by W. A. Lowery against W. Yawn. From a judgment of nonsuit, defe ant brings error. Reversed.

E. D. Graham, for plaintiff in error. Ea & McRae and D. M. Roberts, for defend in error.

LEWIS, J. Lowery brought suit in fair superior court against Yawn to rec damages for a breach of warranty in a d It appears from the evidence in the re that Yawn, on March 5, 1889, conveye certain lot of land to the plaintiff, contai the following warranty of title: "And said party of the first part, the said gained property above described, unto said party of the second part, his heirs, ecutors, and administrators and assi against the said party of the first part, heirs, executors, administrators, and assi and against all and every other person persons, shall and will and does hereby rant and forever defend by virtue of t presents." Plaintiff introduced testim showing a complete chain of title to the l covered by his deed in Norman W. Do under a deed dated June 9, 1888, from Ge E. Dodge. This title was traced back competent evidence to the original plat grant from the state of Georgia to Pete Williams, conveying the land in question February 7, 1834. Plaintiff testified Yawn made him a deed at the time it dated, for which he paid him $250, amount therein stated. He opened a farm the lot, built a dwelling house, and resi there. In two or three years after tal possession, the agents of Norman W. Do entered upon the land without plaintiff's sent, boxed the timber for turpentine poses, worked the timber for such purp for two years, and then cut all the saw timber on the land and carried it av They boxed every tree large enough to tain a turpentine box, and shipped the bo once a week during turpentine season, dipped the gum from the boxes. They en ed on the land and boxed it in 1891. Ya never gave plaintiff any of the back de He promised to defend his title to the l He spoke to Yawn about the agents of Do entering upon the land, and Yawn said would stop them, but he never did so. Ya then went and compromised with Dodge, advised plaintiff to go and fix up the pa with Dodge. Yawn claimed some other in the same district to which Dodge clai title, and he said he compromised with Do as to the other lots, and advised plaintif make terms as to the lot in question. Ya told plaintiff he could settle with Dodge $100. After that plaintiff bought the lo

question from Dodge, and paid him $100 for it. At the time he bought the lot from Yawn it was well timbered, and the turpentine and mill timber on it was about two-thirds of the value of the whole lot. Yawn employed attorneys to stop the agents of Dodge from cutting the timber on the land, and they filed suit, but plaintiff was not present when they made the compromise with Dodge as to the lot of land. After the close of plaintiff's evidence, the defendant's counsel moved for a nonsuit. This motion was sustained by the court below, on the ground that the evidence was not sufficient to authorize a recovery. Upon this judgment error is assigned in the bill of exceptions.

1. Counsel for defendant in error contend that the evidence showed plaintiff in error voluntarily yielded to an outstanding claim without any legal proceeding being brought against him, and was not entitled to a recovery. Civ. Code, § 3617, declares: "In suits for breach of warranty the burden of proof is on the plaintiff, except in cases where outstanding incumbrances have been paid off, or possession has been yielded in consequence of legal proceedings of which the warrantor had notice and an opportunity to defend." In the case of Clements v. Collins, 59 Ga. 124, it was held: "In a suit upon warranty of title to land, unless it can be ascertained from the evidence that title paramount has been asserted against the warrantee, or some person claiming under him, and that he has yielded to it, or is in a situation requiring him to yield presently, as matter of legal duty, no breach is established,—certainly not if a judgment in ejectment, rendered without notice to the warrantor, is relied upon." In the case of Haines v. Fort, 93 Ga. 25, 18 S. E. 994, it was simply decided: "Upon the trial of an action for breach of warranty of land, eviction of the plaintiff under paramount title is not sustained by mere proof that he was sued in ejectment, that a verdict and judgment were rendered against him, and that he surrendered possession in obedience to the judgment; there being no evidence that his warrantor had any notice of the ejectment suit, or any opportunity to defend it, and none as to the title under which the plaintiff was ejected, or the time when that title originated." These are the authorities relied upon to sustain the correctness of the ruling of the judge below in granting the nonsuit. But we do not think they have any application whatever to the facts in this case. It does not necessarily follow that because one has been ejected from land by judgment of court he can recover damages for breach of warranty on the part of his guarantor. Should one suffer such a judgment to go against him without notifying the warrantor he does so at his own risk, and the judgment itself, when the warrantor is not notified to defend, is not binding upon the latter. But it does not follow from this that a party has not a right to bring an action for a breach of warranty without suffering such a lawful eviction by proceedings at law which would necessarily bind the warrantor. The right to sue for a breach of warranty is clearly recognized by Civ. Code, §§ 3556, 3804. Of course, the burden of proof is upon the plaintiff when he brings his action for damages for a breach of warranty in a deed to land. If he has been evicted by judgment, after notifying the warrantor before its rendition to protect his title, such a judgment would make out, at least, a prima facie case in his favor. A judgment, without such notice, as above seen, would amount to no proof. But, even where there has been no suit in court to recover land from him, if he can show by proof that there was a paramount title outstanding against him, to which he was obliged to yield obedience, and that parties had taken possession under that title, this, in itself, would in law amount to an eviction, and would be such a breach of warranty as would authorize him to recover. Such was the proof relied upon for a recovery in the present case. It was absolutely proven by plaintiff that another party, Norman W. Dodge, had a perfect chain of title to the property in dispute, and it was further shown that Dodge had taken possession of the premises by placing laborers thereon for the purpose of obtaining turpentine and lumber for sawmill purposes. The plaintiff notified his warrantor of this possession that was being taken of his property. The warrantor promised to defend and protect him in his possession. Instead of doing this, he advised him to compromise with the holder of the legal title. The evidence is sufficient to show that the defendant acquiesced in the superiority of this title, and was himself a party to the agreement whereby the plaintiff was permitted to retain possession of the land by paying to the adverse claimant a specified sum. It is a well-recognized rule of law that it is not necessary that a tenant should be forcibly ejected or dispossessed of demised premises by process of law in order to maintain his action for a breach of warranty. We quote the following from 2 Am. & Eng. Enc. Law (2d Ed.) pp. 480, 481: "As has been seen, an eviction by title paramount arises where a third person establishes a title to the demised premises superior to that of the landlord, and gains possession by virtue of that title. It is not necessary that the tenant should be forcibly ejected or dispossessed of the demised premises by process of law, but he may peaceably yield possession to the person who has the superior title, or who has been adjudged to be entitled to the possession, and treat himself as having been evicted." To this text is cited quite a number of authorities from various states. In Martind. Conv. § 170, it is stated: "It has been said that, to authorize a recovery upon the covenant of warranty or quiet enjoyment, there must be an eviction, the technical meaning of which is dispossession

by judgment of law. But by the weight of authority, and upon principle, nothing more is necessary to sustain an action than an ouster by title paramount or lawful disturbance. Thus, if one having a legal claim seeks to enforce it by expelling the tenant in possession, it is not necessary for him to wait for a judgment and actual eviction by process of law. He may yield possession to one who has his paramount title, and claim for a breach of the covenant." The same principle is also announced in 2 Greenl. Ev. § 244. These principles would certainly apply to the present case, where not only such paramount title has been shown, and possession forced thereunder, but the warrantor of plaintiff's title by his conduct recognized the superiority of the claimant's title, and was instrumental in bringing about a compromise between the plaintiff and this claimant.

2. In view of the evidence appearing in the record, the court clearly erred in granting a nonsuit. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

GORDON v. GORDON.

(Supreme Court of Georgia. June 7, 1900.)

DIVORCE—ALIMONY—CONTEMPT.

1. On the hearing of an attachment for contempt against a husband for failing to pay to his wife temporary alimony which had been theretofore ordered by the judge, it is within the judge's discretion to modify his former order so as to reduce the amount. He has power in such a proceeding to adjudge that part of the costs be paid by the wife.

2. The discretion given the judge by the Code was not abused in the present case. Civ. Code, § 2459.

(Syllabus by the Court.)

Error from superior court, Greene county; John C. Hart, Judge.

Action by Ellen Gordon against George Gordon for divorce. From proceedings on attachment against the husband for contempt, plaintiff brings error. Affirmed.

J. P. Brown, for plaintiff in error. Park & Merritt and Saml. H. Sibley, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

PASLEY v. BELAND.

(Supreme Court of Georgia. June 8, 1900.)

CHATTEL MORTGAGE—PRIORITIES.

Where an owner of personal property gives a mortgage thereon, and subsequently sells the same property to another, and thereupon the latter mortgages it to yet another, who forecloses his mortgage, and has the property levied on as that of the last mortgagor, the first mortgagee cannot foreclose his mortgage, and place his execution in the hands of the levying officer, so that the property may be sold freed from the incumbrance of his mortgage, and claim the proceeds of the sale in preference to the junior mortgagee. Section 2741 of the Civil Code does not apply to such a case, but only to a case where both mortgages are given by the same person on the same property.

(Syllabus by the Court.)

Error from superior court, Macon county; Z. A. Littlejohn, Judge.

Action by C. M. Pasley against E. S. Beland. From the judgment, Pasley brings error. Affirmed.

Greer & Felton and J. W. Haygood, for plaintiff in error. R. S. Foy, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

GORDON v. GORDON.

(Supreme Court of Georgia. June 7, 1900.)

DIVORCE—REVIEW.

There was no error in the admission of evidence. The charges requested which the court refused did not, except as covered by the general charge, embrace correct legal propositions. Two successive juries have found in favor of a divorce of the parties. The trial judge was satisfied with the verdict, and, there being some evidence to sustain it, this court will not interfere with his discretion in refusing to grant a new trial on the ground that the verdict was contrary to law and the evidence.

(Syllabus by the Court.)

Error from superior court, Greene county; John C. Hart, Judge.

Action by George Gordon against Ellen Gordon. From a decree of divorce, defendant brings error. Affirmed.

J. P. Brown, for plaintiff in error. Samuel H. Sibley, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

HANCOCK v. MINSHEW et al

(Supreme Court of Georgia. June 6, 1900.)

APPOINTMENT OF ADMINISTRATOR—CAVEAT—APPEAL—DISMISSAL.

1. Where, on the application of one person to be appointed administrator of the estate of an intestate, a caveat was filed by another person contesting such appointment, and praying that the caveator be appointed administrator, and the ordinary, after a hearing, passed an order vesting the administration in the clerk of the superior court of the county where the application was made, it was error, on appeal by the original caveator from this order of the ordinary, for the presiding judge of the superior court to dismiss the appeal on the ground "that there had been no caveat to the appointment of the clerk."

2. Even if in such a case it was not necessary to make the clerk a party to a bill of exceptions sued out by the appellant for the

purpose of reviewing in the supreme court the judgment dismissing his appeal, it was certainly not improper so to do.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Caveat by J. M. Hancock against O. Minshew and others over appointment of administrator. The judge of the superior court dismisses an appeal therefrom, and the caveator brings error. Reversed.

Bankston & Cannon, for plaintiff in error. Hal Lawson and Eldridge Cutts, for defendants in error.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

CLARK v. STATE.

(Supreme Court of Georgia. June 5, 1900.)

CRIMINAL LAW—DIMINUTION OF RECORD—JURISDICTION ON APPEAL—VENUE—EVIDENCE.

1. When, in making a suggestion of a diminution of the record in a case pending in the supreme court, it is alleged that the brief of the evidence which was filed with the motion for a new trial had, without authority, been changed in certain particulars before the transcript of the record had been made, and it is not alleged that the copy of the brief of evidence as it appears in the transcript of the record is not a true copy of the approved brief of evidence on file, such suggestion will not be entertained. The office of such a suggestion is to perfect the record in the supreme court so that it may correspond in all particulars with the original on file in the office of the clerk of the trial court.

2. The supreme court has no jurisdiction to make inquiry into the fact whether an alteration has or not been made in any of the original papers which constitute the record of a case, when such alterations are alleged to have been made before the filing in the office of the clerk below of the bill of exceptions duly certified, and, consequently, before the record for this court has been made up and certified. Under such circumstances, jurisdiction to inquire into the matter is confined to the trial court.

3. The venue of the crime for the commission of which the plaintiff in error was convicted does not appear, from an inspection of the brief of evidence, to have been proven. A new trial is therefore awarded.

(Syllabus by the Court.)

Error from superior court, Gwinnett county; R. B. Russell, Judge.

John Clark was convicted of assault with intent to kill, and brings error. Reversed.

Brown & Cooper, for plaintiff in error. C. H. Brand, Sol. Gen., for the State.

LITTLE, J. On the call of this case the solicitor general, under the rules of this court, in writing, suggested a diminution of the record, and set forth the following facts: That he agreed to the original brief of evidence prepared in connection with the motion for new trial on condition that certain corrections made therein by him should be a part thereof, and delivered the same to counsel for the plaintiff in error. Subsequently the brief was examined by the judge who presided at the trial, while such corrections were a part of the brief. That during the week preceding the call of the case in this court he called at the clerk's office for the purpose of preparing a brief for the argument of the case, and, finding that it was in the possession of one of the counsel for the plaintiff in error, obtained it, and on reading it discovered that the same had been altered by an erasure of that part of the brief which showed that the venue and character of the weapon used were parts of the evidence before the jury. This alteration was made without the knowledge or consent either of the judge or himself, and was without authority. The erasure, it was alleged, was made after the judge had read and examined the brief, but before he had formally approved the same. That the brief had been in the custody of one of the counsel for the plaintiff in error before and since the motion for new trial was decided, and before the record was made up. That the evidence which was stricken from the brief was material to a fair hearing of the case, and a suggestion of diminution of the record was made, and the court requested to pass such order as would fully protect the interest of the state. Accompanying this suggestion was a certificate from the clerk setting out certain evidence which appeared in the brief in the handwriting of the solicitor general, showing that the cutting (the plaintiff in error was indicted for an assault with intent to murder, and was found guilty of stabbing) was on Saturday before Christmas in 1898, in Gwinnett county, and that the knife was a weapon likely to produce death, etc. The clerk further certified that this portion of the testimony was at some time (he does not know when) stricken from the brief with pen and ink by some one (he does not know who). Copies of that part of the evidence which was added by the solicitor general, and also that part which was thus stricken, were also attached. A certificate of the judge was also attached, to the effect that, after the brief of evidence was prepared by movant's counsel, and the same was interlined and corrected by the solicitor general, and agreed to by him with the statement that such correction should be a part of the brief, it was transmitted to him, and that he examined it, but made no alteration or erasures, and that the brief then contained a distinct statement that the cutting occurred in Gwinnett county, with a knife which was likely to produce death; that the brief was not approved until some time thereafter, but was approved without re-reading it at the time of the hearing; that, if any changes were made in it subsequent to the time when it was read, it was without his knowledge or consent, and unauthorized. The judge then states as a matter of fact that it was clearly proven on the trial

of the case that the cutting occurred in Gwinnett county, and that the knife was a weapon likely to produce death, and that he would not have approved the brief if he had had any reason to suspect that that portion of it had been erased.

1. After a consideration of the motion submitted by the solicitor general, we are of the opinion that it cannot be granted, for the want of jurisdiction. The brief of the evidence on a motion for new trial, which has been filed and approved, is a part of the record (Civ. Code, § 5537), and by section 5554, Id., it is made the duty of the clerk of the superior court in 10 days from the filing of the bill of exceptions in his office to make out a complete transcript of the record in the case, which, with the original bill of exceptions, shall be transmitted to the next term of this court, the transcript bearing a certificate of the clerk that it is a true and complete transcript of the record in the case. These requirements of the statute were complied with in the present case, and, for aught that appears in the allegations made by the solicitor general, the transcript of the record now in this court contains a complete and correct copy of the original brief of evidence as it is now of file in the clerk's office of the superior court of Gwinnett county. It is the office of a suggestion of a diminution of the record to perfect and complete the transcript (Civ. Code, § 5538), but in no event can such a suggestion be the means of bringing to this court any matter not contained in the brief of evidence at the time the transcript was made and certified. If any error has been made by the clerk in such transcript, and the same is material, a true copy of the brief or any other part of the record can be brought here as the result of a suggestion of a diminution of the record; but such a motion is wholly unavailing to correct the original brief of evidence. Such correction must be made in the court below before the transcript has been made and certified. This court never has before it the original record, but only a copy, and no change can be made here in the copy which does not appear in the original record.

2. It would seem to follow from what has been said that the jurisdiction of this court does not extend to any inquiry into the fact whether an alteration has been made in any of the papers composing the original record of the case before the transcript was made up and certified. Minhinnett v. State, 106 Ga. 141, 32 S. E. 19. Whether such inquiry could be instituted by this court after that had been done it is not now necessary either to discuss or decide. In the case of High v. Candler, 103 Ga. 86, 28 S. E. 377, this court ruled that: "Before a bill of exceptions becomes an office paper of the supreme court, so as to be established here as a lost paper, it must affirmatively appear that it was not only certified by the trial judge, and filed in the office of the clerk of the court below, but certified as the original bill of exceptions, so as to be ready for transmission to this court. Until this is done, it is exclusively an office paper of the trial court, although the case itself be no longer pending there." A distinction must be drawn here between a bill of exceptions and a transcript of the record of a case brought to this court. It is provided by law that the original bill of exceptions, duly certified, shall be transmitted to this court. The effect of such a requirement is to make such bill of exceptions an office paper of this court after it has been duly certified by the judge and by the clerk as the original bill. It is then ready for transmission to this court, and is taken out of the jurisdiction of the trial court; but the original record is not required to be transmitted, and what it contains is determined here from the copy certified by the proper officer to be a true copy. Therefore in no event does the record which includes the brief of evidence ever become an office paper of this court, and it may, therefore, well be doubted whether this court would have jurisdiction at any stage of the proceedings to inquire whether the original brief of evidence as agreed on had been altered. It certainly would have jurisdiction to inquire whether any change in the transcript of the record had been made after it was duly certified and ready for transmission to this court, because, under the statute, such transcript, after transmission, would become an office paper of this court. But, to put the matter beyond peradventure, it is not insisted that the original brief of evidence was changed after it had been approved by the presiding judge and ordered filed. Certainly, then, this court can make no inquiry as to when or by whom such alteration was made. The determination of that fact rests alone with the trial court. In the exercise of the duties imposed upon us, we must take the transcript of the record as it comes; and, unless it is made to appear that the transcript is incorrect or defective as compared with the originals copied into it, the questions of fact which are involved must be made to depend upon the copy of the record sent here. The defendant was indicted for the offense of assault with intent to murder by cutting one Lockridge with a knife, and it is alleged that the crime was committed in the county of Gwinnett. The venue as alleged was not proven, as appears from the brief of evidence, and therefore the judgment overruling the motion for new trial must be reversed. All the justices concurring, except FISH, J., absent on account of sickness.

CENTRAL OF GEORGIA RY. CO. v. BOND.

(Supreme Court of Georgia. June 5, 1900.)

EXPERT EVIDENCE—APPEAL—REVIEW—WRONGFUL DEATH—MEASURE OF DAMAGES—NEW TRIAL—INJURY TO PERSON ON TRACK—NEGLIGENCE—INSTRUCTIONS.

1. The rule that, where the question under examination is one of opinion, a witness not an expert is incompetent to testify to his opinion without stating the facts on which it is based, applies when an attempt is made to prove what distance a train running at a given rate of speed would "knock" a man struck by it on the track.

2. The supreme court cannot undertake to determine whether or not permitting a witness to answer a particular question propounded to him was prejudicial to the party complaining thereof, when it is not informed what the answer was.

3. An exemplification of a municipal ordinance is not admissible in evidence unless duly certified under the corporate seal.

4. It is not competent for any purpose to show that a railroad employé who has violated a municipal ordinance was ignorant of its existence.

5. When a widow is entitled to recover for the homicide of her husband, the measure of her damages is the full value of his life, although she and he were living in a state of separation at the time of his death.

6. A ground of a motion for a new trial alleging error in an instruction to the jury must set forth, either literally or in substance, the language complained of, or such ground cannot be considered.

7. The violation by a railroad company of a valid municipal ordinance is negligence per se, and the court may so inform the jury.

8. A bare complaint that "the court erred" in giving a particular instruction brings nothing into question except the soundness, in the abstract, of the proposition or propositions therein announced. If the instruction is abstractly correct, the question of its inapplicability to the case in hand must be distinctly made, by clearly pointing out how or why it was inappropriate.

9. Where, in its charge to the jury, the court omits to announce to them a rule of law having a direct bearing upon a contested issue in the case, the refusal of a proper request so to do is manifestly erroneous.

(Syllabus by the Court.)

Error from superior court, Macon county; Z. A. Littlejohn, Judge.

Action by Frances R. Bond against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Wm. D. Kiddoo, for plaintiff in error. Hardeman, Davis & Turner, T. C. Taylor, and Greer & Felton, for defendant in error.

LUMPKIN, P. J. Mrs. Frances R. Bond obtained a verdict against the railroad company for the homicide of her husband, and the defendant complains here of a judgment overruling its motion for a new trial.

1. Two witnesses for the plaintiff were allowed, over objection, to testify concerning their opinion as to what distance a railroad train running at a specified rate of speed would "knock" a man if it struck him while he was upon the track. The objection was that these witnesses were not shown to be experts, or of sufficient knowledge to be able to say "what a train could do," and did not undertake to give the facts upon which their opinions were based. We think this testimony should have been excluded. It related to a matter purely of opinion, and the rule is well settled that in such a case a witness who is not an expert cannot testify to his opinion without stating the facts upon which the same is founded. When he expresses his opinion in connection with the facts which he regards as justifying it, the jury are to judge of the value of it, and this they cannot do in the absence of such facts. This familiar rule is applicable in the present instance. No witness could say, as matter of fact, that a running train would, by the impetus of a collision with a man on the track, carry him so many feet. What would happen under such circumstances is certainly, so far as relates to the question of distance, purely a matter of opinion.

2. Complaint is also made that the court, over objection, permitted another witness to answer a specified question. The ground of the motion for a new trial relating to this matter does not, however, set forth what the answer was, and we are therefore unable to determine whether admitting it was or was not prejudicial to the defendant. Telegraph Co. v. Michelson, 94 Ga. 436, 21 S. E. 169; Hule v. McDaniel, 105 Ga. 319, 31 S. E. 189; Reinhart v. Blackshear, 105 Ga. 799, 31 S. E. 748; Pearson v. Brown, 105 Ga. 802, 31 S. E. 746.

3. The plaintiff's husband was killed in the town of Montezuma by a locomotive of the defendant company. For the purpose of showing that the train drawn by this locomotive was running at an unlawful rate of speed, the plaintiff offered in evidence what purported to be a certified copy of an ordinance of that town which made it unlawful to "run engines and trains in any part of the town more than five miles an hour." This document was objected to on the ground that "there was no seal of the town attached" to the certificate which purported to be signed by the clerk of council. The objection was overruled. It ought to have been sustained. The paper offered in evidence was not admissible under section 5211 of the Civil Code; for that section applies exclusively and in terms to the public officers of this state and the several counties thereof, and therefore can have no reference to certificates signed by municipal officers. Indeed, exemplications of the records of municipal corporations were not admissible at all until made so by the act of September 19, 1891 (1 Acts 1890–91, p. 109), and it merely provides that they shall be admitted in evidence when certified under seal. The provisions of this act are now embraced in section 5216 of the Civil Code.

4. The above-mentioned document having been admitted in evidence, the defendant sought, in making out its defense, to prove

by its engineer in charge of the locomotive at the time of the homicide that he had never heard of any ordinance of the town of Montezuma regulating the speed of trains within the corporate limits. We think this evidence was properly excluded. It was insisted in the argument here that testimony upon this line, though not admissible for the purpose of excusing the engineer for a violation of the town ordinance, was competent for the purpose of showing that he was not grossly negligent in running the train at a prohibited rate of speed. We cannot concur in this view. When a town or city passes an ordinance of this kind, all railroad companies concerned, and their agents and servants, are chargeable with constructive notice of it; and it cannot become material, in any judicial investigation of the question whether or not the ordinance was duly observed upon a particular occasion, to inquire whether the company or its employés had actual notice of the existence of the same or not.

5. It is insisted that the court erred in charging the jury that the mere fact that the plaintiff and her husband may have been living in a state of separation at the time of the homicide would neither prevent a recovery, nor have a bearing upon the measure of damages, in case the company was liable. There was no error in this instruction. Section 3828 of the Civil Code gives to a widow a right of action for the wrongful homicide of her husband, and section 3829 prescribes the measure of damages to be "the full value of the life of the deceased." This court, in Boswell v. Barnhart, 96 Ga. 522, 23 S. E. 414, held that under the act of October 27, 1887, from which the language just quoted was taken, "the plaintiff was entitled to recover the gross value of her husband's life, without regard to whether she had previously received anything from him or not."

6. One ground of the motion for a new trial is as follows: "Because the court erred in instructing the jury upon the law as to public road crossings and public street crossings, because it is claimed by defendant that the evidence clearly shows that injury did not occur at either of such crossings, or within a hundred yards thereof." As this ground entirely fails to set forth, either literally or in substance, the language in which the instruction complained of was couched, this court cannot, of course, undertake to say that injury, rather than benefit, resulted to the defendant company from the giving of the charge which it contends was unauthorized by the evidence. In this connection, see Manufacturing Co. v. West, 61 Ga. 120; Railroad v. Freeman, 75 Ga. 332, 339; Railway Co. v. Beauchamp, 93 Ga. 6, 7, 19 S. E. 24; Kehoe v. Hanley, 95 Ga. 321, 22 S. E. 539; Railway Co. v. Dantzler, 99 Ga. 323, 25 S. E. 606; Goldin v. State, 104 Ga. 549, 30 S. E. 749.

7. The court charged the jury, in substance, that the failure of a railroad company to obey a valid municipal ordinance regulating the speed of trains within the corporate limits of a town or city was negligence per se. There was no error in this instruction. Railroad Co. v. Wyly, 65 Ga. 120; Railroad Co. v. Thompson, 76 Ga. 771; Tift v. Jones, 77 Ga. 182, 3 S. E. 399; Railroad Co. v. Smith, 78 Ga. 694, 697, 3 S. E. 397; Railroad Co. v. Young, 81 Ga. 397, 417, 7 S. E. 912; City of Columbus v. Ogletree, 96 Ga. 178, 179, 22 S. E. 709. Counsel for the plaintiff in error relied on the decision of this court in Railroad Co. v. King, 70 Ga. 261, in which a contrary doctrine was announced. We have only to say that as the decision pronounced in the case in 65 Ga., above cited, is older in date, and has never been formally reviewed and overruled, it is to be regarded as controlling upon this question. As will have been seen, that case has several times been cited approvingly, while that in 70 Ga. has never, so far as we have been able to ascertain, been followed or even referred to in subsequent adjudications upon the subject.

8. In still another ground of the motion, the defendant complains, in general terms, that "the court erred" in giving a certain charge therein set forth; but no special reason is assigned why this instruction worked injury to the company, nor is any attempt made in the motion to point out any alleged inaccuracy in the charge, or to criticise the same as being inapt and inappropriate. Viewed in the abstract, it appears to be wholly unobjectionable; for the correctness of the familiar propositions of law therein announced cannot be seriously questioned. That this is true, counsel for the plaintiff in error concedes, but in his brief insists that the evidence did not warrant such an instruction. We cannot, of course, deal with the point thus sought to be raised. It should have been expressly made in the motion for a new trial, if reliance upon it was contemplated, in order that it might be urged before, and passed upon by, the court below. Anderson v. Railway Co., 107 Ga. 500, 33 S. E. 644; Mayor, etc., of Americus v. Eldridge (Ga.) 33 S. E. 654; Clay v. Smith, Id. 963; Dawkins v. Willbanks (Ga.) 34 S. E. 165; Newman v. Day, Id. 167; Railway Co. v. Felton (Ga.) 36 S. E. 93; Cook v. Kilgo (Ga.) 35 S. E. 673.

9. The court was requested, in writing, to give in charge to the jury an instruction in substantially the same language as that used by this court in the fourth headnote to the case of Railway Co. v. Gravitt, 93 Ga. 370, 20 S. E. 550, 26 L. R. A. 553. In view of the evidence relied on by the defendant, this instruction was applicable in the present case; and, as it was not covered by the general charge to the jury, the refusal to give it was erroneous. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

HUBY v. STATE.

(Supreme Court of Georgia. June 5, 1900.)

INTOXICATING LIQUORS—SALE WITHOUT LICENSE.

While the loan of a specified quantity of whisky obtained by the borrower for his own consumption on a promise to return to the lender a similar quantity of the same kind of liquor, may be classed as a sale, under the provisions of section 2944 of the Civil Code, yet it is not such a sale as falls within the operation of the statute which prohibits the sale of spirituous liquors without a license. Skinner v. State, 25 S. E. 364, 97 Ga. 690.

(Syllabus by the Court.)

Error from city court of Wrightsville; V. B. Robinson, Judge.

Abe Huby was convicted of selling liquor without a license, and brings error. Reversed.

O. L. Little and B. B. Blount, for plaintiff in error. Wm. Faircloth, for the State.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness

WILLIAMS v. McAUTHUR, Sheriff.

(Supreme Court of Georgia. June 5, 1900.)

EXECUTION—LEVY—AFFIDAVIT OF ILLEGALITY—MANDAMUS.

1. Whether an affidavit of illegality should be accepted by a levying officer is to be determined by an inspection of the paper, and not by inquiring into the truth of its recitals.

2. An execution is not legally issued when what purports to be the signature of the clerk thereto is not affixed by him or by his authority.

3. The writ of mandamus lies to compel a levying officer to accept a good affidavit of illegality.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Application by P. H. Williams for writ of mandamus against J. O. McAuthur, sheriff. Writ denied, and plaintiff brings error. Reversed.

L. J. Blalock and Cobb, Shipp & Sheppard, for plaintiff in error. J. A. Hixon and J. H. Lumpkin, for defendant in error.

LUMPKIN, P. J. An execution in favor of the National Building & Loan Association of Montgomery, Ala., against C. E. and P. H. Williams, was levied upon property belonging to P. H. Williams, who thereupon tendered to McAuthur, the sheriff of Sumter county, an affidavit of illegality, which the officer refused to accept. Williams sued out a petition for mandamus to compel the sheriff to accept the affidavit. The court refused to make the mandamus absolute, and Williams excepted. One ground of this affidavit was as follows: "Because said execution was signed, or purports to be signed, by J. H. Allen, clerk of superior court of Sumter county, when in truth and in fact the same was not signed by said J. H. Allen, clerk, and it was not signed by any one who had the legal authority or right to sign the same as it is for him. Neither was it signed in his presence." In the view we take of the case, it is unnecessary to set forth the other grounds of the affidavit.

1. At the hearing the court, over the objection of the plaintiff, heard evidence as to the truth of the allegations made in the affidavit of illegality. This was not the proper practice. When a good affidavit of illegality is tendered to a sheriff, it is his duty to at once accept it, and suspend further proceedings upon the execution. If the allegations contained in the affidavit on their face show either that the execution issued or is proceeding illegally, the officer will be protected in accepting it; and he has no right to decline to do so simply because, in his opinion, these allegations do not speak the truth. When, therefore, the court is called upon to compel its officer to discharge his plain duty in such a matter, there should be no inquiry into the truth of the allegations made by the defendant in execution. The only good reason which the officer could set up for declining to accept the affidavit would be that it did not present any sufficient ground for suspending proceedings upon the execution. The law prescibes the manner in which the issues raised by the filing of a legally sufficient affidavit of illegality shall be tried and disposed of, viz. that the sheriff shall return the same along with the execution, to the proper court, where both the plaintiff in execution and the defendant may be fully heard on the questions at issue, to the end that both may be bound by the judgment rendered. To a proceeding by mandamus to compel the officer to return the papers into court as the law directs, the plaintiff in execution is not a party; and it is therefore obvious that the judge, in dealing with the application for mandamus, ought not, by entering upon an investigation into the truth of the recitals of fact contained in the affidavit of illegality, to anticipate and undertake to settle the controversy between the plaintiff in execution and the defendant, which is to be passed upon and adjudicated when the case comes on for a hearing at the proper time and place. On the contrary, the judge should follow the practice which this court, in Taylor v. Reese (Ga.) 33 S. E. 917, held to be appropriate in the event of an application to it for a mandamus to compel a trial judge to certify a bill of exceptions.

2. It is the duty of the clerk of a court in which a money judgment has been rendered to issue an execution thereon. An essential part of the issuing of this writ is that it should be signed officially. When a paper purporting to be an execution has not been signed by the clerk or by his deputy, or by any person having authority to sign it, no argument is necessary to show that it is not

a valid execution. In legal contemplation, such a paper is on no better footing than one not signed at all, and an unsigned document cannot be an execution. It is a mere nullity. Rawles v. Jackson, 104 Ga. 593, 30 S. E. 820. Unquestionably, then, it was the duty of the sheriff to accept the affidavit tendered him by Williams; and, it appearing that the officer had declined to do so, the judge ought to have granted the application for mandamus, if it was the right of the defendant in execution to resort to this remedy.

3. We have no doubt that this was the proper course for him to pursue. Section 4867 of the Civil Code declares that "all official duties should be faithfully fulfilled, and whenever, from any cause, a defect of legal justice would ensue from a failure or improper fulfillment, the writ of mandamus may issue to compel a due performance, if there be no other specific legal remedy for the legal rights." It was certainly the official duty of the sheriff to accept the affidavit of illegality. It is equally true that "a defect of legal justice would ensue" from his failure to perform this duty, and there was "no other specific legal remedy" for the enforcement of the rights of the defendant in execution. If the execution was illegally issued, or was really no execution at all, it was the undoubted right of Williams to file his affidavit of illegality, and upon its rejection to avail himself of the writ of mandamus to compel acceptance of it, in order that he might not be ousted from the possession of his property by virtue of an unlawful sale thereof.

As above stated, we deem it unnecessary to deal with the other grounds of the affidavit of illegality, and as to their merits we express no opinion. It is sufficient to our present purpose to show that the judge erred in refusing to make the mandamus absolute for the reason that the affidavit of illegality contained at least one good ground for suspending proceedings under the execution. After he shall have done so, the merits of all the grounds of the illegality can be passed on when the case arising thereon is tried. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

SHEFFIELD v. BOARD OF COM'RS OF DISPENSARY IN BLAKELY.

(Supreme Court of Georgia. June 5, 1900.)

INTOXICATING LIQUORS—MANAGEMENT OF DISPENSARIES—TAXATION.

1. The commissioners for the management of the dispensary established under the act of December 16, 1897, in the town of Blakely are "county authorities" within the meaning of that portion of the general tax act of 1898 which imposes a tax on "dispensaries operated by county or municipal authorities."

2. The act last mentioned is, therefore, applicable to this dispensary, and consequently the commissioners cannot lawfully operate the same without paying the taxes due the state. This is so without regard to the profits of the business.

3. The property of the dispensary is subject to sale under execution for the state's taxes.

(Syllabus by the Court.)

Error from superior court, Early county; H. C. Sheffield, Judge.

Action by T. E. Sheffield, tax collector, against the board of commissioners of Dispensary in Blakely. Judgment for defendant, and plaintiff brings error. Reversed.

J. M. Terrell, Atty. Gen., John R. Irwin, Sol. Gen., and W. D. Sheffield, for plaintiff in error. Arthur Gray Powell, for defendant in error.

LUMPKIN, P. J. On December 16, 1897, the general assembly passed an act establishing a dispensary "in the town of Blakely, Early county, Georgia," for the sale of intoxicating liquors, and therein provided for the creation of a board of commissioners "for the management of said dispensary." The act provides for the appointment by the judge of the superior court of the Pataula circuit of five discreet citizens of Early county, three of whom shall be citizens of Blakely, and that, when appointed, these commissioners shall constitute a body corporate to be known as the "Board of Commissioners of the Dispensary in Blakely." The act makes it the duty of this board to "maintain at some convenient place in the town of Blakely, Georgia, a dispensary for the sale of ardent spirits, malt liquors, wines, cider and other intoxicants," and prescribes in detail the manner in which the business of the dispensary shall be conducted. Among other things, a manager, to be selected by the board, is required to "keep on hand in such dispensary, under the supervision of said commissioners, such ardent spirits" and other intoxicating liquors "as the said board may direct," and the manager must sell only for cash. The act further provides that the board of commissioners "may buy or contract for such property as are necessary to the purpose of this act, and shall have authority to incumber the same by mortgage or otherwise," and that "said dispensary shall be maintained solely by the proceeds of its sale." The eighth section of the act declares: "That said commissioners shall make semi-annual reports to the grand jury of Early county showing a full financial statement of its affairs. The books of said board shall ever be subject to the reasonable inspection of any citizen of said county." The eleventh section provides "that the proceeds of said dispensary shall be appropriated first to the payment of such liabilities as shall be incurred in its operation, and then, after retaining an amount sufficient to the maintenance of said dispensary, one-half the remainder shall go into the general fund of the county treasury of Early county, and the other half shall be paid to the school fund of said county, to be managed by the board of education."

See Acts 1897, pp. 566–570. The general tax act for the years 1899 and 1900, approved December 22, 1898, imposes "upon all dispensaries, operated by county or municipal authorities, to be paid by the authorities operating the same, a yearly tax of $200." Acts 1898, p. 24. The question for decision is whether or not the commissioners of the dispensary in Blakely are liable to the state for the payment of this tax for the year 1899. The trial judge held that they were not, but our opinion is to the contrary.

1. In support of the judgment excepted to, counsel for the defendant in error insist that these commissioners are neither county authorities nor municipal authorities, within the meaning of the tax act. In our judgment, the dispensary is a county institution, and the commissioners are such functionaries as the general assembly intended to cover by the language above quoted from the act of 1898. It is clear that the dispensary is a public institution. It cannot possibly be regarded as a private enterprise. We do not think it is a state institution. It did not come into existence under a general law establishing a commission for the discharge of duties in which the public at large is interested. The members of the board are not amenable to any state official for misconduct in office, and no official of the state exercises any supervision over them. The act under which this board was created is purely local and special legislation, and has relation exclusively to the county of Early. The members of the board, as will have been seen, are required to make reports to the grand jury of that county. One-half of the profits of the dispensary are to be paid into the general fund of the county treasury, and the other half to the board of education of that county. These things characterize this dispensary as a county institution. The mere location of it in the town of Blakely, and the requirement that three of the commissioners shall be citizens of that town, would not, of course, warrant the conclusion that it was a municipal one; certainly not in view of the fact that under the terms of the act the board of commissioners is in no way responsible to or under the control of the town government. Having shown, as we think, clearly, that the dispensary is a county institution, the next question is, are these commissioners "authorities," and, as such, subject to the tax in question? They are not, of course, authorities in the sense of being county officers, as the term is commonly understood, invested with powers incident to office holders of that character; but we think it no strain to say that they are "authorities" in the broad and comprehensive sense in which that word, as employed in the tax act, was evidently used. At the time of the passage of this act there was no state dispensary for the sale of intoxicating liquors, nor has one since been established; and we are quite sure that it was the purpose of the general assembly to impose the tax in question upon every dispensary operated in the interest and for the benefit of the citizens of either a county or municipality. It could not have been in legislative contemplation that any dispensary had been or would be established in or for any political division of the state other than counties, cities, towns, and villages. When, therefore, the words "operated by county or municipal authorities" were employed, we have no doubt at all of the intention to make the same exhaustively embrace all persons who might be authorized to conduct a dispensary in the interest of the inhabitants of any county or municipality.

2. Another position taken by counsel for the defendant in error is that the tax act was not intended to be applicable to these commissioners for the reason that, if sufficient money to pay the tax should not be earned in the operation of the dispensary, they would themselves be individually liable for the payment of such tax. We are satisfied that this contention is not maintainable. This dispensary, as has been seen, was established under an act passed in 1897. It was not at that time the legislative policy to tax dispensaries. See Acts 1896, pp. 21, 24, prescribing the taxes to be levied for the years 1897 and 1898. Commissioners v. Thornton, 106 Ga. 106, 31 S. E. 733. It was, therefore, within the power of the commissioners to begin to operate the dispensary without making any arrangement or provision for raising money with which to pay a tax to the state. At the session of the general assembly in 1898, however, the legislative policy with respect to taxing institutions of this kind underwent a change. The lawmaking power then distinctly declared that for each of the years 1899 and 1900 they should pay a tax of $200. This act placed dispensary commissioners on the footing of liquor dealers. Presumably, the Early county dispensary began to be operated in 1898. It was certainly in operation in the month of January, 1899. Section 4 of the tax act of 1898 (page 27) made the prepayment of the tax an indispensable prerequisite to lawfully beginning in either 1899 or 1900 the business of conducting a dispensary. If, then, when the 1st day of January, 1899, arrived, the commissioners were without funds derived from their previous operation of the dispensary with which to pay the state tax, it was incumbent upon them either to raise the money necessary for this purpose, and therewith pay this tax, or else suspend operations. They could not lawfully carry on the dispensary without paying the tax; and if, because of a want of funds, or because of inability to borrow or unwillingness to advance the same, they were not in a position to meet the positive requirement of the act of 1898, they ought to have refrained from selling intoxicating liquors. There was nothing for them to do but pay the state's demand or close the dispensary. Under the broad provisions of the act creating the dispensary,

it would seem that the commissioners may lawfully borrow money with which to pay the state tax, and secure its repayment by a mortgage upon their stock in trade.

3. In this connection we will dispose of the only remaining question in this case, which is whether or not the property of the dispensary is subject to sale under an execution for the tax due the state. We think it is. As will have been observed from the above-recited provisions of the dispensary act, the board of commissioners is in many respects placed upon the footing of a trading corporation. As such it can buy or contract for property, and incumber the same by mortgage or otherwise; that is, the board may deal with the goods belonging to the dispensary as a trading corporation does with its goods. If the board, in pursuance of its business as a dealer in liquor, can create liens on its stock in trade, why may not the state, having classed and dealt with it, relatively to the taxes due from it, as such dealer, enforce the collection of these taxes by execution, as in other cases where taxpayers are in default? No good reason why this may not be done occurs to us, and in holding that there is none we feel convinced that we are but giving effect to the true legislative intent with regard to this matter. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

DE SOTO PLANTATION CO. v. HAMMETT.

(Supreme Court of Georgia. June 5, 1900.)

PLEADING—ANSWER.

When a petition in one paragraph alleges that the defendant "is indebted" to the plaintiff "upon an open account," setting forth a copy thereof, and in another paragraph alleges that, although the account is past due, the defendant refuses to pay the same, an answer which in terms specifically denies all the allegations in these paragraphs is good, and ought not to be stricken on demurrer.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action by J. L. Hammett against the De Soto Plantation Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. A. Dodson, J. A. Ansley, and J. A. Ansley, Jr., for plaintiff in error. Shipp & Sheppard and E. F. Strozier, for defendant in error.

LEWIS, J. This was a suit brought in the superior court of Sumter county by J. L. Hammett against the De Soto Plantation Company upon an open account. The petition of the plaintiff contained three paragraphs. In the first it was stated that the De Soto Plantation Company was a corporation under the laws of Georgia, doing business and having its principal office in Sumter county, Ga. The answer of defendant admitted the truth of the allegation in the first paragraph. The second paragraph charged that defendant was indebted to petitioner in the sum of $708.13 on an open account, besides interest, a copy of which was attached, marked "Exhibit A." The third paragraph charged that, although said amount was long past due, defendant refused to pay the same, or any part thereof. In the second paragraph of defendant's answer he expressly denied the allegations contained in paragraphs 2 and 3 of plaintiff's petition. Upon the call of the case for trial it was, upon motion of plaintiff's attorney, ordered by the court that the answer filed by the defendant be stricken as insufficient, to which ruling plaintiff in error excepts. Civ. Code, § 5051, declares: "In all cases when the defendant desires to make a defense by plea or otherwise he shall therein distinctly answer each paragraph of plaintiff's petition, and shall not file a mere general denial, commonly known as the plea of 'general issue.' He may in a single paragraph deny any or all of the allegations, or in a single paragraph admit any or all of the allegations in any or all of the paragraphs of the petition." That is exactly what the defendant did in this case. This was simply a suit upon an open account, and defendant pleaded in answer to each paragraph thereof. The first paragraph is admitted. It charges no liability whatever on the defendant. The second and third paragraphs simply charge liability upon defendant on an open account, and it, in the second paragraph of its answer, simply denies the truth of these allegations. Its denial would not have been more specific and more definite in reply to plaintiff's charges if it had undertaken to have gone further into detail, and explained why it was not liable on plaintiff's demand. The Code itself gives it the privilege of denying in a single paragraph any or all the allegations in any or all of the paragraphs of plaintiff's petition. This case is quite different from those relied upon by counsel for defendant in error, where this court has decided, in effect, that a plea of the general issue to a suit upon a promissory note, which set up no legal defense, was properly stricken upon demurrer. Such was the effect of the rulings in Johnson v. Cobb, 100 Ga. 139, 28 S. E. 72; Lester v. McIntosh, 101 Ga. 675, 29 S. E. 7. The case of Woods v. Roberts, 97 Ga. 254, 22 S. E. 986, was a proceeding to foreclose a mortgage under the provisions of the pleading act of 1893. It was held that "a plea of not indebted, though supplemented by the allegation that the mortgage 'was obtained by fraud on the part of the plaintiff,' without alleging the particular fraudulent acts relied upon to defeat a recovery, is not such an issuable defense as prevents the granting of a rule absolute; and therefore the court did not err in striking such plea." It will be seen that these decisions involved suits

upon written and unconditional contracts in writing. In a suit, for instance, upon an unconditional promissory note, or upon a foreclosure of a mortgage securing an unconditional demand, we cannot conceive of how any evidence could be introduced in behalf of a defendant simply upon a plea of the general issue. This certainly would not cover a plea of failure of consideration, or of payment, or of non est factum, or any other defense which would be available against suits of this character. But this is not true where there is simply a suit upon an open account, especially when the defendant specifically replies to allegations in each paragraph of plaintiff's petition. In the case of Smith v. Holbrook, 99 Ga. 256, 25 S. E. 627, cited and relied upon by counsel for defendant in error, it was decided that a plea simply of the general issue does not in law amount to a denial of averments distinctly and plainly made in plaintiff's petition, and all such averments not otherwise denied are to be taken as prima facie true. It was accordingly held in that case that, where the action was upon an open account, with appropriate allegations, a plea of the nature above indicated raised no issue as to the correctness of the amount of the account sued upon. We have examined the record in that case, and the petition is set forth in paragraphs. The first paragraph of the petition specifically charges that defendant is indebted to petitioners on an account. A copy of the account itemized is attached to the petition. In answer to this paragraph in the petition the defendant simply alleges: "The general issue. Defendants say they are not indebted to the plaintiffs in manner and form as they have alleged, and of this they put themselves upon the country." The defendant nowhere in his answer undertook to specifically deny the allegations of plaintiffs' petition as to his particular indebtedness on the special account therein referred to, but he simply filed a general denial, commonly known as the "plea of the general issue," which by Civ. Code, § 5051, is prohibited; but that very same section provides that he may, in a single paragraph, deny any or all of the allegations, or in a single paragraph admit any or all of the allegations in any or all of the paragraphs of the petition. As we have already stated, this the defendant has literally done in the present case, and, had the defendant in the above-cited case complied with the same rule, and specifically denied the allegations in the first paragraph of plaintiffs' petition, we think this court would have held that it would have been amply sufficient to have put the plaintiffs upon proof of their claim. We are unwilling to extend the ruling announced in the case last cited further than is required by the facts in that particular instance. Literally that decision conforms to the statute, but no more so than the decision in this case conforms to another provision in the same statute. There may be no reason for such a distinction, but a sufficient reply to this is, thus is the law written. The effect of the answer filed in this case is to deny every fact alleged by plaintiff upon which he relies for a recovery, and, his suit not being upon a contract in writing, but simply upon an open account, and the defendant having complied with the requirement of the statute in its answer, that was necessarily sufficient to cast upon the plaintiff the burden of making proof of his demand. In the case in 99 Ga., 25 S. E., the defendant adopted a form of pleading expressly forbidden by law. In the case now here he answered in the manner which the statute prescribes. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

MONTFORD v. ALLEN et al.

(Supreme Court of Georgia. June 5, 1900.)

TAX SALES—ADVERTISEMENTS—POSTPONEMENT—EXECUTION.

1. Under a provision in a city charter declaring that tax sales shall be advertised for 30 days, one insertion of the advertisement of such a sale in each calendar week during the period of 30 days immediately preceding the day of sale will suffice, provided the first insertion appeared at least 30 days before the sale.

2. Where, under a city charter, it is the duty of the marshal to collect executions for taxes and conduct sales thereunder, the city clerk has no authority to postpone a tax sale, or grant indulgence to the defendant in the tax execution.

3. Whether a city has, under its charter, authority to issue an execution for an unpaid street tax or not, if an execution embracing such a tax also included a tax on property to which the property levied on was subject, neither the execution, nor a sale thereunder, would be void merely because the street tax was included in the execution.

4. Under the law allowing 12 months in which to redeem property sold under tax executions, one whose property has been sold cannot redeem after the expiration of the 12 months. Our law does not recognize the existence of equitable grounds as a basis for extending the time within which redemption can be made. Upon the findings of the jury on the issues submitted to them, and an agreed statement of facts, there was no error in adjudging that the sale was valid.

(Syllabus by the Court.)

Error from superior court, Sumter county; Z. A. Littlejohn, Judge.

Action between O. C. Montford and H. E. Allen and others. From the judgment, Montford brings error. Affirmed.

R. L. Maynard, for plaintiff in error. Hooper & Crisp, for defendants in error.

COBB, J. 1. The charter of the city of Americus provides "that it shall be the duty of the marshal to levy all executions in favor of the city, and after advertising for thirty days, he shall sell the property levied on before the court house door in Americus, on a regular sheriff's sale day, and between the

legal hours of sheriff's sales." Acts 1889, p. 970. One of the questions raised in the present case is whether, under this provision in the charter, an advertisement inserted seven times in a newspaper published in the city of Americus, when the time elapsing between the first insertion and the date of the sale was 31 days, and there was at least one insertion for each calendar week embraced within such time, is an "advertising for thirty days," within the meaning of the charter. "Advertise" means "to give public notice of; to announce publicly,—especially by a printed notice." Webst. Int. Dict. It is to be noted that the charter does not require, in terms, that sales shall be advertised in a newspaper or gazette; but, conceding that the charter should be so construed, what is essential to meet the requirements of a law which says that a sale shall be had after advertising the same for 30 days? Construing such language strictly, it might bear the interpretation that notice shall be given in a newspaper every day during a period of 30 days. In the light of the purpose for which advertisement is given, in the light of other laws of the state relating to the manner of giving notice of sales and other transactions, would such a construction be a reasonable one? Can it be presumed that, in providing the way in which notice of tax sales in the city of Americus should be given, the general assembly intended that a sale should be void unless notice of the same was published every day, except Sunday, for a period of 30 days preceding the day of sale? Is there an act of the general assembly relating to public sales in which such a requirement is had? If so, our attention has not been called thereto. Is it to be presumed that the general assembly intended that a tax sale of this municipality should be governed by a rule which is entirely inconsistent with the uniform practice in the state in regard to public sales, as well as a rule which would impose upon the taxpayer a burden in the way of advertising fees which is not imposed upon any one else whose property is seized under judicial process? We are clear in our opinion that the general assembly did not so intend. Treating it as settled that the legislature did not intend by this provision in the charter of Americus that a tax sale should be advertised every day for 30 days, what was its intention with reference to the number of times a notice should be inserted within that period? There can be but one answer to this question, and that is that an advertisement appearing one time at least 30 days before the day of sale, and as near as practicable immediately preceding the beginning of that period, would be an advertising within the meaning of the charter. That would be giving 30 days' public notice of the sale, or announcing publicly that the sale was to take place at the expiration of that time; and, if the charter is to be construed as requiring advertisement in a newspaper, but one insertion of the advertisement at least 30 days before the sale, and as near as may be immediately preceding the beginning of that period, would be a compliance with the law. The charter requires either that the advertisement should appear every day for 30 days, or its appearance for one day 30 days before the sale would be sufficient. There is no escape from this. To hold that the charter required notice to be published every day would be to construe the law as requiring something which is not only unusual, but unreasonable. To hold that only one insertion of the notice was necessary would be giving a construction which would authorize a sale after advertising in a manner which is unusual, but not in a manner which is unreasonable, in so far as it regards the rights either of the public or the taxpayer; and, when a statute is susceptible of two constructions, the one which is the more reasonable should be adopted. It is to be noted that, as regards the effect of a failure to properly advertise, there is a distinction to be drawn between tax sales had in pursuance of the general law of the state, and those had in pursuance of a provision in a municipal charter. In the former the law in reference to notice is merely directory, and purchasers at such sales, if themselves without fault, will be protected, whereas a provision of a city charter prescribing the time for giving notice of a municipal tax sale must be strictly complied with, or the sale will be void, even as against an innocent purchaser. That this is the law as established by decisions of this court was pointed out in Conley v. Redwine (Ga.) 35 S. E. 92. That such is the law is an additional reason for construing the charter of Americus as requiring that method of advertising which is less cumbersome, and therefore more apt to be ordinarily complied with. Section 5458 of the Civil Code, providing that where the law of force on October 21, 1891, required notices of sales "by ordinaries, clerks, sheriffs, county bailiffs, administrators, executors, guardians, trustees or others," to be published in a newspaper for 30 days, it should be sufficient to publish such notices once a week for 4 weeks preceding the sale, does not in any manner affect the provision of the charter of Americus relating to advertisements of tax sales. The act of 1891, which is now embodied in that section, does not expressly refer to the subject of municipal tax sales, nor is there anything in the act which would necessarily raise the implication that the general assembly intended the provision of the act to apply to such sales. Neither did the law of which that act was amendatory relate in any way to such sales. Both had reference, rather, to sales under the general laws of the state, and not to sales made under local or special laws, such as municipal charters. A general law will not be so construed as to repeal an existing particular or special law unless it is plainly manifest from the

terms of the general law that such was the intention of the lawmaking body. "A general later affirmative law does not abrogate an earlier special one by mere implication." "Having already given its attention to the particular subject, and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one." "The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction." End. Interp. St. § 223 et seq. While the general law is not at all applicable to the present case, it will be noticed that the sale under consideration was advertised in such a way as to be a compliance with that law. Section 732 of the Political Code, providing that "the time, place, and manner" of the sale of property for taxes due a municipality shall be the same as that provided by law for sheriff's sales for state and county taxes, does not undertake to prescribe the manner in which notices of sales shall be given. See Bacon v. Mayor of Savannah, 86 Ga. 303, 312, 12 S. E. 580.

There is nothing in the case of Rish v. Ivey, 76 Ga. 738, to conflict with the ruling that the provision of the charter of Americus above quoted does not require that notice of the sale should be published in a newspaper every day for 30 days. Taking that decision in the light of the facts as stated by Mr. Justice Blandford, it might be said that it was ruled merely that a law requiring an advertisement for 30 days was not satisfied by an insertion of the notice once a week for 4 weeks; that is, 28 days,—a period less than 30 days. But, even if this be not a proper construction of the decision, upon examining the act which was under consideration in that case it will be found that it required that the comptroller general should, "for thirty days, make advertisement" in one newspaper at the capital of the state of a list of all wild lands which were not given in for taxes in the different counties, and require in such publication the owners of the lands to come forward and give in and pay taxes on the lands, and that in default thereof the lands would be sold in the counties where they were situated. After the expiration of the time required by the act, the comptroller general was authorized to issue executions against the wild lands, and proceed to have them sold in the manner prescribed in the act. Acts 1874, p. 105. It was held in that case that the introduction in evidence of one issue of a paper published at the capital, in which was inserted the list of wild lands claimed to be unreturned, was not sufficient to establish that such list had been published for 30 days. There is a distinction to be drawn between advertising or publishing a certain writing or article for a given number of days, and giving notice or advertising that a certain thing will occur after the expiration of a given number of days. A law requiring that a certain list shall be published for 30 days in a newspaper is not complied with by publishing such list one time, when the newspaper is issued more than one time during the period of 30 days. Such we understand to be the ruling made in the Rish Case. A law requiring that an officer shall sell property seized for the payment of municipal taxes only after having given public notice of the sale for 30 days (and, properly construed, this is all that the charter of Americus requires) is complied with when there has been an insertion of such notice one time in a newspaper which is published at least 30 days before the date of the sale, when such insertion is, as near as may be, 30 days immediately preceding the day of sale; and certainly such a law is complied with when there has been at least one insertion during each calendar week for a period of 30 days immediately preceding the sale, and the first of such insertions was 31 days before the sale.

2. Under the provision of the charter of Americus which is quoted above, it is the duty of the marshal to levy tax executions, and conduct sales of the property thereunder. The city clerk has no authority whatever over the executions after they are placed in the hands of the marshal, and consequently has nothing to do with the sales. Such clerk would therefore have no authority to postpone a sale under a tax execution, or to grant indulgence to the defendant therein, after it has been placed in the hands of the marshal for collection. The clerk having no authority to make such an arrangement, the taxpayer would rely upon it at his peril; and even if, in the present case, the clerk entered into such an arrangement, this would not invalidate the sale had by the marshal.

3. It was argued in this case that the city of Americus had no authority under its charter to issue an execution for an unpaid street tax, and that, therefore, including the amount due for such a tax in the execution, which also embraced the tax due upon the property of the tax payer, vitiated the entire execution. It was conceded that the execution, except as to the amount due for street tax, embraced a sum which was due by the taxpayer as a tax upon property. Such being the case, it is unnecessary to determine whether or not the authorities of the city of Americus could enforce by execution the payment of the street tax. Even if they could not, embracing the same in an execution with other claims which

could be lawfully collected by execution would not invalidate the execution. State v. Hancock, 79 Ga. 799, 5 S. E. 248; Barnes v. Lewis, 98 Ga. 558, 25 S. E. 589; Dawson v. Dawson, 106 Ga. 45, 32 S. E. 29. The cases cited thoroughly establish the foregoing rule, so far as this state is concerned; but they do not seem to be in accord with many rulings made in other states. See Cooley, Tax'n (2d Ed.) pp. 496, 497; 25 Am. & Eng. Enc. Law (1st Ed.) p. 387 et seq.

4. The right of a taxpayer to redeem property sold at municipal tax sales is purely statutory. Pol. Code, § 733. After the time fixed by the statute for redemption has expired, the right to redeem is gone, and there is no power, even in a court of equity, to authorize a redemption of the property in such cases.

5. The right of the taxpayer to redeem his property had expired before any tender was made. The sale was not invalid for any of the reasons which were set up in the petition, and the decree entered by the judge upon the agreed statement of facts and the findings of the jury was in all respects regular and proper. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

CARTER v. SOUTHERN RY. CO.

(Supreme Court of Georgia. June 5, 1900.)

ACTION BY AGENT.

A person who, having in charge, as agent, the goods of another, makes with a common carrier a contract to ship such goods, in which the agency is not disclosed, may maintain an action in his own name for a breach of such contract.

(Syllabus by the Court.)

Error from superior court, Telfair county; C. C. Smith, Judge.

Action by W. R. Carter against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

E. D. Graham, for plaintiff in error. De Lacy & Bishop, for defendant in error.

COBB, J. Carter sued the railroad company for damages resulting from the breach of a contract of shipment which the defendant had entered into with the plaintiff. On the trial the plaintiff introduced in evidence a receipt signed by an agent of the defendant, of which the following is a copy: "Received from W. R. Carter the following articles in apparent good order, contents and value unknown, as per coupon attached, to be transported to W. R. Carter, McRae, Ga.,"—setting forth the articles shipped. The plaintiff testified that the distance from the point from which the goods were shipped to their destination was 30 miles; that they should have been delivered in 24 hours, which was a reasonable time; that the goods were new, and in good condition, when delivered to the defendant; that they were not delivered by it at the point to which they were shipped until 25 days had elapsed from the time they were delivered to the defendant; and that, when delivered, some of the goods were in such a damaged condition that they were rendered worthless, and all of them were more or less damaged. Just before leaving the witness stand, the plaintiff stated: "The goods belonged to my wife, Mary Carter. She owned them, and I had the goods in my charge as her agent." There being no further evidence for the plaintiff, the court, upon motion of defendant's counsel, granted a nonsuit on the ground that the goods alleged to have been damaged did not belong to the plaintiff, but to his wife. To this judgment the plaintiff excepted. The question, therefore, presented for decision is whether or not the plaintiff could maintain the action in his own name. It is an elementary principle that the action on a contract must be brought in the name of the party in whom the legal interest is vested, and that the legal interest in a contract is in the person to whom the promise is made, and from whom the consideration passes. 15 Enc. Pl. & Prac. 499, 500; Civ. Code, § 4939. In the present case the plaintiff, although in reality he occupied the relation of agent of his wife to take charge of the goods shipped, was named both as the consignor and consignee in the contract of shipment, with no reference whatever therein to the fact of his agency. Under such circumstances the action could be maintained in his own name. Generally, it is true, an agent has no right of action upon a contract made by him in behalf of his principal, but he has a right of action in his own name "where the contract is made with the agent in his individual name, though his agency be known." Civ. Code, § 3037 (3). Certainly, the action could be maintained where the fact of agency and the name of the principal are both concealed by the agent. In such a case the agent is, in contemplation of law, the real contracting party, to whom the promise of the other party was made, and who is entitled to enforce it. Mechem, Ag. § 755; Story, Ag. (9th Ed.) § 393. But the plaintiff was the consignor of the goods shipped. The contract was made with him, and he is primarily liable for the transportation charges. The carrier dealt with him as the owner of the goods, and could not, in an action by the plaintiff to recover the goods, dispute the title, unless the title of the real owner was sought to be enforced against the carrier. Civ. Code, § 2286. In the case of Haas v. Railroad Co., 81 Ga. 792, 7 S. E. 629, suit was brought by Haas upon a contract or bill of lading made by the defendant with one Ayres. It was held that, "the bill of lading for the flour not having been indorsed to plaintiff by the party in whose

favor it was issued, the former could not maintain an action against the company upon it." It appears from the record in that case that Ayres was the consignor, and Haas the consignee. The present chief justice says in the opinion: "The record does not show that this bill of lading was assigned or indorsed by Ayres to Haas. This being true, Haas, under our Code, could not bring suit on the contract made between the railroad company and Ayres."

The courts of both this country and England are now, with a few exceptions, all agreed that, where the consignor makes the contract of shipment with the carrier, he may bring an action for loss of or injury to the consignment, although he may not be the actual owner of the property. In such a case the privity of contract between the carrier and the consignor is a sufficient foundation on which to base the action. It is also well settled by the authorities that where a consignor, who is himself not the real owner, recovers damages from the carrier for a breach of the contract of carriage, the recovery inures to the benefit of the owner, and the consignor is regarded simply as the trustee of an express trust. It would seem to follow necessarily from this that a recovery by the consignor for a breach of the contract would be a bar to an action by the owner in tort for the injury done him. The English courts have, so far as we are aware, uniformly adhered to the rule that an action for a breach of a contract of carriage made with the consignor may be maintained by him. In Davis v. James, 5 Burrows, 2680, a decision rendered in 1770, it was held that "action lies against carrier in name of consignor, who agreed with him and was to pay him." The question was squarely made in that case, and the court reached the conclusion above indicated. Lord Mansfield said, in the opinion which he rendered in that case: "This is an action upon the agreement between the plaintiffs and the carrier. The plaintiffs were to pay him. Therefore the action is properly brought by the persons who agreed with him and were to pay him." This decision, as above stated, was uniformly adhered to by the English courts, and, there being in this state no statute law to conflict with the rule therein announced, it became, by force of our adopting statute, the law of this state. In Moore v. Wilson, 1 Term R. 659, the doctrine announced in the case just referred to was reaffirmed, and the court held further that it was immaterial whether the hire was to be paid by the consignor or the consignee, as the former was, in law, liable to the carrier for the hire. In Joseph v. Knox, 3 Camp. 320, it was held that an action by the consignor would lie. The opinion was rendered by Lord Ellenborough, who said: "I am of opinion that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid by the plaintiffs in London. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the nondelivery of the goods. After such a bill of lading has been signed by his agent, he cannot say to the shipper they have no interest in the goods, and are not damnified by his breach of contract. I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner." In Dunlop v. Lambert, 6 Clark & F. *600, the house of lords held: "Though, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring the action against the carrier, yet, if the consignor make a special contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods, and the consignor may maintain the action, though the goods may be the property of the consignee." The "special contract" referred to in the above quotation was simply a bill of lading declaring that the goods were to be delivered to Matthew Robson, "freight for the said goods being paid by William Dunlop & Co.," the plaintiffs. The case of Dawes v. Peck, 8 Term R. 330, is sometimes cited as authority for a contrary rule. That case is thus commented upon and distinguished by Judge Turley in the case of Carter v. Graves, 9 Yerg. 446, 450: In that case "an action on the case was brought by a consignor against a common carrier for not safely carrying, according to his undertaking, in consideration of a certain hire and reward to be therefor paid, two casks of gin from London to one Thomas Aday at Hillmorton, in Warwickshire. The court determined that, if a consignor of goods deliver them to a particular carrier by the order of a consignee, and they be afterwards lost, the consignor cannot maintain an action against the carrier, and that the action can only be maintained by the consignee. In this case there is no contract with the consignor by the carrier for the delivery of the articles; the freight is not paid by him; the property is delivered to a carrier specified by the consignee; and, more than all, the court, in the opinions delivered, refer to the cases of Davis v. James, 5 Burrows, 2680, and Moore v. Wilson, 1 Term R. 659, and recognize them as sound authority." A leading American case is Blanchard v. Page, 8 Gray, 281, where, after an elaborate review of the authorities, Chief Justice Shaw reached the conclusion that "the shipper named in a bill of lading may sue the carrier for an injury to the goods, although he has no property, general or special, therein." The reasoning upon which this ruling is based seems to be unanswerable, and the decision ought to be accepted as decisive of this question. It must not be lost sight of that the present action was based upon a contract. If the action had been based upon the tort of the

carrier in delivering the goods in a damaged condition, then a question entirely different from that involved in the present case would be raised. In such a case it would seem that the right of action is to recover for the injury to the interest or right in the property, and the shipper, if not the owner, could not bring such an action. The distinction between such a case and one like the present was pointed out in Finn v. Railroad Co., 112 Mass. 524, where it was ruled, in effect, that, in order to authorize an action by the consignor who is not the owner of the goods, there need be no express contract between him and the carrier, but that the action may be maintained upon the contract implied by the delivery and receipt of the goods for carriage, if no action ex delicto has been begun by the consignee; and that the consignor will hold the sum recovered in trust for the consignee. In Carter v. Graves, 9 Yerg. 446, it was held: "A consignor cannot maintain an action on the case for the loss or injury of the property consigned without showing that he has a general or special right thereto, but he may in all cases maintain an action of assumpsit upon a contract to deliver the property safely, he having made the same, and paid or become bound for, the consideration." In Hooper v. Railway Co., 27 Wis. 81, 91, it was said: "The shipper is a party in interest to the contract, and it does not lie with the carrier who made the contract with him to say, upon a breach of it, that he is not entitled to recover the damages, unless it be shown that the consignee objects; for, without that, it will be presumed that the action was commenced and is prosecuted with the knowledge and consent of the consignee, and for his benefit. The consignor or shipper is, by operation of the rule, regarded as a trustee of an express trust, like a factor or other mercantile agent who contracts in his own name on behalf of his principal." Another well-considered case, in which an elaborate review of the authorities is made, is Express Co. v. Craft, 49 Miss. 480. In Railroad Co. v. McComas, 33 Ill. 186, it was ruled: "Where goods are shipped upon a railroad for transportation, the consignor may sue for their nondelivery, though he be but a bailee. He has such a special property in the goods as to give him a right of action. So may the real owner sue, and so may the consignee." It was ruled further in that case that, whichever of these three first obtains damages, it will be in full satisfaction of the claims of the others.

We have not undertaken to collate here all of the cases bearing upon this question. Many of them, perhaps nearly all, are cited in the decisions above referred to. The following also support the ruling made in the present case: Cobb v. Railroad Co., 38 Iowa, 601 (Syl. point 8); Dows v. Cobb, 12 Barb. 310; Harvey v. Railroad Co., 74 Mo. 539; Atchison v. Railway Co., 80 Mo. 213; Moore v. Sheridine, 2 Har. & McH. 453; Express Co. v. Caperton, 44 Ala. 101; Railway Co. v. Smith, 84 Tex. 348, 19 S. W. 509; Railway Co. v. Scott, 4 Tex. Civ. App. 76, 26 S. W. 239; Railroad Co. v. Emrich, 24 Ill. App. 245; Packet Co. v. Shearer, 61 Ill. 263; Brill v. Railway Co., 20 U. C. C. P. 440; Moran v. Packet Co., 35 Me. 55; Cantwell v. Express Co., 58 Ark. 487, 25 S. W. 503; Goodwyn v. Douglas, Cheves, 174; 3 Enc. Pl. & Prac. 826; Hutch. Carr. § 724 et seq.; Parks v. Railway Co. (Tex. Civ. App.) 30 S. W. 708; Railway Co. v. Barnett (Tex. Civ. App.) 26 S. W. 782; Davis v. Southeastern Line (Mo. Sup.) 28 S. W. 965. There are a few cases which seem to hold that the sole right of action against a carrier for loss of or injury to goods is in the consignee, notwithstanding a contract of carriage was made with the consignor. It would not be profitable to attempt to reconcile these decisions. Some of them, however, will be found upon examination to refer to actions ex delicto brought by the consignee as the real owner of the goods. Those which do hold that the consignor cannot maintain an action for a breach of a contract made by the carrier with him are, as has been seen above, against both principle and the great weight of authority, and ought to be disregarded. So far, however, as the present case is concerned, the plaintiff was both consignor and consignee, and the real owner was a party entirely unknown in the transaction. We prefer, however, to place our decision upon the ground that, as the plaintiff was the agent of the real owner of the goods, and had charge of the same, he was authorized to enter into a contract of shipment with the carrier; and that, having entered into this contract, the legal interest therein was vested in him, and he could sue for its breach. The decision of this court in Lockhart v. Railroad Co., 73 Ga. 472, does not conflict with anything ruled in the present case. The plaintiff in that case had no contract with the carrier, and had no interest whatever in the property.

It was contended by counsel for defendant in error that the plaintiff in the present action failed to make out a prima facie case of liability on the part of the defendant for injury to the goods, and that, this being so, even if the court erred in placing his decision granting a nonsuit on the ground indicated in the order, the judgment should be affirmed, as the right result was reached, though the wrong reason may have been given for it. We think the plaintiff did make out a prima facie case of liability, and consequently the judgment of nonsuit was, in any view of the case, erroneous, and a trial upon the merits should be had. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

PAPWORTH et al. v. CITY OF FITZGERALD.

(Supreme Court of Georgia. June 6, 1900.)

RES JUDICATA—CERTIORARI—SUFFICIENCY OF PETITION.

1. If, in rendering its judgment upon a demurrer to a petition, the court does not decide upon the merits of the case, a judgment sustaining the demurrer and dismissing the action is not a bar to another proceeding for the same cause.

2. A petition for certiorari, in which there is no attempt to assign error upon the judgment sought to be reviewed, except to allege that the "petitioners objected to the judgment of said court, still object, and say the same was error, and as such assign it," does not comply with the statute prescribing that a plaintiff in certiorari "shall plainly and distinctly set forth the errors complained of."

3. There was in the present case no error in refusing to sanction the petition for certiorari.

(Syllabus by the Court.)

Error from superior court, Irwin county; C. C. Smith, Judge.

Action by the city of Fitzgerald against Frank Papworth and others. Judgment for plaintiff. From refusal of a writ of certiorari, defendants bring error. Affirmed.

E. H. Williams, for plaintiffs in error. E. W. Ryman, for defendant in error.

LEWIS, J. Proceedings were instituted in the mayor's court of the city of Fitzgerald against Papworth as principal, and certain others as securities, for the purpose of forfeiting a forthcoming bond given by him and his securities for his appearance before that court. On the trial of the case a judgment absolute was rendered by the court in favor of the city against Papworth and his securities, who, being dissatisfied with the judgment, filed a petition for certiorari to the superior court of Irwin county for the purpose of reviewing the same. This petition for certiorari the judge refused to sanction, to which ruling plaintiffs in error except.

1. It appears from the petition that a proceeding was instituted by the city of Fitzgerald against these plaintiffs in error in the county court of Irwin county on this same bond. To that suit a demurrer was filed, one ground of which was "that plaintiff's petition shows on its face that the bond herein sued on was, before the commencement of said suit, forfeited in the mayor's court of the city of Fitzgerald, and that this court is without jurisdiction in the premises; jurisdiction having been previously acquired by said mayor's court." The county judge rendered the following judgment on this demurrer: "On hearing, the within demurrer is sustained for the reason set forth in paragraph two (2) of the within demurrer, to wit, the court has no jurisdiction; jurisdiction in said case having been acquired by the mayor's court, as alleged in said paragraph." In answer to the proceeding in the mayor's court, plaintiffs in error pleaded, among other things, this proceeding which was had in the county court, and the judgment of the county judge rendered thereon, sustaining the demurrer, as res adjudicata; claiming that the rights of the parties in regard to the alleged breach of the bond had, by the judgment of the county judge, been settled and determined. Civ. Code, § 3744, declares: "If upon demurrer the court has decided upon the merits of the cause, the judgment may be pleaded in bar of another suit for the same cause." Section 5095 declares: "A former recovery on grounds purely technical, and where the merits were not and could not have been in question, will not be a bar to a subsequent action brought so as to avoid the objection fatal to the first. For the former judgment to be a bar, the merits of the case must have been adjudicated." It will be seen that the judgment of the county judge was in no sense upon the merits of the case. The plaintiffs in error themselves invoked that ruling,—that the county court had no jurisdiction over the case, for the reason that proceedings had previously been instituted in the mayor's court for the purpose of forfeiting the bond,—and for that special cause the court dismissed the action. The judgment, of course, is conclusive between the parties only as to the particular matter decided by the judge; and, that decision being invoked by plaintiffs in error, they are estopped from denying the legality thereof. The only thing decided by the county judge had no reference to the merits of the case, but he simply ruled that his court had no jurisdiction to try the same. See Stevens v. Stembridge, 104 Ga. 622, 31 S. E. 413.

2. The petition for certiorari, after reciting certain facts that occurred upon the trial, without specifically alleging any other error committed by the court, stated, "After argument duly had, the court proceeded to give judgment against your petitioners, in favor of said city of Fitzgerald, in the sum of $500, and the costs of said proceeding." The only error assigned on that judgment in the petition was that "petitioners objected to the judgment of said court, still object, and say the same was error, and as such assign it." The bill of exceptions simply recites that, on the trial of the case, judgment absolute was rendered in favor of the city against plaintiffs in error, and that, being dissatisfied therewith, they petition the superior court for certiorari, and complain of the judgment of the court refusing to sanction their petition. The petition for certiorari makes no attempt whatever to assign error upon the judgment sought to be reviewed. It does not even charge that it was contrary to law or evidence, or in what particular it is defective, or for what reason it should be set aside. Civ. Code, § 4637, declares that, when a party applies to obtain a writ of certiorari by petition to the superior court, he shall plainly and distinctly set forth the errors complained of. It is true that the bill of ex-

ceptions in this case, which complains of the judgment refusing to sanction the certiorari, would be sufficient in itself, had the petition for certiorari plainly and distinctly set forth the errors complained of. It was accordingly held in Insurance Co. v. Gray, 107 Ga. 110, 32 S. E. 948: "A bill of exceptions which complains of the overruling of a certiorari sued out to review in a superior court a judgment of a city court denying a motion for a new trial is, as to the matter of assigning error, sufficiently clear and explicit when it alleges that the superior court erred in overruling the certiorari; it appearing that a copy of the motion for a new trial was attached to the petition for certiorari, and that in this petition exception was taken to the action of the city court in refusing to grant the motion." In the present case, there being no specific assignment of error whatever, either in the petition for certiorari, or in the bill of exceptions upon the particular judgment of the court complained of, the principle decided in the case above cited has no application whatever. In the case of Kimball v. Williams (Ga.) 33 S. E. 994, it was decided that a bill of exceptions makes no lawful assignment of error, the only attempt to do so being as follows: "To which ruling and judgment the said defendant excepted, and now assigns the same as error;" that the language used was entirely too general, and did not properly present any question for determination by this court, and accordingly the writ of error was dismissed; that the statutory requirement that alleged errors shall be plainly and distinctly pointed out is imperative, and applies to all cases. See, also, Wheeler v. Worley (decided April 9, 1900) 35 S. E. 639.

3. It follows from the above that the court did not err in refusing to sanction the petition for certiorari. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

TURNELL et al. v. McHAN.

(Supreme Court of Georgia. June 7, 1900.)

CLAIM OF WIDOW—YEAR'S SUPPORT.

Prior to the act of December 20, 1899 (Acts 1899, p. 47), the widow's claim for a year's support out of the crops made by her husband on rented land was superior to the special lien of the landlord for rent. Since the passage of that act the law on this subject has been different.

(Syllabus by the Court.)

Error from superior court, Morgan county; John C. Hart, Judge.

Action between Turnell & Rearden against G. A. McHan. From the judgment, Turnell & Rearden bring error. Affirmed.

Foster & Butler, for plaintiffs in error. W. R. Mustin, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

GEORGIA & A. RY. v. POUND.

(Supreme Court of Georgia. June 5, 1900.)

WAREHOUSEMEN — CUSTOM — EVIDENCE — ARGUMENT OF COUNSEL.

1. As was decided in Almand v. Railroad Co., 22 S. E. 674, 95 Ga. 775, "where goods are shipped by rail, and arrive at destination within the usual time required for transportation, and are there deposited by the railroad company in a place of safety, and held ready to be delivered to the consignee on demand, the company's liability as a common carrier, in the absence of a contrary custom of trade as to delivery, ceases, and its liability as a warehouseman begins."

2. In order to show the existence of a custom varying the general rule as above announced at a particular place by reason of the railroad company having observed a usage of notifying consignees of the arrival of goods, it must be affirmatively proved that this usage was of an established and general nature, and that the notices given in pursuance thereof were of such character as to indicate, or to reasonably warrant the inference, that the company intended to remain liable as a common carrier until the consignee, in each instance, had had reasonable time and opportunity to remove his goods from its custody.

3. Such a custom is not sufficiently proved by evidence which shows no more than that the company had been in the habit of notifying a particular customer, by postal card, of the arrival of his goods, and informing him that storage or demurrage would be charged thereon unless they were called for within a time specified, and that it had in this manner, and also by messages, by telephone and otherwise, given similar notices to other customers, in some of which it was stated that unless the goods were removed as requested they would be "held" or "stored" at the owner's risk.

4. It is not, in the trial of an action against a railroad company for the value of goods alleged to have been burned in its depot, proper to allow counsel for the plaintiff to argue to the jury that his client is entitled to recover money collected by the company for insurance, when there is no evidence that the plaintiff's goods were covered by insurance, or that the defendant received anything from an insurance company on account of the loss thereof.

(Syllabus by the Court.)

Error from superior court, Dooly county; Z. A. Littlejohn, Judge.

Action by B. B. Pound against the Georgia & Alabama Railway. Judgment for plaintiff, and defendant brings error. Reversed.

E. A. Hawkins, for plaintiff in error. W. H. Dorris, Pearson Ellis, and J. T. Hill, for defendant in error.

LEWIS, J. This was a suit brought by B. B. Pound against the Georgia & Alabama Railway Company for damages resulting from loss by fire of certain dry goods in defendant's depot at Cordele, Ga. It appears from the record that the freight depot of plaintiff in error was accidentally destroyed by fire on August 4, 1897, at which time defendant in error had a shipment of dry goods burned in said depot. These goods were received in Cordele on July 27, 1897, and placed in the company's warehouse, having arrived at destination within the usual time required for transportation. It is not contended that the fire was caused by the negligence of the

railway company, or its servants or employés, and there was no proof tending to show any carelessness or negligence upon the part of the company. But defendant in error relied upon the contention that the company had established a custom in Cordele of notifying its customers of the arrival of goods, and that, therefore, its liability as carrier continued until such notice was given. In this instance he testified that he had received no notice of the arrival of these goods until a day or two after their destruction. After hearing evidence, the jury returned a verdict for the plaintiff; whereupon the defendant made a motion for a new trial, and alleges error in its bill of exceptions upon the judgment of the court below in overruling this motion.

1. Civ. Code, § 2279, declares: "The responsibility of the carrier commences with the delivery of the goods, either to himself or his agent, or at the place where he is accustomed or agrees to receive them. It ceases with their delivery at destination according to the direction of the person sending, or according to the custom of trade." The law nowhere imposes upon common carriers the obligation of notifying consignees of the arrival of their freight at the point of destination, provided it has arrived in the due course of transportation. As a general rule a railroad company is responsible as common carrier only for the safe deposit of goods shipped by freight upon the platform or in the warehouse of the road at the end of their transit, there to await delivery to the consignee when he should call for them; and from the time of such deposit, even without notice by the carrier to the consignee, the liability of the railway is usually changed from that of a common carrier to that of a warehouseman. See this doctrine thoroughly discussed in Hutch. Carr. § 867 et seq. This general doctrine has been clearly recognized by repeated decisions of this court, and the language of the first headnote is copied from the decision in the case of Almand v. Railroad Co., 95 Ga. 775, 22 S. E. 674. See, also, authorities therein cited.

2, 3. As a general rule of law, then, it follows that after the company has placed goods at their destination within the usual time required for transportation, and are there by it deposited in a place of safety, and held ready to be delivered on demand, its liability as a common carrier ceases, and that of a warehouseman commences. The only exception to this rule is where the custom of trade is shown to be otherwise as to delivery. In order to show the existence of such a custom varying this general rule at a particular place, by reason of the company having observed a usage of notifying consignees of the arrival of goods, it should be affirmatively shown that this usage was of an established and general nature. The notice given in pursuance thereof should be of such a nature as to reasonably warrant the inference that the company intended to remain liable as a common carrier until the consignee, in each instance, had reasonable time and opportunity to remove his goods from its custody. Upon examining the record in this case, we think it fails to show the establishment of such a usage and custom on the part of the plaintiff in error as would make it liable as a common carrier until notice is given by it to the consignee of the arrival of his goods. The plaintiff below testified in his own behalf, in effect, that he was never given any notice of the arrival of these goods sued for until after they were destroyed by fire; that the company's agent usually sent out postal cards stating that there were so many cases of shoes, notions, etc., arrived at a certain time, and, if not removed within a specified time, they would be subject to a certain amount of demurrage. This card he had not received before the destruction of these goods by fire. The card referred to was only a notice to the consignee that unless the goods were removed by a certain time he would be charged storage for them, and he testified that he thought the main feature of the notice was to carry out its purpose of not charging such storage or demurrage until after it gave that notice, and he further admitted in his testimony that he could not say that he had always been getting such notices on the arrival of his goods at the defendant's depot in Cordele. There were a few other witnesses introduced who testified to receiving the same notice as to goods consigned to them. We do not think it can be fairly inferred from the contents of this notice that it was the intention of the plaintiff in error to remain liable as a common carrier while the goods were stored in its warehouse at the point of destination until notice of their storage was given to the consignee, but the evident purpose of this notice was simply to notify the consignee that if he did not remove his goods at a certain time he would likewise be charged with storage. The only custom, then, the record tends to establish was for the company to give such notice to a party before preferring against him a charge for demurrage, and we cannot see how it can be implied from this custom that the company thereby agreed to remain liable as a common carrier up to the time of the notice in reference to storage. It is true there was some evidence introduced in behalf of the plaintiff below by two or three witnesses that they had received notices to the effect that, unless their goods were removed from the company's warehouse, they would be held or stored at the owner's risk. It might with plausible force be argued that a notice of this sort carried with it the implication that the common carrier retained the goods entirely at its own risk as a common carrier or an insurer of their safety until this notice is given. But the evidence in the record absolutely fails to establish anything like a

general custom of the company to give such notice, and it was only shown in one or two isolated instances. The testimony in behalf of the company was to the effect that there was no special custom of dealing with customers in reference to giving them notice in regard to the arrival of freight; that they were sometimes notified by postal cards, sometimes by telephone, by draymen, and in person; and we think there is nothing in the record to contradict the proof offered in behalf of the company that there was really no fixed rule upon this subject. The evidence fails to establish such a usage or custom on the part of the company's employés as would authorize the conclusion that the company, at this particular station, had waived its clear legal rights simply as a warehouseman, and had assumed the responsibility of a common carrier and insurer of the property up to the time of giving notice to the consignee that his goods had arrived at destination, and had been stored in its warehouse.

4. Complaint is made in the motion for a new trial that the court erred in permitting, over objection of counsel for the company, plaintiff's attorney to argue to the jury in conclusion that the plaintiff was entitled to recover of the defendant at least his pro rata of the insurance money upon the contents of the depot. While there is some evidence in the record showing that there was a collection of some insurance money as the result of loss occasioned by this fire, yet the evidence is uncontradicted that none of the goods of the defendant in error were covered by this insurance, nor does it appear that the company received anything from the insurance company on account of plaintiff's loss. It was therefore error to permit counsel for plaintiff below to contend for liability of the railway company on account of any insurance it collected growing out of this fire. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

FRANKS v. GRESS LUMBER CO.

(Supreme Court of Georgia. June 6, 1900.)

DEPOSITIONS—EXCEPTIONS TO INTERROGATORIES—EVIDENCE.

1. "No exception to a written interrogatory, on the ground that it is a leading question, shall prevail, unless it be filed with the interrogatories before the issuing of the commission."

2. Some of the answers to the interrogatories which were ruled out related to matters which were relevant, and some of the interrogatories which were properly objected to were not subject to the objection that they were leading.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by W. M. Franks against the Gress Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed.

Bankston & Cannon, for plaintiff in error.

COBB, J. Franks sued the Gress Lumber Company upon an account for goods sold and delivered, and at the trial a nonsuit was awarded. The case is here upon a bill of exceptions sued out by the plaintiff, in which he complains of certain rulings of the judge on the admissibility of testimony and of the judgment granting a nonsuit. The plaintiff endeavored to make out his case by the testimony of himself and another witness contained in answers to interrogatories. Numerous interrogatories were propounded to each witness, and the judge refused to admit the answers to a number of them, for the reason that the interrogatories were leading. Some of the answers ruled out were to interrogatories to which no exception had been taken, on the ground that they were leading, prior to the trial, while the greater number were made the subject of exception in compliance with the rule of court which required that the exceptions should be filed with the interrogatories before the issuing of the commission. Common-Law Rule 37, Civ. Code, § 5668. Some of the evidence which was ruled out was clearly relevant, and it therefore becomes necessary to determine whether the court committed error in characterizing the interrogatories as leading questions. A "leading question" has been defined to be one which directly suggests the answer expected. 1 Greenl. Ev. (16th Ed.) § 434. "A 'leading question' is one which suggests to the witness the answer desired, or which, embodying a material fact, admits of a conclusive answer by a simple negative or affirmative." 3 Tayl. Ev. (9th Ed.) § 1404. In Denson v. Miller, 33 Ga. 275, Judge Lyon says that "interrogatories, to be objectionable as leading, must suggest the answer to the witness." In Insurance Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18, it was held that interrogatories which assumed material facts in controversy are manifestly objectionable as being leading. In the opinion Chief Justice Bleckley says: "This sort of assumption is one of the most pernicious forms in which the vice of leading questions can make its appearance, its tendency being to induce the witness to adopt the theory of facts propounded by the examiner, and shape his testimony in a way to lend support to that theory. Even an honest and well-meaning witness may sometimes be drawn by this device into coloring the letter, if not the spirit, of his evidence more highly than the exact truth, so far as his knowledge of it extends, would warrant. It is not lawful, as a general rule, to propound in chief 'questions which involve or assume the answer which the party desires the witness to make, or which suggest disputed facts as to which the witness is to testify.' 1 Whart. Ev. § 499; Steph. Dig. Ev. art. 128." See, also, Green v. State, 43 Ga. 368; Powell v. Railroad Co., 77 Ga. 192, 3 S. E. 757; Clark v. Fee, 86 Ga. 9, 12 S. E. 181; Railroad Co. v. Huggins, 89 Ga. 495, 501, 15 S. E. 848; Railway Co. v. Beauchamp, 93 Ga. 6, 9, 19 S.

E. 24. In Ewing v. Moses, 51 Ga. 419, Judge McCay said: "Unless a very great change is made in the mode of executing interrogatories, the rule against leading questions must be very liberally interpreted in such cases. The party must ask all his questions at once. He must base one upon the answer he expects to another, and the witness, who always has an opportunity of reading over the whole, can, if he desires, easily get the drift of the questions. Why be so precise as to the form, when this broad road is open in all cases? This is one of the evils of the system, and can only be met by weighing all testimony thus taken with caution."

Applying these principles to those interrogatories in the present case the answers to which related to matters which were relevant to the issues on trial, we have reached the conclusion that at least some of them were not subject to the objection that they were leading. It would not be profitable to embody herein all of the numerous interrogatories and answers which are contained in this record. Upon another trial the presiding judge, by applying the rules above referred to, and exercising that liberality in favor of allowing the evidence to be introduced which is indicated by Judge McCay in the case last cited, will, without difficulty, be able to determine what questions should be allowed and what should be ruled out. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

GORE v. MALSBY et al.

(Supreme Court of Georgia. June 4, 1900.)

ACTION ON CONTRACT—ANSWER—DAMAGES FOR BREACH—PROFITS.

1. An answer denying liability on a written contract upon which the action was brought, on the ground that the defendant, because of illiteracy and consequent inability to read, was induced to sign the instrument by the false and fraudulent representations of the plaintiffs' agent respecting its contents, of which he was ignorant, and to thus apparently make a contract entirely different from that into which he believed he was entering, and with a person he did not intend to contract with at all, and setting up what the real contract was, is not demurrable, as seeking to add to or vary the terms of a valid written instrument.

2. Damages in the nature of expenses necessarily incurred because of the breach of a contract, and traceable solely to such breach, may be pleaded in defense to an action on the contract.

3. So, too, may profits capable of exact computation, if the loss of the same is directly due to the breach of the contract, and if the damages resulting from such loss are such as must have been within the contemplation of the parties when entering into the contract.

4. The court erred in striking certain portions of the defendant's answer, as the same set up valid matters of defense.

(Syllabus by the Court).

Error from superior court, Randolph county; H. C. Sheffield, Judge.

Action by Malsby & Co. against A. F. Gore. Judgment for plaintiffs, and defendant brings error. Reversed.

Wm. D. Kiddoo, for plaintiff in error. Arthur Hood, for defendants in error.

LEWIS, J. Malsby & Co. brought suit against A. F. Gore in Randolph superior court upon a promissory note dated February 14, 1898, due December 15, 1898, for $600, with interest at 8 per cent. per annum from maturity, and 10 per cent. attorney's fees, payable to plaintiffs, and given "for balance or difference due on one forty horse Erie City Iron Works engine, one No. 9 forty-five horse return tubular Erie City Iron Works boiler," a copy of which note was attached to plaintiffs' petition. To this petition the defendant filed the following answer: "(1) He admits he is a resident of Randolph county. (2) He denies that he is indebted to the petitioner in the sum of $600, besides interest at 8 per cent. from maturity, and 10 per cent. on amount due as attorney's fees; but he admits that he signed, with his mark, the note described in plaintiffs' petition, but he says that said note does not set forth the true contract made at the time the same was signed. (3) He says that the signature to said note was secured by fraud, and that the fraud was perpetrated upon him in this way: He is illiterate, unable to read or write, and ignorant, and did not know, until long after said note was signed, that the same was made payable to Malsby & Co., nor did he make with said Malsby & Co., that he knew and believed at the time, any contract whatever as to the articles described in the note sued on, or as to any other thing; nor did he know that the said note failed to set forth the true contract made by him with the person hereinafter named, but, on the contrary, by false and fraudulent representations of the said party that the same contained the contract, was induced to sign the same, believing at the time that he was signing a note payable to the Northington-Munger-Pratt Company. Before and at the time said note was signed, one P. H. Baker came to his residence in Randolph county, Ga., and where, at the time, he owned and was running a public gin, and represented himself as the agent of the said Northington-Munger-Pratt Company, and proposed to sell to him what is known as the 'Munger System of Ginning,' furnish all the necessary machinery, including the boiler and engine named in the note sued on, and all necessary attachments and fittings, and to put up the same in good running order, and to take in part pay therefor defendant's old engine, boiler, and some other old machinery, and for which he was to pay the sum of $2,500 additional, in several payments, and the whole of the machinery was to be shipped to Weston, Ga., by the 1st day of June, 1898, this defendant to pay the freight on said machinery, and to haul the same from Weston, Ga., to his

home place; and this defendant and the said P. H. Baker, representing himself as the agent of the aforesaid Northington-Munger-Pratt Company, did enter into a contract thereto in the terms proposed, and the said P. H. Baker prepared and drafted all the papers in reference thereto, including the note sued on, and falsely represented to this defendant that the said papers so drawn, including the note sued on, embodied the contract, as hereinbefore set forth, and, knowing that the defendant could not read or write, fraudulently took advantage of his ignorance, and failed to put in the said note the terms of said contract, and the same, by said fraud, does not contain all of the said contract, nor show all of the consideration therefor, nor the obligation that the said Baker, as agent, entered into with reference to the matter, and especially as to the said engine and boiler, the obligations to ship them to defendant by the 1st day of June, 1898, with all necessary attachments for both engine and boiler, and to put up the same, and connect it with other machinery of the said Munger system, and to furnish a machinist to run the same until it was fully proved that the whole was in good running order, and also put in the said note name of plaintiff as payee instead of the said Northington-Munger-Pratt Company. The defendant never knew of these fraudulent acts perpetrated on him by the plaintiffs until the Northington-Munger-Pratt Company had sent a machinist to put up the ginning machinery, and he had almost completed that part of the work, and defendant called his attention to the fact that he would have to put up the engine and boiler, and make all the necessary attachments to the machinery, when he declined to do so, saying that it was not part of his company's contract, and then for the first time he was led to suspect that a fraud had been committed by the said P. H. Baker, and examined the papers left with him by the said P. H. Baker, and he ascertained that the engine and boiler, 'with all attachments,' was ordered from the plaintiffs. And he alleges that although the said plaintiffs shipped, not from Atlanta, whence defendant was to pay freight, but from Erie, Pa., the said engine and boiler, they did so to Richland, Ga., and not to Weston, Ga., and also shipped another engine and boiler to defendant, in the same car, that was intended for one W. O. Barbse, and before the railway company would deliver the machinery to him it required him to pay the extra freight from Richland to Weston on all the car contained, and in consequence of said wrongful shipment he paid out in freight the sum of twenty-seven dollars and seventy cents more than he would have had to pay had the same been first shipped to him at Weston, Ga., and he was required to pay freight from Erie, Pa., and not from Atlanta, Ga., and he alleges that this was more than he ought to have paid, the amount not yet ascertained, and he asks that he may hereafter insert the same. The plaintiff having failed to send him the necessary attachments agreed to be furnished, he was compelled, as the ginning season was approaching, to buy at Columbus and Dawson, Ga., the same at an expense of fifty-seven dollars and forty-one cents for the same, and expenses going and sending therefor (a full statement of which is annexed as an exhibit to this answer). The plaintiffs having failed to send any machinist to put up said boiler and engine, and make the attachments to the other machinery aforesaid, and delay in attempting to get the one suggested by the said P. H. Baker, the defendant hired another, and proceeded to have the said engine and boiler put in place, and all attachments made, and the same put to work, at an expense of ninety dollars and sixty cents (a full statement of which is also annexed as an exhibit to this answer); and, in consequence of the said fraud committed by the plaintiffs through their agent, said plaintiffs should not recover against him any sum whatever on said note, the same being void on account of the fraud before alleged; and because of the said fraud, and the failure of the plaintiffs to carry out the obligations of the true contract entered into, the consideration of the said contract has failed in part, to the amount of one hundred and seventy-five dollars and seventy-one cents, and the extra freight paid hereafter to be ascertained, and said amount ought to be deducted from the amount agreed to be paid under the true contract. (4) For further answer, the defendant says that the plaintiffs are indebted to him in the sum of one hundred and seventy-five dollars and seventy-one cents for attachments, fittings, work, and labor in and about the putting up the engine and boiler named in the note sued on, and extra freight and expenses paid on account of the failure of plaintiffs to carry out their obligations under the true contract as set forth in paragraph 3 of this answer (full particulars of which are set forth in the exhibits), and he prays that the amount may be set off against the plaintiffs' claim. (5) Further, answering, the defendant says that, for the reasons that the plaintiffs did not comply with the cross obligations and independent covenants arising under the contract made as to the matters in their petition alleged and set forth in paragraph 3 of this answer, and the great delay occasioned thereby, by which the defendant was unable to commence ginning for the public at the beginning of the cotton season, August 1, 1898, and not until the 7th day of September, 1898, which he would have been able to do had plaintiffs complied with their obligations under the contract, plaintiffs have injured and damaged this defendant in the sum of two hundred dollars over and above amount claimed as set-off, etc., and defendant prays that said amount of two hundred dollars may be deducted from plaintiffs' claim by way of recoupment."

To this answer the defendant filed an amendment alleging that before he could get possession of the engine, boiler, fixtures, etc., he was required to pay the freight from Erie, Pa., to Richland, Ga., and then local freight from Richland to Weston, Ga., while the true contract between the parties required that said freight should either be shipped from Atlanta, Ga., or from Birmingham, Ala., and that the amount he paid for freight was much larger than under the contract he ought to have been required to pay by the sum of eighty-five dollars and —— cents, and plaintiffs damaged him to said amount by improper shipment of the goods. Defendant asked that this amount be deducted from the true amount due by him to plaintiffs. Defendant further amended his plea by adding to the third paragraph thereof the following: "The note described therein, nor the contemporaneous order and papers also described therein, were never, before the signing of said notes or said contemporaneous papers, read over to him by the said P. H. Baker, nor by any one else, except the order to Northington-Munger-Pratt Company, which was read, and, upon objection of defendant that it did not contain former statement that the company was to pay wages of man to put up machinery, he represented that he had stricken that out, nor were any of the same read over to him until long afterwards, and after the Munger system was being put up at his place." Also by adding to the fifth paragraph the following: "Had the said engine, boiler, etc., been delivered at the time agreed upon, he would have been able to gin two hundred bales of cotton more than he did from the opening of the cotton season until he was able to do so, and would have received therefor one dollar per bale; that he did gin in the cotton season the year before 175 bales of cotton, and received therefor $175, during the same time, with an inferior outfit, and in the year 1899, during the same time, 201 bales of cotton, at one dollar per bale, and he would have ginned the same number in 1898 if the machinery had arrived as agreed to be delivered."

To this plea and the amendments thereto the plaintiffs demurred upon the following grounds: "(1) That matters of defense set up in said plea seek to add to and vary the written contract sued on in this case. (2) Because the allegations of fraud as set out in paragraph 3 of defendant's plea are too vague and uncertain, and do not allege that the contract sued on was not read over to him, and because the matters and things therein set out seek to contradict and vary the contract sued on. (3) Because the matters of defense set up in paragraph 5 of defendant's plea, setting up damages, are too remote and consequential, and not set forth with sufficient particularity to put plaintiffs upon notice of what particular damages were claimed, or how and in what manner defendant was damaged."

After argument upon this demurrer, the court sustained the same, striking all of the answer and amendments except the first and second paragraphs thereof. A jury was impaneled to try the case, and, after the introduction in evidence by plaintiffs of the note sued on, the trial judge directed a verdict in their favor for principal, interest, and attorney's fees sued for, and judgment was accordingly entered. To the order striking the defendant's answer as amended, except the paragraphs thereof above mentioned, and to the direction of the verdict in plaintiffs' favor, the defendant excepts, and assigns the same as error in his bill of exceptions.

1. The judgment of the court below sustaining the demurrer to the answer of the defendant was doubtless based mainly, if not entirely, upon the idea that the defendant was seeking to vary the terms of an express written contract by parol evidence. We think this view is founded upon an entire misconception of the defense sought to be established by this answer. It does not seek to vary the terms of a contract that the answer alleges was really entered into between the parties. It attacks the written instrument sued upon as having been fraudulently procured by misrepresentation of its contents. In the first place, it is claimed by the defendant that he had never made any contract with the plaintiffs, or with any one who pretended to be acting as the plaintiffs' agent in this case; that he thought he was giving the note payable to the Northington-Munger-Pratt Company; that he did not know Malsby & Co. at all in the transaction, and that Baker represented himself as the agent of the Northington-Munger-Pratt Company. In short, the answer clearly indicates that there was no intention of the maker of this note to enter into any sort of a contract with Malsby & Co. or their agent. It further appears from the answer that material stipulations were agreed upon between this agent and the maker of the note which were represented by the agent to have been embodied in the note, and which induced his signature to the same. The defendant was illiterate, could neither read nor write, and avers the note was never read over to him before he signed it. We think the allegations make out a clear case of the procurement of the note by such fraud as would render it absolutely void in law; and, instead of seeking to vary a written contract by parol evidence, he is simply endeavoring to show what the real contract was, and that his signature to what purports to be the written contract was obtained by the fraudulent misrepresentations of the party with whom he was dealing. The facts in the present case bear no analogy to the decisions relied upon by counsel for the defendant in error. For instance, in the case of Boynton v. McDaniel, 97 Ga. 400, 23 S. E. 824, it was decided: "It is no defense to an action upon a promissory note that the maker, relying on certain representations made by another at

the time of its execution, signed the note without reading it, and that it did not contain or express the contract as actually made, the note not having been signed under any emergency, there being nothing to prevent the maker from reading it, and no sufficient excuse for failing to do so being alleged." It has repeatedly been decided that when one, through his own negligence, fails to inform himself about the contents of a written contract, he will not be allowed to vary it by parol evidence. But the difference is very marked between that class of cases and where one, from illiteracy or ignorance, is unable to read the writing he is induced to sign, and has to rely upon the representations made by the draftsman. In the same volume (Robinson v. Donehoo, 97 Ga. 704, 25 S. E. 491) it is recognized that there are authorities which hold "that, where the maker of an instrument is illiterate or blind, the burden of showing that it was read over to him, and that he understood it, is upon the person claiming rights under it; while others hold that, where such a person is shown to have signed the paper, the presumption is that it was read over to him." In adjudicating this case it is not necessary to determine the better weight of authority upon this point; for, as above indicated, it appears that the note was never read to the plaintiff in error. In Carbine v. McCoy, 85 Ga. 185, 11 S. E. 651, it was decided: "If a husband and wife agreed that he should make to her a deed conveying an estate in the property as long as they should reside in a certain place, and she fraudulently instructed the scrivener to so draw the deed as to convey the title absolutely to her and her children, reserving to the husband only a life estate, and he was illiterate and deaf, and relied on his wife's fidelity, equity will afford him relief." And it was further decided in that case that the court below was not authorized to decide, as matter of law, that the plaintiff was not entitled to relief because of gross carelessness in not knowing and understanding the terms of the deed before he signed it. See, also, in this connection, Hansford v. Freeman, 99 Ga. 376, 27 S. E. 706. In Chapman v. Guano Co., 91 Ga. 821, 18 S. E. 41, where a note was written out for more than the agreement, and was signed by the maker when so dark that he could not see well, but signed it on the representation of the payee, it was held that this constituted a good defense to the note. Certainly it would be equally as good a defense when the maker could not read what he was signing, and relied upon the representations of the draftsman. Numerous other authorities might be cited to sustain the ruling herein announced. In fact, we know of no other adjudication of this or any other court of last resort at all in conflict with our decision in this case.

The point made in the second ground of the demurrer, that the answer did not allege the contract sued on was not read over to him, was cured by the amendment to the plea; and the ground in the demurrer that the allegations of fraud in defendant's plea were too vague and uncertain was without merit, for we think that the fraudulent conduct of the party with whom this defendant was dealing was very specifically and definitely set out.

2. The answer also claims damages in the nature of expenses necessarily incurred because of the breach of the contract which it alleges was actually made between the parties. Attached to the answer in the record is an itemized statement of these expenses. It will be observed that there is no special demurrer filed to this portion of the answer. The answer on the subject of damages might be considered as a plea in conflict with that portion thereof which attacks the contract sued upon on the ground of fraud. If the defense based upon the alleged fraudulent procurement of the note should be sustained by proof, then we think it would necessarily follow that there could be no recovery on the note, and that would be an end to this litigation; for we do not see how the defendant would be entitled to recoup damages growing out of a contract not sued upon in the case. If, however, the jury should find the contract was with Maisby & Co., then they could adjust the equities between the real contracting parties.

3. The only remaining ground in the demurrer is that "the matters of defense set up in paragraph 5 of defendant's plea, setting up damages, are too remote and consequential, and not set forth with sufficient particularity to put plaintiffs upon notice of what particular damages were claimed, or how and in what manner defendant was damaged." We think the amendment allowed to that paragraph of the plea fully meets all the objections set forth in this ground of the demurrer. This amendment specifically sets forth how the damages were sustained in consequence of the defendant below being delayed in commencing his ginning operations. The length of this delay was specified, and the amount of cotton that he was thus deprived of ginning for the public was specifically set forth. When the parties entered into a contract for the purchase of this machinery, defendant was then engaged in the business of ginning for the public, and had been for years previous. It was clearly contemplated that he desired this new machinery for the purpose of engaging in this business, which was to start at the time designated by the defendant in his answer, and delay in furnishing and properly fitting up the machinery for service during the ginning season would necessarily result in loss to the defendant, which must have been in contemplation of the parties at the time their contract was made. We do not think the provisions of Civ. Code, § 3798, which declares that remote or consequential damages are not allowed whenever they cannot be traced solely to the breach of the con-

tract, or unless they are capable of exact computation, apply to the facts set up in the answer in the present case. In Parker v. Forehand, 99 Ga. 745, 28 S. E. 400, in commenting upon that section of the Code (Code 1882, § 2944), Justice Lumpkin said: "Such a rule is surely not to be held applicable to a case where it appears that the contract is of such a nature that it must, of necessity, be known to the party deliberately and wrongfully violating his obligations that a breach of the same will inevitably result in the very kind of damages to the other party of which the declaration complains. In such a case, the inference is warranted that the damages in question, though to some extent remote and difficult of exact computation, must have been within the contemplation of both parties when entering into the contract; and, where these damages are substantial in the essential ingredient of actual injury, they justly call for compensation." See, also, Walden v. Telegraph Co., 105 Ga. 275-278, 31 S. E. 172, where it was held: "In an action against a telegraph company, claiming damages for failure to transmit a message containing an order for goods which had, before the delivery of the message to the telegraph company, been sold by the sender, the profits lost by the failure to receive the goods are not too remote to be the subject of recovery." See, also, Van Winkle v. Wilkins, 81 Ga. 98, 7 S. E. 644, and Stewart v. House Co., 75 Ga. 582, where loss of profits of a hotel keeper occasioned by failure of his lessor to make necessary repairs of leased premises were held to be recoverable.

5. From the above recital of facts it will be seen that the court sustained the demurrer as to all the portions of the defendant's answer embodied in the foregoing opinion, and practically deprived him of any defense whatever to the action upon the note. For the reasons above given, we think these portions thus stricken contained valid matters of defense, and that the court, therefore, erred in sustaining the demurrer to the same, and in directing a verdict for the plaintiffs. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

HAIRALSON v. CARSON.

(Supreme Court of Georgia. June 6, 1900.)

CANCELLATION OF INSTRUMENTS—EQUITY—INJUNCTION.

1. A court of equity will not decree the cancellation of a paper, when so doing is in no way essential to the protection of the party seeking such relief.

2. Even if a prayer for "general relief" can under any circumstances be treated as a prayer for an injunction, a petition which has no standing in court as one for injunction, otherwise than by virtue of the general prayer, and which is in other respects without equity, will not be retained, when it is apparent from the petition itself that the plaintiff is not seeking an interlocutory injunction, by which alone he could be afforded adequate relief, and that a permanent injunction after a final hearing would be unavailing.

(Syllabus by the Court).

Error from superior court, Telfair county; C. C. Smith, Judge.

Action by W. H. Hairalson against J. R. N. Carson. Judgment for defendant, and plaintiff brings error. Affirmed.

D. C. McLennan, for plaintiff in error. D. M. Roberts and B. M. Frizzelle, for defendant in error.

LUMPKIN, P. J. The plaintiff in error, W. H. Hairalson, brought a petition against J. R. N. Carson; alleging, in substance, the following: Hairalson purchased from Carson certain sawmill machinery, and gave for the same a negotiable promissory note, due on the 1st day of December, 1899. The instrument embracing the note also contained a mortgage on the property purchased. The defendant fraudulently represented to the plaintiff at the time of the sale that the machinery was in good condition, in first-class order, and would do good work, whereas it was very inferior in character, badly worn, "almost wholly worthless, and of no value at all." A portion of the machinery belonged to one Bankston, to whom the plaintiff was compelled to surrender it. Upon inquiry, plaintiff ascertained that the rest of the machinery had been sold to the defendant by Redmond & Wilson, which firm "had a mortgage on it, and a reservation of title until the same was paid for, and that the purchase price is still due by the said Carson." As soon as the plaintiff became apprised of these facts, he offered to rescind the contract, but Carson declined to do so. The petition concludes as follows: "Petitioner alleges that the said J. R. N. Carson is insolvent, and that, without the aid of the state's writ of injunction, he is without remedy in the event that said Carson should trade said note and mortgage to an innocent purchaser without notice, and thereby prevent the defense of nudum pactum or failure of consideration. Petitioner avers that the said defendant is trying to dispose of said note and mortgage, and fears that he will trade the same to some innocent purchaser, and that he will thereby be cut off from his defense against the enforcement of the collection of the said note and mortgage. Petitioner alleges that said note and mortgage is entirely without any consideration, and was obtained by the fraudulent representations of the said J. R. N. Carson, made to petitioner, relative to said sawmill" machinery. "Wherefore, petitioner prays that the said note and mortgage be delivered up and canceled, as being fraudulent and without consideration, and that process do issue, requiring the defendant, J. R. N. Carson, to be and appear at the next October term, 1899, of Telfair superior court, to answer your petitioner's complaint, and that

he have such other and further relief as he is entitled to." At the appearance term of the court the plaintiff's petition was dismissed on demurrer, and he excepted.

1. Treating the petition as one for cancellation merely, it is manifestly without equity. The superior court will not, in the exercise of its chancery powers, grant relief when it is in no way essential to the protection of the party seeking it. This is a fundamental principle of equity jurisprudence, and rests upon the simple reason that a court will not do a thing which is entirely useless. As between Hairalson and Carson, there was no need for cancellation; for, in the event of an attempt by the latter to enforce the collection of the note by legal proceedings, Hairalson would have nothing to do but to interpose his defense, and thus prevent the rendition of a judgment against him.

2. The only need which Hairalson really had for equitable relief was to prevent Carson from transferring the note before its maturity to an innocent purchaser, who would have the right to collect it without regard to the equities between Hairalson and Carson. It is to be observed, however, that, although the plaintiff alleged facts which would have warranted the granting of such relief, he did not undertake to pray for the same. It is certain that his petition did not contain a specific prayer for injunction. It does contain a prayer for general relief, but we are clear that he was not entitled, for this reason, to have his petition retained in court as a petition for injunction. Where a specific prayer in an equitable petition is followed by a prayer for general relief, the plaintiff is not entitled under the latter to any relief which is not consistent with the case made by the petition and with such specific prayer. Butler v. Durham, 2 Ga. 414; Bennett v. Brown, 56 Ga. 216, 221; Peek v. Wright, 65 Ga. 638; Hotel Co. v. Main, 98 Ga. 183, 184, 25 S. E. 413; Schmitt v. Schneider (Ga.) 35 S. E. 145. The main relief sought by the present petition was a cancellation of the note and mortgage. After obtaining that, it is obvious that the plaintiff would have no need for an injunction, even if the same could be predicated upon his prayer for general relief. Indeed, it would be absurd for the court, after decreeing that a paper be delivered and canceled, to enjoin the defendant from negotiating it to a third person. The truth is, the only sort of injunction which would have been available to the plaintiff in this case was an interlocutory injunction, and this he certainly did not seek to obtain. Upon a state of facts such as that disclosed by the allegations of the petition before us, the proper course to pursue in order to obtain full and complete relief would have been as follows: (1) The plaintiff should have fully set out the facts, and prayed specifically for a restraining order, for a temporary injunction, and for cancellation. (2) He should have verified his petition as required by law, and then have presented the same for the sanction of the judge, as a condition precedent to a right to file it. (3) The next step would have been to secure an interlocutory hearing and the granting of a temporary injunction, to remain of force so long as might be necessary to the plaintiff's protection. Had such steps as these been taken, the plaintiff's petition, because of the extraordinary relief sought by way of injunction, would have had a standing in court; and, at the final hearing, equity, having taken hold of the case for the purpose of affording the extraordinary relief, would have also disposed of all the matters involved in the litigation. Now, what course was pursued by the plaintiff in the present instance? Conceding that he set forth with sufficient particularity the facts of his case, he did not follow the same with a prayer for a temporary injunction, which was the only basis upon which he could properly apply to a court of equity to take cognizance of the case. His petition was not only lacking in this essential prayer, but it was not verified or presented to the judge for his sanction before it was filed. Clearly, in preparing it the pleader never once contemplated obtaining a restraining order or an interlocutory hearing upon an application for temporary injunction. On the contrary, it is manifest that he had no intention of asking any action to be taken upon the petition in advance of the appearance term; and there is scarcely room for reasonable doubt that if, at that term, no demurrer had been filed, the plaintiff would have been quite content to allow his petition to stand as it was until the trial term, and then have pressed it only for the purpose of obtaining cancellation. In his bill of exceptions he characterized the case as being "a petition for the cancellation of a certain mortgage note." We take the same view of it. Even if the prayer for general relief could be treated as a prayer for injunction, it is evident that the pleader did not contemplate securing an injunction prior to the trial term of the case; and at that time the granting of it would have been entirely vain, for the reason that the note would have passed its maturity. In the brief of counsel for the plaintiff in error, he cited and relied upon the case of Willcox v. Ryals (Ga.) 34 S. E. 575, in which this court recognized and applied the rule laid down in 2 High, Inj. 1126, that: "The negotiation of commercial paper may be enjoined when it was obtained through fraudulent or improper conduct, rendering it against conscience to enforce it, and when there is danger of its passing into the hands of innocent purchasers for valuable consideration and without notice, whereby the maker would be cut off from asserting his defense at law." The difficulty is, however, that counsel signally failed to bring the present case within the operation of this eminently just and sound doctrine, and it is now too late for him to invoke the same in behalf of his client. Judg-

ment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

JONES et al. v. CONEY et al.

(Supreme Court of Georgia. June 6, 1900.)

LEVY OF EXECUTION—CLAIM OF THIRD PARTY—NEW TRIAL.

1. That a levying officer against whom a rule was sued out by a plaintiff in fi. fa. answered that the fund in his hands was claimed by another execution creditor did not, of itself and without more, make that creditor a party to the proceeding.

2. When, therefore, the movant of such a rule appealed from a judgment rendered thereon in a county court, and in the superior court obtained a judgment with which he was satisfied, a motion for a new trial filed by the other claimant of the fund, he never having been made a party to the case, was properly dismissed, for the obvious reason that it was filed by one who had no right to do so.

(Syllabus by the Court.)

Error from superior court, Pulaski county; C. C. Smith, Judge.

Action between one Jones and others and Coney, Lovejoy & Co. and others. From the judgment, Jones and others bring error. Affirmed.

J. B. Mitchell and J. H. Martin, for plaintiffs in error. W. L. Grice & Sons and T. C. Taylor, for defendants in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

STONE v. MINTER et al.

(Supreme Court of Georgia. June 6, 1900.)

CONFIDENTIAL COMMUNICATIONS—PAROL EVIDENCE—CONSIDERATION OF DEED.

1. When a client makes to his attorney a communication or statement in the presence of the opposite party as to the transaction in hand, it is not confidential or privileged, and the attorney is a competent witness to testify respecting the same on the trial of a case arising out of such transaction between the administrator of the client and the other party.

2. Parol evidence tending to show that a conveyance of land was really made in extinguishment of a debt, and that the grantor, for reasons satisfactory to himself, desired that the grantee should pay over to him, on delivery of the conveyance, the amount of money specified as the consideration, with the promise that, if this was done, he would repay said sum to the grantee, does not have the effect of varying any of the terms or conditions of the deed. Such evidence goes alone to the point as to what was the true consideration of the instrument, concerning which inquiry always can be made. The court erred in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Jasper county; John C. Hart, Judge.

Action by J. A. Stone against T. C. Minter and others. Judgment for defendants, and plaintiff brings error. Reversed.

F. Jordan & Son and George & George, for plaintiff in error. J. D. Kilpatrick, for defendants in error.

LITTLE, J. Stone instituted an action against Minter, administratrix, and Minter, administrator, of the estate of William S. Minter, making substantially the following case: That the intestate died on July 5, 1897, and at the time of his death was indebted to petitioner in the principal sum of $2,300, besides interest. That said indebtedness arose in the following manner: In June, 1887, the intestate, who was aged, infirm, and had no family, was residing on his farm near where petitioner lives; that at the urgent request of the intestate, he was received as a boarder at the house of petitioner, with the understanding and agreement that he would pay to the wife of petitioner satisfactory compensation for his board, no specific sum being agreed on; that, in addition to boarding at the house of petitioner, the intestate, in March, 1888, became a lodger at his house, and continued to board and lodge, under the agreement aforesaid, from said respective dates to the time of his death. That, after he thus became an inmate of petitioner's home, the intestate repeatedly declared that he intended to convey a part of his estate to the wife and children of petitioner for the kind treatment he had received, and in payment for the board and lodging furnished him. That subsequently the intestate, not having performed any of said promises, petitioner insisted on a settlement of his claim for board. It was then mutually agreed that the sum of $2,800 would be a fair and reasonable compensation for the board and attention which the intestate had received, which sum the intestate proposed to pay by conveying to petitioner the title to 400 acres of land which adjoined the premises of petitioner. This proposition was accepted. It was then further proposed by the intestate that, inasmuch as his relatives would be dissatisfied with him, and cause a disturbance, if the land was conveyed in payment of the debt, he suggested that the petitioner should pay him $2,300 in cash, and execute and deliver to him a promissory note for $500, being the consideration to be mentioned in the deed, and that subsequently he (the intestate) would refund the money and note thus to be given to petitioner. That intestate stated as a reason for desiring to make this arrangement that he was old and feeble, and did not desire to be worried by his relatives, and that the arrangement proposed by him would be the means of concealing from his relatives the true transaction. That, relying on the promise of the intestate to repay him the sum of $2,300, and to return to him his promissory note, petitioner agreed to the proposition, and on June 29, 1896, he paid to the intestate $2,300 in cash, and delivered to him his promissory note for $500, and received a deed from the intestate conveying to him the aforesaid land.

That shortly thereafter the intestate did return and deliver to him his note, with the statement that, as soon as he was well enough, he would go to the bank, procure the money, and return it also to the petitioner. That the intestate was prevented from so doing by sickness which terminated in his death. The answer denied specifically and at length all the allegations in reference to the indebtedness and the contract as set up by petitioner. On the trial of the case, Maj. John C. Key was introduced as a witness, and testified as follows: "I knew William S. Minter in his lifetime, and I know plaintiff. This deed [referring to a deed handed to him], William S. Minter to James A. Stone, dated January 23, 1896, is in my handwriting. I wrote it at the instance and request of Mr. Minter. He and Mr. Stone were present. Mr. Minter said on that occasion, in the presence of Mr. Stone, that he and Mr. Stone had agreed upon the compensation he was to give Stone for his board, lodging, and attention for several years past. He said that he and Stone had been talking a long time about this compensation, and that he had agreed to give Stone that piece of land, and wanted me to write a deed to it to Stone as a compensation for his having remained and boarded there at Stone's. He said that they had agreed on the price of the land at $2,800, and he was going to make him a deed to that land; that he had been talking about making a will, but he thought that arrangement would not do; that it would involve Stone in some litigation with his (Minter's) kin after his death. He spoke of Stone having been his friend and confidant, and said that he had, perhaps, created a suspicion among his kindred that he would do more for Stone than for them. He said that Stone had done more for him than any one else had done, and that he did not want Stone to get into such litigation, and he had decided to make him a deed to the land. He said that his people would be asking him about the matter of this deed, and, in order that he might have an excuse, and as Stone had the money to pay him the $2,800, he wanted it to appear as if it was a sale, and that he would pay the money back to Stone. He said that was the agreement. I was not present when the $500 note was executed by Stone, but in the conversation just related Mr. Minter said he wanted the deed made, and he would sign it, and that he and Stone would arrange balance by Stone's handing him $2,300 and his note for $500, and that both money and note were to be returned by him to Stone." On cross-examination the witness said: "I had been of counsel for both Minter and Stone. In writing this deed I was in his (Minter's) retainer. Q. Who represented Stone in that matter? A. Nobody but himself. Q. Who appealed to you to draw that paper [the deed]? A. Mr. Minter. Q. You didn't represent Stone at all? A. No, sir; I was doing this for Mr. Minter." And also: "A few days before I wrote the deed, I heard Mr. Minter and Mr. Stone talking together in my presence about this matter. In that conversation Minter told Stone that he was going to give him that piece of land valued at $2,800 as compensation for his board and the services that Stone had rendered him in taking care of him. He said to Stone that the money that he was to pay him was simply a sham, and fixed so he could say, if he was inquired of about it, that he had got the money from him. He was talking to Stone then." Counsel for defendant objected to this evidence, and moved to rule out the same on the ground that the facts testified to were a privileged communication between attorney and client, and therefore inadmissible. The court sustained the motion, and ruled out the evidence, to which ruling the plaintiff excepted. The plaintiff then introduced a number of witnesses, whose evidence tended to support the allegations of the petition. The plaintiff having closed, defendant moved for the grant of a nonsuit, which was ordered, and to which judgment the plaintiff also excepted.

1. Section 5198 of the Civil Code declares that certain admissions and communications are, from public policy, to be excluded as evidence. Among these are communications between attorney or counsel and client. Section 5271 of the same Code gives the rule to be enforced more explicitly. Its provisions are that "no attorney shall be competent or compellable to testify in any court * * * for or against his client, to any matter or thing, knowledge of which he may have acquired from his client by virtue of his relation as attorney, or by reason of the anticipated employment of him as attorney, but shall be both competent and compellable to testify, for or against his client, as to any matter or thing, knowledge of which he may have acquired in any other manner." Section 5199 still further enlarges the rule relating to privileged communications, and declares that "communications to any attorney, or his clerk, to be transmitted to the attorney pending his employment, or in anticipation thereof, shall never be heard by the court." The rules established by these sections of our Code are, in their effect, the same as existed at common law, except that under the common-law rule the attorney could not be compelled to testify as to communications, nor to disclose papers, or letters, or entries made by him in that capacity; while our statute goes to the extent of declaring that the attorney shall not be competent or compellable to testify for or against his client. Lord Chancellor Brougham declared that the rule was not founded on any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, but out of regard to the interests of justice, which could not be upheld, and to the administration of justice, which could not go on, without the aid of men skilled in jurisprudence, in the practice of the courts, and in matters affecting rights and allegations

form the subject of judicial proceed-
nd that, if such communications were
otected, no man would consult a pro-
al adviser with a view to his defense,
fely go into a court either to obtain
s, or to defend himself. Greenough v.
l, 1 Mylne & K. 102; Bolton v. Cor-
on of Liverpool, Id. 94, 95. Mr. Green-
n the first volume of his Law of Evi-
(section 239), says that this privilege
personal to the attorney, but is a rule
for the protection of the client. Mr.
, in his treatise on Attorneys and Coun-
at Law (section 144), gives the general
stablished by the weight of authority
s subject as follows: "An attorney is
ged from giving evidence of any con-
al communication made to him by his
or concerning which he has been in-
l in his professional capacity as attor-
r the client. The privilege is that of
ent, and not that of the attorney." The
author, in section 151, says, on author-
at the rule does not extend to informa-
cquired by him in any other way than
ch confidential communication by the
and Mr. Best, in his work on the
ples of Evidence (section 581), says that
ivilege does not extend to matters of
hich the attorney knows by any other
than confidential communication with
ent, though, if he had not been em-
as attorney, he probably would not
known them. It appears that Mr. Key
n attorney, and that he was employed
h by the deceased at the time the deed
vritten. It is thereby established that
lation of client and attorney did exist
time the deed was executed between
and the intestate. It is, however, con-
l that, inasmuch as the privilege which
v allowed is for the benefit of the client,
ot counsel, the rule relates only to con-
al communications existing because of
relation; that, inasmuch as the com-
ation made by the client to the attorney
the presence of the other party to the
ct, it was not in law such a confidential
unication as could not be given in evi-
by the attorney. There seems to be
nuch force in this contention. The idea
seems to be involved in the establish-
of the rule is not that of mere secrecy.
not that the client has imparted to the
ey information about a matter which
be concealed from the public, but it is
ed on altogether a different principle.
g respect solely to the free and un-
rassed administration of justice, and to
curity of all men in the enjoyment of
civil rights, no man is under a legal
tion to disclose facts or circumstances
would render questionable his demand
particular right, or impair his defense
ther's demand. Originally, suitors and
ants appeared personally before the
al which interpreted and administered
w. Subsequently, however, when the application of legal principles and the forms of procedure became more complicated and intricate, the services of persons having knowledge of the one and skill in the other came into demand, and to fully protect the rights of parties litigant the procurement of the services of persons skilled in the law became universal. No man being compelled to himself disclose the weakness of his case, it followed almost as a necessary consequence that the person who represented him and presented that case could not do so. If it were otherwise, the free administration of justice would be restricted, and the ascertainment and enforcement of rights endangered. Therefore when, in order to obtain the measure of his rights, the client resorted to a representative who could better judge the merits of his case, and disclosed to him the facts upon which the ascertainment of his rights must depend, the law of public policy put a seal upon the lips of his counsel just as effective as the interest of the client placed a ban upon his own disclosure; and, to the credit of the profession be it said, that as a rule, almost without exception, the private matters of the client communicated to counsel are held sacred. There is no reason why an attorney may not be called as a witness to give evidence of facts within his knowledge. In the administration of justice the courts will compel him so to do, and to place before the jury his knowledge of any fact in issue, except as to those which his client, depending on him for advice and direction, has seen fit to communicate in order to obtain the full measure of his right. These are deemed confidential in the interest of the client, and privileged for his protection; but when communicated to other persons, and when others are allowed the same opportunities of knowledge that the attorney possesses, the confidential relation necessarily did not exist, and the privilege does not attach. In the present case the communication which was claimed to be privileged was transmitted to the attorney in the presence of the other party to the contract. It is true that by agreement between them the public were not to be informed of their private arrangement. Not because such information would add to the strength or increase the weakness of either side. The parties were apparently in full accord. No differences existed between them, and in order to carry out terms upon which they were fully agreed the communication was made to the attorney in the presence of both, and the secrecy necessary to be observed did not affect the contract, but was for the purpose of avoiding criticisms and questions of strangers to their agreement. It is the secrets of the client which affect his right that the law does not permit the attorney to divulge, and it seems to be well settled on authority that if the communication made by the client to the attorney is in the presence of the other party to the contract, and it comes within his knowledge, such communication is not em-

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braced in the rule which prohibits that it may be given in evidence by the attorney when called on so to do. Mr. Weeks, in section 159 of his treatise on Attorneys at Law, declares as an exception to the general rule which we have stated that the statements of parties made in the presence of each other may be given in evidence by attorneys, because such statements are not in their nature confidential, and cannot be regarded as privileged. Mr. Wharton, in his Law of Evidence (section 587), on authority says, "Privilege, however, has been held not to extend to communications made to counsel in the presence of all the parties to the controversy." In the case of Brand v. Brand, 39 How. Prac. 193, it was ruled that communications to counsel, made in the presence of the adverse party, are not privileged, and the counsel is a competent witness thereon. The same ruling is made in Britton v. Lorenz, 45 N. Y. 51. In Hummel v. Kistner, 182 Pa. St. 216, 37 Atl. 815, it was ruled that "on a bill in equity to set aside a deed made by a father in his lifetime to his daughter, declarations of the deceased to his attorney while he was writing the deed are not privileged, when made in the presence of both parties to the transaction." In this connection, see, also, Wyland v. Griffith, 96 Iowa, 24, 64 N. W. 673; Frank v. Morley's Estate, 106 Mich. 635, 64 N. W. 577; Rice v. Rice, 14 B. Mon. 417; Whiting v. Barney, 30 N. Y. 330. Our own court seems to have recognized the same rule. In the case of Corbett v. Gilbert, 24 Ga. 454, it was ruled that an attorney who is called on to write a bill of sale is not prohibited by the statute from giving evidence of a conversation between the parties in relation to the contract, and in the case of Brown v. Mathews, 79 Ga. 1, 4 S. E. 13, this court, in discussing the statute now under consideration, said, "Furthermore, what is known to both parties is not a confidential secret in a subsequent controversy between them." See, also, Burnside v. Terry, 51 Ga. 186. See, also, in this connection O'Brien v. Spalding, 102 Ga. 490, 31 S. E. 100, and notes to same case as reported in 66 Am. St. Rep. 202–213. We are of the opinion, under the authorities cited above, that the court erred in ruling out the testimony of Maj. Key.

2. An examination of the opinion of the very able and careful judge who presided in the trial of this case, which accompanies the record, discloses that in his opinion the proof offered to establish the fact of the promise by the intestate to repay the plaintiff the sum of $2,300 paid under the circumstances detailed was an effort to ingraft on the deed a verbal agreement inconsistent with its terms. We do not so understand it. The action which was instituted was in the nature of an action for money had and received, which always lies where another is in possession of money which, ex æquo et bono, ought to be paid to the plaintiff. The deed recites a consideration of $2,800. It is true that the proof submitted tended to show that the true consideration was not $2,800, nor any other amount of money, but was the payment of a debt claimed by the petitioner to be due him by the intestate to the amount of $2,800, and that, while the petitioner paid to the intestate $2,800, it was on an agreement that the land was in fact conveyed to pay the debt, and the $2,800 paid to the intestate was to be repaid to the petitioner. Such an agreement in no wise affects the validity of the deed, nor does it change any of its terms. It is true that it shows the consideration to be different from that which is expressed in the deed. The consideration of a deed may be inquired into without affecting the terms of the contract, and, whatever was the consideration of the deed,—whether it was $2,800, as expressed, or whether it was the payment of a debt of $2,800,—really becomes immaterial. So that there was a consideration, and the effect of the instrument under this proof is to vest in the grantee all the title which the grantor possessed. Nor do we think, as suggested in his opinion by the judge, that the evidence shows that the right of action, if any there was, was in the wife of the petitioner, and not in him. The suit was not instituted on the original agreement to pay Mrs. Stone for the board of the intestate. It has for its foundation the agreement on the part of the intestate to repay to the petitioner the amount of money which he turned over to the intestate under the agreement alleged. We are not to be understood as passing on the merits of this case, nor deciding as to whether the evidence offered was sufficient to establish the contention of the plaintiff. The questions of fact involved must be determined by the jury. For the reasons which we have given, it is our opinion that the evidence of Maj. Key was admissible, and we might go further, and add that without it the case ought to have been submitted to the jury for determination of the facts. As it is, we think the judge erred in ruling out the evidence of Key, and that he likewise erred in granting a nonsuit. The judgment is therefore reversed. All the justices concurring, except FISH, J., absent on account of sickness.

WATSON v. ALBANY & N. RY. CO.

(Supreme Court of Georgia. June 5, 1900.)

RAILROAD CORPORATION—ORGANIZATION.

The issuance by the secretary of state of a certificate of incorporation to those who had purchased at judicial sale the property and franchises of a railway company does not, ipso facto, create a corporation authorized to operate the railroad and exercise the franchises of that company. Such a corporation does not come into complete existence until after organization under the certificate in the manner prescribed by law.

(Syllabus by the Court.)

Error from superior court, Dooly county; Z. A. Littlejohn, Judge.

on by P. B. Watson against the Albany thern Railway Company. Judgment endant, and plaintiff brings error. Af-

ters & Wallace and J. T. Hill, for plain- error. W. F. Clark and D. L. Hender- r defendant in error.

IPKIN, P. J. On the trial of this case, was an action by Watson against the & Northern Railway Company, the directed a verdict for the defendant, he plaintiff excepted. In his petition ged that on or about the 18th day of r, 1895, he was in the employment of fendant company in the capacity of a hand, and sustained serious personal s, attributable to the negligence of endant's engineer. As a witness in his ehalf, he testified that he was injured day above mentioned. The ground which the verdict was directed against as that on that date there was no such ation as the Albany & Northern Rail- Company, and that consequently the ff failed to prove the essential allega- at he was at the time in question an r of this company. The evidence in nnection was, in brief, as follows: At ial sale of the property and franchises Albany, Florida & Northern Railway ny, which occurred on the 17th day of 1895, Frank L. Hamilton, Luther L. and Henry P. Talmadge became the sers. Subsequently they presented to retary of state a petition for incorpora- nder the name of the Albany & North- ailway Company, and a certificate of oration was issued to them on the 12th September, 1895. They did not for- organize under this certificate until ber 1, 1895, on which day they met, d a common seal, issued stock, made s, and elected a board of directors. se, therefore, turns upon the question er the Albany & Northern Railway ny, immediately upon the issuing of rtificate by the secretary of state, be- corporation duly authorized to carry business of running a railroad, and t to the liabilities incident thereto, or ecame such on the date of the formal zation of the company. We think this on is settled by the provisions of para- 12 of section 2167 of the Civil Code, was codified from the general act for corporation of railroad companies, ap- December 17, 1892. See Acts 1892, 45. That paragraph declares that the sers at judicial sale of the property anchises of a railroad company, "their ites or assigns, may organize anew ng a petition with the secretary of requesting to be substituted for the l petitioners and stockholders, with all owers, rights, privileges, duties and ies, * * * when said new incorporators may proceed anew by electing new directors as provided by the act above mentioned," "and may distribute and dispose of stock, and may conduct their business generally as provided by" said act; and such "purchasers and their associates shall thereupon be a corporation, with all the powers, privileges and franchises conferred by, and be subject to the provisions of," said act. It will thus be seen that the purchasers of a railroad were, under the provisions of this act, given the right to "organize anew" by filing the prescribed petition with the secretary of state; and, upon so doing, the "new incorporators" were further authorized to "proceed anew" by electing directors, distributing and disposing of stock, and conducting generally the business of the newly-formed corporation. The phrase declaring that the "purchasers and their associates shall thereupon be a corporation" means, we think, that they shall be a corporation duly authorized to exercise the franchises of a railway company only after having proceeded to elect directors, etc., as in the act expressly provided. Under the provisions of section 2168 of the Civil Code, which were taken from the act of 1894 (Acts 1894, p. 65), the mere filing of a petition by such purchasers is not sufficient. On the contrary, they are not now authorized to proceed with the organization of a company until after receiving a certificate of incorporation from the secretary of state. They may then proceed to elect directors and issue stock, but not until these things have been done is it contemplated that the newly-formed corporation shall assume control and management of the property. It is to be observed that under paragraph 11 of section 2167 of the Civil Code, the party or parties acquiring by purchase the title to the property and franchises of a railway company sold under judicial process may, if they choose, operate the railroad without obtaining a new charter. If they do this, they are, of course, responsible to the public and to their employés for the manner in which their business is conducted. In case they elect to form a railway corporation, this same responsibility will rest upon them until they shall have proceeded so far in the organization of such corporation as to have duly-appointed officials authorized, in behalf of the corporation, to accept from the purchasers a surrender of the property and franchises of the old company. Until this point is reached, the liability of the purchasers must necessarily continue, and not until it is reached can the liability of the new company begin. Where, as the law contemplates may be done, and as is usually the case, the purchasers, in forming the new corporation, associate with themselves other persons, who will not be interested in the affairs of the railroad until the company is duly organized, and who before that time can have no voice in the management of the business, it would be manifestly unjust to

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hold them responsible for the consequences of the negligence or mismanagement of the original purchasers before complete organization took place, and possession and control of the railroad could be surrendered to the corporation. It certainly cannot be seriously contended that the general assembly ever contemplated such a result.

Applying what is above said to the facts of the case in hand, it follows that on the 18th of October, 1895, the Albany & Northern Railway Company was not in existence as a duly-organized corporation. It did not actually become such until the 1st of November of that year. It therefore neither had nor could have, prior to that date, a servant or employé; and consequently the plaintiff's allegations that he was on October 18th injured while in the employment of this company, and that his injuries were caused by the negligence of an engineer in its service, were not established. This being so, there was no error in directing a verdict in favor of the defendant; for the plaintiff did not, as it was incumbent upon him to do, prove his case as laid. He was at that time, under the facts in evidence, the employé of the purchasers of the property and franchises of the old Albany, Florida & Northern Railroad Company, and this fact precluded the possibility of a lawful recovery against the defendant corporation. See, in this connection, Railroad Co. v. Buice, 88 Ga. 180, 14 S. E. 205, and Railroad Co. v. Strauss (Ga.) 35 S. E. 332. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

STATE v. HILL.

(Supreme Court of North Carolina. June 14, 1900.)

CITY ORDINANCE—REASONABLENESS—SCAVENGERS.

A city ordinance providing that all scavenger work of the city shall be done by licensed scavengers, fixing the time when closets must be cleaned and the charges for cleaning them, and giving the board of health power to decide who are competent bidders for this work, is in derogation of common right, and, in the absence of a showing that it is reasonably necessary and just, must be held invalid so far as it applies to a defendant prosecuted under it for cleaning a closet without a license as a scavenger.

Clark and Montgomery, JJ., dissenting.

Appeal from superior court, New Hanover county; Bryan, Judge.

Fred Hill was convicted of violation of a city ordinance, and he appeals. Reversed.

L. V. Grady, for appellant. The Attorney General, for the State.

DOUGLAS, J. This is a criminal action originally begun in the mayor's court of the city of Wilmington, wherein the defendant is charged with doing "scavenger work for pay at the surface closet of W. S. Royster without having license to do such sca ger work, and not being employed by licensed scavenger of the city" of Wilm ton. The closet is thereafter referred t belonging to Niestle. The following are admitted facts: That in January, 1899 defendant made a contract with Wil Niestle to do his scavenger work for term of one year by cleaning the closc his store once a week, and that at his dence once every two weeks; that he to receive 15 cents each time for clea the store closet and 25 cents for the dence closet; that he continued to do work without license, after the passag the ordinance, and that when the con was made no license was required, and one was at liberty to contract for such w The city ordinance was introduced pr ing that the city shall be divided into sanitary districts; that "persons propc to do scavenger work of one or more tricts shall submit bids for doing the for a term of one year"; that "the boa health may refuse any and all bids for enger work, and shall have power to d who are competent bidders"; that in ca disagreement between the owner or pant and the scavenger as to the work ing been properly done, the question be referred to the superintendent of he that "all closets must be cleaned at once a month, and more frequently i dered by the superintendent of health"; "the charges for cleaning closets shal governed by the previous going rates, shall not exceed twenty-five cents per c in the First, Second, Seventh, and Eig and in the Third, Fourth, Fifth, and S districts east of Tenth street, and shall exceed fifty cents in the Third, Fourth, Sixth districts west of Tenth street." W Slocum testified for the state as foll "I am the regular licensed scavenger for city of Wilmington, and the defendant not working under me at the time he charged with doing scavenger work wit license. I am the only licensed scave in the city of Wilmington. I do not re any pay from the city of Wilmington for work. I collect of the parties for whc do scavenger work. I have it done, pay a certain per cent. of the proceed such work for same. I do not know per cent I pay. Do not know whether I 10 per cent., 25 per cent., or 50 per There are no public sewers in the cit Wilmington." It does not appear what the charges of the city scavenger, but presume they were the full amounts allo as our attention has not been called to instance where a municipal contractor ing an exclusive privilege has charged than the maximum allowed by his cont We do not say that there are no such c but their whereabouts are unknown to The real point in the case is not very cle presented by the prayer for instruction,

y appears from the case itself. The is not charged with carrying on the of a public scavenger, but simply ing the work for one man; and it is d in the argument that the effect of nance would be to prevent the owner from removing the refuse from his emises. This is clearly an interfer- th a natural right, and, while this allowable on the ground of public y, some such necessity must appear, ordinance must be reasonable in its ns. State v. Higgs (N. C.; at this 5 S. E. 473; 1 Dill. Mun. Corp. (4th 319; 2 Wood, Nuis. (3d Ed.) § 745; etc., v. Redecke, 49 Md. 217. Is the ce under consideration reasonable in isions, or just in its results? We are ed to think that it is not. It takes rom the citizen a natural and a nec- ight without apparent necessity, and tes nothing adequate to take its The owner cannot clean his own s, no matter how filthy they may be- nd the public scavenger cannot be o clean them oftener than once a without an order from the superin- of health. This case does not ques- right of the city to clean all closets, ave them cleaned or kept clean; but ves the right of the owner himself up. If the ordinance has that ef- nd the state claims that it has such t,—then it is void, at least pro tanto. particular the effect of the ordinance o keep the city clean, but rather to dirty, for the time being. It is a of common knowledge that refuse quickly decays during the summer and it can scarcely be contended rely a monthly cleaning is sufficient a closet in a healthy condition in a limate. Are the rates allowed to the scavenger reasonable? If the ordi- vere otherwise valid, we would hesi- interfere with it on this ground alone, do not decide it as a matter of law; us it seems questionable. What is by the words in section 7 of the ordi- "shall be governed by the previous ates," is unknown to us, and we have n favored with any explanation either record or the argument. We assume e scavenger would be entitled to 25 or 50 cents, as the case might be, n time a closet was cleaned. The re- Nestle would be that to have his one by the city scavenger would cost least $19.50, and possibly $39, accord- his location. It is now costing him private contract. The result of the ce would be that any one who lived humblest cabin in the furthest corner city would be compelled to pay at a year for the privilege of having , and much more if he wished to keep decent condition. No matter how he may be, or how willing to do the most menial labor, he would be compelled to employ the city contractor to clean his own premises, and, of course, to pay him at the contract rates. As bearing somewhat on the rate of compensation, we are informed that the city of Raleigh charges a license tax of one dollar per year for each surface closet, and keeps it clean without further expense to the owner. We do not know the relative expense of performing such duties in Raleigh and in Wilmington, nor is it within our province to inquire, but such gross disparity might well be questioned on the ground of fairness or necessity. In the case at bar the defendant could not have obtained a license, even if he had applied for one, as the city was all under contract. Had it not been, he would not have been licensed as a scavenger unless he had bid for an entire district. Even then he had no assurance of obtaining it, no matter how low he bid, as the board of health retained the right to refuse any and all bids, and to "decide who are competent bidders." The public scavenger was not required to do any special duty, or to perform his duty in a special manner. He was not required to use carts or implements of any special kind, or to use any special precautions either for cleanliness or disinfection. As far as we can see from the record, the defendant was fully as well equipped for such work as the city scavenger himself, who, indeed, does not appear to have performed any personal duties other than perhaps making certain reports, or possibly superintending those who were working for him on shares.

We will briefly examine the authorities that have been cited in support of the contention of the state, none of which are strictly applicable in our view of the case. In State v. Hord, 122 N. C. 1092, 29 S. E. 952, the court says, on page 1094, 122 N. C., and page 953, 29 S. E.: "Of that the commissioners, the local legislature, are the sole judges, unless their ordinance is unreasonable." Hill v. City of Charlotte, 72 N. C. 55, simply holds that a municipal corporation is not liable to an action for damages in the exercise of discretionary powers. In Re Vandine, 6 Pick. 187, while the court recognized the power of the city to require public scavengers to take out a license, it held that the ordinance must be reasonable. It says, on page 191: "To arrive at a correct conclusion whether the by-law be reasonable or not, regard must be had to its object and necessity." And again, on page 192: "We are all satisfied that the law is reasonable, and not only within the power of the government to prescribe, but well adapted to preserve the health of the city." In Com. v. Stodder, 2 Cush. 562, the court says, on page 571: "We cannot doubt that a by-law reasonably regulating the use of the public streets of the city * * * would be valid and legal." It then concludes, on page 576, as follows: "A by-law to that effect is an unnecessary restraint upon the busi-

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ness of those carrying passengers for hire, and not binding upon inhabitants of other towns. For this reason the by-law must be held invalid as respects the defendant." The case of Boehm v. Mayor, etc., 61 Md. 259, which at first glance seems to fit our case, has really no direct bearing. There the action was brought by a public scavenger to recover from the mayor and city council of Baltimore damages alleged to have resulted from their wrongful act in suspending and revoking his license. The court held that the city had the power to pass reasonable by-laws requiring a license from a public scavenger, and requiring all refuse matter to be carried off in carts of a certain character; that such by-laws were reasonable, and that the plaintiff could not recover damages for the revocation of his license. The court, in its opinion, distinguishes this case from that of Mayor, etc., v. Radecke, 49 Md. 217, in which certain ordinances of the city of Baltimore were held unreasonable and invalid. In City of Louisville v. Wible, 84 Ky. 290, 1 S. W. 605, the court held that the city could not, upon its mere caprice, or to gain a pecuniary advantage, violate a contract which it had made upon a valuable consideration with an individual, whereby it granted to him the exclusive right for five years to the use of its streets for the purpose of removing the bodies of all dead animals from its streets, alleys, etc. The second headnote of that case is as follows: "The exclusive privilege of hauling the bodies of dead animals out of a city along its streets, having been granted by the city to an individual, others cannot be allowed to buy up such dead animals, and haul them out along the streets, although the original owners have the privilege of thus removing them." That case does not appear to be an authority against the right of the owner to remove refuse from his own premises. The Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394, discuss at great length and with great ability the question of monopoly under the fourteenth amendment to the constitution of the United States, but they do not appear to us to directly affect the principle now under consideration; that is, the necessity and reasonableness of the ordinance. We are not disposed to question the law as laid down in 1 Dill. Mun. Corp. § 144, as to the duty and power of a municipal corporation to preserve the public health and safety, but by lawful means, and in subordination to the principles enunciated by the same author in sections 319–322, 325. These sections expressly lay down the rule that all ordinances "must be reasonable and lawful; must not be oppressive; must be impartial, fair, and general; and must not contravene common right." But one citation remains to be examined,—that of Brodnax v. Groom, 64 N. C. 244. The subject-matter of that decision was an act of the legislature providing "that the commissioners of the county of Rockingham be and they are hereby authorized to levy and collect a special tax for the purpose of building and repairing bridges in said county." The court says, on page 249: "Repairing and building bridges is a part of the necessary expenses of a county, as much so as keeping the roads in order, or making new roads. So the case before us is within the power of the county commissioners. How can this court undertake to control its exercise? Can we say such a bridge does not need repairs; or that in building a new bridge near the site of an old bridge it should be erected as heretofore, upon posts, so as to be cheap, but warranted to last for some years; or that it is better policy to locate it a mile or so above, where the banks are good abutments, and to have stone pillars, at a heavier outlay at the start, but such as will insure permanency, and be cheaper in the long run?" This language, half humorous and half sarcastic, was surely never intended to apply to the constitutional rights of the citizen, which are not held at the pleasure of a board of aldermen, or even of the legislature. We do not say that the defendant, or even the owner of the premises, had the right to clean out their closets in a manner offensive to their neighbors, or detrimental to the public health and comfort. They would be subject to such reasonable regulations as were necessary to attain these ends. Nor do we say that the city might not, under reasonable regulations, require any one to take out license before acting as a public scavenger, or even do the work through its own officers. Such cases are not before us. We are constrained to say that the ordinance, construed as it appears to us, is not shown to be reasonable, necessary, or just; and therefore, being in derogation of common right, must be held invalid in its application to the case at bar. Error.

CLARK, J. (dissenting). One of the most urgent causes for the institution of municipal government is the conservation of public health, and no duty more important is confided to municipal bodies. The nature of the ordinances they shall adopt for that purpose is a matter for their discretion, subject to change by the election of a new board, and not reviewable by the courts unless the ordinance is unreasonable. When people assemble in towns, matters of sanitation which are left to each one's own judgment in the country become a matter of public concern. It is a matter of common observation that in this matter of cleaning out water-closets, cesspools, and sinks, if it is left to each householder, some will be guilty of neglect, to the great discomfort of their neighbors, and often to the detriment of the public health. Hence it has always been recognized that the regulation of that matter rested with the municipal authorities. Code, § 3802, confers on towns and cities the power "to pass laws for abolishing or preventing nuisances and preserving the health of the citizens," and

hods they shall adopt are left (ex- cases of abuse) to the "local legisla- he municipal body. State v. Hord, C. 1092, 29 S. E. 952; Hill v. City of e, 72 N. C. 55. The latter case says othing can be clearer than that it is irely to those authorities to deter- hat ordinances are proper for those s." In this matter of the best meth- ving the scavenger work of the city ed it may be that, if it were for this decide, I should agree with the that the best method is to have it ectly by the city through its officers ployés. Such is certainly the mani- dency of the age as to all matters cipal interest, including the furnish- light, water, sewerage, street cars, like. But it is not a matter commit- s, but to the people of each town and determine through its local board. ny town, as in the present instance, that the scavenger business, whose egulation is of the highest local im- , should be performed by licensed ers, giving bond for the faithful per- e of their duties, and under supervi- the city health officers, there has reason shown why it cannot be There are ample authorities to that In Re Vandine, 6 Pick. 187, as far 1828, it was held that a by-law of of Boston forbidding any one to re- ght soil, etc., unless duly licensed by was valid, though the court there in their own judgment it would be the city would have the work done by its own employés than through ors. This was cited and approved v. Stodder, 2 Cush. 563. In Boehm r, etc., 61 Md. 259, it was held that nance that "no person shall remove tents of any privy, well, or sink the limits of the city without hav- obtained a license so to do," was a dinance under the power "to pre- e health of the city, and to prevent ove nuisances"; thus coming within y letter of our Code (section 3802) ordinance of the city of Wilmington. her late case—City of Louisville v. 4 Ky. 290, 1 S. W. 605—it is held city can have such or similar work contractors, and that it is no objec- he validity of the contract if there is e contractor. The above doctrines down as well-settled law. 1 Dill. rp. § 144, note; Id. § 569, and notes. held in the Slaughter-House Cases, 36, 21 L. Ed. 394 (which is a thor- cussion of the proposition), that con- this general nature are not invalid xclusive, because they are made in ation of public services; but in this however, there is no exclusive con- The ordinance requires advertise- or bids, one contractor at least for the eight districts, bonds to be given for discharge of duty, supervision by the health officer, and power reserved to the city to cancel and revoke any contract at will, each contract to be renewed annually. The city's interest is fully safeguarded. It is purely incidental that one man has taken all the contracts, and his doing so in no wise invalidates the ordinance. The power being clearly in the municipal body to regulate the scavenger work of the city, whether the method shall be directly by the city or by contract under the license system, is for them to decide. This court cannot review their discretion. This is stated in ever-memorable words by Pearson, C. J., in Brodnax v. Groom, 64 N. C., at page 250.

MONTGOMERY, J., also dissents.

STATE v. MORRISON.

(Supreme Court of North Carolina. June 9, 1900.)

LICENSES—SALE OF ORGANS AND PIANOS—PROSECUTIONS—BURDEN OF PROOF.

1. Under Laws 1899, c. 11, § 27, providing that every person or corporation engaged in the business of selling pianos and organs shall, before selling or offering to sell, pay to the sheriff or tax collector a tax of $10, and obtain a license which shall operate one year from its date, and all licenses shall be countersigned by the register of deeds, and shall not be valid unless so countersigned, the issuance of a license to a corporation having several agents and employés traveling and selling organs under that one license does not protect all of them, but authorizes sales only by the agent to whom the license is intrusted, and who has possession thereof.

2. Where, in a prosecution for selling a certain class of merchandise without a license, which the law provides the seller shall not sell without a license, it appears that a license was issued to defendant's employer, which would authorize sales by only that one of the employer's agents having possession of the license, the burden is on defendant to show that he has possession of the license, since knowledge of such fact lies peculiarly within his own knowledge.

Appeal from superior court, Lincoln county; Allen, Judge.

R. J. Morrison was indicted for engaging in the business of selling pianos and organs without a license. From a judgment in favor of defendant entered on a special verdict, the state appeals. Reversed.

D. W. Robinson and Brown Shepherd, for the State. Jones & Tillett, for appellee.

CLARK, J. Section 27, c. 11, Laws 1899, requires that every person or corporation engaged "in the business of selling pianos or organs by sample, list or otherwise in this state, shall before selling or offering to sell any such instrument, pay to the sheriff or tax collector a tax of ten dollars on each brand and obtain a license which shall operate one year from its date, and all licenses provided for in this section shall be countersigned by the register of deeds and shall not be valid

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unless so countersigned." The defendant is indicted for engaging in the business of selling pianos and organs in Lincoln county without license. It is found by the special verdict that E. M. Andrews & Co., a corporation having its principal place of business in Mecklenburg, upon payment of $10 obtained a license from the sheriff of that county under the above section; that it had several agents and employés traveling and selling organs by sample under that one license; that the defendant sold organs in Lincoln as one of the agents of aforesaid corporation; that no license had been issued to him. It is not found, nor, indeed, is it contended, that the defendant had in possession the license issued to said corporation. If he had, that was a matter of defense, to be shown in evidence, and found as a fact. State v. Smith, 117 N. C. 809, 23 S. E. 449; Cook v. Guirkin, 119 N. C. 13, 25 S. E. 715, and cases cited. The sole question arising upon the special verdict is whether such license protects only the person or agent who has it in possession, or an unlimited number of agents. Among the rules for the construction of an act, if of doubtful meaning, is that the intent must govern, if it can be ascertained, and a reasonable construction must be placed upon the statute; taking it in connection with the other provisions with which it is associated, and the previous law.

1. The requirement that the license must be signed by the sheriff and countersigned by the register of deeds, and the fact that when thus authenticated the licensee shall be able to sell anywhere in the 97 counties of the state, would indicate that the license shall protect only the agent who at the time has it in possession. If this were not so, why require signing and countersigning, and why the absence of provisions for certifying duplicates or copies? Shall the sheriffs of each of the other counties be held off by the simple statement of any one selling pianos and organs that he is agent for a corporation which has paid $10 to some sheriff, in perhaps a distant county, and gotten his license? If the license is good without producing it, then every sheriff must take the word of any salesman who says that his principal has gotten his license in some other county, or run the risk of an action for false imprisonment or illegal arrest. Is that a reasonable construction of the law?

2. Construed by the context, section 26 (the section just before this) requires a license for selling sewing machines (in which there is possibly less profit, because more competition) to be issued by the state treasurer. For that the sum of $350 is required, and there is accordingly a provision that the licensee "shall have power to employ an unlimited number of agents to sell" under his license, and that the treasurer shall issue duplicate copies of the license upon payment of 50 cents each. The absence of these two provisions in section 27, and the exaction of only $10 instead of $350, is convincing proof that the legislative intent was that the latter license should authorize no agent to sell, other than the one having it in possession. There is nothing to indicate that the legislature meant to discriminate against useful sewing machines and in favor of ornamental pianos, by taxing the business of selling the former $350, and the latter only $10. This would not be a reasonable construction of the statute.

3. The former law (Laws 1895, c. 116, § 1) required a tax of $250 for license to sell pianos and organs. The reduction to $10 was made by the act of 1897, c. 168, § 26; although the public treasurer was to issue the license, there was a significant absence of authority to licensee to employ an unlimited number of agents, and for issue to him certified copies of the license, which then, as now, appears in the section (23) just before it, and which exacts a license tax of $350 for the kindred and hardly more profitable business of selling sewing machines. These two sections as to licenses for selling sewing machines and for selling pianos and organs were re-enacted in 1899, with the difference only that in the latter section the license is to be issued by the sheriff instead of the state treasurer.

For these reasons, we must think that the legislative intent was that the $10 license only authorizes only the person having it in possession to sell under it. Such has always been the policy of the law, except when the statute authorized the issuance of certified duplicates or copies of the license. Lewis v. Hagar, 91 N. C. 16; State v. Smith, 93 N. C. 516; State v. Rhyne, 119 N. C. 905, 26 S. E. 126. The statutes were possibly more explicit in those cases, but they serve to show the settled policy of the law in these matters. Upon the special verdict, the court should have adjudged the defendant guilty. Reversed.

MOTT v. COMMISSIONERS OF FORSYTH COUNTY.

(Supreme Court of North Carolina. June 1900.)

SUPERIOR COURTS — CONSTITUTIONAL JURISDICTION — STATUTE TRANSFERRING JURISDICTION — INVALIDITY — SUPREME COURT — GRAND JURY — COUNTY COMMISSIONERS — MANDAMUS—SOLICITOR OF SUPERIOR COURT —INTEREST—PARTY.

1. Const. art. 4, §§ 2, 8, 27, establish a supreme court, superior courts, and courts of justices of the peace, and define the jurisdiction of all but superior courts. Sections 10, 11, require the state to be divided into judicial districts, provide that a superior court shall be held in each county at least twice a year, require the rotation of district judges in the holding of superior courts, and provide that such courts shall be at all times open for all business within their jurisdiction, etc. Acts 1899, c. 371, creates criminal courts for certain counties, transferring to them the original jurisdiction of superior courts in such matters. Prior to the adoption of the constitution the superior courts were in existence with full original criminal jurisdiction. *Held*, that the jurisdiction

the superior court was such as was not otherwise constitutionally allotted, and such as the superior courts exercised at the adoption of the constitution, such jurisdiction being given a constitutional character by the constitutional recognition of the courts, and hence that Acts 1899, c. 371, infringing the criminal jurisdiction of such courts, was unconstitutional and void.

2. A solicitor of a superior court duly entitled to the fees and emoluments of his office has a sufficient interest therein to enable him to maintain mandamus to compel the county commissioners to draw a grand jury for such court.

Montgomery and Clark, JJ., dissenting.

Appeal from superior court, Forsyth county; Starbuck, Judge.

Mandamus by M. L. Mott, solicitor of the Forsyth county superior court, against the commissioners of Forsyth county, to compel the drawing of a grand jury for such court. From a judgment refusing a peremptory writ, plaintiff appeals. Reversed.

Holton & Alexander, for appellant. Glenn & Manly, for appellees.

FURCHES, J. It is admitted that the relator, Mott, was elected solicitor of the superior courts of the Ninth judicial district in November, 1898, for a term of four years, and was regularly inducted into that office; that said term of office has not expired; and that the county of Forsyth is one of the counties composing the Ninth judicial district. It is also alleged and admitted that the defendants are the county commissioners of Forsyth county, and that they have not drawn a grand jury for the superior court of that county since February, 1899; and, while they say that the plaintiff never demanded the drawing of a grand jury for the superior court, they do not say that they would have drawn one if such demand had been made; and in fact they substantially say that they would not have done so, as they justify their action in not drawing said jury under chapter 371, Acts 1899, and that this act justifies them in not drawing a grand jury, if the same is constitutional; and as it was not expected that they, acting in this respect, as ministerial officers, should pass upon its constitutionality, they were, therefore, not to blame for obeying the act of 1899 until it should be passed upon by the courts, and declared unconstitutional. While it is contended that Mott, who is a resident and citizen of Wilkes county, is not the proper relator, the main and important question is the constitutionality of the act of 1899. This is not only an important, but a serious, question, and should receive a careful consideration; and, after it has received this, if it should plainly appear to be unconstitutional, it will be our duty to so declare,—that is, if we shall find that the provision of the act of 1899 in effect abolishing the grand jury of the superior court in Forsyth county is plainly in conflict with the constitution, it will be our duty to say so. Where an act of the legislature is in conflict with the terms of the constitution, they cannot both stand. One must give way to the other. And, as the constitution is superior to the legislative act, the latter must give way to the former. "It is a proposition too plain to be contested that the constitution controls any legislative act repugnant to it." Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60. But we do not think it necessary at this late day for us to undertake to establish the proposition that the constitution is superior to ordinary legislative acts, and that when they conflict the latter must yield to the former. Taking this to be conceded, we will proceed to the consideration of the constitutionality of the act of 1899, so far as it deprives the superior court of Forsyth county of any grand jury, and if, upon this examination, it shall be found to conflict with the constitution, the act must give way, and not the constitution. The amended constitution (article 4, § 12) authorizes the legislature to establish courts inferior to the supreme court, "so far as the same may be done without conflict with the other provisions of this constitution." So it must be held that the act of 1899 is constitutional so far as it does "not conflict with" some of "the other provisions of the constitution"; but, if it conflicts with any of the other provisions of the constitution, it is, to that extent, unconstitutional. In considering this question it must be understood that it is not the constitutionality or unconstitutionality of the criminal court of Forsyth that is being considered, but only those provisions in the act of 1899 establishing the criminal court of Forsyth and other counties that deprive the superior court of its grand jury. Is that part of said act which deprives the superior court of Forsyth of its grand jury in conflict with any of the other provisions of the constitution? This is the question. The constitution (article 4, § 2) establishes a supreme court, superior courts, and courts of justices of the peace. Article 4, § 8, defines the jurisdiction of the supreme court, and article 4, § 27, defines the jurisdiction of courts of justices of the peace. But the jurisdiction of the superior court is nowhere defined in the constitution. Section 10 provides for the division of the state into judicial districts, for each of which a judge shall be chosen, "and there shall be a superior court held in each county at least twice in each year." Section 11 provides that "every judge of the superior court shall reside in the district for which he is elected. The judges shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years." Section 18 prohibits the reduction of the salaries of judges during their terms of office; and section 22 provides that "the superior courts shall be, at all times, open for the transaction of all business within their jurisdiction, except the trial of issues of fact requiring jury." Thus it is seen that the constitution establishes superior courts; that it

has provided for dividing the state into judicial districts; that it has provided that each of these districts shall have a judge, and that these judges shall rotate, and shall not hold the courts of the same district oftener than once in every four years; that they shall preside and hold a superior court in each county as often at least as twice a year, and that the superior courts shall at all times be open for the transaction of all business not requiring a jury. These are constitutional requirements, and yet the constitution has nowhere in express terms given the superior courts any jurisdiction. While the jurisdiction of all the other courts are prescribed and defined, not a word is said as to the jurisdiction of the superior courts. And yet we know that they have a jurisdiction, well known and understood by every lawyer, recognized and acted upon at every term of the superior court and this court. Indeed, we cannot conceive the idea that the constitution would establish such courts as superior courts, next in dignity to the supreme court, and leave them without jurisdiction. Their constitutional jurisdiction, then, is to be found to include everything below the supreme court and above the courts of justices of the peace. These courts are established by the constitution, and have their constitutional jurisdiction defined, of which they cannot be deprived by the legislature. This, we think, will be conceded. But, as there is no express grant of jurisdiction to the superior courts in the constitution, it remains to be seen what their jurisdiction is. We know they have a jurisdiction,—that is known of all men,—and, as we have said, is constantly acted upon by this court. How did they get this jurisdiction? If we can determine this, then we are in a position to ascertain and determine what it is, as the same reason that gives these courts their jurisdiction will determine what that jurisdiction is. This jurisdiction is to be found in the fact that these courts—superior courts—are not creatures of the constitution, but adoptions of the constitution. The constitution found them here, established institutions, with their jurisdiction well known and established; and the constitution, not wishing to make any change as to the jurisdiction of these courts, simply adopted them as they were. In this adoption it made provision for the holding of these courts by providing judges to hold them, by requiring the judges to reside in the district for which they were elected, by requiring them to rotate, and to hold at least two terms a year in each county in the state; and that these courts—superior courts—should at all times be open for the transaction of all business that did not require the intervention of a jury. Yet not a word is said as to what their jurisdiction should be. They were to do business, because these courts were to be open to the transaction of all business that did not require a jury. But it cannot be inferred from this that they were not to have a jury, but the inference is otherwise,—that they were to do business at term time where the court had a jury,—as we know this was the fact, as the terms of these courts were provided with judges. We say these courts—these superior courts—were here before the constitution, and became constitutional courts by adoption, and without any change or modification as to jurisdiction,—a part of which was a grand jury. This was not the case with the other courts established by the constitution. There were changes made in the jurisdiction of each of the other courts from what they were at the time of adopting the constitution. This made it necessary to define their jurisdiction, and in doing this the jurisdiction of the superior courts were substantially defined. The whole law of the state was to be administered. The superior courts were courts of general jurisdiction, and when the jurisdiction of the other courts, which were special, were taken out, the remainder was left as the jurisdiction of the superior courts.

While the question now before the court has not before been directly presented, it has been discussed to some extent in several recent opinions of this court. In Rhyne v. Lipscombe, 122 N. C. 650, 29 S. E. 57, this court said: "The constitution (article 4, § 2) establishes the supreme court, superior courts, and courts of justices of the peace, and authorized the legislature to create other courts inferior to the supreme court. Section 12 of the same article provides that the general assembly shall have no power to deprive the judicial department of any power or jurisdiction which rightfully pertains to it, but that it shall allot and distribute that portion of the power and jurisdiction which does not pertain to the supreme court among the other courts prescribed in the constitution, or which may be established by law, in such manner as it may deem best, * * * so far as the same may be done without conflict with the other provisions of this constitution. * * * But under our state constitution the superior courts and courts of justices of the peace are created by the constitution itself, and the general assembly cannot abolish them. The term 'superior court' had a well-defined signification at the time of the adoption of the constitution, and the language of that instrument must be taken as referring thereto. * * * While the general assembly is given the power to allot and distribute the jurisdiction of the courts below the supreme court, this is with the important limitation that it must be done 'without conflict with other provisions of this constitution.' This renders it essential to consider what is the inherent nature of the superior courts created by those 'other provisions' of the constitution itself, which treats them with so much consideration, prescribing their election and terms of office, besides the other provisions above re-

cited. The general assembly may allot and distribute the jurisdiction below the supreme court, but it cannot, in doing so, create new courts with substantially the same powers as the superior courts, and make the offices elective, otherwise than by the people, subject to be abolished by legislative enactment, and hence without independent tenure of office, as prescribed by the constitution, and freed from the provision as to rotation, the residence of the judges, and the requirements as to two terms annually in each county, and being always open. All this cannot be done by simply creating new superior courts, or criminal courts, or otherwise. * * * Applying these reasonable rules of construction to the superior courts established by the constitution, and fenced about, as its importance demanded, by so many provisions in the constitution, what was the superior court, as the term was well understood, at the time of adoption of the constitution? It means the highest court in the state next to the supreme court, and superior to all others, from which alone appeals lay directly to the supreme court, and possessed of general jurisdiction, criminal and civil, and both in law and equity. * * * The constitutional guaranties and the inherent nature and general jurisdiction of the superior courts, recognized by the historical and legal meaning of the term at the adoption of the constitution, cannot be held revoked and discarded by the incidental authority to the legislature to create criminal courts in cities, and other inferior courts (which the constitution did not deem of sufficient importance even to name), and to allot the jurisdiction among them. Even this provision is guarded, as already stated, by the requirement that the allotment shall not conflict with the other provisions of the constitution." We must be pardoned for quoting so extensively from this case of Rhyne v. Lipscombe, as it is so recent an expression of this court, and, though written by Justice Clark, was concurred in by the entire court. These extensive quotations seem to fully sustain the contention of the plaintiff. But this opinion was delivered in a case of a direct appeal from the criminal court to this court, and not involving the question now before the court, as to the jurisdiction of the superior court, and cannot be claimed as an adjudication. But, as it seems to us, it is valuable for the strength of its argument upon the question now presented for our consideration and determination, and should go a long way in its determination. But there are expressions in that opinion—such as "exclusive jurisdiction except as to the right of appeal"—which defendants claim tend to weaken the argument of the case. But upon a careful review of the case it seems to us that these expressions were inadvertences. They were not necessary to the decision of the case; certainly that part which speaks of the exclusive jurisdiction was not; and they are the only expressions in the opinion that seem to be in conflict with the contention of the plaintiff, and they are in conflict with the argument of the opinion. So we think we are justified in saying that they must have been inadvertences, as they are at entire variance with the whole argument of the opinion. The argument of the opinion in Rhyne v. Lipscombe is that the superior courts had a known and established jurisdiction at the adoption of the constitution. That the constitution adopted these superior courts, and made them constitutional courts, with their known and established jurisdiction, thereby adopting the jurisdiction they had at the adoption of the constitution, and making such jurisdiction the constitutional jurisdiction of the court. If this be true,—and we think it is, and it is certainly the argument of Rhyne v. Lipscombe,—then the contention of defendants and the construction they put upon Rhyne v. Lipscombe cannot be correct. It is said in Rhyne v. Lipscombe that "the legislature cannot take the constitutional jurisdiction from the superior courts." This cannot be true if the legislature can give the inferior courts original and exclusive jurisdiction of all criminal offenses and take from the superior courts their jurisdiction. The superior courts are essentially courts of original jurisdiction, with very little appellate jurisdiction, and in almost all cases where it had appellate jurisdiction (from justices' courts) the trial is de novo, as if originally commenced in the superior court. And, if its jurisdiction under the constitution is original, the legislature has no power to take this jurisdiction from it. Chief Justice Marshall, in speaking of the constitution of the United States and the acts of congress, uses this language: "If congress remains at liberty to give this court appellate jurisdiction where the constitution has declared their jurisdiction shall be original, and original jurisdiction when the constitution has declared it shall be appellate, the distribution of jurisdiction made in the constitution is form without substance." Marbury v. Madison, 1 Cranch, on page 174. 2 L. Ed. 60. Besides this being from the greatest judge and the highest court of this country, it is so clearly correct that we do not hesitate to adopt and follow it. It seems to us to be a necessary result that, as this act takes from the superior court its constitutional right to a grand jury, the effect of which is to deprive that court of its original jurisdiction, the act so depriving the superior court of this jurisdiction is in conflict with that part of the constitution that gave the superior court a grand jury and original jurisdiction as a constitutional court. But we said the contention of the defendants could not be true, and was in conflict with the reasoning of the opinion in Rhyne v. Lipscombe that, if it were true, its logical result would lead to the utter destruction of the superior courts. It must be admitted—in fact, it is

admitted—that if the legislature can deprive the superior courts of all their original criminal jurisdiction, the legislature may also deprive the superior courts of all their original civil jurisdiction. Suppose the legislature establishes another inferior court for the county of Forsyth and the other counties composing the criminal circuit, and gives them original exclusive jurisdiction of all civil actions, in which act it provides that it shall be unlawful for the clerk of the superior court to issue any summons returnable to the superior court, and if the act taking the grand jury from the superior court, thereby cutting off the means by which it obtained original jurisdiction, is constitutional, it would be constitutional to take away the civil jurisdiction of the superior court in the way we have suggested, we would then have the carcass of the superior court, without life. This cannot be done. Almost this very question was presented in Rhyne v. Lipscombe. The legislature of 1897 undertook to give Judge Ewart both civil and criminal jurisdiction, equal to that of the superior courts, and this court said it could not be done. But, if what the legislature of 1899 did in taking from the superior courts their grand juries, and giving Judge Stephens exclusive original jurisdiction, can be done, then the court was in error in holding that it could not be given to Judge Ewart, because it can make no difference, so far as the constitutional question is concerned, whether this exclusive original jurisdiction is given to one or to two judges. The cases of State v. Ray, 122 N. C. 1097, 29 S. E. 61, and Tate v. Commissioners, 122 N. C. 661, 29 S. E. 60, are cited by defendants. But they simply follow Rhyne v. Lipscombe, and are put upon that case, and we do not deem it necessary to give them a separate consideration. In Wilson v. Jordan, 124 N. C. 683, 33 S. E. 139, the same argument was advanced as to grand juries, putting that argument upon Rhyne v. Lipscombe. This opinion was concurred in by all the court except Justice Clark, who filed a lengthy dissenting opinion, based entirely upon other grounds, apparently agreeing to this argument in that case, as he does not allude to it, unless it is in saying, "If there are other errors they can be corrected by the legislature."

The only remaining question is the objection made to Mott's being the proper relator. But as it is admitted that he is the solicitor of Forsyth superior court, and entitled to the fees and emoluments, we think he has such an interest as entitles him to bring and maintain this action. Houghtalling v. Taylor, 122 N. C. 141, 29 S. E. 101; Hines v. Vann, 118 N. C. 3, 23 S. E. 932. There was error in the judgment appealed from, and the writ of mandamus should have been issued as prayed for. Error.

MONTGOMERY, J., dissenting, thinks that under article 4, § 12, of the state constitution, the general assembly has the power to create criminal courts, and to give them all, or such part as it pleases, of the original criminal or original civil jurisdiction above that given by the constitution to justices of the peace, and even as to that it may confer concurrent original jurisdiction, all subject to the right of appeal to the superior courts. Rhyne v. Lipscombe, 122 N. C. 650, 29 S. E. 57; Tate v. Commissioners, 122 N. C. 661, 29 S. E. 60; Pate v. Railroad Co., 122 N. C. 879, 29 S. E. 334; State v. Ray, 122 N. C. 1098, 29 S. E. 61; State v. Hinson, 123 N. C. 755, 31 S. E. 854.

CLARK, J. (dissenting). Prior to the constitution of 1868 all the courts, including the supreme court, were created by the legislature, which allotted to each court such jurisdiction as it thought proper. The supreme court was remodeled by the legislature at least three different times. K. P. Battle's History of the Supreme Court, 103 N. C. 475–479. The constitution of 1868 (article 4, § 2), provided: "The judicial power of the state shall be vested in a court for the trial of impeachments, a supreme court, superior courts, courts of justices of the peace and special courts." And section 15: "The superior courts shall have exclusive original jurisdiction of all civil actions, whereof exclusive original jurisdiction is not given to some other courts; and of all criminal actions in which the punishment may exceed a fine of fifty dollars or imprisonment for one month." And section 19 authorized the general assembly to establish special courts for the trial of misdemeanors in towns and cities. It was soon held, in consequence, that these special courts had no jurisdiction in civil cases (City of Wilmington v. Davis, 63 N. C. 582; Town of Edenton v. Wool, 65 N. C. 379), and no criminal jurisdiction except over misdemeanors (State v. Pender, 66 N. C. 313; Town of Washington v. Hammond, 76 N. C. 33). This "straight jacket" system not being satisfactory to the people of the state, they amended the constitution in 1875 by striking out this section 15, which fixed the superior court with original jurisdiction. By that repeal, of itself, the jurisdiction of the superior court was restored to legislative control, as was the case before 1868. But, to put the matter beyond controversy, the same convention amended the above section 4 (now become section 2) of article 4 by striking out the words "special courts," and inserting in lieu thereof the words "such other courts inferior to the supreme court as may be established by law." Section 12, as to the number of superior court districts, was rewritten, and made section 10, reducing the number of superior court judges from 12 to 9, and adding the words, "But the general assembly may reduce or increase the number of districts." And then a new section 12 was inserted, which is as follows: "The general assembly shall have no power to deprive the judicial department of any power or jurisdiction which

ully pertains to it as a co-ordinate de-
ent of the government; but the general
bly shall allot and distribute that por-
this power and jurisdiction which does
rtain to the supreme court, among the
courts prescribed in this constitution, or
may be established by law, in such
r as it may deem best, provide also a
system of appeals; and regulate by
hen necessary, the methods of proceed-
the exercise of their powers, of all the
below the supreme court, so far as the
may be done without conflict with other
ions of this constitution." By striking
d repealing the provision of the consti-
of 1868, which had given the superior
original civil and criminal jurisdiction,
erting the new provision authorizing the
ture to establish other courts inferior
supreme court, to reduce at will the
r of superior court districts, and to
and distribute" the jurisdiction below
upreme court among the other courts
ner named in the constitution or estab-
by law) in such manner as the legisla-
may deem best," it is clear that the
c law put the remodeling of the juris-
of all the courts below the supreme
into the hands of the general assembly,
ing (except as to the supreme court)
to the system which, prior to 1868,
all the courts, even the jurisdiction and
tution of the supreme court itself, in
wer of the legislature. Should, there-
he legislature see fit to deprive the su-
courts of all original jurisdiction, mak-
purely an intermediate appellate court,
ourts of that kind in New York and
states, it is clearly within legislative dis-
by the express words of the amend-
made to the constitution in 1875. This
clearer by reference to the legislative
over the jurisdiction of the courts up to
and the evident intent and purpose to re-
that power by the repeal of the provi-
in the constitution of 1868 which gave
perior courts original jurisdiction. This
cannot re-enact and replace provisions
en out of the constitution by the conven-
f 1875, whose action in so doing has
ratified by the people at the ballot box.
very utmost that was reserved to the
or courts after the amendments of 1875
t they retain the headship of the judi-
stem below the supreme court, and that
hem alone appeals lie to this court, and
ppeals lie to the superior courts from
es of the peace. Const. art. 4, § 27.
ever jurisdiction the superior courts
beyond this is a matter of legislative
nent, and not of constitutional right,
s court (as now constituted) has over
gain decided. In Rhyne v. Lipscombe,
. C., at page 655, 29 S. E. 58, this court
"Subject to these constitutional re-
ons [just recited, as being the right
eal from justices to the superior courts,
hat all appeals to this court must come
from the superior courts], the general assembly may allot the jurisdiction below the supreme court. It may create criminal courts, or circuit courts, city courts, or other courts, and give them all, or such part as it thinks proper, of the original criminal or original civil jurisdiction above that given by the constitution to justices of the peace, and even as to that it may confer concurrent original jurisdiction with the justices of the peace, for their jurisdiction is not exclusive." This decision is expressly in point, was concurred in by all the judges, and adjudged that the legislature had power to give to the criminal courts all the original civil and criminal jurisdiction heretofore used by the superior courts, but denied that the legislature could make them the equal of the superior courts by taking away the headship of the superior court through its appellate supervision of them. In Tate v. Commissioners, 122 N. C., at page 663, 29 S. E. 60, this court again said: "It is competent for the general assembly to give to said circuit court, or any other court it may erect, original jurisdiction, either exclusive or concurrent, with the superior court, civil as well as criminal, of all matters which may originate in said counties, subject to the right of appeal therefrom to the superior courts." And this is emphasized and reiterated on the next page. In Pate v. Railroad Co., 122 N. C., at page 879, 29 S. E. 335, it is said that article 4, § 12, "conferred on the legislature power to give to courts created by it original jurisdiction, exclusive or concurrent with the superior courts," subject only to appellate supervision over such subordinate court by the superior courts, since appeals lay to this court only from the superior courts. In State v. Ray, 122 N. C., at page 1098, 29 S. E. 61, it is said that the act creating the criminal circuit court of Buncombe, etc. (the court whose jurisdiction is here called in question), "confers upon said court exclusive original jurisdiction of all crimes, misdemeanors, and offenses committed within the counties composing said districts"; and adds that the court has held that provision of the statute valid in Rhyne v. Lipscombe, supra, and reaffirms that decision. State v. Rumbough, 122 N. C. 1104, 31 S. E. 1006, and State v. Potsell, 122 N. C. 1105, 31 S. E. 1006, were decided upon the ruling in State v. Ray, supra. In Malloy v. City of Fayetteville, 122 N. C., at page 482, 29 S. E. 880, the above cases of Rhyne v. Lipscombe, Tate v. Commissioners, and State v. Ray were all cited on the point "that the power of the general assembly to allot and distribute the jurisdiction below this court was unlimited," save as in those cases stated (as above recited). The same three cases were cited as authority by Faircloth, C. J., in State v. Hinson, 123 N. C. 755, 31 S. E. 854, the court holding that the defendant was not entitled to a trial de novo by a jury in the superior court, but only to an appeal upon matters of law, as the legislature had so prescribed; and that it had the right so to prescribe under Const.

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art. 4, § 12. State v. Hinson is cited as authority for that proposition in State v. Davidson, 124 N. C., at page 844, 32 S. E. 957, and in State v. Bost, 125 N. C., at page 709, 34 S. E. 650. Rhyne v. Lipscombe is cited as authority by Furches, J., in Wilson v. Jordan, 124 N. C., at page 690, 33 S. E. 139, and in McCall v. Webb, 125 N. C., at page 247, 34 S. E. 430; and by Douglas, J., State v. Mallett, 125 N. C. 729, 34 S. E. 654. Several of the above cases have been also cited as authority in opinions at this term.

After the above repeated and reiterated construction of the amended constitution as giving the general assembly power to confer upon courts created by it "all the original jurisdiction, civil as well as criminal," which was formerly in the superior courts, subject only to the appellate jurisdiction of the superior court, it should seem that the matter was settled. The judges who concurred in all the above decisions are the same who now sit on the court. In the above cases the jurisdiction was construed at the instance of parties in civil actions, and of both the state and defendants in criminal actions directly raising the question of jurisdiction. In the present case it is somewhat indirectly raised. The plaintiff, who is seeking by mandamus to compel the county commissioners to draw a grand jury, is not a citizen of the county, and his only interest is in the fees which, as solicitor of the superior court, he might receive if the original jurisdiction of criminal cases, in whole or in part, should be taken from the criminal court, to which the general assembly has seen fit to "allot and apportion" it, as empowered by the express language of the constitution construed by the above numerous decisions of this court. The statute creating the criminal court reserves, as the decisions hold necessary, the right of appeal in matters of law to the superior court. Faircloth, C. J., in State v. Hinson, supra. All the decisions of all courts that exercise the power of declaring an act of the legislature unconstitutional hold that it can only be done when it is plainly and clearly so; and, if there is any reasonable doubt, the presumption in favor of constitutional action by the co-ordinate branch of the government will prevail. Sutton v. Phillips, 116 N. C. 502, 21 S. E. 968. After the above repeated decisions sustaining the jurisdiction of criminal courts when conferred by the legislatures of 1895 and 1897, this court is in no condition to hold that the same jurisdiction thus held valid is plainly and clearly unconstitutional when conferred by the legislature of 1899. There is no clause of the constitution which conflicts with the act abolishing the grand jury in the superior court of Forsyth county. There is no constitutional provision requiring a grand jury at any term of the superior court, and, since the amendments of 1875, no constitutional bestowal upon the superior courts of the original criminal jurisdiction which would require a grand jury. In Wake and many other counties certain terms of the superior court have no grand jury, but are purely for civil business. If, therefore, the peremptory mandamus should issue as prayed for, it should properly issue, if at all, to the general assembly, for the county commissioners of Forsyth are not empowered to legislate as to what terms of the superior courts must be for criminal business requiring a grand jury, and what terms may be for civil business, not necessitating a grand jury. It may be true, and doubtless is, that the growth of population and business does not yet require a superior court system having only appellate jurisdiction. The legislature—the best and only judge of that matter—has so thought, and in only a few counties at present is the superior court made appellate, and in them only as to criminal business. It may also be true that a frank increase of the number of superior courts, with judges elected for fixed terms by the people, is preferable to the creation of criminal courts, with nonrotating judges, liable to be abolished and recreated at the will of legislatures changing with the vicissitudes of parties. But under the constitution that question is to be settled by the general assembly, as from time to time "it may deem fit," and not by the decrees of this court.

SHORT v. GILL.

(Supreme Court of North Carolina. June 5, 1900.)

NONSUIT — CONFLICTING EVIDENCE — JURISDICTION OF COURT—OBJECTION—WAIVER—NEGLIGENCE—QUESTION FOR JURY.

1. A motion for a nonsuit, made at the close of plaintiff's evidence, is properly refused where the evidence was conflicting.

2. Where defendant in an action for damages does not make any objection to the jurisdiction of the court to try the case at an adjourned day of a special term, intervening which adjourned session and the day from which the adjournment was taken a regular term has been held, he will be deemed to have waived the objection to the jurisdiction, and cannot raise it for the first time on appeal, where the court had jurisdiction of the subject-matter of the action.

3. Where the evidence is conflicting as to the facts on which plaintiff predicated his right to recover in an action for injuries, it is proper to submit the question of negligence and proximate cause to the jury.

Appeal from superior court, Guilford county; Timberlake, Judge.

Action by John C. Short against John Gill, as receiver, to recover for injuries. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. T. Morehead and G. M. Rose, for appellant. Bynum & Bynum and Z. V. Taylor, for appellee.

FAIRCLOTH, C. J. This action is for damages alleged to be the result of defendant's negligence. A general statement of the case is this: That plaintiff was the conductor;

that it was his duty to see that his train was properly equipped before pulling out of the yard; that he knew it was not so equipped, and was, therefore, guilty of contributory negligence, as he started out without a bell cord, and the car ran a long distance on the cross-ties after it had jumped the track, because he could not stop the train for want of the bell cord, and that finally the plaintiff either fell off or jumped off, and was injured. The plaintiff claims that defendant was negligent, to his injury, in that: (1) It caused a comparatively light car to be attached to a powerful engine. (2) That the coupling iron was inferior to those in general use. The witnesses call it a "goose neck" or "S" link, by which we understand an iron bent so as to connect the car with a base lower than that of the engine. (3) That the speed of the train ordered to be run was too fast for a train of this character. Several witnesses were examined, and there were no exceptions to the evidence. There was some conflict in the evidence of the conductor and the engineer as to the rate of speed when the injury occurred, and as to the orders received by the latter from the company and from the conductor himself.

The first exception was the refusal of his honor to nonsuit the plaintiff under Act 1897, c. 109. There was no error here, as there was manifestly conflicting evidence proper to be considered by the jury.

The fourth exception was that the court had no authority to try the case at an adjourned day of the special term ordered by the governor to "continue until business is disposed of" in civil cases only. A regular term of the superior court was held during the recess of the special term. No objection to the jurisdiction was made before the judge holding the special term, but was first made in this court. This the defendant may do if this court can see that the superior court was without jurisdiction. This motion raises an important question. Counsel cited no authority, nor did he refer to the distinction which is decisive against his motion. There is, perhaps, no word more frequently used in judicial proceedings than "jurisdiction"; very often in a general and vague sense, without due regard to precision in its application. The question arose in Branch v. Houston, 44 N. C. 85, and the distinction clearly marked, citing English authorities. "If there be a defect—e. g. a total want—of jurisdiction apparent upon the face of the proceedings, the court will, of its own motion, stay, quash, or dismiss the suit. This is necessary to prevent the court from being forced into an act of usurpation, and compelled to give a void judgment." If, however, "the subject-matter is within the jurisdiction, and there be any peculiar circumstances excluding the plaintiff or exempting the defendant, it must be brought forward by a plea to the jurisdiction; otherwise, there is an implied waiver of the objection, and the court goes on in the exercise of its ordinary jurisdiction." Applying this clear-cut distinction, we see that his honor, on the face of his commission, had complete jurisdiction, with authority equal to that of a judge holding a regular term, with few unimportant exceptions; and when he organized his court there was nothing before him to excite a doubt of his authority to go on until the business was disposed of. Having, then, jurisdiction, if any thing or circumstance occurred which the parties thought terminated jurisdiction, they are presumed to waive such matters unless they bring them to the attention of the court by a plea to the jurisdiction. The fourth exception was, therefore, properly overruled.

The second and third exceptions are to parts of the charge indicated by "a" and "b." After charging as to the caboose in a manner not excepted to, his honor said: "(a) But, if you should not so find, you will proceed to the next allegation of negligence, to wit, the use of goose-neck link or coupling. There is evidence on the part of plaintiff tending to show that it was dangerous and unsafe, and evidence on the part of defendant that it was not. You must consider it all together with the facts and circumstances surrounding the accident, and ascertain the facts. The burden is here again on the plaintiff, and, unless satisfied by the greater weight of evidence that a prudent man in the exercise of ordinary care would not have, under the circumstances, used such a coupling, you will find that it was not negligence to use it. If you are so satisfied, you will say 'Yes,' provided you find plaintiff's injury was caused thereby; and not consider or trouble yourself with the other allegations of negligence. If not so satisfied, you will consider the allegation of negligence in giving a maximum rate of speed of 24 miles per hour,—by train dispatcher,—and so running by engineer." He then told the jury that the burden was on the plaintiff, and directed them to consider all the facts and circumstances. He further said: "(b) But before you can find the second issue 'Yes,' you must find that the plaintiff's negligence was the proximate cause of the injury; that is to say, that his negligence was nearer the injury than that of defendant. The law seeks to find out who had the last chance to avoid the accident, and holds that party responsible who had the last chance to avoid it. * * * You must find the defendant negligent either in coupling such a caboose to such an engine, in using an 'S' coupling link, or in running at an excessive rate of speed;" and he charged that the burden of the second issue was on the defendant, and that they must find that the defendant's negligence, if any, was the proximate cause, and not the plaintiff's negligence. It appears from this review that there was conflicting evidence as to the main questions, and the proximate cause was submitted to the jury. We think that the court was justified in this case in submitting the question of negligence and proximate cause to the jury, and we see no material error in any part of his

charge. Taking the facts as the jury have found them, there is no error in the record. Affirmed.

McMANUS et ux. v. TARLETON.

(Supreme Court of North Carolina. June 5, 1900.)

FRAUDULENT CONVEYANCES—VALIDITY AS BETWEEN PARTIES.

An executed contract of conveyance is valid, as between the parties, although executed for the purpose of defrauding the grantor's creditors.

Appeal from superior court, Union county; McNeill, Judge.

Action by N. J. McManus and wife against J. J. Tarleton. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

R. B. Redwine and Armfield & Williams, for appellant. Adams & Jerome, for appellees.

FURCHES, J. This is an action for the possession of land. The plaintiffs claim title as heir at law (the wife) of G. W. Little, assignee of W. C. Tarleton. The defendant claims title as the heir at law of W. C. Tarleton. The pleadings admit that the feme plaintiff is the legal owner of the land in controversy. But the defendant alleges that the deed from W. C. Tarleton to G. W. Little was intended by the parties as a power of attorney, and not as a deed, but by the inadvertence and the ignorance of the draftsman and of the parties the same was drawn, in form, a deed in fee simple. The defendant therefore asks that the deed be reformed, and that plaintiffs be declared trustees of the land for his benefit. The plaintiffs reply to the defendant's answer; alleging that the deed was not intended as a power of attorney, and drawn as a deed through mistake and ignorance of the parties, and deny the same, and allege that it was a fee-simple deed, and, in fact, that said deed was made to delay, hinder, and defraud the creditors of the grantor, W. C. Tarleton. Upon this state of the pleadings there was an issue submitted to the jury, as to whether the deed was made to defraud the creditors of W. C. Tarleton; also, another, as to whether it was intended as a power of attorney, and drawn in form a deed in fee simple by mistake; and also another, as to whether the plaintiff was the owner of the land in controversy. The jury found that the deed was not made to defraud creditors, and that it was not intended as a power of attorney, but as a deed of conveyance; and the court, having reserved the issue as to the ownership of the land, found it in favor of the plaintiffs.

Before the commencement of the trial in the court below, the defendant made a motion to dismiss the action upon the ground that the plaintiffs had alleged in their replication that the deed to G. W. Little, under w they claim, was made to defraud cred The court refused the motion, and th fendant excepted, and the defendant ren this motion in this court. The court properly refused this motion, and the m made here cannot be allowed. The found that the deed was not made to de creditors. But, if they had found otherw would not have affected the plaintiffs' to recover the land. York v. Merritt, C. 285. This deed was an executed con and the statute of frauds, as between ties and privies, does not apply to exec but only to executory contracts. Cho Wright, 13 N. C. 280; Hall v. Fisher (a term) 85 S. E. 425. This issue was unn sary, and should not have been subm even if we were to admit that it was by the pleadings, which we do not. C of law will not enforce fraudulent exec contracts, and courts of equity will set fraudulent conveyances in proper cases. there is no equitable ground alleged her setting aside this conveyance, and, in the defendant alleges that the plaintif the legal title, and asks that she ma declared trustee of the land for the de ant's benefit. Upon the jury's finding the deed was not made as a power of ney, but a deed in fee simple, the defe having admitted that the plaintiffs ha legal title to the land, it necessarily fo that they were entitled to judgment, there was error committed on the trial. have examined the other exceptions o defendant, and fail to find error in The judgment is affirmed.

AUSTIN v. STATEN et al.

(Supreme Court of North Carolina. Jun 1900.)

CONVEYANCES OF LAND—FRAUD—PRIOR ISTRATION—BURDEN OF PROOF.

Acts 1885, c. 147, provides that no shall be valid to pass any property ag creditors or purchasers for a valuable con ation from the donor except from the reg tion thereof. Code, § 1546, provides where one has sold lands with intent to de one who has purchased the same, the deed be void against a purchaser for the full thereof without notice before and at the of his purchase of the conveyance alleg have been made with intent to defraud. under these statutes, that where plaintif defendant had a common grantor of c lands, and plaintiff's deed, though given after defendant's, was recorded first, the den of proving it fraudulent rested on de ant, since, under the first statute, merel knowledge of a former conveyance, requir the second statute, and not knowledge of to defraud, must be manifested by registr

Appeal from superior court, Union ty; McNeill, Judge.

Action by M. C. Austin against E Staten and another. From a judgmen

' defendants, plaintiff appeals. Re-

Redwine and Adams & Jerome, for
t. Armfield & Williams and A. M.
or appellees.

HES, J. This is an action for the
on of land commenced on the 23d
May, 1896. The defendants rely on
eral denial of the plaintiff's right
ession, in which the plaintiff's title
defendants' possession under color
are involved. The following issues
ubmitted without objection: "(1) Is
ntiff the owner and entitled to the
on of the land described in the com-
Ans. No. (2) What is the annual
value of the said land? (3) What
is the plaintiff entitled to recover?"
intiff and defendants both claim title
e same parties, to wit, W. H. Staten,
aten, and J. B. Staten. The plaintiff
under a deed dated March 31, 1896,
istered on the same day. The de-
s claimed under a deed dated Decem-
1887, and registered May 31, 1897.
admitted that the defendant E. M.
had been in the continuous posses-
the land ever since the date of his
1887. It was also in evidence that
a neighbor of the defendant E. M.
knew of the deed to said defendant,
defendant's possession. The plain-
fe is a sister of the grantors, and a
er of the defendant. The evidence
to show (and was not contradicted)
defendant E. M. Staten was threat-
caveat and contest his father's will,
other defendants conveyed him the
controversy in consideration that he
not do so; that two of the grantors
nors under 21 years of age when the
the defendant was executed, but had
ached the age of 21 more than three
efore the date of the conveyance to
ntiff, and before the commencement
action. It was in evidence that the
were men of small means, and in
hat on the day they made the deed to
ntiff they went to the town of Mon-
consulted an attorney as to wheth-
could recover the land in contro-
rom the defendant E. M. Staten, and
his advice they made the deed to
intiff, and he executed his note to
s the consideration therefor in the
$297.50, due one day after date,
ted March 31, 1896; that no part
note has been paid, but it was offer-
vidence on the trial by the plaintiff
ence of consideration for the deed;
grantors testified that the sale to
intiff was bona fide. This is sub-
y the case at the close of the evi-
nd the plaintiff asked the court for
owing special instructions: "(1) That
dence is insufficient to show fraud in the procurement and execution of the deed under which the plaintiff claims title to the land mentioned in the complaint. (Refused, and plaintiff excepted.) (2) That there is no evidence to show fraud in the procurement and execution of the deed under which the plaintiff claims title to the land. (Refused. Plaintiff excepted.) (3) If the jury believe the evidence, they will find that the plaintiff is a purchaser of the land for value. (Refused, and plaintiff excepted.) (4) That, if the jury believe the evidence introduced by the defendant himself, then the plaintiff paid a valuable consideration for the land. (Refused, and plaintiff excepted.)" And the court charged the jury in part as follows: "The burden is upon the plaintiff to show that he is a purchaser for a valuable consideration, the defendant having shown a deed to the land older than the plaintiff's. He must show this by a preponderance of the testimony; that is, he must show you by a greater weight of the testimony that he paid for the land." The plaintiff excepted to this part of the charge. "If you should find from the evidence that the note given for the purchase money of the land was executed under an agreement, or with any understanding with the grantors in said deed upon the part of the plaintiff that the note was not to be paid unless the plaintiff recovered the land in this suit, in such case the plaintiff would not be a purchaser for value, and, should you find that there was such an agreement or understanding, you will answer the first issue, 'No.'" The plaintiff excepted. "In this case the defendant contends that the transaction by the plaintiff and his grantors was one without a valuable consideration, and as to this the court has instructed you that the burden of proof is upon the plaintiff to show that he paid for the land, or gave a note without any understanding or agreement that it was not to be paid in case plaintiff should not recover in this suit." The plaintiff excepted. "The burden is upon the plaintiff to show the bona fides of the transaction,—that is, to show that he paid for the land; and in passing upon the question as to whether or not Austin paid or was to pay for the land without any condition you will consider all the circumstances surrounding the transaction." The plaintiff excepted. "The defendants contend that the fact that there has nothing been paid on the note; that no effort has been made to collect the note save a request to the attorney to collect the note; that the grantors are poor men, while the grantee is worth considerable property; that the plaintiff, Austin, has not gone on the stand to testify concerning his transaction with his grantors,—taken together with the circumstances at the making of the deed, which you will recall, and taken with the testimony of H. W. Staten that he was to receive one-third of the land in case of recovery by the plaintiff, though the

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witness afterwards changed that evidence,—that these matters throw suspicion on the transaction, and prove lack of consideration and fraud." Plaintiff excepted. Under the instructions of the court the jury found "No" to the first issue, and, upon the judgment being signed, the plaintiff appealed.

The plaintiff contends there were errors committed by the court in refusing to give the special instructions, and also in the instructions given to the jury, as pointed out in his exceptions. He further contends that, whether this is so or not, still he is entitled to recover under chapter 147 of the Acts of 1885, as his deed was registered before the deed of the defendant; while the defendant contends that his deed, though not registered, was color of title; that he had been in possession, holding under said deed, for more than seven years, and more than three years after all the grantors came of age; that his possession was open and notorious, known to the plaintiff when he took his deed, and that the plaintiff had actual knowledge of the fact that the defendant E. M. Staten had a deed for the land from his grantors when he took his deed. Besides the questions presented upon the exceptions to the prayers for instruction and the judge's charge, this case presents a new and important question growing out of the registration act of 1885. That act provides "that no deed or contract for the sale of land shall be valid to pass any property against creditors or purchasers for a valuable consideration from the donor, bargainor or lessor, but from the registration thereof." While section 1546 of the Code (27 Eliz. c. 4, § 2) provides that the deed of a party who has sold land "with the actual intent in fact to defraud such person as hath purchased or shall purchase in fee simple * * * the same land, * * * or to defraud such as shall purchase, * * * shall be deemed utterly void against such person and others claiming under him, who shall purchase for the full value thereof * * * the same land * * * without notice before and at the time of his purchase alleged to have been made with intent to defraud." These statutes, construed separately, would seem to be in conflict with each other. But they were both passed to prevent fraud, and must be construed together with a view to the end for which they were passed; and, when so considered, it does not seem to us that they are in conflict with each other. The knowledge required by section 1546 of the Code, it would seem, must now be manifested, under chapter 147 of the Acts of 1885, by registration. But this only applies to knowledge of the former conveyance, and carries with it no taint or knowledge of actual intent to defraud, which vitiates the deed when it exists, and is so found. The act of 1885, it seems to us, does no more than to put the second purchaser upon the same footing where a second purchaser stood before the act of 1885 who purchased without notice of the former deed. And the second purchaser must now, as before the act of 1885, still be a bona fide purchaser, and for full value. We do not mean to say that he should have paid every dollar the land was worth, but he should have paid a reasonably fair price,—such as would indicate fair dealing, and not be suggestive of fraud. Considering these acts together, it seems to us that this is their necessary construction, and the only construction that will prevent a statute passed to prevent fraud from becoming a means of fraud. To give these acts any other construction—to give them the construction contended for by the plaintiff—would be to open the door to the very worst kind of fraud. If the construction contended for by the plaintiff be put upon it, A. might sell his land to-day to B., and receive every dollar of the purchase money, and to-morrow, by an arrangement with C., sell the same land to him, and, if C. is able to get his deed registered first (which he would likely do if he was engaged in a trick of this kind), B. would be without remedy. But, if the plaintiff's deed is void for any of these reasons, the title to the land would be in the grantors but for their deed to the defendant E. M. Staten, which is good as between them. The real matter involved in this case, it seems to us, is this: Was the purchase of the plaintiff an absolute bona fide purchase for a full price, and without any actual intent to defraud the defendant? The plaintiff, though having obtained his deed long after the defendant obtained his, got it registered first; and this, under the act of 1885, gives him the vantage ground, and the burden is upon the defendant to show the ground which he alleges vitiates the plaintiff's deed. As a general rule, one who alleges fraud or vitiating circumstances must prove them; and we do not think the relationship of the parties to this action changes this rule. Reiger v. Davis, 67 N. C. 185; Redmond v. Chandley, 119 N. C. 579, 26 S. E. 255; Bank v. Gilmer, 116 N. C. 684, 22 S. E. 2. We cannot adopt the argument of the defendant that an unregistered deed is color of title, now. To hold this would be in effect to destroy chapter 147 of the Acts of 1885, which we cannot do. We see no error in the court's refusing to give the plaintiff's prayers for instruction, but there was error in the charge as pointed out by the plaintiff's first, third, and fourth exceptions thereto, in which he placed the burden of proof upon the plaintiff. For this reason, and for the reason that it does not seem to us that the case was tried upon the real issues presented (as we have endeavored to point out), there must be a new trial. New trial.

ON et al. v. WEBB, Sheriff, et al.

Court of North Carolina. June 14, 1900.)

N — TOLL FOR USE OF FLOATABLE —CONSTITUTIONAL LAW—STATUTE.

act of March 9, 1897 (Acts 1897, c. horizing an exaction of tolls from the f logs floated down certain streams in unties, the toll to be used in removal ood which might gather at shoals and private and public fords or pond water at any point, violates Const. , making it the duty of the legislature e for the organization of cities and d to restrict their power of taxation; toll authorized is for a private bene- not for the public good, and confers ponding benefit on the owner of the

right of the individual to use a float- am for floating logs is not derived state, and the state cannot deny its ut just compensation, but has merely to regulate highways for the public

and Montgomery, JJ., dissenting.

tition for rehearing. Dismissed.

rmer opinion, see 33 S. E. 169.

Avery and J. M. Mull, for appellants.

ne and Shepherd & Busbee, for ap-

LAS, J. This is a petition to rehear as reported in 124 N. C. 749, 33 S. The difficulties of the case apparent- from the fact that the concurring which, under the otherwise even of opinion, had the peculiar effect lling the judgment of the court, did concur in its opinion. The case ted to us did not involve the ab- ght of the state to improve its float- navigable streams, and to charge s as would fairly represent their in- value as public highways to those received the benefit of such improve- t simply the right of the state to de- plaintiff of the use of his natural without some corresponding benefit ature of compensation. The domi- rinciple apparently controlling the t of the court is thus expressed in the g opinion on page 759, 124 N. C., e 171, 33 S. E.: "The term 'float- eam' implies an easement in some se the stream for purposes of trans- . Whether this easement belongs to ral public or is appurtenant to the lands it is difficult to say. If it all, it must belong to the riparian s a natural easement. Whether it him solely or in common with oth- needless now to discuss. If it is ything to anybody, it is a valuable ance to his land, of which he cannot ved without adequate compensation. this compensation must be in mon- ay be in the increased conveniences him by reasonable improvements up- tream, need not now be considered, as no compensation whatever appears to have been given to him, and no substantial improvements have been made which would increase the facility of transportation. I speak of the riparian owners as a class, each of whom has the easement, where it exists, as far as the floatability extends. If he owns the easement, then the state cannot charge him with the simple use of it. I concede the right of the state to establish a highway on water or land. * * * I also admit that where the state has made, or caused to be made, valuable improvements of a local nature, it may charge a reasonable compensation for the use of the increased facilities and benefits afforded by such improvement. But this is in the nature of a toll, and not a tax, and presupposes some corresponding benefit to him who pays the toll. Where there is an utter failure of consideration, why should the toll be paid? But it is said to be in the nature of a special tax levied upon the property to be benefited. But on what property is it levied? Not on the logs; for they have not been benefited, nor even assisted, in their journey. Moreover, a tax must possess some element of uniformity, and, if levied locally for a special purpose, its disbursement must be confined to its creative objects." This we understand to be the general tenor of the opinion of the court, which says on page 751, 124 N. C., and page 169, 33 S. E.: "It is true that the legislature may by proper enactment provide for the improvement of such water way for the benefit of navigation. But the legislature cannot impose duties upon the commerce upon such waters for the purpose of 'building public bridges, and of cleaning out fords, public and private, across' such water courses." The plain meaning of this is that such duties, whose imposition upon commerce can be justified only by their reciprocal benefits, cannot lawfully be diverted to a purpose, public or private, utterly foreign to their original object, nor can we give our approval to any law which permits such unjust diversion. As the purpose of a special tax or toll is the only justification for its imposition, it cannot lawfully be imposed where such diversion is permitted. We presume that a city can impose general taxes for the improvement of its streets, even if the bulk of it is spent in some one locality. It seems equally true that it can levy special assessments in different localities for the purpose of making special improvements within those localities. This is permitted upon the principle that, where money is spent for the benefit of those who paid it, they are not injured, as the nature of the improvement is supposed to be worth its cost. But can a city levy special taxes in one particular section to be spent in an entirely different section? Or can it impose a special assessment upon one piece of property for the exclusive benefit of another? Surely not. And yet this has been done in the case at bar. A heavy as-

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sessment has been levied on these logs without any corresponding benefit to them or their owner. No improvement has been made in the floatability of the stream of which they have had any advantage. At best, the money which they paid would be devoted to the future improvement of the stream, even if none were used in building bridges or cleaning out private fords. Their owner may not have any more logs to float down, and, if he did, he would probably be called on to pay toll for the floatage. This right of floatage he already possessed, as we have held this to be a floatable stream. It did not come to him by grant from the state, nor was it created by the decision of this court. All that this court did or could do was to declare its existence as a natural easement,—the right inherent in the general public to use a natural highway. It was said that this right belonged to the riparian owner, but it was not said that he was its exclusive owner. If it exists, it certainly belongs to him in some capacity and to some extent. If it is a local highway, he is entitled to its use by virtue of his riparian ownership; and, if it is a public highway in its broadest sense, he is equally entitled thereto as one of the general public. This right cannot be taken from him without just compensation in some form or other, and this is the essence of our decision.

There seems to be an idea that an easement can exist in the general public without belonging to the individual. The general public, in such a sense, is a pure abstraction. As an artificial entity, it cannot use the highway, as it can neither ride nor walk, having neither feet nor hands. The easement is available only to the individual, and, if he has the right to use it, then he has the easement.

Again, it is suggested that the state owns the highway separate and apart from the individual, to whom it may forbid its use without any form of compensation. This is probably a survival of the old idea that the highways belonged to the king, in whom in fact was vested the ultimate fee to all land. While, for purposes of government, we must still regard the state as an artificial entity apart from the individual citizen, and while certain kinds of property must be reserved by the state to be used in a certain manner and for certain specific purposes free from all private interference, yet after all the state is but the trustee for its people, and, within the necessary limitations of the trust, the privileges of the citizen are inherent and of common right. Thus the right of the individual to use the highway does not come from the permission of the state, but rests upon the primary object for which the highway was established,—the use of the public. The power of the state to regulate the highway is an entirely different matter, but rests upon the same general principle,—the ultimate welfare of the people Suitable highways are absolutely necessary to all people, and the more free, intelligent, and progressive a people become, the greater will be their demand for highways suitable to their development and commensurate with their advancement. Such highways it is the duty of the state to establish, and with this duty go the corresponding powers necessary to its performance. Such powers, however, although ample and largely within the discretion of the legislative body, cannot ignore the vested right of the citizen. Such rights, on the other hand, are not permitted to lie "in cold obstruction across the pathway" of the state, but are subordinate to the paramount right of eminent domain. By condemnation, with compensation, any right of property can be taken for a public purpose.

We do not deny the right of the state to improve floatable streams, including the one in question, and to regulate their use, even if it interferes with the natural easement hitherto enjoyed by the public. When, however, one is deprived of his vested easement, which is the result, pro tanto, if he is made to pay for its use, he must be given some compensation in money or in kind. This compensation must be actual and present, and not merely speculative and prospective. Where the easement is in the nature of a toll, the benefit must be contemporaneous and reasonably coextensive with the payment. When we say that the state can do this, we mean it can do so directly, or by means of such agencies as it may deem best suited to accomplish its public purposes. We do not deny the power of the state to intrust such work to a private individual or corporation, nor the right of such private party to charge such reasonable tolls as would return a fair profit; but there may be some doubt whether public agencies would be entitled to any profit beyond the interest on the investment, and the cost of maintenance, operation, and repair. On this point we express no opinion, as it is not before us, in our view of the case. All that is now before us is the judgment of the court below continuing until the trial of the action the injunction restraining the sheriff and tax collector "from proceeding in any way under the assessment against the plaintiffs mentioned in the pleadings, and also from interfering with the floatage of logs by the plaintiffs down said Catawba and Johns rivers, by the assessment or imposition of toll, or the levying or collecting of any tax or toll on the property of the plaintiffs, or by the sale of any property of the plaintiffs under any assessment or otherwise."

The learned counsel for the defendant is mistaken in supposing that we overlooked the case of Commissioners of Burke Co. v. Catawba Lumber Co., 116 N. C. 731, 21 S. E. 941, to which we presume he refers. That case was cited in the dissenting opinion, and referred to in the concurring opinion, but is

lved in the decision of this case. under consideration does not affect ciple that the right of floatage in the superior to any right of riparian rs," but attempts to deprive both c and the riparian owners of their of floatage without compensation to Nor do we deny "the power of the e to provide for levying tolls or as- s for keeping in order public high- ed for floatage." "Keeping in or- lies that the highway has previously in order; that is, that substantial ents have already been made, from e user has derived a substantial ben- such cases, the toll is regarded as the t of the benefit already received. ion not only recognizes the right of s existing in the public, but protects t against the encroachment of the t the same time, we admit the right ate, directly or through proper agen- mprove the stream whenever it sees so, and to charge a just equivalent enefit enjoyed as the result of such ent. Upon the facts of the case as l to us, and the legal principles above , we think the judgment should be The petition to rehear is therefore l. Petition dismissed.

K, J. (dissenting). We are saved ussion whether this is a floatable r not; for it was held in Commis- f Burke Co. v. Catawba Lumber Co., 731, 21 S. E. 941, that the Catawba that part of it which is embraced in te now before us, was a floatable This act (Acts 1897, c. 388) recites sion, and provides for the regulation se of the stream for floatage pur- n State v. Glen, 52 N. C. 321, it that floatable streams are "public s by water," like navigable streams; difference being that in floatable the bed of the stream is capable of the riparian owners for such uses as conflict with the paramount public the use of the stream for floatage. rian owner, as such, can have no t common to all others, except over of the stream, to the center, within daries. He can have no possible riparian owner, above or below his there the riparian rights of the oth- s come in. Consequently, as riparian has no right whatever above or be- line to the use of the stream for any more than a landowner over nd a toll road or canal or other high- . The riparian owner has rights of but not as a riparian owner, and ny other citizen has the right to the public highway, and on the same is granted to all others, whether free or on payment of toll. By the of location, a riparian owner may have greater need to use the stream for float- age or for navigation (when it is navigable) and greater ease of access. But anyone else, who can get his logs to the stream either by the use of public roads crossing the stream or by permission of some riparian owner to cross his land, when he places his logs in stream, has the same right to use the stream. The stream being a public highway (State v. Glen), he owes no duties or tolls to any ripa- rian owner, and no riparian owner has any superior rights to his, any more than land- owners adjacent to any other public highway have superior rights to the use of the high- way. All public highways are alike in this: that their regulation, and the terms on which they may be used, rest with the people at large, who express, and can express, their will only through their representatives in the legislature, unless when some question is presented direct to them at the ballot box by what is now termed a "referendum." Whether this or any highway shall be free, or whether tolls shall be paid, and, if so, what tolls, is a matter for the legislature, not for the courts, to decide. The riparian owner loses no property rights. He has none beyond his upper and lower lines and to the thread of the stream, and within those limits he has the bed of the stream for such use as he can make of it, but subject to the superior right of the sovereign to the use and regula- tion of the stream for all its citizens alike. The lawmaking power is confided by the con- stitution to the general assembly, and no act of theirs can be held invalid unless it plainly and palpably violates some provision of the state or federal constitution. No provision of either can be pointed out that restricts the power of the general assembly to regulate the use of public highways or to exact tolls for the use of them. There is no requirement of either instrument that work must be done by the sovereign on public highways by wa- ter before tolls can be exacted, and that thereafter tolls can be exacted only to the precise amount of public funds so expended. Whether or not this would be a desirable re- striction upon the power of the lawmaking body intrusted with general legislation, the people have not seen fit to place it in the constitution, and no one else can place such restriction there. The supreme court of the United States has uniformly held that the power of a state legislature to regulate the use of floatable streams and prescribe tolls upon logs is unlimited by the United States constitution, save when such stream lies in two states, and even then the lower state can place tolls upon logs between any two points in it, and also as well upon logs coming from a state higher up, unless congress has legis- lated on the latter subject. In a very recent decision in the United States (Lindsay & Phelps Co. v. Mullen [filed Jan. 15, 1900] 20 Sup. Ct. 325, Adv. S. U. S. 325, 44 L. Ed. —), it is said, speaking of the Manistee river:

"The state can authorize any improvement which in its judgment will enhance its value as a means of transportation from one part of the state to another. The internal commerce of a state—that is, the commerce wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government; and, to encourage the growth of this commerce and render it safe, the states may provide for the removal of obstructions from their rivers and harbors, and deepen their channels, and in other ways. * * * And, to meet the cost of such improvements, the state may levy a general tax or lay a toll upon all who use the rivers and harbors as improved. Regulations of tolls and charges in such cases are mere matters of administration, under the entire control of the state." What the improvements shall be, and what the rate of toll; whether the tolls shall be greater or less than the cost of the improvement; and whether the agency shall be directly by the state through special commissioners, or, as here, by the agency of the boards of commissioners of the riparian counties; or whether the agency shall be by means of chartered "navigation companies" or contractors (for all these methods have been tried); and whether the state shall raise a fund by tolls to be applied, when raised, to making the improvements, or shall first advance the necessary funds out of money raised by general taxation; and, further, if the tolls prove insufficient, whether the deficiency shall be made good out of the public treasury; or whether, if the tolls shall be more than sufficient, the surplus receipts (like the receipts of the federal government from port dues and the like) shall go into the general treasury; or whether such surplus shall go, as directed by this act, to building bridges over the stream to take the place of the fords deepened for floatage,—all these matters rest with the representatives of a self-governing people, who, from time to time, will change the tolls and regulations as experience may dictate. There is no hint in the constitution (state or federal) that the general assembly is restricted from legislating as to the regulations and tolls upon public highways by water. Still less is there any indication that the wisdom of the courts is so far superior to the will of the people, expressed through the lawmaking body, that the judiciary shall virtute officii supervise and correct legislation, whether wise or unwise (in its estimation), when such legislation is enacted within the limits not forbidden to the general assembly by the constitution.

MONTGOMERY, J. (dissenting). He doubts the power of the general assembly to enact that part of chapter 388 of the Acts of 1897 which has given rise to this litigation, but its unconstitutionality does not clearly appear to his mind, and therefore he does not concur in the opinion of the court.

STATE v. MEDLIN.

(Supreme Court of North Carolina. June 14, 1900.)

HOMICIDE—SELF-DEFENSE—WITHDRAWING FROM CONFLICT—INSTRUCTION.

Defendant requested the following instruction: "If the jury find from the evidence that the prisoner willfully, deliberately, and with premeditation shot at the deceased, with intent to take his life, * * * and, after having made the first assault, turned and fled, * * * with the intent of wholly withdrawing from the conflict in good faith, and with no design to continue it, and the deceased knew that all danger from the prisoner had passed, and the deceased then went to the window and shot at the prisoner, still holding his pistol drawn on the prisoner, and the prisoner turned and shot the deceased, killing him, such killing would be in self-defense and excusable: * * * provided, at the time of firing the fatal shot he reasonably apprehended his own life was in imminent peril, and that further retreat would be fatal to him." *Held*, that such instruction was properly refused, because it assumes that deceased was killed by the last shot fired, excluding the possible effect of the previous shots, and also that the "deceased knew that all danger from the prisoner had passed," whereas there is no evidence to support either of these assumptions.

Appeal from superior court, Gaston county; McNeill, Judge.

Drayton Medlin was convicted of murder, and appeals. Affirmed.

Osborne, Maxwell & Keerans, for appellant. Jones & Tillett, Brown Shepherd, and the Attorney General, for the State.

DOUGLAS, J. This is an appeal on a conviction of murder in the first degree. There is but one exception, which is to the refusal of the court to give the following instruction: "If the jury find from the evidence that the prisoner willfully, deliberately, and with premeditation shot at the deceased, with the intent to take his life, and the deceased shot at the prisoner, in the tower, in self-defense, and the prisoner, after having made the first assault as above set forth, turned and fled from the deceased, down the steps out of the tower, closing the door after him to prevent the deceased from shooting him, and further retreating from the tower some 15 or 20 steps, with the intent of wholly withdrawing from the conflict, in good faith, and with no design to continue it, and the deceased knew that all danger from the prisoner had passed, and the deceased went to the window and shot at the prisoner, still holding his pistol drawn on the prisoner, and the prisoner turned and shot the deceased, killing him, such killing would be in self-defense, and excusable, under the law, and the verdict should be, 'Not guilty:' provided, at the time of firing the fatal shot he reasonably apprehended his own life was in imminent peril, and that further retreat would be fatal to him." We have given this case most careful consideration, as we try to do in all cases, and as

we always do in those involving the life of a fellow being. Whatever doubts we have are resolved in favor of the prisoner whose life is in our hands, unless, upon mature reflection, it clearly appears that those doubts are purely the result of human sympathy, unsupported either by reason or precedent. In such cases we cannot permit personal feelings to interfere with the proper execution of the law, whose ultimate object in punishing the guilty is the protection of the innocent. In cases of murder, in our sympathy for the accused we cannot entirely forget the victim, or the living who may become the victims of unpunished crime. We do not think that the prisoner was entitled to the instruction asked, under all the circumstances of his case. It is drawn with great skill and care, and appears to be correct as an abstract proposition of law; but it assumes, in favor of the prisoner, facts and evidence that do not appear to us. In the first place, it assumes, or might well have been understood by the jury as assuming, that the deceased was killed by the last shot fired by the prisoner. This entirely excludes the possible effect of the previous shots, which the jury might have believed, from the evidence, caused the death of the deceased. Therefore, even if the remainder of the prayer had been proper, as to the last shot being fired in self-defense, it was not proper to say that therefore "the verdict should be, 'Not guilty,'" without some further qualification. It seems to us that even if the last shot had been admittedly fired in self-defense, and had inflicted a mortal wound, the prisoner would still have been guilty, if any of his previous shots had mortally wounded the deceased. Those shots were, by the very terms of the prayer, admittedly fired without excuse or palliation; and, if either of them had produced a mortal wound, the prisoner would have been guilty of a crime that would have ripened into murder upon the death of the deceased, if they had proximately contributed to his death. This rule would be different if it were shown that the last shot was the exclusive cause of death, or by itself the proximate and immediate cause. State v. Scates, 50 N. C. 420; State v. Hambright, 111 N. C. 707, 16 S. E. 411. But of this we find no evidence, and certainly none that would justify the court in assuming it as a fact. It is well settled in this state that the killing with a deadly weapon implies malice, and that, where it is admitted or proved beyond a reasonable doubt, the prisoner is presumed to be guilty of murder, at least in the second degree, and the burden then rests upon him of proving such facts as he relies on in mitigation or excuse. State v. Byrd, 121 N. C. 684, 28 S. E. 353; State v. Booker, 123 N. C. 713, 31 S. E. 376.

Aside from this, we do not think that the evidence justified the prayer. We see no evidence tending to show that "the deceased knew that all danger from the prisoner had passed," nor can we find either in the citations furnished to us by the learned counsel for the prisoner, or in our own investigations, a single precedent holding that the prisoner, under circumstances similar to those of the case at bar, had so far "withdrawn from the conflict" as to relegate him to his right of self-defense. The counsel cited us to State v. Hill, 20 N. C. 491; State v. Ingold, 49 N. C. 216; State v. Brittain, 89 N. C. 481, 500; State v. Hensley, 94 N. C. 1021, 1036; State v. Wilcox, 118 N. C. 1131, 23 S. E. 928; 1 Hale, P. C. 479, 480; Whart. Hom. 213; Kerr, Hom. 201, 202; 1 Bish. Cr. Law, §§ 870, 871; Horr. & T. Cas. 213, and notes; Stoffer v. State, 15 Ohio St. 47. None of these authorities appear to sustain his position. Some of them relate to chance-medley, where the party attacked had never lost his right of self-defense, but in all cases where the prisoner pleaded se defendendo he was required to show that he had "retreated to the wall." Hale says (omitting the citations): "But now suppose that A. by malice makes a sudden assault upon B., who strikes again, and, pursuing hard upon A., A. retreats to the wall, and in saving his own life kills B.; some have held this to be murder, and not se defendendo, because A. gave the first assault. * * * It seems to me that if A. did retreat to the wall upon a real intent to save his life, and then merely in his own defense killed B., that it is se defendendo. * * * But if, on the other side, A., knowing his advantage of strength or skill or weapon, retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defense, but really intending the killing of B., then it is murder or manslaughter as the circumstances of the case require. * * * Regularly it is necessary that the person that kills another in his own defense fly as far as he may to avoid the violence of the assault before he turn upon his assailant." East and Hawkins both think it would be murder, but Sir Michael Foster appears to agree with Sir Matthew Hale. Wharton says, on page 213: "In cases of personal conflict, in order to prove this defense, it must appear that the party killing had retreated, either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him." Bishop says, in section 869: "But he [referring to Lord Hale] goes on to explain, and so do the other old writers, that the assailant's life can be taken only when no other means of escape are open. Such, likewise, is our own modern law." Kerr says, in section 179: "In those cases where the assailant by his own conduct had, before the homicide was committed, given notice of his desire to withdraw from the combat, and had really and in good faith endeavored to decline any further struggle, and the homicide was necessary to save himself from

great bodily harm, it might be excusable." And again, at the head of section 180: "The killing must appear to be the last resort for safety." The same author, in section 181, says: "The weight of authority now is that when a person, being without fault in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force; and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable." Clearly, this section does not apply where the assailant is the slayer, as in the case at bar. Clarke, Cr. Law, p. 155, says: "Self-defense is no excuse for a homicide, if the accused brought on the difficulty, and was himself the aggressor. If, however, after bringing on the difficulty a person in good faith withdraws, and shows his adversary that he does not desire to continue the conflict, and his adversary pursues him, he has the same right to defend himself as if he had not originally provoked the difficulty, but the withdrawal must be in good faith. If he withdraws, and gives his adversary reasonable ground for believing that he has withdrawn, it is sufficient. * * * It follows from what has already been said that where the original aggressor ceases the attack, and shows that he has abandoned it, and the person assailed renews the difficulty, he becomes in turn the aggressor, and cannot plead self-defense if he kills the original aggressor to save his life." The matter is very clearly treated in McClain, Cr. Law, §§ 308–310. In the last section the author says: "As appears from the preceding section, one who voluntarily enters into a combat, or is the original aggressor, cannot excuse a subsequent homicide committed in consequence thereof, on the ground of self-defense, it being his duty to withdraw; but there must be allowed room for repentance, and abandonment of the evil and unlawful purpose, and if the defendant, though originally in the wrong, does thus abandon his purpose, he may afterwards exercise the right of self-defense. The withdrawal, however, must be in good faith * * *; and the fact of change of purpose must be known to the other party [citing State v. Edwards, 112 N. C. 901, 17 S. E. 521]. Perhaps this duty to withdraw does not exist where the danger has become such that a reasonably prudent man would consider that withdrawal would imperil his life. But a distinction must be introduced between the duty to withdraw, here referred to, and the duty to retreat, discussed in the next section; for in the cases now under consideration the party who seeks to avail himself of the right of self-defense has been originally in the wrong, and it is doubtful whether he ought to be excused for killing in self-defense before a definite withdrawal, no matter how dangerous such withdrawal might be."

Perhaps the best expression of the rule we have found applicable to the case at bar is in Stoffer v. State, 15 Ohio St. 47, justly considered a leading case, in which the subject is learnedly and reflectively considered. The court says on page 53: "While he [the assailant] remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his own. In such case it may be rightfully and truthfully said that he brought the necessity upon himself by his own criminal conduct. But when he has succeeded in wholly withdrawing himself from the contest, and that so palpably as at the same time to manifest his own good faith, and to remove any just apprehension from his adversary, he is again remitted to his right of self-defense, and may make it effectual by opposing force to force, and, when all other means have failed, may legally act upon the instinct of self-preservation, and save his own life by sacrificing the life of one who persists in endangering it." Can the case at bar in any aspect be brought within this rule? Let us take the prisoner's own testimony, which is contradicted by other witnesses, but which we will assume to be true for the purposes of the argument. He testifies that he had a dispute with the deceased about the time and pay of his daughter. Next morning he put his pistol in his pocket, and again went to see the deceased. They had another dispute, in which both he and the deceased cursed each other and bandied opprobrious epithets. He then went home, and soon after returned to the office of the deceased. The following are his own words, as they appear in the record: "I went on to the mill, with my little girl behind me. When I got to the tower door Mr. Sherrill was standing in the door, with his back against the south door, facing,—with his face towards me. He says to me, 'Mr. Medlin, if I was you, I wouldn't have any fuss with Brown.' I said, 'Oh, hell! I didn't come here to have any fuss.' I walked into the door, and turned to the right, and stepped on a platform about one step high, and then I stepped two or three steps up the steps. When I got up two or three steps I could see Mr. Brown getting up out of a chair. I could not see the chair. He was raising up when I first saw him, looking right at me. I stepped one step after I saw him, and Brown was getting up, with both hands in his pockets, and when he got up I saw that he was drawing his pistol out of his right pants pocket. I saw the white-metal piece on the butt of the pistol, between his fingers. When I saw that, I stepped one step down and reached for my pistol, and says to Brown, 'Don't.' Then I jerked my pistol out as quick as I could get it out. When I jerked it out of my pocket, I nearly let it fall out of my hand, and I grabbed it with both hands. I throwed it up with both hands in front of my body. By that time Brown was coming over with his pistol, and throwing it right down in my face. I shot then. I saw

that he was going to shoot, and I shot, and then Brown shot. I kept going backwards down the steps. I saw that Brown was making an effort to shoot again, and I shot again as quick as I could. When I shot the second time I was near the bottom of the steps,—I think, on the platform. I wheeled. As I turned round to run out the door, somebody shot at me. I don't know who it was. I ran out the door, and jerked the door shut behind me. When I got on the outside I thought of my daughter, and turned round to find her. She jerked the door open behind me, and jumped out of the door, and hallooed: 'Lord have mercy! what is the matter, pa?' While I was standing there I heard somebody coming down the steps, running. I looked inside the door, and Mr. Brown by that time had got to the last step, stepping onto the platform, and turned to come out in the door. Just as he came in front of the door I told him to stop, and he didn't stop, but was raising his pistol to shoot again, and I shot at him. When I shot he jumped back and slammed the door to. My little girl was down about the corner of the tower then. I said to her, 'Get out of the way,' and started for home. She followed me. I was going in a sort of a run. When I got 20 or 25 steps from the tower, I heard somebody say: 'Yonder he goes. Shoot him.' I turned my head, and just as I turned my head somebody shot at me again. As I turned round, I saw George Ballard leaning out of the window upstairs. While I was looking I dropped my eyes, and saw Mr. Brown standing in the window downstairs, with his pistol in both hands. The smoke was boiling out of the window, as if he had just shot. I threw my pistol back and shot at Brown, and ran on. I looked back again, but did not see Brown any more. As I shot the last shot, I saw him throw his hand on his left breast and stagger back. That's the last I saw of Brown." It thus appears from the prisoner's own testimony that he took no chances, but anticipated every action of the deceased. He went around to the office of the deceased, Brown, with whom he had recently quarreled. He drew his pistol because Brown looked as if he intended to draw his pistol. He fired because Brown looked as if he was going to fire. As he was going down the steps backwards, he shot again because Brown looked as if he was making an effort to shoot. After getting out of the factory, he turned around and shot again because Brown would not stop when he told him to stop. After getting 20 or 25 steps from the factory, but how far from the place where he fired the last shot is not stated, he turned again because he heard some one say: "Yonder he goes. Shoot him." After he turned his head around, somebody shot at him, and then he again shot at Brown. We rarely find a more perfect specimen of Parthian tactics. Two things here are worthy of note: He turned around before the shot was fired, and he does not say that it was fired by Brown. He says Brown was "standing in the window with his pistol in both hands," and that "the smoke was boiling out of the window as if he had just shot." It is common knowledge that, if Brown had shot in such a position, the smoke from his pistol would have been carried out of the window with the discharge. The prisoner certainly had not "succeeded in wholly withdrawing himself from the contest," if, indeed, he had made any effort to do so, as he was constantly turning and shooting as he retreated. We are at a loss for any evidence whatever that he had done anything to "remove any just apprehension from his adversary." The last word he addressed to him but a few seconds before was a peremptory order to stop, followed by a pistol shot. He is not certain that Brown himself fired but one shot at him, while he admits he fired four shots at Brown. None of the shots hit him, or came any where near him, as far as we can see. If he was in any danger when the last shot was fired at him, he would have been in less danger if he had kept on running, instead of stopping and turning around to await and return the shot. He had not retreated to the wall, or a ditch, or anything that could stop him; and, if he had continued running, he would soon have been out of any effective range of the ordinary pistol. In any event, a man in the open would be safer running than stopping and exchanging shots with a man in a building, who by stepping aside could have fired out of the window with perfect aim, and but little exposure of his own person. We must remember that the prayer itself is based upon the assumption that the prisoner had been the aggressor, and therefore the duty rested upon him, not simply of retreating, but of wholly withdrawing, from the contest, as far as possible, before he could resume his right of self-defense, of which he had voluntarily devested himself by his original assault.

Of all the cases cited by the defendant, that of State v. Ingold goes furthest in his direction, but even that falls far short of sustaining his contention. In that case this court says: "There is manifest error in the first proposition of law laid down by his honor: 'If the prisoner willingly entered into the fight, and during its progress, however sorely he might be pressed, stabbed the deceased as described by the witnesses, his offense, at least, would be manslaughter. By 'sorely pressed' we understand being put to the wall, or placed in a situation where he must be killed or suffer great bodily harm, or take the life of his adversary. Supposing there was evidence to raise this point, the offense, according to all the authorities, was excusable homicide, which Foster calls 'self-defense, culpable, but, through the benignity of the law, excusable'; citing Fost. Crown Law, 273,

274; 1 East, P. C. 279; 4 Bl. Comm. 184; 1 Hale, P. C. 482. Indeed, as the deceased made the first assault with a deadly weapon, i. e. 'a stone about the size of a goose egg,' thrown with violence at a short distance, and following it up by pushing the prisoner against the jam of the fence, gave him two blows, and then caught him with his hand about the mouth, having him against the fence, bent over on the side, before the prisoner struck him at all, if the necessity for killing existed, which his honor assumed, it would seem to have been rather a case of justifiable homicide." This short statement shows the utter dissimilarity of that case from the one at bar. In that case occurs the following sentence, illustrating, among others, not only the profound legal knowledge of the great chief justice, but also his intimate acquaintance with the mainsprings of human action. He says on page 222: "It is true, while they were holding him in the piazza, he flourished his knife, and swore 'one of us has to die before sunset'; but every one who has witnessed scenes of this kind knows that such 'rearing and charging and popping of fists' are far from evincing a deliberate purpose, particularly when the opponent is a much stouter and more able-bodied man. The barking of a dog shows that he thinks it safer to bark than to bite." This illustration was very apt where used, but scarcely applies to the case at bar. The popping of a pistol, especially when aimed with a deadly intent, means far more than the popping of fists; and the barking of a Colt's revolver has a compass beyond the gamut of a barking dog. We regret to say that we see no evidence, beyond a scintilla, that the prisoner had in good faith wholly withdrawn from the contest before he fired his last shot, and certainly none that "the deceased knew that all danger from the prisoner had passed." The record says that there was "evidence tending to show: That the prisoner armed himself with a pistol, and returned to the tower for the purpose of shooting the deceased, drew his pistol as he went up the steps leading to the second story of the tower, where he had left Brown, took aim at him with his pistol, fired once at him while deceased was sitting in his chair. That Brown returned the fire. Prisoner fired again, and inflicted a mortal wound upon him. After firing the second shot, the prisoner turned and fled down the steps. Brown pursued him to the ground floor of the tower. Prisoner got out of the tower, and Brown, the deceased, went to the window on the lower floor, fell, and died from the wound inflicted as above stated." The record further says that: "The prisoner introduced evidence tending to show that the shooting occurring in the upper story of the tower was done in self-defense. Upon this evidence his honor charged the jury as requested by the prisoner." As the prisoner appears to have had a fair trial,—so much so that he has complained of nothing except the single exception already considered, to which he was not entitled,—we are constrained to affirm the judgment of the court below. Affirmed.

HINKLE et al. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina. June 9, 1900.)

CARRIERS—DAMAGE TO CATTLE—NOTICE OF DAMAGES—NEGLIGENCE—BURDEN OF PROOF.

1. Where a shipper, suing a carrier for damages resulting from failure to seasonably transport and safely deliver cattle, shows that they were delivered in a damaged condition, and after an unreasonable delay, the burden is on the carrier, if the shipment was under a special contract, to bring the injury within its exception, and to show that it was not caused by its own negligence.

2. Where a contract for shipment of cattle stipulates that, as a condition precedent to shipper's right to recover damages for their injury, he will give written notice of his claim to the carrier before removal from destination, the shipper's failure to give a formal written notice of his intention to demand compensation will not preclude recovery, where he signed a receipt for the cattle at destination under protest, because of their damaged condition.

Appeal from superior court, Caldwell county; Allen, Judge.

Action by Hinkle, Craig & Co. against the Southern Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an action to recover damages for injuries to a carload of cattle resulting from delay in transportation. The complaint, among other allegations, contains the following: "(3) That on or about the 4th day of November, 1896, the plaintiffs shipped from Lenoir, N. C., to Hickory, N. C., over the railroad of the Chester & Lenoir Railroad Company, thirty head of cattle; that said cattle were shipped from Lenoir, N. C., on Wednesday, November 4, 1896, at 2 o'clock a. m., and reached Hickory at about 4 o'clock a. m., of the same morning, and were at once turned over to, and received by, the defendant for further transportation; that defendant company, instead of transporting said cattle promptly and expeditiously, refused to carry them on a through freight train which passed Hickory at 8 o'clock a. m. of the same morning, bound for points in the direction of Norfolk, on the defendant's road, although requested and urged to do so by plaintiffs, but instead allowed them to remain in the cars of the Chester & Lenoir Railroad Company from 4 o'clock a. m. till 3 o'clock p. m., at which time they were placed in defendant's cars by plaintiffs at their own expense, and remained in said cars of defendant from 3 o'clock p. m. until 10 o'clock p. m. of the same day before they were removed from Hickory; that said defendant then carried them on a local freight train, which traveled much more slowly than a through train instead of transporting them on a through

train, as it should have done; that said cattle did not reach Norfolk over defendant's railroad until Saturday, the 7th day of November, 1896, having been on the road nearly or quite three nights and four days, although the distance is less than four hundred miles, as plaintiffs are informed and believe. (4) That plaintiffs allege that defendant company had ample notice of the date upon which the said cattle would be delivered to it for transportation, so as to have had cars ready for their prompt shipment." The plaintiffs further alleged, in substance, that on account of the unreasonable delay in shipment the cattle were injured, and lost greatly in weight, and consequently depreciated in price; that they were forced to incur the additional expense of feeding them en route and keeping them over Sunday at Norfolk; and that they thereby lost what is known as the "Saturday market," when cattle bring a higher price than at any other time. These allegations are denied by the defendant on information and belief, who sets up the further defense, "that no notice in writing was given to defendant of any claim for damages to plaintiffs' stock, as set forth in said contract, and for the failure to serve such notice, as defendant is advised and believes, plaintiffs are not entitled to recover in this action."

The following are the material facts of the statement of the case on appeal: "The plaintiffs offered evidence tending to support the allegations of their complaint; among other evidence, that the cattle were shipped from Hickory, N. C., on Wednesday, and were not received in Norfolk until the following Saturday. They admitted the execution of the contract for the shipment of his cattle, which was exhibited to them, and closed their case. The defendant offered in evidence said contract, which contained, among others, the following stipulations: 'Now, in consideration of said railroad agreeing to transport the above-described live stock at the reduced rate of ——— dollars to Norfolk, and a full passage to the owner or his agent on the train with the stock, the said owner and shipper does hereby assume and release the said railroad from all injury, loss, and damage or depreciation which the animal or animals, or either of them, may suffer in consequence of either of them being weak, or escaping, or injuring himself or themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, and from all other damages incidental to railroad transportation which shall not have been caused by the fraud or gross negligence of said railroad company. And it is further agreed that, as a condition precedent to the right of the owner and shipper to recover any damages for any loss or injury to said live stock, he will give notice in writing of his claim therefor to the agent of the railroad company, actually delivering said * * * to him, whether at the point of destination or at any intermediate point where the same may be actually delivered before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same, and before said stock is intermingled with other stock. And this agreement further witnesseth that said owner and shipper has this day delivered to said company the live stock described, about to be transported on the conditions, stipulations, and understandings above expressed, which have been explained to, and are fully understood by, the owner and shipper.' This contract was duly executed by the plaintiffs and by the railroad agent at the point of shipment. The plaintiffs admitted that they had not given the notice in writing stipulated for in the above contract. They testified, however, in rebuttal, that their agent, upon the receipt of the cattle in Norfolk, signed a receipt for the same under protest, owing to their bad condition. Upon this evidence the defendant moved the court to dismiss the complaint. Motion refused, and defendant excepted. Defendant further requested the court to charge the jury that if the jury believed the evidence the plaintiffs are not entitled to recover, and to answer the issue, 'No.' This motion was refused, and defendant excepted. The court charged the jury that, if they believed the evidence, the plaintiffs are entitled to recover such damages to their carload of stock as they had shown by their evidence. And to this charge of the court the defendant excepted. The issue submitted was as follows: 'Were the plaintiffs endamaged by the negligence of defendant; and, if so, in what amount?' The jury answered this issue, 'Yes; in the sum of $225.' The defendant moved for a new trial on the ground of misdirection by the court, and to the refusal of the court to instruct the jury as requested by the defendant, and because the court submitted the case to the jury upon the evidence. Motion refused, and defendant excepted. There was a judgment according to the verdict. The defendant assigns as error (1) the refusal of the court to dismiss this action at the close of the evidence; (2) because the court refused to charge the jury that, if they believed the evidence, the plaintiffs are not entitled to recover, and to answer the issue, 'No;' (3) to the charge of the court that, if the jury believed the evidence, plaintiffs are entitled to recover such damage to their carload of stock as they had shown by their evidence; (4) because the court refused to grant a new trial."

G. F. Bason, F. H. Busbee, and A. B. Andrews, Jr., for appellant. Edmund Jones and W. C. Newland, for appellees.

DOUGLAS, J. (after stating the facts). This case was submitted to us on printed briefs for the plaintiffs, but was argued in behalf of the defendant, both orally and by

brief. It is perhaps proper to say that almost the entire brief of the defendant was devoted to proving a proposition that we have no disposition to deny; that is, that a common carrier can, by special contract, reasonably limit its common-law liability. But we cannot admit the assumed corollary that thereby it ceases to be a common carrier, or ipso facto reverses the legal burden of proof. It is well established that, where the negligence of the defendant is the primary cause of action, it must be alleged and proved by the plaintiff; but here it is merely incidental to the cause of action,—in fact, it arises as a matter of defense. We must not lose sight of the real cause of action, which is the injury resulting from the failure of the defendant to seasonably transport and safely deliver live stock received by it as a common carrier. The plaintiffs' case is fully made out when they have shown that the cattle were received by the carrier, and not seasonably and safely delivered; that is, not delivered at all, or delivered in a damaged condition, and after an unreasonable delay. The burden is then upon the defendant, and, if it wishes to escape any part of its common-law liability by showing a special contract, it must affirmatively prove such contract, and bring the injury clearly within the terms of its exemption. These principles have been so recently and so fully discussed by this court in Mitchell v. Railroad Co., 124 N. C. 236, 32 S. E. 671, that any further elaboration seems needless, at least for the present. The essential principle is tersely and strongly stated by Chief Justice Faircloth in Morganton Mfg. Co. v. Ohio R. & C. Ry. Co., 121 N. C. 514, 28 S. E. 474, where, speaking for a unanimous court, he says: "Among connecting lines of common carriers, that one in whose hands goods are found damaged is presumed to have caused the damage, and the burden is upon it to rebut the presumption." The rule is well stated in Greenl. Ev. (14th Ed.) § 219, in the following language: "And, if the acceptance was special, the burden of proof is still on the carrier to show, not only that the cause of loss was within the terms of the exception, but also that there was on his part no negligence or want of due care." That this rule, which at first was seriously questioned, is receiving almost general acceptance, would appear from the recent work of Elliott on Railroads, where the author says, in section 1548, on page 2403: "There is some conflict among the authorities as to the burden of proof in such cases; but the prevailing rule, where the owner or his agent does not go with the stock, is that when the animals are shown to have been delivered to the carrier in good condition, and to have been lost or injured on the way, the burden of proof then rests upon the carrier to show that the loss or injury was not caused by its own negligence." This rule, which is the natural result of the prima facie liability of the common carrier, is further strengthened by the universal acceptance of the principle that, where a particular fact necessary to be proved rests peculiarly within the knowledge of a party, upon him rests the burden of proof. 5 Am. & Eng. Enc. Law (2d Ed.) p. 41; Best, Ev. § 274; 1 Greenl. Ev. § 79; Starkie, Ev. § 589; Rice, Ev. § 77; Selma, R. & D. R. Co. v. U. S., 139 U. S. 560, 567, 11 Sup. Ct. 638, 35 L. Ed. 266; State v. McDuffie, 107 N. C. 885, 888, 12 S. E. 83; Govan v. Cushing, 111 N. C. 458, 461, 16 S. E. 619; Mitchell v. Railroad Co., supra. Some of the earlier cases appear to take the view that a common carrier ceases to be such when it makes a special contract, and becomes a private carrier for hire. Whatever foundation may have existed for such an idea in the earlier days of the law, when common carriers were private individuals, and carried their shipments in wagons or boats on the ordinary public highway, without receiving or asking any special privileges, has long since disappeared. A railroad company is, at least, a quasi public corporation, exercising one of the highest prerogatives of the sovereign, that of eminent domain. It is purely a creature of the law, and has no existence outside of its public capacity. It is a common carrier by virtue of its charter, and not by any supposed usage or contract with the shipper. Its character as such is fixed by its contract with the state, and cannot be waived either by the corporation or the shipper. It may limit its liability to a certain extent by special contract, but cannot change its character. All such contracts of limitation, being in derogation of common law, are strictly construed, and never enforced unless shown to be reasonable. Any doubt or ambiguity therein is to be resolved in favor of the shipper, and it has further been held that the burden of proof rested upon the carrier of showing that all such stipulations and exemptions were reasonable. Compania de Navigacion la Flecha v. Brauer, 168 U. S. 104, 118, 18 Sup. Ct. 12, 42 L. Ed. 398; 4 Elliott, R. R. § 1424; Cox v. Railroad Co. (Mass.) 49 N. E. 97; Railroad Co. v. Reeves (Tex. Sup.) 39 S. W. 564; 5 Am. & Eng. Enc. Law (2d Ed.) 326. Stipulations in a bill of lading are similar in their nature to conditions in a policy of insurance. It is well settled by the highest authority that if a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured, and against the construction which would limit the liability of the insurer. Imperial Fire Ins. Co. v. Coos Co., 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; London Assurance v. Companhia de Moagens do Barreiro, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113.

In the case at bar it does not appear necessary for the plaintiffs to resort to the burden of proof, as the unreasonable detention is in itself evidence of negligence. It appears from the evidence that the cattle were four

three nights—that is, 84 hours—in their destination, a distance of 400 t the present day, the transportation ock over a great trunk line of rail- an average rate of less than five hour cannot be considered reasona- ace, in the total absence of explana-

y remaining question is whether the the plaintiffs to give formal writ- e of their loss or intention to de- mpensation is an absolute bar to overy, if otherwise entitled. We . The object of such a stipulation relieve the carrier from its just lia- such a purpose would be clearly but simply to give it such notice nable it, by proper investigation, to self against unjust claims. It is not at the plaintiffs signed the receipt ittle "under protest." These words pon the receipt would be ample no- e defendant that the plaintiffs in- enforce their rights. The meaning words is too well known in the busi- d to be capable of misconstruction. resent instance they clearly meant plaintiffs objected to receiving the their damaged condition, but did so mpulsion of circumstances to prevent ner loss, but at the same time re- l their rights of action against the . If the defendant's agent had de- more specific notice or information, have asked for it after having been notice, but this he did not see fit ven if the protest had been merely nd not in writing, the stipulation ll have been deemed to have been nder the circumstances. It appears uncontradicted testimony that the suffered the injury, and gave actual the defendant of their claim for We do not see why they cannot Any other construction would con- t, properly construed, is a reasona- ation for the proper protection of r into an instrument of fraud and of wrong. This is so clearly ex- v Justice Furches, speaking for the Wood v. Railway Co., 118 N. C. 1056, S. E. 707, as to require no further Judgment of the court below is

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RAMPTON v. IVIE et al.

(Supreme Court of North Carolina. June 14, 1900.)

L AND ERROR—REHEARING—NEW TRIAL.

etition for rehearing in an action for njuries, the supreme court will grant al, where the court has grave doubt the essential principle of proximate properly explained to the jury, es- here the previous decision was by a rity of the court.

e plaintiff is injured through the neg- ligence of defendant concurring with that of plaintiff's driver, he cannot recover.

3. Where defendant's negligence was remote, and did not concur in producing plaintiff's injury, but was caused by the negligence of plaintiff's driver, plaintiff cannot recover.

Montgomery and Furches, JJ., dissenting.

On rehearing. Reversed.

For former opinion, see 32 S. E. 968, 124 N. C. 591.

DOUGLAS, J. This is a petition to rehear the case reported in 124 N. C. 591, 32 S. E. 968. It was then decided by a bare majority of the court, and now we find it impossible to come to a unanimous decision, and difficult to come to any decision at all, under the circumstances; and, in view of the fact that there is grave doubt in our minds whether the essential principle of proximate cause was properly explained to the jury, we think that substantial justice will be best subserved by granting a new trial.

We may regard it as settled law that the negligence of the driver of a public conveyance is not imputable to a passenger therein, unless the passenger has assumed such control and direction of said vehicle as to be considered practically in exclusive possession thereof. In other words, the possession of the passenger must be such as to supersede for the time being the possession of the owner, to the extent of making the driver the temporary servant of the passenger. The contrary doctrine, that the negligence of the driver was imputable to the passenger, seems to have had its origin in the English case of Thorogood v. Bryan, decided in 1849, and reported in 8 C. B. 115. For a time this celebrated case bade fair to receive general acquiescence, but was subsequently doubted, and finally directly overruled in the recent English case of The Bernina, 12 Prob. Div. 58. In the meantime the doctrine had met but scant favor in this country, and was distinctly repudiated by the supreme court of the United States in Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, decided in 1886, in which it was held that the passenger could not be held accountable for such negligence. The same conclusion had been announced by the supreme court of New Jersey in Railroad Co. v. Steinbrenner, 47 N. J. Law, 161, 54 Am. Rep. 126, where the principle is elaborately discussed. So far we have no trouble, but there is an essential difference between the contributory negligence of the driver and his primary negligence. Contributory negligence presupposes the negligence of the defendant, causing the injury, to which the negligence of some one else has contributed. Strictly speaking, contributory negligence applies only to the plaintiff, or some one whose negligence is legally attributable to the plaintiff. If the plaintiff was injured through the negligence of the defendant proximately concurring with that of the plaintiff's driver, then he can recover, as the negligence of his driver is not imputable to him unless, as stated

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above, he had assumed such complete control over the vehicle as to control its management. On the other hand, if the defendant's negligence was remote, and did not proximately, either immediately or by a direct line of causation, produce or concur in producing the plaintiff's injury, he cannot recover, not because he is responsible for the negligence of his driver, but because the defendant has not been guilty of any actionable negligence. Again, if the negligence of his driver was the sole, proximate cause of his injury, he cannot recover from the defendant, but must look to the driver or the driver's master. This would be the primary negligence of the driver. Again, if the proximate cause of the injury was the negligence of the plaintiff in negligently jumping out of the buggy, or negligently sitting therein so as to fall out from some otherwise inadequate cause, he cannot recover, as this would be his own negligence.

We have endeavored briefly to lay down the principles that should govern a new trial, but the testimony may so materially alter the application of these principles, or bring new ones in requisition, that it is impossible to anticipate the course of the trial. For the reasons stated above, a new trial must be ordered. New trial.

MONTGOMERY, J. I dissent from that part of the opinion of the court in which a new trial is granted. My views are fully set forth in the opinion of the court as reported in 124 N. C. 591, 32 S. E. 968.

FURCHES, J., also dissents.

STRAUSS v. MUTUAL RESERVE FUND LIFE ASS'N.[1]

(Supreme Court of North Carolina. June 9, 1900.)

MUTUAL BENEFIT ASSOCIATIONS — INCREASE OF ASSESSMENTS—BREACH OF CONTRACT—DAMAGES.

1. Where assessments in a mutual insurance association are to be on the entire membership, and proportioned among the members according to the age of each, the association, after receiving large sums in assessments from a member, cannot, without his consent, so alter the contract as to place him in a class of members whom it requires to pay on the basis of the age attained by each at the date of the assessment, while other members continue to be assessed as of their age at entry.

2. Where a mutual life association violates its contract with a member, the damages to which he is entitled are the amount of premiums and dues paid by him, with interest from the date of each payment.

Appeal from superior court, Craven county; Hoke, Judge.

Action by Joseph Strauss against the Mutual Reserve Fund Life Association. From a judgment for plaintiff, defendant appeals. Affirmed.

[1] Rehearing pending.

Shepherd & Busbee, J. W. Hinsdale, and Sewell Tyng, for appellant. W. W. Clark, for appellee.

DOUGLAS, J. This is an action brought to recover damages for the alleged wrongful cancellation of a policy of insurance. The record comprises over 500 pages, with a large number of insertions, amounting in the aggregate to perhaps 600 pages of printed matter. The case was fully and ably argued at length, and we have been favored with well-prepared and exhaustive briefs; and yet we see but one simple point essential to the determination of the case: Can a mutual association, by whatever name it may be called, or whatever may be its purposes, enter into a contract with one of its members, and, after receiving large sums upon said contract, alter its essential terms, without the consent of the member, so as practically to destroy its value? We think not. The plaintiff became a member of the plaintiff association in 1883, and received a policy in the form of a certificate of membership, wherein it was expressly agreed that assessments should "be made upon the entire membership in force at the date of the last death for such a sum as the executive committee may deem sufficient to cover said claims; the same to be apportioned among the members according to the age of each member as per table indorsed" on said certificate. It appears from the findings of fact that the plaintiff paid all demands made upon him up to the year 1898, and call No. 96. This last call he refused to pay on the ground that it was exorbitant and contrary to the express terms of his policy. It seems that by successive resolutions, none of which were amendments to its constitution, the association has placed in a separate class all members who entered prior to 1890, and requires them to pay on the basis of the age attained by each at the date of each assessment, while other members continue to be assessed only as of their age of entry. That the result of such discrimination is injurious to the plaintiff clearly appears from the 16th, 18th, 21st, and 22d findings of fact, as follows: "(16) * * * That since the last resolution of 1898 the plaintiff and all who joined said company prior to 1890, and who held policies similar to plaintiff's, were assessed at their full attained age, and rates applicable to such age, whereas persons who became members since 1890, and who held policies under what is styled the 'Ten-Year Class' and the 'Five-Year Class,' are only assessed at their age of entry; and plaintiff is thereby assessed at a higher amount than if the entire membership were assessed at rates of their attained ages." "(18) That call number 96, made on plaintiff in 1898, and pursuant to the resolutions of said year, is larger in amount than it would have been had all the members of the association been assessed at their full attained ages." "(21) That the present value

of plaintiff's policy, assuming that the rates were properly established and the members lawfully classified, was, at the time he ceased to be a member of said company, only a nominal sum, as by said classification and rating the amount of policy discounted to such time would not exceed the present value of premiums which would be due and payable for the period of plaintiff's expectancy. (22) That if the entire membership of the company had been rated and assessed at their attained ages, and no distinction made among the classes, then the present value of plaintiff's policy would be more than the present value of the premiums, and the policy have a substantial present value; but there are no data given from which said damage can be estimated or even approximated." Upon his findings of fact, the court below concluded, as matter of law, that the assessment made in pursuance of the resolutions of 1898 was "in violation of defendant's constitution and excessive and invalid"; that the defendant, having ceased and refused to recognize the plaintiff as a member on account of his having refused to pay such excessive and invalid assessment, had broken its contract, and had become liable to the plaintiff in damages, to be measured by "the amount of premiums and dues paid by plaintiff prior to call 96, with interest thereon from date of each payment." Judgment was rendered accordingly. In it we see no error. All that we decide in the present case is that the defendant has violated its contract with the plaintiff in a material matter, whereby the plaintiff, having suffered substantial injury, is entitled to substantial damages. We do not decide that a mutual insurance company, or any other kind of insurance company, cannot issue policies of divers kinds and classes, if so authorized by its charter; nor do we decide that a member of a purely mutual association is not bound by all reasonable by-laws and changes lawfully made therein. We are not considering the enforcement of a contract inequitable on its face, but the violation of a lawful contract by attaching thereto, without the consent of the plaintiff, conditions which utterly destroy its value. It is evident that, if the resolution of 1898 is binding upon the plaintiff, he would in any event be eventually forced out of the company by the constantly increasing premiums.

There is one fact that does not clearly appear from the record, and upon which counsel themselves seem to differ, which, while not essential to the determination of this case, seems worthy of notice: On the hearing it was contended that the defendant association had the right to subsequently rearrange its members into classes, so as to make each class bear the burden of insuring its own members. If by that the association claims the right to place all its members who entered before 1890 into a distinct class, entirely separate from the other members, and make them raise exclusively among themselves enough to pay all the death claims that may occur among their own number, we cannot admit the right, unless such was the understanding when the original contract was made. What would be the result? Suppose certain men start a mutual association, and support it through all its infant struggles into a vigorous and enlarged growth. In course of time the new members would naturally outnumber the old ones. Suppose they should say to the old members: "You are getting old, and therefore your insurance is more costly than ours. We will place you in a class by yourselves, and make you insure each other without any help from us. It is true you have borne the heat and burden of the day, and we are resting in the shade of the tree you have planted, but that makes no difference to us. Insure yourselves or leave." Of course, as one by one died off, the burden would be greater upon the survivors, as a death claim of $1,000 bears more heavily upon 20 men than it would upon 100. Finally 2 would be left. When one died, the other would have to pay his entire policy, and then pay his own policy at his own death. Would this be insurance, and could it be said that any claim which would lead to such a result is sound in principle? It may be that the association has provided for such cases, but it is apparent that if any class of men is set apart, and no new blood permitted to enter, it will eventually die out. If a man voluntarily goes into such a contract with his eyes open, we are not inclined to help him; but his valid, existing contract cannot be changed into such a contract without his consent. Whatever may be the power of a mutual association to change its by-laws, such changes must always be in furtherance of the essential objects of its creation, and not destructive of vested rights.

It is admitted that the measure of damages followed by the court below is the established rule in this state. Braswell v. Insurance Co., 75 N. C. 8; Lovick v. Association, 110 N. C. 93, 14 S. E. 506; Burrus v. Insurance Co., 124 N. C. 9, 32 S. E. 323. But it is contended that this rule was established purely in contemplation of old-line companies, and was not intended to apply to mutual associations. Whatever may have been the inception of the rule, we see no better one to adopt, and, as at present advised, must follow our own precedents. The judgment of the court below is affirmed.

PRICHARD et al. v. COMMISSIONERS OF MORGANTON et al.

(Supreme Court of North Carolina. June 14, 1900.)

HEALTH — TOWN COMMISSIONERS — BURNING DWELLINGS — CHARTER — ACTION — COUNTY COMMISSIONERS — SUPERINTENDENT OF HEALTH—NUISANCE—COMPLAINT — DEMURRER — NEGLIGENCE — PLEADING FICTITIOUS STATUTE.

1. Priv. Laws 1885, c. 120, § 37, providing that the town commissioners of Morganton,

to prevent the spreading of contagious diseases, "are permitted to cause to be destroyed or disinfected such furniture or other articles which shall be believed to be tainted," does not give such commissioners power to burn a dwelling house to prevent the spreading of smallpox; and hence the commissioners, in their corporate capacity, are not liable to an action therefor.

2. Under Code, § 707, subd. 22, providing that county commissioners shall make rules, regulations, and by-laws for preventing the spread of contagious diseases, such commissioners have no power to burn a dwelling house to prevent the spread of smallpox; and, such an act being outside the scope of their powers, the commissioners, in their corporate capacity, would not be liable to an action therefor.

3. Under Acts 1893, c. 214, § 22, providing that, where the county superintendent of health declares that a nuisance exists on premises, it shall be abated at the expense of the town or county, a complaint to recover for the burning of a dwelling house by the county commissioners to prevent the spread of smallpox, which fails to allege that the same was declared a nuisance by such superintendent, is demurrable.

4. Since Priv. Laws 1885, c. 120, § 37, authorizing the town commissioners of Morganton to destroy tainted furniture or other articles, to prevent the spread of contagious diseases, gives no power to burn a dwelling house to prevent the spread of smallpox, they are not liable therefor, in their corporate capacity, unless such burning was done in the negligent enforcement of their authorized duties; and a complaint in an action against the commissioners for recovery in tort on that ground, which does not allege such negligence, is demurrable.

5. Where a complaint pleads a statute which has no existence, and is not a law of the state, a demurrer to the complaint admits only the facts alleged therein, and has not the effect to admit the existence of the statute.

Faircloth, C. J., and Furches, J., dissenting.

Appeal from superior court, Burke county; Bowman, Judge.

Action by Nancy Prichard and others against the commissioners of Morganton and others to recover for the burning of a dwelling house as a health precaution. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Modified and affirmed.

S. J. Ervin and Avery & Ervin, for appellants. J. T. Perkins, for appellees.

MONTGOMERY, J. The plaintiff Nancy Prichard, a tenant in dower, brought this action against the commissioners of the town of Morganton, the board of commissioners of Burke county, and R. T. Claywell and Robert Ross, as their agents and servants, to recover of them damages for burning the house in which she lived, and certain personal property therein, as a nuisance, because of alleged smallpox taint and infection, for injury and damage to growing crops on the same, and for unlawfully and wrongfully depriving her of her liberty by seizing and carrying her to a pest house for smallpox patients, and keeping her there for weeks, in restraint of her freedom and contrary to her will. The persons entitled to the remainder interest in the real estate are the other plaintiffs in this action. The commissioners of Morganton, for one cause of demurrer to the complaint, say that the complaint fails to allege that the tortious acts complained of were within the scope of the powers conferred on said corporation by its charter, and that it appears on the face of the complaint that the acts complained of are not within the scope of the powers of the corporation, and, for another ground of demurrer, say that, if the acts complained of had been done under the express direction of the town commissioners, the conduct of the commissioners would have been ultra vires. The board of commissioners of the county demurred to the complaint, and, among the grounds assigned, these two seem to be the chief: (1) "That the acts alleged to have been done by these defendants, and constituting the plaintiff's cause of action against these defendants, are not within the scope of the corporate powers and duties conferred upon or delegated to these defendants by law; (2) that said acts are not alleged to have been done or performed under or in pursuance of any order, resolution, or direction of these defendants, and these defendants are in no way liable." The defendant Claywell demurred because the complaint alleged that he was merely acting as the agent of the other defendants, and that there was imputed to him, as an individual, no unlawful or wrongful act.

We have examined the charter of the town of Morganton (Priv. Laws 1885, c. 120), and find no authority given to the town commissioners to burn or destroy any house or residence. In section 37 the town commissioners are authorized to take such measures as they may deem effectual to prevent the entrance into the town, or the spread therein, of any contagious or infectious diseases; and under those powers they are permitted to cause to be destroyed or disinfected such furniture or other articles as shall be believed to be tainted or infected with any contagious or infectious diseases, or which there shall be reasonable cause to apprehend will generate or propagate diseases, and may take all other reasonable steps to preserve the public health, and for this purpose may use any money in the treasury. That statute certainly does not even purport to give to the town commissioners the right to burn a house in which a family infected, or thought to be infected, with a contagious disease, resides. The right of the commissioners to destroy the property, indeed, is not admitted by the plaintiffs, but it is intimated that they acted under the authority of the act of 1893, c. 214, § 22; but upon examination of that section it appears that reference is there made to the powers and duties of the superintendents of health of the several counties. No powers or rights are there given to the town commissioners or to the board of commissioners of the county. It is there provided that, in cases where the county superintendent of health declares that a nuisance exists on premises, it shall be

removed or abated at the expense of the town, city, or county in which the offender lives, in case of his inability to remove it, with the proviso that the expense chargeable to the town, city, or county shall not exceed $100. In reference to the powers conferred by law upon boards of county commissioners, we find that, by subsection 22 of section 707 of the Code, they can establish public hospitals for their several counties in cases of necessity, and make rules, regulations, and by-laws for preventing the spread of contagious and infectious diseases, and for taking care of those afflicted thereby; the same not being inconsistent with the laws of the state. By no reasonable construction of that subsection of the Code can it be held that the boards of county commissioners can burn a residence house to prevent the spread of contagious and infectious diseases. A proper disinfection would be the extent of their powers in respect to property thus tainted or infected. It is not alleged in the complaint that the acts complained of were ordered by the county superintendent of health; nor does the cause of action, as stated in the complaint, proceed upon the idea that the property was destroyed by the defendants under a method allowed by law, and that the plaintiff is entitled to compensation for its loss. The action is one purely in tort.

It is well settled in this state that counties (that is, the boards of county commissioners in their corporate capacity) are not ordinarily liable to actions of a civil nature for the manner in which they exercise or fail to exercise their corporate powers. They may be sued only in such cases and for such causes as may be provided for and allowed by the statute. Counties are not, in a strictly legal sense, municipal corporations, like cities and towns. They are, rather, instrumentalities of government, and are given corporate powers to execute their purposes; and they are not liable for damages, in the absence of statutory provisions giving a right of action against them. White v. Commissioners, 90 N. C. 439; Manuel v. Commissioners, 98 N. C. 9, 3 S. E. 829. There is, however, a distinction between the liability of a county for failure to discharge corporate duties, and that of a town or city for such a failure. Towns and cities are, as a general rule, liable in damages for the negligence of their officers and agents when specific duties are imposed by their charters and special statutes, when the damages are caused by their failure to discharge such duties and to exercise the powers conferred to that end, or when the town authorities are acting within the scope of their authority in the management of their property for their own interest, or in the exercise of powers voluntarily assumed for their own advantage; and that, notwithstanding the work they are engaged in will inure to the benefit of the municipality. But it is said in Moffitt v. City of Asheville, 103 N. C. 237, 9 S. E. 695, "Where a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute expressly or by necessary implication subjects the corporation to pecuniary responsibility for such negligence." But the plaintiff does not complain of a negligent act of either of the defendants. The alleged cause of action is a positive act in tort,—the burning of a residence house as a sanitary measure. The board of commissioners of the county, as representing officially the county, are not liable to the demand of the plaintiff, for the reason that there is no statute in existence which makes them so, either expressly or by necessary implication. The town commissioners, as representing the town community, are not liable, for the reasons: First, that the act complained of was for the interest of the state at large; and, second, because they unreasonably exceeded the powers conferred on them by the charter of Morganton, or by any special statute in aid thereof.

The case is before us on demurrer, and, of course, the facts concerning the burning are to be taken as true for the purposes of the demurrer. If, however, it be a fact that the house in which the plaintiff lived was burnt as alleged in the complaint, it was a most high-handed and unreasonable act on the part of those who did it, and was done without the semblance of authority. But she is not without redress. Her remedy will doubtless suggest itself to her counsel. The propositions of law which we have laid down seem to be admitted in the plaintiff's brief, and a recovery is sought upon the effect of the defendant's demurrer to the complaint. In the sixth allegation of the complaint it is alleged that the board of town commissioners burnt the house under some statute or provision of law which they claimed authorized them to assess and burn, and pay for the damage an amount not exceeding $100. Only the facts are admitted by the demurrer. Parties to an action cannot by complaint and demurrer enact a law. There is no such statute as the one referred to in the complaint, and the defendants' demurrer cannot have the effect to admit that there is such a statute and law in force.

If the complaint be treated as containing only one cause of action, the demurrers ought to have been sustained; for the demurrers were directed against the whole complaint, though there was only one allegation that was demurrable,—the one which charged that the residence house of the plaintiff was burned. Cowand v. Meyers, 99 N. C. 198, 6 S. E. 82. If the complaint be treated as embracing more than one cause of action, as we will treat it,—all growing

out of the same matter, and therefore not demurrable on that account,—we think that the demurrers were good against that cause of action which set forth the burning of the plaintiff's house, and damages therefor. The other causes of action were not demurrable, and the demurrers should have been overruled as to them. There was error in the particular we have pointed out. Modified and affirmed.

FURCHES, J. (dissenting). The plaintiff Nancy Prichard alleges that she is the widow of Z. T. Smith, deceased, and that the other plaintiffs are the children and heirs at law of said Smith; that as such widow she was entitled to dower upon the lands of her said husband, which was laid off and assigned to her in a house and lot in the town of Morganton, in which she and her family were living; that there were other buildings on said lot, and a growing crop of corn, and a garden with vegetables growing therein; that, besides these, she owned and had in said house clothing, bedclothing, tableware, and other domestic articles and furniture; that on or about the last of May, 1899, the defendants Robert Ross and R. T. Claywell, under the pretense that the plaintiff had smallpox, or had been exposed to the disease of smallpox, and claiming that they were authorized to do so by an order of the board of commissioners of Morganton, sustained and approved by the board of commissioners of Burke county, came to her house, arrested her, and carried her to a pest house, set fire to and destroyed her house and the other outhouses on the lot, and also burned and destroyed her clothing, bedclothing, tableware, and household furniture, when in fact she did not have smallpox, nor does she believe that she had been exposed to that contagious disease. To recover damages for this treatment,—the loss of houses, and the loss and destruction of her personal property,—she brings this action against the defendants, Robert Ross, R. T. Claywell, the board of commissioners of Morganton, and the board of commissioners of Burke county. To this complaint the defendants demurred, thereby admitting the facts stated in the complaint to be true; and, taking these facts to be true, as we must do, it would seem that the plaintiff is entitled to damages from somebody. One ground of the demurrer is the misjoinder of causes of action—too many causes joined together in one action. But it appears that they all grew out of one wrongful act, or are connected with the same, and that the complaint is not demurrable on that account. Benton v. Collins, 118 N. C. 196, 24 S. E. 122; Solomon v. Bates, 118 N. C. 311, 24 S. E. 478. It is claimed in the demurrer that Ross and Claywell are not liable because they were only the agents and servants of the other defendants. Admitting that this defense can be raised by the demurrer in this case (which we do not admit), it could not protect them, unless their employers had the right to commit this trespass upon the plaintiff's, and to destroy their property. And, while this is so,—must be so,—the other defendants claim that they had no right to order this trespass and destruction of property, and demand protection on that account. So it is manifest that both of these contentions cannot be true, nor can both these defenses be good. This is sufficient to justify the court in overruling the demurrer. But are the other defendants liable? The complaint alleges that this trespass and destruction of plaintiff's property were done by order of the board of commissioners of Morganton, sanctioned by the commissioners of Burke county. But it is contended that they had no right to make such order; that it was ultra vires, and they are not bound by it. But it is provided in section 37, c. 120, Priv. Laws 1885 (Charter of the Town of Morganton), "that the board of commissioners may take such means as they may deem effectual to prevent the entrance into the town or the spreading therein of any contagious or infectious diseases, * * * may cause any person in the town believed to be infected with such contagious disease or whose stay may endanger the public health, to be removed to some place within or without the town limits, may cause to be disinfected or destroyed such furniture or other articles which shall be believed to be tainted or infected with any contagious or infectious disease, or of which there shall be reasonable cause to apprehend will generate or propagate diseases, and may take all other reasonable steps to preserve the public health, and for this purpose may use any money in the treasury." It would be very hard to believe that the draftsman of this act did not think he was giving the commissioners of Morganton plenary power to deal with contagious diseases; and it seems that they so understood it when they made this order, as it appears from the complaint that they have had the plaintiff's damages assessed at $100, and have offered to pay plaintiff that amount. But it is contended that the commissioners were limited to that amount. This cannot be so,—that the act authorized the commissioners to destroy property, and limited the plaintiff's damages to $100, or any other amount less than the value of the property destroyed. If this contention of defendants were true, it would allow the defendants to assess their own damage. This cannot be so. It is further contended that this act does not extend to the destruction of houses. I do not agree to this contention. If that were true, what becomes of damage for her clothing, the bedclothing, tableware, and other articles of household furniture destroyed? Has the plaintiff no remedy for this trespass and destruction of property? I cannot so hold. As there was no statute called to our attention that authorized the

county commissioners to destroy property in Morganton, it is probable that they are not liable. The demurrer should have been sustained as to them, but was properly overruled as to the others. This was written as a tentative opinion, and, although the opinion of the court has been modified since it was written, it is filed as a dissenting opinion.

FAIRCLOTH, C. J. I concur in the dissenting opinion.

RUTTER et al. v. ANDERSON et al.

(Supreme Court of Appeals of West Virginia. June 12, 1900.)

WILLS—CONSTRUCTION—INTENT OF TESTATOR—DEVISE TO WIFE—POWER OF SALE.

1. The rule which controls all others in the interpretation of wills is that the intention of the testator, to be gathered from the entire will, must govern.

2. A., the owner of a tract of 35¼ acres of land, of very small value, makes the following will: "First, I give and bequeath unto my beloved wife, Lucinda J. Anderson, my farm, of thirty-five and one-fourth acres, on which I now reside, situated in Grant district, Wetzel county, West Virginia, and adjoining the lands of Charles Gilbert and others, to have and to hold the same to her for and during her natural life; or my wife, Lucinda J. Anderson, may sell said farm and live on the proceeds, if necessary; and, second, I give to my wife, Lucinda J., all of my personal property of every kind, including horses, cows, household and kitchen furniture of every kind and description, of my personal property; and, further, my wife, Lucinda J., is to pay my son, J. R. Anderson, all the money that I owe him at this present time, and to pay all of funeral expenses." *Held*, the facts and circumstances of the case make it clear that the intention of the testator was to authorize and empower Lucinda to sell and convey the said land in fee simple if the same should be necessary for her support and maintenance.

(Syllabus by the Court.)

Appeal from circuit court, Wetzel county; R. H. Freer, Judge.

Bill by Hannah J. Rutter and others against Lucinda J. Anderson and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Wiley & Keifer, for appellants.

McWHORTER, P. On the 20th day of March, 1894, William H. Anderson, the owner of a tract of 35¼ acres of land in Wetzel county, together with his wife, Lucinda J. Anderson, executed a deed of lease of the oil and gas in and upon said land to the South Penn Oil Company; said company to deliver in the pipe line, to the credit of lessors, their heirs and assigns, free of cost, the equal one-eighth part of all the oil produced and saved from said premises, and to pay $300 per year for the gas from each and every gas well drilled on the premises, the product of which should be marketed and used off the premises. On the 18th day of January, 1895, said W. H. Anderson executed his last will and testament, as follows: "First, I give and bequeath unto my beloved wife, Lucinda J. Anderson, my farm of thirty-five and one-fourth acres, on which I now reside, situated in Grant district, Wetzel county, West Virginia, and adjoining the lands of Charles Gilbert and others, to have and to hold the same to her for and during her natural life; or my wife, Lucinda J. Anderson, may sell said farm and live on the proceeds, if necessary; and, second, I give to my wife, Lucinda J., all of my personal property of every kind, including horses, cows, household and kitchen furniture of every kind and description, of my personal property; and, further, my wife, Lucinda J., is to pay to my son, J. R. Anderson, all the money that I owe him at this present time, and to pay all of funeral expenses." On the 2d day of March, 1895, in consideration of one dollar paid, said Lucinda J. Anderson conveyed by deed to J. R. Anderson, his heirs and assigns, "the one-eighth part of the oil and gas produced and saved" in and under said tract of land, and on condition that the grantee should within six months after a well should be drilled for oil and gas, and be properly completed, tubed, and tested for oil, at his election, either pay to the grantor the sum of $200 personally, or deposit it to her credit in a bank designated, or release and reconvey to the grantor the oil and gas rights so conveyed. The South Penn Oil Company drilled two wells on said tract, one of which was dry, and the other a small producer. Hannah J. Rutter and others, heirs at law of William H. Anderson, deceased, filed their bill in equity in the circuit court of Wetzel county against Lucinda J. Anderson, widow of said decedent, Lavina Anderson, widow of J. R. Anderson, who was one of the heirs at law of William H. Anderson, Sherman L. Anderson and Clyde Anderson, infant children of said J. R. Anderson, deceased, and Lavina Anderson, South Penn Oil Company, a corporation, and Eureka Pipe-Line Company, also a corporation, alleging that under said will the said widow, Lucinda J. Anderson, took nothing except a life estate in the said tract of 35¼ acres; that the remainder in fee simple is vested in the heirs at law of William H. Anderson, who are entitled to all the royalties arising under the lease to the South Penn Oil Company made by Anderson in his lifetime; and that Lucinda J. Anderson, the widow and tenant for life, had no right or power to sell or convey the said royalties to said J. R. Anderson,—and praying "that said royalties of oil and gas arising by virtue of said contract of lease made by said W. H. Anderson, deceased, and South Penn Oil Company, may be declared to be the absolute property of the heirs at law of said W. H. Anderson, deceased, and that the same may be apportioned and divided among them share and share alike," and that the South Penn Oil Company be required to disclose and show the amount of oil and gas produced from

the premises, and the amount of oil run into the pipe lines of the Eureka Pipe-Line Company, and that said last-mentioned company be inhibited and restrained from delivering and paying over to said Lucinda J. Anderson, or to the estate or the heirs of J. R. Anderson, any portion of said royalties; that the same be decreed to be paid over to plaintiffs and others, the heirs at law of said W. H. Anderson, deceased. The defendant Lavina Anderson answered the bill, denying the material allegations thereof, and showing what payments had been made to Lucinda J. Anderson, on account of the purchase of said royalties by J. R. Anderson, and by herself as administratrix of said J. R. Anderson, and averring that Lucinda J. Anderson had the right to convey the royalties as she did to J. R. Anderson, or to convey the land itself, under the provisions of the will, if it should be necessary for her maintenance, and that the estate of J. R. Anderson had a right to collect the royalties. The South Penn Oil Company answered that it had no interest in the royalties, and was willing to deliver the same to whoever might be entitled thereto; that it had been delivering the same to Lucinda J. Anderson, the widow of the lessee, who, as respondent supposed, was entitled to the same under the will of her deceased husband. The infant defendants, Sherman L. Anderson and Clyde Anderson, by their guardian ad litem, filed their answer, to all of which general replications were entered, and the bill was taken for confessed as to the other adult defendants. On the 6th of December, 1897, the cause was referred to a commissioner to ascertain and report what amount of oil had been extracted and taken from the land in controversy, and the value of same, when taken, and by whom, and who had received the royalties thereof; also, who were entitled to said royalties, and in what amounts. The depositions of defendant Lavina Anderson and W. H. Showalter were taken and filed in the cause, by which depositions they show that the land, in most part, was poor and rough, of very little value for agricultural purposes, being steep hillside, and cut up by ravines, hollows, and gutters, and the soil not very productive, and that the value of the personal property left by W. H. Anderson was about $60; that the sale of the royalties by Lucinda J. Anderson was necessary for her support and maintenance. The commissioner made his report under the order of reference, reporting that defendant, Vina Anderson, as administratrix of J. R. Anderson, had been receiving the royalties of all the oil taken from said tract of land, and had received up to May 13, 1897, the sum of $136.36 for royalties, but was unable to ascertain and report the amount extracted subsequently. On the 2d day of February, 1899, the cause was heard. The court confirmed the said report of the commissioner, there being no exceptions or objections thereto, and ascertained that there had been sold of the royalty oil from said tract amounting to $136.36, which had been paid to defendant Vina Anderson, and that there was yet in the pipe line of Eureka Pipe-Line Company, up to December 31, 1898, 364.67 barrels of oil from the royalty turned over and delivered to said pipe-line company by the South Penn Oil Company under its lease from said W. H. Anderson, which was the property of said Vina Anderson as administratrix of the estate of J. R. Anderson, and that she was authorized to sell the same, as well as the royalty to be produced from said land; that, by virtue of the terms of W. H. Anderson's will Lucinda J. Anderson only took a life estate in said tract of 35¼ acres of land, and that the will did and does not empower, authorize, or give said Lucinda J. Anderson power to alienate or sell the said land, or any part of or interest therein, in excess of her life estate, even though such alienation or sale be necessary for her support and maintenance; that the operations (drilling, etc.) took place under a lease executed by W. H. Anderson in his lifetime, and, although oil was produced after the death of the said Anderson, said lease was and is a valid lease; that said life tenant or her assignee, J. R. Anderson, was entitled to the whole of said one-eighth royalty of oil and gas from said tract, being the production under said lease lawfully produced by virtue thereof, subject, however, to the debts of said W. H. Anderson, deceased; that the royalty deed executed by Lucinda J. Anderson to said J. R. Anderson, dated March 2, 1895, filed with complainant's bill as Exhibit C, conveyed to J. R. Anderson the one-eighth of all the oil and gas produced from said tract, and is a valid and subsisting royalty deed, and that Lucinda had the right, authority, and title to make said royalty deed, and directed the Eureka Pipe-Line Company to deliver and place to the credit of Vina Anderson, administratrix of the estate of J. R. Anderson, deceased, one-eighth of all the oil and gas produced and saved from said tract, except such oil as was theretofore produced, and sold therefrom, and that plaintiffs were not entitled to the relief prayed for in their bill, and refused to grant relief, but let the bill stand, and gave defendants judgment for their costs, and awarded them execution therefor. The defendant Vina Anderson, widow of J. R. Anderson, and as his administratrix, appealed, assigning as error:

1. In referring the cause to a commissioner to ascertain and report what amount of oil had been extracted from said land, etc. Whatever was the effect of the will of W. H. Anderson,—whether it vested in Lucinda J. Anderson the title to said land in fee, or only a life estate,—she was entitled to the whole of the royalties under the lease executed in the lifetime of the testator by virtue of the will, and was competent to sell and convey her interest, and she or her assignee or vendee was entitled to the same. "The tenant of an estate for life, unless re-

ied by covenant or agreement, has a to the full enjoyment and use of the and all its profits during his estate in, including mines of oil or gas open his life estate begins, or lawfully d and worked during the existence of estate." Koen v. Bartlett, 41 W. Va. 3 S. E. 664, 31 L. R. A. 128 (Syl., point The devisee under the will, or her grantieing entitled to the whole of the royalwas not required to account for same, ere should not have been an order of ence for that purpose. The plaintiffs no interest therein.

That the court erred in decreeing that nda only took a life estate in said tract id, and that she could not alienate said or any part of it or interest therein, id her said life estate, even though such ition be necessary for her support and enance. "The rule which controls all s in the interpretation of wills is that ntention of the testator, to be gathered the entire will, must govern." Boyd v. an, 36 Ill. 355; Houser v. Ruffner, 18 a. 244; Pue v. Pue, 1 Md. Ch. 382; James nden, 14 Ohio St. 251; Smith v. Bell, 6 38, 8 L. Ed. 322. W. H. Anderson was up in the seventies," and his wife a little ger, but rapidly approaching old age, she would no longer be able to battle the world, and having no property in own right to rely on, while they to- r had managed to get this little farm ¼ acres of rough, hillside land, of thin cut up with ravines and gutters, worth ittle if any more than $10 per acre. naturally, the first care and greatest tude on the part of the old man in makis will was to provide, as far as his property would do so, for his widow er declining years. Indeed, judging the language of the will, he had no object in view, as he made no provias to remainder, and made no residuary e; his whole purpose and intent were ovide for her. Knowing that his estate d be liable for his debts, having given s personal property to his wife, which ecord shows amounted to $60 to $75, he ged her with the payment of his debts the payment of his funeral expenses. only debt he owed, it seemed, was to on, J. R. Anderson. Being fully aware e producing capacity of the farm, no oil opment having then been made thereon, estator knew it was at least very doubtwhether his widow could pay the debt xpenses required by the will to be paid, upport herself from it. Hence he did ntend to confine her to a life estate in, but clearly intended to, and did, her the power to sell and convey any on thereof, or the whole of it, if it d be necessary for her maintenance and ort. The language of the will, in the of all the facts in the case, clearly ines this. The second or added clause in the first clause of the will, referring to the real property, giving it "to her for and during her natural life," "or my wife, Lucinda J. Anderson, may sell said farm and live on the proceeds, if necessary," beyond all question, intended, in case the use of the property did not furnish the necessary support, to fully empower her to sell and convey in fee simple the said farm in order to provide such support, and it should be so construed. Liston v. Jenkins, 2 W. Va. 62; Magers v. Edwards' Adm'r, 13 W. Va. 822; John v. Barnes, 21 W. Va. 498. "When two clauses are irreconcilably repugnant, in a deed the first, and in a will the last, prevails." 2 Minor, Inst. (4th Ed.) 1059; Blair v. Muse, 33 Va. 238, 2 S. E. 31. That the product of the soil would not furnish the necessary support is proven, and in no way questioned.

It is assigned as error that it was decreed that plaintiffs were not entitled to the relief prayed for, and giving defendants judgment for costs, and "then allowing the said bill to stand and continue the said cause." I fail to see the object in retaining the bill, as its only purpose was to set aside the deed from Lucinda Anderson to J. R. Anderson for the royalties, and to have the said royalties divided among the heirs of W. H. Anderson, deceased; plaintiffs having utterly failed to show themselves entitled to any relief whatever, or that they have any interest, except that which is contingent upon the death of Lucinda J. Anderson, leaving the tract of land undisposed of under the power given her by the will of W. H. Anderson. The decree entered on the 2d day of February, 1899, is affirmed in so far as it decrees the deed from Lucinda J. Anderson to J. R. Anderson, conveying the royalties, to be a good and valid royalty deed, and refuses to grant the relief to the plaintiffs prayed for in their bill, and entering judgment in favor of defendants for their costs; and in all other respects, the said decree is reversed and annulled, and plaintiffs' bill dismissed.

BRANNON, J. I think the power to sell and consume proceeds of the land, given by the will, passed a fee, as stated in the Wilmoth Case, 34 W. Va. 426, 12 S. E. 731.

ROOT-TEA-NA-HERB CO. v. RIGHTMIRE et al.

(Supreme Court of Appeals of West Virginia. June 12, 1900.)

EQUITY—PROCESS — APPEARANCE — FRAUDULENT CONVEYANCE—KNOWLEDGE OF GRANTEE.

1. Where a party files his petition, in the nature of an original bill in a chancery suit, praying to be made a party plaintiff, and that the defendants to the suit, being named in the petition, be made defendants thereto, and such defendants appear to said petition and demur, and demurrer is overruled, and on the record waive their right to answer or further plead thereto, it is not error to proceed upon said

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petition in the cause without process issued thereon; the waiver of right to answer or further plead being, in effect, a waiver of process.

2. Under chapter 74, Code, a bona fide purchaser for valuable consideration, who had no notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor, is protected.

3. E. V. R., a married woman living with her husband, purchased and had conveyed to her a house and lot. She borrowed from a building and loan association $500, which she used principally in paying for and improving the property, and, together with her husband, executed a deed of trust on the property to secure the loan, which was evidenced by bond, and payable in monthly installments. Shortly afterwards judgment creditors of the husband, of whose claims the said loan association had no notice at the time of the loan, instituted a suit to set aside the conveyance to E. V. R., as being in fraud of their rights, and succeeded in setting it aside as to their judgments. *Held*, the deed of trust was the prior lien, and, the court having no power to change the terms and conditions of the trust as to the maturity of the loan secured, it could only decree the sale of the property, subject to the trust debt to satisfy said judgments.

(Syllabus by the Court.)

Appeal from circuit court, Tucker county; John Homer Holt, Judge.

Bill by the Root-Tea-Na-Herb Company against Emma V. Rightmire and others. Decree for plaintiff. Defendants appeal. Reversed.

W. B. Maxwell and W. G. Conley, for appellants. J. Hop Woods and A. B. Parsons, for appellee.

McWHORTER, P. By deed dated October 5, 1894, N. E. Canfield and her husband, J. C. Canfield, conveyed to Emma V. Rightmire certain lots of land in the town of Parsons in consideration of $700, of which $380 was paid in cash, and $320 to be paid to A. Currence by said Rightmire; said Canfields retaining a lien on said property to secure the payment of said money to Currence. On the 14th day of January, 1895, said Rightmire and R. F. Rightmire, her husband, executed a deed of trust to J. C. Stoddard and A. C. Dubois, trustees, on said property, to secure to the Washington National Building & Loan Association the payment of $500 borrowed from said association, which money so borrowed was used in paying off the Currence lien, and on debts made for work and material performed and furnished in improvements on the property, except $84.85 paid to Mrs. Rightmire, and $7.50 to the local attorney of said association. At the February rules, 1896, Root-Tea-Na-Herb Company, a corporation, filed its bill in the circuit court of Tucker county, setting up a judgment for $417.32 obtained on the law side of the same court on the 27th of November, 1895, against said R. F. Rightmire; alleging that said judgment was recovered on notes of said Rightmire dated May 17, 1894, given under a purchase of goods made in October, 1893, and alleging that the purchase of the property was made from Canfield by said R. F. Rightmire, and the deed procured by him fraudulently to be made to Emma V. Rightmire, his wife, for the purpose of hindering, delaying, and defrauding his creditors, and especially the plaintiff in the collection of its said debt; that said Emma had full notice and knowledge of the said fraudulent intent and purpose on the part of her husband, and participated in the fraud; that she had no separate estate or property of any kind, and the property was paid for wholly by her said husband, except what was paid out of the money so borrowed from the said Washington Building & Loan Association; that said R. F. Rightmire was indebted to other creditors in large amounts of money, and it was his object and purpose to defraud them, as well as plaintiff, in having said deed made to his wife, said Emma V. Rightmire,—and prayed that said deed of Canfields to Emma V. Rightmire be set aside and annulled, as having been made in fraud of plaintiff's rights; that said property be sold to satisfy its said debt; that the true amount yet due the said building and loan association be ascertained, etc.; and for general and special relief. Emma V. Rightmire filed her answer, denying that her husband had paid any part of the purchase money for said property, but claiming that the property was purchased, paid for, and improved by her with the money she borrowed from the building association, and with the help of her two sons, and that she still owed said association, except what she had paid on the dues, etc., and owed the Union Manufacturing Company, a corporation, for materials for the improvements, and denied all fraud and knowledge of fraud, and averred that the amount due the Union Manufacturing Company was agreed to be paid in payments of $10 per month. At the December rules, 1896, the Union Manufacturing Company filed its bill to enforce its mechanic's lien against said property for materials furnished, claiming a balance of $261.25, and making the parties to the suit of Root-Tea-Na-Herb Company parties defendants, and exhibiting its statement and account of its said lien; alleging that it furnished the materials charged for for the improvements put upon said property; that, at the time it so furnished the materials for which it has its lien, it had no intimation that there was any such claim as that set up by the plaintiff in the other suit; and that, if the Root-Tea-Na-Herb Company should succeed in setting aside the conveyance as to its claim, the said mechanic's lien should be first paid. On the 13th of March, 1897, Samuel V. Woods, by leave of court, filed his petition praying to be made a party plaintiff in case of Root-Tea-Na-Herb Company, and making all the parties to said suit, named in the caption of his petition, parties thereto; setting up a judgment recovered in the circuit court of Barbour county on the 4th of April, 1894, against R. F. Rightmire, for $130.03, with interest from that date and costs, $3.75,

cking the said deed of October 5, n Canfields to Emma Rightmire, as t and void as to his said judgment, of the fact that said property was d and paid for by said R. F. Right- d, for the purpose of hindering, de- nd defrauding his creditors (especial- ner), he had procured the deed for perty to be made to his wife, said . Rightmire, and alleging that the d of January 14, 1895, to secure said and loan association (the said R. F. e being then insolvent) operated, by section 2, c. 74, Code, as a security e creditors of said R. F. Rightmire, perty therein conveyed was his prop- if said deed of the Canfields was hinder, delay, and defraud petition- ther creditors of said R. F. Right or existing liens, like the lien of , attached, and are so chargeable upon a judicial ascertainment and of the fact; prayed to be admitted laintiff in said cause, and made the rges and objections of fraud in re- said deed dated October 5, 1894, a is petition, and that the pleadings fs therein, in so far as applicable, read and considered on the hearing tition; that his judgment be decreed first lien upon said property, as the of R. F. Rightmire; that said deed er 5, 1894, be held to be void as to assailing the same, and charged payment of such creditors according respective rights and equities, and, to do so, that said trust debt might y paid, only, as provided for un- section 2; that the cause be referred missioner, etc., and that the parties the caption be made parties defend- process issue, etc., and for general al relief. And the defendants nam- d petition appeared and demurred petition, in which petitioner joined, rounds being assigned, the demurrer ruled, and the defendants, and each waived their right to answer or fur- d to said petition. The cause was on to be heard upon the bill taken essed as to R. F. Rightmire, the answer of E. V. Rightmire, general n thereto, etc., upon depositions of , and upon said petition; and the s of opinion, and so decreed, that from N. E. Canfield to E. V. Right- October 5, 1894, was taken in the E. V. Rightmire for the purpose of , delaying, and defrauding plaintiff tioner Woods in the collection of ts, and set the same aside, and de- at the land conveyed thereby was be sold to satisfy said debts, and re- e cause to a commissioner, to ascer- condition of the title to said proper- he liens thereon, their amounts and , and to whom owing, giving to the ot due the Washington Building & Loan Association its proper priority, just as though the said deed of October 5th had not been set aside as to plaintiff's debt, but subject to the opinion of the court to be thereafter rendered upon the question of law and fact raised in respect thereto in the allegations of said petition, and to report the annual rental value of said property, and any other pertinent matter, etc. On the 19th day of June, 1897, the Washington Building & Loan Association tendered its answer, showing amount due on its debt on 12th June, 1897, to be $428.65; that its deed of trust is the first lien on said property; that, in case the deed of October 5th should be held to be fraudulent, Woods' lien would be fourth in priority; denying the fraudulency of said deed, and insisting that, if the property should be sold, it must be sold subject to the deed of trust of respondent, on the terms set forth in the deed of trust. The suits of Root-Tea-Na-Herb Company and of Union Manufacturing Company against Rightmires and others were consolidated. The commissioner filed his report. Emma V. Rightmire excepted to the original report, and asked that the alternate report made at her instance be affirmed, allowing to her the sum of $89.10 paid by her to the building and loan association, which should be second in priority to the lien of the association, and $75 paid by her on the mechanic's lien, which should have the same priority as the original mechanic's lien. The Washington Building & Loan Association excepted to the report because it says the evidence shows clearly that there was due it on its claim $428.65 as of June 12, 1897, while the commissioner allowed a less amount. And S. V. Woods excepted because he was not given his proper priority; that the deed of October 5, 1894, to Emma V. Rightmire being set aside restored the property to R. F. Rightmire, when his judgment would take precedence over the trust deed, over the Root-Tea-Na-Herb Company's judgment, and over the mechanic's lien debt reported as to the lots, but not as against the building constructed on the lots.

The cause was finally heard on the 4th day of December, 1897. The court overruled all the exceptions to the report of the commissioner, and confirmed the report, and ascertained the first lien to be that of the Washington Building & Loan Association, for $424.71; the second lien, a balance of $199.73 due on the mechanic's lien of the Union Manufacturing Company; the third, the judgment of Root-Tea-Na-Herb Company for $495.17; and the fourth lien, the judgment of Samuel V. Woods for $158.76; with interest on each of said sums from June 12, 1897,—and decreed the sale of the property to satisfy the same, if not paid within 30 days from date of the decree.

Defendant Emma V. Rightmire appealed from said decree, assigning several errors: First, that the court erred in considering Exhibit J with the bill of Root-Tea-Na-Herb

Company, because the same was not a proper paper for consideration of the court in ascertaining the solvency or insolvency of the defendant R. F. Rightmire. This paper was simply the alleged report of the Bradstreet Commercial Agency touching the commercial standing of the said defendant R. F. Rightmire, dated Cleveland, October 16, 1893, made an exhibit with plaintiff's bill. There was no exception to the consideration of it, and I am unable to see how it could, in any event, have influenced the mind of the court prejudicially to the rights or interests of the appellant.

The second, third, and fourth assignments all refer to the petition of Samuel V. Woods: First, that it was error to permit the petition to be filed without process against the principal defendant, R. F. Rightmire; second, in not remanding the same to rules as to said defendant, as he was never represented by counsel in the case, as shown by the record, and never had a day to answer the allegations of said petition; and, third, in decreeing the debt due to petitioner, Woods, without first giving said R. F. Rightmire a time to appear, and a day to answer the allegations of the petition. The record shows that on the day the petition was filed, praying "for process against the defendants named therein, and thereupon the said defendants, by their counsel, W. B. Maxwell and Lipscomb & Lipscomb, appeared and demurred thereto, and this petitioner joined in said demurrer, and, no grounds being assigned in support thereof, the same is overruled; and thereupon the said defendants, and each of them, waived their right now to answer, or further plead to said petition," etc. This petition distinctly makes R. F. Rightmire a defendant thereto, and "the defendants named therein appeared by counsel" and demurred, and they, and each of them, waived their right to answer or further plead to said petition. The object of process is to secure the appearance of the defendants in court. When that is done by general appearance, the function of the process is accomplished; and, unless there is some ruling of the court touching the validity of the process or return of service, the same is not made or considered a part of the record. A defendant cannot voluntarily appear and demur to a petition, and waive his right to further plead or answer thereto, and then take advantage of the fact that no process issued against him.

The fifth assignment is that "the court erred in setting aside the deed of N. E. Canfield to E. V. Rightmire, dated October 5, 1894, as fraudulent and void as to the creditors assailing it." "In case of a purchase by a wife during coverture, the burden is upon her to prove distinctly that she paid for the thing purchased with funds not furnished by her husband. Evidence that she purchased amounts to nothing unless it is accompanied by clear and full proof that she paid for it with her own separate funds. In the absence of such proof, the presumption is that her husband furnished the means of payment." Rose v. Brown, 11 W. Va. 122; Herzog v. Weiler, 24 W. Va. 199; McMasters v. Edgar, 22 W. Va. 673; Stockdale v. Harris, 23 W. Va. 499; Seitz v. Mitchell, 94 U. S. 580, 24 L. Ed. 179; Hutchinson's Ex'x v. Boltz, 36 W. Va. 754, 14 S. E. 267; Brooks v. Applegate, 37 W. Va. 373, 16 S. E. 585. It does not appear that Emma V. Rightmire had any separate estate. All that she paid on account of the property was a part of what she borrowed from the building and loan association, the team of horses she got from her husband, and some little help she got from her sons, who worked in the tannery; and, in accounting for the disbursement of the money she borrowed from the loan association, in her testimony she says: "I paid to different parties,—Mr. Currence, Mr. Gibson; and I paid some money back to my husband, I owed him." How much she paid her husband, or for what she owed him,—whether for the team of horses, or money advanced by him on the property, or for other purposes,—does not appear. In her examination in chief, when asked to "state how you purchased the property in controversy, and whether or not any of the money or property of R. F. Rightmire has gone into said property," she answered: "I bought the property of N. E. Canfield, and I procured a loan from the Washington National Building & Loan Association. I kept the dues paid to said loan association, with my own money. None of R. F. Rightmire's money or property has ever gone into this property." This is her whole testimony in chief. The court did not err in setting aside said deed of October 5, 1894, from N. E. Canfield to E. V. Rightmire, as to plaintiff's and petitioner's claims.

The sixth assignment is "that the court erred in decreeing the mechanic's lien of the Union Manufacturing Company, held by assignment by Ruth M. Ryder at the date of final order, to be a lien upon the house and lot of E. V. Rightmire, because the account filed with said lien was never sworn to by any person for said corporation"; and, as to this assignment, counsel for plaintiff Root-Tea-Na-Herb Company says there is some confusion as to whether or not there has been a compliance with the statute as to verifying the account claimed to be a mechanic's lien, but thinks "the court will probably conclude that the affidavit shown was sufficient. However, there is a fatal defect in this mechanic's lien, to wit, it is not shown on the face of the lien, or in the bill of the Union Manufacturing Company, or anywhere in the cause, that the claimant of the lien ever filed an account, verified by affidavit, with Mrs. Rightmire, within 35 days after furnishing the material, as required by statute, and for that reason the lien ceased to exist. And this appellee now assigns said

error, and which is covered by the last exception of Mr. Woods. Code 1891, c. 75, § 3." As to appellant's said assignment, the Union Manufacturing Company began, November 20, 1895, furnishing material under contract made directly with E. V. Rightmire, the owner of the property, and continued until March 24, 1896, when it ceased to furnish the same. On the 18th day of May, 1896, J. H. Ryder, manager of said company, filed with the clerk of the county court of Tucker county such statement and account under his oath as is required by section 4, c. 75, Code, giving in said statement a sufficient description of the property to be charged with the lien, and the owner's name, and seems to have in all respects complied with the statute. As to the appellee's assignment, the material having been furnished to the owner under a contract made directly with the owner, is not affected by section 3, but the lien is created and completed under sections 2 and 4, and was properly filed within the time required by section 4.

Assignments 7, 8, and 9 refer to the exceptions of appellant to the commissioner's report. Appellant excepts to the commissioner's report, but points out no error in the report, except by inference, in claiming that she ought to be allowed the payments made, aggregating $89.10, on account of the loan from the building and loan association, and $75 on account of the mechanic's lien of the Union Manufacturing Company, and subrogated to the rights of such creditors. The deed was set aside only as to the debts of plaintiff and petitioner, and the payments made by her, for which she claims the right of substitution, were upon her own debts, made and created by herself in the purchase and improvement of said property, and she will have the benefit of such payments. Petitioner, Woods, insists that, R. F. Rightmire being insolvent when the property was purchased, and the property being his, the deed of trust given to secure the building and loan association operated to create a lien, as of that priority and date, for the ratable benefit of all his then existing creditors, and in support of this proposition cites Refining Co. v. Quinn, 39 W. Va. 538, 20 S. E. 576, and Kurner v. O'Neil, 39 W. Va. 515, 20 S. E. 589. These authorities cannot apply, as against the claim of the Washington National Building & Loan Association, because it stands in relation of purchaser of the property from Mrs. E. V. Rightmire, who held the legal title, and there is no allegation in any of the pleadings, nor does it otherwise appear in the record, that it had notice either of any rights of R. F. Rightmire in said property, or of the claims of either plaintiff or petitioner. Neither of their judgments had been recorded, and there is nothing in the record to show that the bona fides of said deed of trust was in any way questioned by any one. "Under our statute against fraudulent conveyances, etc. (Code 1891, c. 74), a bona fide purchaser for valuable consideration, who had no notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor, is protected." Bump, Fraud. Conv. §§ 304, 497, 499; Blackshire v. Pettit, 35 W. Va. 547, 14 S. E. 133; Goshorn's Ex'r v. Snodgrass, 17 W. Va. 717. It is claimed by the trust creditor, the building and loan association, that its trust deed is the first lien upon the property, and that in case the deed of October 5th from N. E. Canfield to Mrs. Rightmire be set aside as to the creditors of R. F. Rightmire, and the property be directed to be sold, it should be sold subject to the deed of trust. The debt secured by the deed of trust, and evidenced by bond, was not yet due, and was payable in installments in the future. The debt was contracted and the trust executed in good faith, the payments had been kept paid up according to the contract, and it was error to decree sale for the whole amount yet unpaid, and still not due. "Where the owner of real estate has executed a valid deed of trust upon the same to secure the payment of a loan (which is evidenced by note or bond) contracted to be paid in installments, which have not yet matured, when a creditor obtains a judgment against the grantor in said trust deed, and proceeds to enforce his judgment lien in equity, he can only subject the equity of redemption; and the court has no power to change the terms and conditions of the deed of trust, as to the maturity of the loan thereby secured." Wise v. Taylor, 44 W. Va. 492, 29 S. E. 1003. As to the exception of the building and loan association to the report of the commissioner, where it is claimed that the claimant proved a balance of $428.65 yet unpaid, while the commissioner allowed a less amount, the fact is that the record shows that the commissioner allowed a greater amount, viz. $434.71, while the court decreed the sum of $424.71, or $3.94 less than claimed, while the commissioner allowed $6.06 more than claimed. As the court did not directly pass upon the exception, and it is a mere matter of calculation, it is left open for the circuit court to act upon it. The first lien upon the property is the trust deed of the said building and loan association, which is not yet due and payable; the second, the mechanic's lien; the third, the judgment of petitioner, Woods (being a judgment many months prior to the judgment of plaintiff); and the fourth is plaintiff's judgment. For the reasons herein given, said decree of March 13, 1897, is affirmed, except as to that part of the decree which holds that the land embraced in the deed mentioned is liable to be sold to satisfy said debts, without qualification, but the same is so modified as to hold that the said land is liable to be sold subject to the trust deed of said building and loan association; and the decree of December 4, 1897, is reversed and set aside, and the cause remanded to the circuit court of Tucker county,

with directions to enter a decree of sale of the said property in accordance with the principles herein stated.

BAER et al. v. FORBES et al.

(Supreme Court of Appeals of West Virginia. June 12, 1900.)

WILLS—CONSTRUCTION—"HEIRS."

1. It is an ancient rule of construction that the heir is not to be disinherited without an express devise or by necessary implication; such implication importing, not natural necessity, but so strong a probability that an intention to the contrary cannot be supposed.
2. The word "heirs" is a legal term having a definite meaning, and expresses the relation of persons to a deceased ancestor, and not a living, according to the maxim, "Nemo est hæres viventis."
3. It is a rule in the interpretation of wills that the testator is presumed to use technical words in their strict technical sense, unless there is something in the context indicating that he has used them in a different sense.
4. A testator devises his real estate to his wife during her life, and adds, "At the death of my wife all the property to go to my daughter, Isabella Mathews Baer, for the benefit of her heirs." The daughter, surviving the life tenant, takes the property in fee simple under the will.

(Syllabus by the Court.)

Appeal from circuit court, Marshall county; Joseph P. Paull, Judge.

Suit by James M. Baer and others, by their next friend, against Hannibal Forbes and others. Decree for defendants, and plaintiffs appeal. Affirmed.

Riley & Ritz, for appellants. Caldwell & Caldwell and J. Howard Holt, for appellees.

McWHORTER, P. James Mathews made the following will: "Being in feeble health, but sound in mind, I do hereby bequeath to my wife, Nancy Mathews, the following described property, viz.: Lot No. 4, North Wheeling, McClure's addition, on which is one two-story brick house containing seven rooms; lot No. 5, same addition, upon which is two-story frame house; lot No. 6, same addition, upon which is two-story frame house; likewise a farm in Webster township, Marshall Co., West Va., containing two hundred and fifty acres, more or less. My wife, Nancy, to be full heir to this property during her life, and to have full control of the income arising therefrom. I likewise authorize her to sell sufficient amount of said property to pay any debts I may now owe. At the death of my wife all the property to go to my daughter, Isabella Mathews Baer, for the benefit of her heirs. I declare this to be my last will and testament,"—which was duly probated in the office of the recorder of the county of Marshall on the 20th day of September, 1871. Mathews left surviving him his wife, Nancy, and his daughter, Isabella, then the wife of John Baer, and the mother of three children. She afterwards intermarried with H. F. Sinclair, by whom she had two children. Nancy, on the 15th of June, 1874, conveyed the tract of 250 acres to said Isabella, who in September of the same year conveyed the same to Luke McDermott, who executed a deed of trust conveying the same to Henry M. Russell, trustee, to secure a large part of the purchase money to said Isabella. Said trustee sold the same under the deed of trust, which was purchased by Hannibal Forbes, and conveyed to him by said trustee. On the 2d day of March, 1874, said Nancy, in her own right and as executrix of James Mathews and Isabella, conveyed the said Wheeling property, lots 4, 5, and 6, to Christian Gleasner, in consideration of $4,300. The children of Isabella, James Mathews Baer, Anna M. Baer, and Amelia Baer Jay, and Joseph Henry Sinclair and Frank Sinclair, infants, by their next friend, John R. Loomis, filed their bill in the circuit court of Marshall county against Hannibal Forbes, Luke McDermott, Christian Gleasner, and Isabella Sinclair, claiming the sole right to said property under the will of their grandfather James Mathews; that said Isabella was simply a trustee under said will for the benefit of the plaintiffs; that by the deeds she executed she conveyed no interest whatever in the property to said McDermott and Gleasner, and that by said pretended deeds and conveyances, and delivering possession and control of said property to defendants Forbes, McDermott, and Gleasner, said Isabella violated and abused her trust; and that since the death of Nancy Mathews she has still allowed said defendants to keep and hold the possession of said property, and rents, issues, and profits thereof, and she has not in any manner accounted to plaintiffs, or any of them, for such rents, issues, and profits, and that she should be required to account for the same since the death of her mother, Nancy; and that the pretended deeds executed by her to said defendants should be set aside and held for naught; and that said trustee Isabella should be removed or required to properly execute her trust under the provisions of the said will; and that, under the facts and circumstances set out in the bill, said will should be interpreted and construed defining the rights and interests of plaintiffs, and each of them, in and to the property devised; and prayed for relief according to the allegations of the bill, and for general relief. On the 12th of March, 1898, the defendants Forbes and McDermott filed their demurrer, and defendant Gleasner filed his demurrer and answer, in which demurrers plaintiffs joined, and the same were argued, and the court took time to consider of said demurrers; and on the 14th day of June, 1898, the court, having maturely considered the same, sustained said demurrers, and, the plaintiffs not desiring to further amend their bill, the same was dismissed, and judgment for defendants' costs. The plaintiffs appeal, and say the court erred in holding that plaintiffs have no interest in the property of

Mathews under his said will, and their uld not have been dismissed.

question is as to the intention of the r in the use of the words, "At the of my wife all the property to go to ughter, Isabella Mathews Baer, for nefit of her heirs." It is earnestly led by appellants that Isabella, their , took nothing under the will for her- ut that she is simply a trustee, hold- ely and only for their benefit. It must ne in mind that Isabella was the only he sole heir at law, of her father. If nts' contention is correct, then the ild, the sole heir at law, is disinherited will of her father. "It is an ancient construction that the heir is not to be rited without an express devise or by ry implication; such implication im- , not natural necessity, but so strong ability that an intention to the con- cannot be supposed." Beach, Wills, Jarm. Wills, § 326; 29 Am. & Eng. aw, 352; Bender v. Dietrick, 7 Watts 7. In Graham v. Graham, 28 W. Va. s held (Syl., points 1, 2): "The heir t be disinherited unless it be done by terms of the will, or by necessary tion;" and, "the heir being favored there should be no strained construc- work a disherison when the words of l are ambiguous."

llants insist that no estate passed by nguage of the will to the daughter, , but that she was named as a mere to hold the legal title to the property benefit of her children. What was ention of the testator in the disposition property is the first matter to ascer- d then, as stated in Ewing v. Winters, Va. 23, 11 S. E. 718, "we are to inquire r that intention can be effectuated t violating or infringing upon any ttled and inexorable rule of construc- retofore recognized and established." ffs in their bill allege "that at the id will was executed, and long before, til the time of his death, the said John he first husband of the defendant Is- M. Sinclair, drank to excess, and was s and careless in the management of ncial affairs, and in fact would spend money he was able to produce from ult of his labors or from others; and e said James Mathews, the testator, ware and knew, at the time of the ex- of said will, of the habits of said aer, and his disposition to spend mon- knew that he had great control and ee over his wife, the defendant Isa- . Baer, now Sinclair; and the testator ew, at the time of the making and ex- of said will, that if he devise his y in fee to his daughter, or dispose a manner in which she, and through said John Baer, could get control of ne, that he would have expended the of his estate in a very short time." If these facts were all shown to be true, the tendency would be not to induce the testator to entirely disinherit his only child, who had been so unfortunate in her marriage, but would naturally make him more solicitous for her welfare in making disposition of his property. If the testator's purpose had been to guard against his reckless, drunken son-in-law, instead of placing the property in the hands of his daughter as trustee without bond or security, where the husband could have managed it without let or hindrance, if he had the influence over his wife as claimed, he would have placed it in the hands of some reliable person, who could not be influenced by him.

But to what extent can we consider these facts and circumstances, if they exist? In Barber v. Railroad Co., 166 U. S. 83, 17 Sup. Ct. 488, 41 L. Ed. 925, at page 109, 166 U. S., page 495, 17 Sup. Ct., and page 936, 41 L. Ed., Justice Gray in the opinion of the court says: "Evidence of extrinsic circumstances, such as the testator's relation to persons, or the amount and condition of his estate, may be admitted to explain ambiguities of description in the will, but never to control the construction or extent of devises therein contained." Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23; Smith v. Bell, 6 Pet. 68, 8 L. Ed. 322. It is contended by appellants that plaintiffs took under the will at the date of the death of Nancy Mathews, the life tenant; "that there are three periods at which they might take, namely, at the death of the testator, at the death of the life tenant, the wife, or at the death of the daughter; but we think the language of the will controls, and that is, 'At the death of my wife all the property to go,' etc. Therefore the heirs of the daughter, Isabella M. Baer, are her children living at the time of the death of the life tenant, Nancy Mathews;" and appellants cite authorities on the construction of the word "heirs," and the application of the word in speaking of the heirs of persons living, to sustain the right of plaintiffs to maintain their suit. They first invoke the case of Reid v. Stuart, 13 W. Va. 338. In that case, at page 348, Judge Green in the court's opinion says: "If the devise is a present one, to take effect immediately, and it is made to the heirs of a person known to the testator to be living, it is reasonable to construe it as intended as a devise to the children or heirs apparent; for if the testator did not mean, by the word 'heirs,' heirs apparent, then his devise could not possibly take effect immediately, and yet this is the expressed purpose of the testator. But this reasoning has no application when the devise to the heirs is not present or immediate, but is the limitation of a future estate, after some preceding estate. There is no necessity to construe the word 'heirs' as meaning heirs apparent in such a case to effect the expressed purposes of the testator. The strict legal signification may in such cases

be attached to the word 'heirs,' and yet the purposes expressed by the testator be fully carried out; for the estate devised to the heirs is not intended to vest, or come into possession, till the termination of some present estate created by the same will, and, giving to the word 'heirs' its usual legal signification, the testator's will is not, as in the other case, necessarily defeated; for, though the party whose heirs are given such future estate be living, yet he may die before the particular estate ends, and must die at some time, and his heirs will then be in existence to receive the future estate intended by the will to be devised to them, to take effect at a future time." Also the case of Stuart v. Stuart, 18 W. Va. 675, is cited, also written by Judge Green. Syl., point 2, is as follows: "The rule construing the word 'heirs' used in a will in respect to living persons as merely designatio personarum is inapplicable to a devise of a future estate; such construction not being necessary in order to give effect to any clearly-expressed intention of the testator. In such case the word 'heirs' has its strict legal meaning, and means the parties who would on the death of the propositus inherit his real estate, and they take the real estate devised in the same proportions as such persons would as heirs."

This was not in any case a devise of an immediate estate in possession for the benefit of the heirs of Isabella Baer, but a devise of a future estate to her heirs, limited upon a preceding estate for life in Nancy Mathews. Therefore the word "heirs" must have its technical meaning, as held in Campbell v. Rawdon, 18 N. Y. 412, cited by appellants: "The rule construing the word 'heirs' used in a will in respect to a living person as merely designatio personarum is inapplicable to the devise of a future estate. In such case the word has its strict legal meaning, and carries the inheritance, unless a different intention appears clearly from the context." It is further said in Stuart v. Stuart, supra: "The word 'heirs' is a word of well-known legal signification, and when used in a will it ought to be given this strict legal meaning, unless from the context it clearly appears that it was used by the testator in a different sense. An instance where the courts have given to the word 'heirs' another meaning than its strict technical and well-known meaning is where a testator by his will makes a present and immediate devise to the heirs of a person known to be living, or where the devise is to heirs said in the will to be living. In such case it is apparent that the word 'heirs' must mean heirs apparent or children, and that without violating the clear intention of the testator it cannot be construed as used in its ordinary legal signification;" and citing James v. Richardson, 1 Vent. 334, Jones, 99, 8 Keb. 832; Burchett v. Durdant, 2 Vent. 311; Goodright v. White, W. Bl. 1010; Campbell v. Rawdon, 18 N. Y. 416; Conklin v. Conklin, 3 Sandf. Ch. 64. In Cushman v. Horton, 59 N. Y. 149 (Syl., point 1): "When the word 'heirs' is used in a will to point out legatees, the primary legal meaning of the word will be given it, unless the context shows the testator used it in a different sense; the question will not be determined on mere conjecture;" and in that case in the opinion it is said: "The word 'heirs' is a legal term, having a definite meaning, and expresses the relation of persons to a deceased ancestor, and not a living, according to the maxim, 'Nemo est hæres viventis.' Its primary import relates to the succession of real property,"—clearly recognizing the distinction between a devise to a living person's heirs, which is to take effect immediately on the death of the testator, and a devise of a future interest after a previous life estate; and Reid v. Stuart, above cited, holds that in the latter case the word "heirs" does not mean "children," but takes its primary technical meaning. 1 Greenl. Cruise, Real Prop. tit. 16, "Remainder," c. 4, §§ 19, 20. In Wallace v. Minor, 86 Va. 550 (Syl., point 2) 10 S. E. 423: "The word 'heir' has a well-known technical meaning. Technical words are prima facie to be taken in their legal sense, unless from the contents of the will it plainly appears that testator intended to use them in a different sense." In Allen v. Henderson, 49 Pa. St. 333, a testator gave to his "daughter E., in trust for her heirs until they are twenty-one years old, until which time she is to have the income arising therefrom for her support, and the support and education of her heirs, and, should she die leaving no heirs of her body, then said properties to revert to her brothers and their heirs." This was a devise to take effect in præsenti, and not in futuro. Yet the court says in the opinion: "And, notwithstanding the trust that is expressed, can it be doubted that an interest was intended to vest in her? The trust was an impossible one. She could not be trustee for her heirs. 'Nam nemo est hæres viventis.'" The court held "that the trust failed, and the devisee took an estate in fee tail, which by the act of April 27, 1855, became enlarged into a fee simple." As very pertinently suggested by appellees' counsel, suppose the testator had left out the name of Isabella Baer entirely, and made the devise to some one else, "for the benefit of Isabella's heirs," the trust must have failed for want of a cestui que trust. There is nothing in the other parts of the will that will throw light upon the question. By inserting the words "and her" between the words "her" and "heirs," so that it would read, "for the benefit of her and her heirs," the evident intention of the testator would be made clear, if, indeed, it is not sufficiently plain as it stands in the will. The decree of the circuit court sustaining the demurrer is affirmed.

WILSON v. BRADEN et al.

(Supreme Court of Appeals of West Virginia. June 12, 1900.)

FOREIGN JUDGMENT — EFFECT — REALTY — TRANSFER OF TITLE — EJECTMENT — EVIDENCE—ADVERSE POSSESSION—VERDICT.

1. A judgment or decree of a court of another state has no effect to pass title to or affect land in this state, nor can a sale or conveyance under it by a trustee or commissioner appointed by it do so.

2. A trustee appointed or substituted by a court of another state has no power as such to convey land in this state.

3. When a conveyance of land made by a special commissioner under a sale under a decree of a court is offered in evidence to pass title, it must be accompanied by either the whole record of the cause, or enough to show that the parties holding title affected by the deed, and also the land itself, were before the court, and that it was decreed to be sold, and was sold, and the sale confirmed by the court, and that authority was given by the decree to the commissioner to make the conveyance. The recital in the deed of these important facts is no evidence of them, against strangers to the deed, contesting its effect.

4. An outstanding title in a third person, in order to defeat the plaintiff's recovery in ejectment, must be a present, subsisting, legal title, not one barred by the statute of limitations, abandoned or otherwise lost. It must be one which the party owning it could now assert. The burden is on the defendant to show the present validity of such title.

5. One who is in actual possession of land, and sued in ejectment, cannot defeat recovery by showing that before the action he had conveyed his title to another.

6. Where there is an interlock between two tracts of land claimed under different titles, the possession under the junior claim outside the interlock does not give that claim possession of the interlock; but, if the junior claimant is in actual possession within the interlock, he has possession of the whole interlock, and the statute of limitations runs in his favor against the older title, if the claimant under the older title, though in actual possession of his tract, is not in actual possession inside of the interlock. If the claimant under the older title is in actual possession within the interlock, that possession extends to the whole interlock, except where the junior claimant is also in actual possession within the interlock, and then the possession of the junior claimant is limited to his inclosure, and the possession of the owner of the older title covers the residue of the interlock. The actual possession under the older title anywhere within its bounds gives actual possession of the whole tract, including the interlock, unless the adverse claimant is in actual possession of the interlock.

7. In ejectment, when a part of the land claimed in the declaration is found for the plaintiff, and a part for the defendant, the verdict must specify and describe the parts found for each by some method of description reasonably definite, such as is required of a declaration in that action.

(Syllabus by the Court.)

Error to circuit court, Ritchie county; R. H. Freer, Judge.

Action by Henry S. Wilson against George W. Braden and John Deem. Judgment for defendants, and plaintiff brings error. Reversed.

Ayers & Ireland and W. N. Miller, for plaintiff in error. Freer, Robinson & Pierpoint and P. W. Morris, for defendants in error.

BRANNON, J. Henry S. Wilson brought an action of ejectment in Ritchie county circuit court against George W. Braden and John Deem, resulting in a judgment for defendants. Wilson claimed under a patent to Tilton, dated August 4, 1785. Braden and Deem defended under a patent to Dorsey Pentecost, Samuel Purviance, and Robert Purviance, dated October 15, 1784, and two patents, dated September 1, 1860, to Purviance and Williams as trustees for the estates of Robert and Samuel Purviance, and under possession. In order to connect with the older patent, of 1784, Braden gave in evidence a certain record of proceedings in the circuit court of Baltimore, Md. It showed a petition appearing to be an application in 1787 by Samuel Purviance for discharge as an insolvent upon surrender of his estate. It is purely ex parte, without process to any one. This land is not mentioned in the list of assets. This part of the record has no relevancy to the case, and is so indefinite that I should not have mentioned it as pertinent to the case. It appears from other parts of that record that James M. Camp, as special commissioner, acting under a decree of the circuit court of Augusta county, Va., in a case therein in 1838, directing certain land of Samuel and Robert Purviance to be sold, conveyed the land to Donaldson as trustee for creditors of said Purviances. How Donaldson became trustee does not appear. He resigned in the Baltimore court, and Williams was made trustee in his place, and he conveyed land to parties from whom the defendants purchased. The deed from Williams gives as his only authority for acting his appointment by the Baltimore court. This record does not suggest how the West Virginia land got into the hands of Donaldson, trustee. It does not appear that it was at all a subject-matter before the court in a suit, or in any wise calling for its action, and the court never assumed to pass any decree for its sale, or directing the trustee to convey. It only substituted Williams as trustee in place of Donaldson. The proceeding was wholly ex parte. No parties appear from the record. How, then, could it operate upon any parties? But, even if the court had the land and parties before it, that Maryland court could not itself sell, or by a commissioner, trustee, or other agent sell, land in Virginia, as no state can give its laws force outside of its territory; nor can the decrees of its courts operate upon land outside of it. Pennoyer v. Neff, 95 U. S. 714, 722, 24 L. Ed. 565. As Judge Moncure said in Dickinson v. Hoomes' Adm'r, 8 Grat. 410: "It is undoubtedly true that real estate or immovable property is exclusively subject to the laws of the government in whose territory it is situated, and no writ of sequestration or execution, or any order, judgment, or

decree of a foreign court, can be enforced against it." "In respect to immovable property, every attempt of a foreign tribunal to found a jurisdiction over it must be nugatory, and its decree must be forever incapable of execution in rem." Story, Confl. Laws, § 551; 1 Rob. Prac. 336. It is true that, if a court of one state or foreign country has a person before it subject to its jurisdiction, it may, by action direct upon him, affect property in another state or country by operating on the person, by compelling him to make a personal conveyance of the land there, or do any act which of itself, without regard to the decree, would affect the land according to the lex rei sitæ; but the cases so holding admit that the decree, in and of itself, does not affect the foreign property, but affects it only indirectly, by operating in personam to compel a transfer according to the decree, and that the courts of the state where the land is located may disregard the decree. If the conveyance is made pursuant to the decree, it is that, not the decree, which passes title. Massie v. Watts, 6 Cranch, 160, 3 L. Ed. 181; Farley v. Shippen, Wythe, 135; Guerrant v. Fowler, 1 Hen. & M. 5; Dickenson v. Hoomes' Adm'r, 8 Grat. 410. If even this Maryland court had decreed a sale, or directed a commissioner to execute a deed (but it did not), it would pass no title. "A Virginia court has no jurisdiction over land in another state, and cannot by its order of sale or decree, or by deed of commissioners, merely as such, pass the title to such land. McLawrin v. Salmons, 11 B. Mon. 96. The court of one state has no power over land in another, except through the person of its owner. It cannot act for him in making a conveyance through a mere commissioner, but it may compel the owner himself to convey the land, and such conveyance will be as effectual in another state as if made at his own mere will." 1 Rob. Prac. 342. "A court of chancery, acting in personam, may well decree the conveyance of land in another state, and may enforce the decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court." Watkins v. Holman, 16 Pet. 26, 10 L. Ed. 873. Now, the court allowed this record to go in evidence to the jury for general purposes in the case. The jury might well have taken it as proving that defendants had the title conferred by the older grant, of 1784. That it was so used is shown by defendants' instruction No. 4: "If the jury believe from the evidence that defendant George Braden, or those through whom he claims, had or have the senior patent to the land in controversy, and the better and stronger title, and neither plaintiff nor defendant had any actual, open, notorious, visible, hostile, exclusive possession to the other, then the jury must find for the defendant George Braden." Thus Braden relied upon superior title under that senior patent, without regard to possession, and used that Baltimore record to connect himself with it, when it did not do so. We can imagine nothing more hurtful to the plaintiff's cause. Its use was not restricted to show color of title. It was not admissible for that purpose, even, nor necessary, as the defendant could use his mere deed and the junior patents for that purpose. Again, in this record is a deed made by Camp, as commissioner, under a decree of a Virginia court, conveying land to Donaldson as trustee. If Donaldson had any title, he got it by this deed, but not a letter of authority in Camp to make this deed is shown. The decree giving Camp power to convey does not appear. Not an item of the Virginia record was produced. This was essential to give any effect whatever to that deed. You must give in evidence, as a general rule, in such case, the whole record, but surely enough to show that the party holding the title to the land and the land were before the court; that that land was decreed to be sold, and was sold, and the sale confirmed, and authority given by decree to the commissioner to convey. That commissioner does not own the land. He has a mere naked authority, uncoupled with any personal interest. His authority to make the very deed for the very land he conveys must appear by the record. This has been so often held. Waggoner v. Wolf, 28 W. Va. 820. The recital in that deed of Camp's authority under decree is no evidence against third parties claiming adversely to it, and denying his authority to convey. Walton v. Hale, 9 Grat. 198. Yet this deed went in evidence for Braden to show title, to connect Braden with the old patent, and was used by the jury as such in connection with said instruction. That deed did not show title. It did not connect Braden with the patent of 1784. Braden's instruction No. 4, quoted above, was improperly given, because not pertinent to the case; no connection being shown by him with the senior patent, to enable him to stand on senior title.

Braden's instruction No. 5 was improper, as given in this case, because it puts as an element in its theory that the Purviances entered into actual possession under the patent of 1784, when no evidence showed that fact. It is also wrong in stating that Braden's possession would be referred back to that patent, when no evidence connected him with it.

Braden's instruction No. 7 is bad. It says that, even if plaintiff had possession until 1879 or 1883, yet, if thereafter Braden had adverse possession, the jury must find for Braden. Now, plaintiff claimed that under the evidence such possession as Braden had was obtained from Bradley, a tenant under the plaintiff's title, and that this fact made Braden a tenant of the plaintiff, so that he could not hold adversely to him. If such

he fact, Braden's possession would be plaintiff's possession, not adverse to the ntiff, and could not ripen into title. Al- v. Bartlett, 20 W. Va. 46; Emerick v. ener, 9 Grat. 224. If, as assumed in the ruction, plaintiff had possession for the utory period, that gave him title by pos- ion, though he had not superior title; even if the land was thereafter unoccu- , the plaintiff's title having thus become l by time, Braden could not devest it out he plaintiff, except by adverse posses- for 10 years. Industrial Co. v. Schultz, V. Va. 483, 27 S. E. 255. This instruction the jury that, if Braden had actual ad- e possession, the verdict must be for den; ignoring the question whether Bra- obtained possession from a tenant under plaintiff's title, thus discharging the jury n passing on that question. This is er- as often decided. Woodell v. Improve- t Co., 38 W. Va. 28, 17 S. E. 386. It is leading for a court, among a confusing ber of instructions, to give one taking certain facts; telling the jury that, if exist, the verdict must inevitably be a party, when there is evidence present- other questions of fact, which, if exist- militate against the facts stated, and y them the legal effect given by the in- ction. Braden says, "I obtained adverse session, and held long enough to give me ." The instruction then says, "If this o, the jury must find for Braden," when e stood Wilson, saying: "I grant that, stood alone; but Braden got his pos- ion from my tenant, and, though he calls possession adverse, it is not. He is my nt still." But his question is not put the jury in this important instruction. er instructions may put it, but each in- ction that turns only on one question, ed a "binding instruction," should put theories touching it, else it may mis- the jury. The question of how the pos- ion was derived was a material one in den's case, because upon it turned the stion whether such possession was ad- e or not.

eem's instruction No. 8 is bad. It says in ejectment, involving title to land, plaintiff must recover on the strength is own title, not on the weakness of his ersary's title, and that the "defendant defeat plaintiff by even showing an out- ding title in another, although the de- lant may have no title in himself." does not state the proposition as the rts uniformly state it. To enable a de- lant to defeat a plaintiff showing better than he shows, a defendant should not at the plaintiff merely because at some some one else had a superior title, when defendant has no connection with it, un- the outstanding title is "a present, sub- ng, operative, legal title, on which the er could recover if asserting it in an ac- . It is not for the plaintiff to disprove its validity." Industrial Co. v. Schultz, 43 W. Va. 470, 27 S. E. 255. There this subject is discussed. I add to the authorities there given Jackson v. Hudson, 3 Johns. 375, 3 Am. Dec. 500; McDonald v. Schneider, 27 Mo. 405; Peck v. Carmichael, 9 Yerg. 325. The last case holds that "an outstanding title, to bar recovery in ejectment, must be a present, subsisting, legal title, not one abandoned or barred by the act of limitations." This instruction omitted an important element of a legal proposition as stated by the courts. It failed to call on the jury to say whether the patent of 1784 was yet a live, good, superior title. Was it forfeited or sold for taxes, so that the plaintiff got it? Was it lost by possession under plaintiff's title,—the patent of 1785? Some evidence of plaintiff would tend to show this, yet the instruction does not call attention to this important matter under this legal proposition. It does not state the law correctly. Under it any title once good, but now lost, might be used. If a defendant comes into court, and for plea says that the plaintiff ought not to have and maintain his action because another title in some stranger is better than the plaintiff's title, should he not, in justice, be required to show it? He holds the affirmative on that point, and must he not show, not merely that there once was, but also that there yet is, such superior title? This instruction was plainly material and hurtful to the plaintiff. If this instruction was intended to apply to show title under Mrs. Deem's claim, it is improper in the case, first, because it was later in birth and inferior to the plaintiff's title. Deem showed no connection with the patent of 1784. He introduced a deed from Camp, as commissioner, to Webb, made under a decree of the circuit court of Augusta county, but introduced no record to authorize that deed, as shown above as to the deed from Camp introduced by Braden. It made no connection between Deem and the old patent. Deem's right, being thus junior to that of the plaintiff, must be shown to have become good by possession, and that would not require such instruction. Such title would not be an outstanding title in a third person, as that was the title under which Deem justified. In this view, the instruction was irrelevant.

Deem introduced a deed from Dilworth to himself, and followed this up with other documents to show that Deem conveyed the land to Clammer, and Clammer conveyed to Hester Deem, wife of defendant John Deem, and that she conveyed to Mary C. Braden. The effort was to show that the title was outstanding in Mary C. Braden, or that John Deem had no longer any title at the commencement of the action. The deed from Hester A. Deem is void, because the husband did not join in it, and this left the title in her; and presumably she and her husband were living on the land,—he, the head of the family, in possession. But I do not men-

tion this as very material. If Deem expected to defend because his title had, before suit, been passed away, he could not do so, if in possession at the beginning of the suit; for the Code allows the person in possession to be sued. He represents his own title, or that of another under whom he claims, for the purposes of the suit. He is occupant detaining against the supposed rightful title, and, as between him and its claimant, he may be sued, and, if in the wrong, ejected. In view of this defense by Deem, Wilson asked the court (which refused) to instruct that Deem having employed counsel and defended the action, and given evidence that he was occupying and farming part of the land in controversy, it was no defense for him to show that before the suit he had conveyed the land away. It was error to refuse that instruction, for reasons above stated. Also, if Deem did not want to defend, why did he not enter a disclaimer? Why not surrender? As stated by Judge Green in Beckwith v. Thompson, 18 W. Va. 135, if he claimed no interest a verdict against him would take nothing from him but costs. He did not disclaim, but made full defense, and, being in possession, he could not defend on the score that he had parted with title before suit.

Deem's instruction No. 9, telling the jury that possession under the deed from Dilworth to Deem for the statute period would call for a verdict for Deem, is bad, in not saying that such possession under the Dilworth deed must be within the interlock, if Wilson was in possession of any part of his land, because, that being the older title shown, possession anywhere under it gave possession over the interlock, unless Deem had possession inside that interlock. Deem's instruction No. 10 is open to the same objection. These instructions do not have regard to that land in controversy,—the interlock.

Deem's instruction 12 is bad. It says that if Dilworth, who conveyed to Deem the land claimed by Deem, by deed dated November 1, 1872, had possession for more than 10 years before the time when the vendors of Wilson commenced operations of mining on their land, and that if Deem and his vendees had possession after November 1, 1872, then no act of vendors of Wilson could put plaintiff in possession of the land. Very indefinite. What does it mean? It is error to give an instruction that may not readily be understood by the jury. It bewilders, and may mislead. Dilworth had actual possession, say. The subsequent operations of Wilson's vendors, it is said, could not put Wilson's vendors in possession of the land in controversy. That depends. It was a question whether the Dilworth deed covered any of the land of the plaintiff. If it did not, the instruction would not be proper. There would be then no clash, and the possession of Dilworth and Wilson's vendors would have no bearing on each other. This instruction assumes or predicates its law upon the theory that the land of Wilson and that of Dilworth interlock. An instruction must not assume a controverted fact, and give a legal result therefrom. If the tracts do interlock, the instruction puts bad law. If Dilworth had first actual possession outside of the interlock, the Wilson title appearing older, Dilworth's possession would not include the interlock; but, if Dilworth had actual possession inside the interlock, then possession by Wilson's vendors, taken afterwards, or any time, not inside the interlock, would not displace Dilworth's possession in it. The instruction should have stated that if Dilworth's land covered any part of the land in controversy, and if his possession was inside the interlock, then the operations of Wilson's vendors would not change the right of Dilworth, or put plaintiff's vendors in possession of the land in controversy. If Dilworth did not have actual possession inside the interlock, then, when the owners of the Wilson title took possession, it gave them actual possession of that interlock, their title being senior. If the junior claimant has actual possession within an interlock, he has possession of the whole interlock, unless the senior claimant has also actual possession within the interlock; and in such case the possession of the junior claimant is limited to his inclosure, while the residue of the interlock is in the possession of the senior claimant. Garrett v. Ramsey, 26 W. Va. 345. This instruction may also be said to assume that Dilworth's possession was within the interlock,—a vital point,—and, if so, that is the objection to it; and, if it does not so assume, then it simply says that if Dilworth had possession, no matter whether inside or outside the interlock, the subsequent possession under the Wilson title would have no effect in limiting Dilworth's possession, but that, wherever it was, it would give title to the land in controversy, whereas such possession outside the interlock would not in any time give title.

Deem's instruction No. 13 touching the effect of the conveyance by Deem of the land before suit, is bad, for reasons above given. These conveyances, being younger, could show no outstanding, superior title. It was error to admit those deeds. They had nothing to do with the case.

I see no objection to the other instructions.

Another point of error made by Wilson's counsel is this: Wilson sued for a boundary of 2,500 acres. Braden claimed only 50 acres; Deem, 236 acres. The verdict was general for the defendants; not specifying the parts which the defendants claimed, nor saving to the plaintiff any part of the 2,500 acres. Wilson says there was no pretense, even, that he did not own the balance of the boundary, and that his claim was good to such balance, and that in any view the verdict should have specified the particular land the defendants were entitled to, and what

s entitled to. Is this error? We think and that because of this defect the ent should have been arrested, and a trial granted. No proper judgment be given on such a verdict. Wilson for 2,500 acres, and the defendants not ng all of it, but parts, they should have med to all the land in the declaration bed, except those parts. That would reduced the controversy to those parts. did not do this, but pleaded not guilty all. This plea admits that the party g it is in possession of all the land or. 7 Enc. Pl. & Prac. 341, 342, citing . Strode, 13 Pa. St. 433; Hill v. Hill, St. 521; James v. Brooke, 6 Heisk. Gibson v. Bank, 69 Me. 579. Beckwith mpson, 18 W. Va. 103, holds that this lspenses with proof that defendant was session of the land claimed, and calls plaintiff only to prove his right to pos-n,—his title. Thus, it holds logically he plea admits defendant's possession. by law, this general plea of not guilty, t disclaimer as to any part of the land, ithout being not guilty as to a particu-rt, admits the defendant to be in pos-n of all,—imports a claim to all; and, if rdict and judgment be for the defend-hey import that defendant has better o all the land, and would be res judi-gainst the plaintiff as to all the land, as I think he would be entitled to do, ld show that in fact the controversy ly as to a particular part. But years ards the defendant, from perishment dence, may be unable to show this, and clear right to demand that the record so speak and stand as a perpetual rial of what was actually tried and This seems very plain. It may be e practice is not uniform in this matter erent sections of the state. In some it is not observed. There ought to be l rule. Low v. Settle, 22 W. Va. 387, as this position. It held a verdict fa-lefective because it found that the de-t was entitled to hold a specified part land described in the declaration, and e had no title to any other land de-l in it, but did not find that the plain-as entitled to recover the residue, and re failed to find whether the defend-as entitled to hold that residue or not. f that verdict was bad, what shall be this one? That found for the defend-specific part, and that he had no claim balance, whereas in this case the ver-ecified no parts which the defendants ntitled to hold, but implied that they ntitled to all the land, and the plaintiff e. The verdict in this case is much ulnerable than the one in that case. , our Code brands this verdict. Chap-§ 23, says that, if the plaintiffs es-their right, "the verdict shall be for laintiffs, or such of them as appear to ight to the possession of the premises, or any part thereof." This obviously means that, if a part only is recovered, that part shall be specified. That is the case here, as was really intended by the jury. Section 25 says that, "when the right of the plaintiff is proved to all the premises claimed, the verdict shall be for the premises generally, as specified in the declaration; but if it be proved to only a part or share of the premises, the verdict shall specify such part particularly, as the same is proved, and with the same certainty of description as is required in the declaration." These provisions mean that, when the plaintiff recovers all he claims, the verdict may be general; and, if the defendants hold all, it is general, but when the defendants hold a part the verdict should specify what parts they hold, and what part the plaintiff holds. If the defendants have separate parts, each should be specified. In Reynolds v. Cook, 83 Va. 817, 3 S. E. 710, the declaration claimed an entire tract, and the defendant claimed only a right to quarry limestone from it, and the verdict was general for the defendant; and the court reversed the judgment, saying that the verdict should have been for the plaintiff, except as to the right to quarry and remove limestone. It cited a section of the statute, the same as section 18 in chapter 90 of our Code: "The plaintiff may recover any specific or any undivided part or share of the premises, though less than he claimed in the declaration." The court said (and the same is here applicable) that "the verdict and judgment would conclude the plaintiff and his privies as to the title and right of possession established in such action as to the whole tract; for the statute in express terms enacts that 'any such judgment in an action of ejectment * * * shall be conclusive as to the title or right of possession established in such action upon the party against whom it is rendered,' "—the same, for our purpose, as section 35, c. 90, Code 1891. Callis v. Kemp, 11 Grat. 78, and Slocum v. Compton, 93 Va. 374, 25 S. E. 3, say that, where less land is recovered than demanded, the part should be described; and this is the same as to say that, when the evidence shows that plaintiff and defendant are each entitled to hold part of the land, each part should be described in the verdict. For this strong reason the motion to set aside the verdict should not have been overruled. Therefore we reverse the judgment, set aside the verdict, and grant the plaintiff a new trial.

MONTGOMERY v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 14, 1900.)

ASSAULT—TRESPASS—ATTACK BY OWNER—INDICTMENT—INCLUDED OFFENSE.

1. Where defendant committed a technical trespass on prosecutor's land, such fact did not authorize prosecutor to assault defendant with a deadly weapon to compel him to leave, and

hence defendant was entitled to defend such assault without himself being guilty of assault.

2. Where the evidence, in a prosecution for malicious assault with intent to maim, disfigure, disable, or kill, failed to prove a malicious cutting or wounding with intent to maim as charged in the indictment, the defendant was not entitled to acquittal by reason of such fact, since under Code, § 4040, he might have been convicted of a simple assault.

Error to circuit court, Rockbridge county.

One Montgomery was convicted of a felonious assault, and brings error. Reversed.

Hugh A. White, for plaintiff in error. The Attorney General, for the Commonwealth.

HARRISON, J. The prisoner was indicted in the county court of Rockbridge county for felonious assault with intent to maim, disfigure, disable, and kill William E. Davidson. He was found guilty, and sentenced, in accordance with the verdict, to confinement in the penitentiary for a term of four years.

Upon petition for a writ of error and supersedeas, the circuit court of Rockbridge having refused to grant a new trial, the case is now before this court for review.

The salient facts established by the commonwealth are as follows: The prisoner went upon the lands of Davidson for the purpose of selling a gun to Reed Tyler, one of the hands on the place. While in conversation with Tyler and John Randolph, a tenant on the premises, Davidson, who was riding by, was called up by Randolph, who said to him: "Here is a man who says he is going to hunt anyhow." Davidson then told the prisoner that he could not hunt; that the land was posted to white and black. The prisoner replied that he was not hunting, but that he had seen no notices of posting, and if he had seen anything would have shot at it. Davidson then asked the prisoner what business he had, and was told that he had come to sell his gun, and that Reed Tyler had bought it. Davidson said, "If you have transacted your business, you must leave," and motioned his hand to him to go. The prisoner replied that he would go when he got ready. Davidson then dismounted, and started towards the prisoner, saying, "I will see about that." The prisoner, with his gun in hand, stepped back some 10 or 15 feet, saying, "If you hurt me, I'll shoot you, damn you." Davidson picked up a corn cutter recently ground and sharp, ran to the prisoner, and they clinched. In the scuffle the gun was discharged in the air, and Davidson received, it does not clearly appear how, a cut and some abrasions on the head. They fell to the ground, Davidson on top. After some scuffle, the prisoner cried, "Take him off," and they were separated. Davidson was not laid up by his wounds, and was "all right," as stated by his physician, at the time of the trial, which was within six weeks from the date of the affray.

The first error assigned is the action of the court in refusing certain instructions asked for by the prisoner, and giving of its own motion in lieu thereof the following:

"The court instructs the jury that W. E. Davidson had the right to require the accused to leave his premises, and that, if the accused refused to leave when so requested, the said Davidson had the right to use such force as was necessary to eject him from his premises."

The theory of the prosecution is that the prisoner, having refused to leave immediately upon being ordered to do so, thereby became a trespasser, and as such Davidson had a right to use any force necessary to remove him, even to the extent of assaulting him with a deadly weapon.

The prisoner contends that, if he was a trespasser at all, the trespass was of the most trivial character, as he was neither doing or threatening to do any harm to Davidson or his property, and that his act did not justify the assault made upon him with a deadly weapon, and that he had a right to defend himself from such assault.

The instruction as given contains the general rule, which is sound as an abstract proposition, that every man has the right to defend his person or property, but it ignores the well-settled and important modification of the rule that in defense of person or property one cannot, except in extreme cases, endanger human life or do great bodily harm. The law is clearly stated by a learned judge in State v. Morgan, 25 N. C. 186, 38 Am. Dec. 714, as follows: "When it is said that a man may rightfully use as much force as is necessary for the protection of his person and property, it should be recollected that this rule is subject to this most important modification, that he shall not, except in extreme cases, endanger human life or do great bodily harm. It is not every right of person, and still less of property, that can lawfully be asserted, or every wrong that may rightfully be redressed, by extreme remedies. There is a recklessness—a wanton disregard of humanity and social duty—in taking, or endeavoring to take, the life of a fellow being in order to save one's self from a comparatively slight wrong, which is essentially wicked and the law abhors. You may not kill because you cannot otherwise effect your object, although the object sought to be effected is right. You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty." See, also, 1 Bish. New Cr. Law, §§ 839, 841, 850.

In the light of these elementary principles, and in view of the facts of this case, it is clear that the instruction given by the court was erroneous, calculated to mislead the jury, and very prejudicial to the rights of the prisoner. Conceding that the prisoner was a trespasser, and that he ought to

nptly left the premises when or-
lo so, still this did not justify the
ade upon him. Davidson, armed
ecently sharpened corn cutter, ad-
pon the prisoner, and saying that
see about his leaving, was well cal-
excite in the prisoner apprehen-
eat bodily harm. Under such cir-
s the prisoner had the right to de-
self, within the limits of the law,
ry should have been so instructed.
as no error in refusing to give de-
instruction No. 2. Although the
might not prove a malicious cut-
wounding with intent to maim, dis-
able, and kill, the defendant was
sarily entitled to an acquittal; for
dence proved an unlawful cutting
ding with such intent, or merely
t and battery, he might have been
of either of these latter offenses,
the indictment charged a mali-
ng and wounding with intent, etc.
40; Canada v. Com., 22 Grat. 899.
error to refuse defendant's instruc-
3 and 4. For a mere trespass upon
owner has no right to assault the
with a deadly weapon, the re-
ich may be to kill him or do him
ily harm. The question involved
two instructions has been consid-
connection with instruction "a,"
s given by the court in lieu of
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ssed.
as no error in refusing instruction,
ed for by the defendant. That in-
is so plainly erroneous that com-
t necessary.
ese reasons the county court of
e county must be reversed, the
t aside, and a new trial awarded,
in accordance with the views here-
ed.

T v. PRISON ASS'N OF VIRGINIA.

Court of Appeals of Virginia. June 14, 1900.)

LE CORPORATION — LIABILITY FOR RTS—POLLUTION OF STREAM.

sociation for the care of prisoners
sation, which is managed by officers
itself, makes its own by-laws, and
ght to hold property, is not exempt
ity for its torts on the ground that
blic corporation, though its objects
enevolent character, and it is requir-
annual reports to the governor.
iff used the water of a stream for
urposes, and for a large number of
se milk and butter made therefrom
the highest market price on ac-
heir purity. Defendant, who owned
ged an institution on said stream
ntiff, in which were housed several
rsons, polluted the stream by empty-
large quantities of refuse water,
excrement, whereby plaintiff's dairy
as destroyed, the health of his fam-
ily seriously injured, and the market value of his lands greatly lessened. *Held*, that plaintiff was entitled to damages for such injuries to health and property.

Error to circuit court, Henrico county.

Action by one Trevett against the Prison Association of Virginia. From a judgment sustaining a demurrer, plaintiff brings error. Reversed.

A. R. Courtney and Pollard & Pollard, for plaintiff in error. Robert Stiles, for defendant in error.

KEITH, J. Plaintiff in error sued the Prison Association of Virginia in an action of trespass on the case, and in his declaration states that he is the owner of a tract of land in the county of Henrico, upon which he and his family reside and carry on a dairy and butter business in addition to ordinary farming operations, keeping a large number of cows, which renders a supply of pure water essential; that the water for the use of the stock is supplied by a stream which was pure and uncontaminated, and without pollution of any kind, and that the milk and butter from the cows which drank the water was free from any objection or odor, and commanded the highest price on the market; that the defendant in error, the Prison Association of Virginia, became the owner of a certain tract of land upon said stream above the land of the plaintiff, so that the water which passed through the plaintiff's land, and was used by his stock and family, came through the defendant's land; that the defendant established upon its land a school for the confinement of youthful criminals, known as the "Laurel Industrial School," and erected thereon numerous buildings for their accommodation, and collected and quartered therein several hundred persons, and furnished the buildings with washtubs, bathtubs, urinals, and closets, without the consent of the plaintiff, and against his protest, and emptied the refuse water, urine, and excrement therefrom into the stream, and thereby polluted the natural and pure water of the stream on plaintiff's lands below, and by reason thereof broke up and destroyed his dairy business, seriously injured the health of his family, impaired the healthfulness of his home, and greatly lessened the value of his property in the public estimation, and reduced its salable value in the market.

The second count is substantially identical with the first, except that it charges the defendant with having erected wash houses, urinals, and closets, and constructed sewers from them to the stream where it passes through the defendant's lands, and by means of the said contrivances the defendant emptied large quantities of impure water, urine, excrement, and fecal matter, which mingled with the water therein, and by the natural flow of the stream polluted the water of the branch in and upon plaintiff's farm below, from which his stock and milch cows had

to obtain their daily supply of water to satisfy the demands of nature.

The third count is to the same effect, with the additional allegation that by reason of the impurities carried into it by means of the sewers erected by the defendant not only was the water contaminated, but that the atmosphere about plaintiff's home became impregnated with microbes of typhoid fever and malaria, and was made in every way injurious to health, and in consequence thereof the healthfulness of the plaintiff's farm was destroyed, and that of his family seriously impaired. By reason of the premises plaintiff claims to have suffered damage to the extent of $2,000, for which he sues.

The defendant demurred to this declaration, the demurrer was sustained, the suit dismissed, and a writ of error was obtained from this court by the plaintiff.

The first objection interposed by defendant in error is that it is not liable to be sued for its torts, and in support of this proposition relies upon the recent case of Maia's Adm'r v. Directors, etc. (Va.) 34 S. E. 617. It was there held that "an examination of the statutes creating and continuing this hospital shows that it was created and exists for purely governmental purposes, and is under the exclusive ownership and control of the state. It has no stockholders, no members even, except directors, having no interest in it or its affairs, who are appointed by the governor by and with the consent of the senate, and are in fact public, rather than corporate, officials, endowed with a corporate being for a more convenient administration of the duties imposed upon them by law, and are made liable to fines for any failure to perform their duties.

"The moneys necessary to defray the expenses of maintaining and caring for its inmates is provided by annual appropriations made by the general assembly out of the public treasury, and the manner of keeping and disbursing its funds is prescribed by statute. The directors are required to make quarterly reports to the auditor of public accounts showing in detail how they have been disbursed, and to report annually to the governor, for the information of the general assembly, the condition of the hospital, and the sums received and disbursed by them."

The prison association is not such a corporation. It is a voluntary association of individuals, who procured a charter for certain specified objects. It is not controlled by the state, but by its own corporate officials. It makes and enforces its own by-laws and regulations for the management of its affairs and property. It is invested with all powers, rights, and privileges conferred, and made subject to all the responsibilities, regulations, and restrictions imposed, by the common law and the statutes of this commonwealth upon corporate bodies. It may acquire and hold property, the value of the real estate held by it being limited to $100,000. Its general objects, it may be conceded, are of a benevolent character, as they look to the improvement of the government, discipline, and general management of prisons within this state, and the amelioration of the condition of prisoners, but for its services in this behalf it receives a reasonable compensation; and, while its officers are required "to make an annual report of their work to the general assembly of Virginia," that does not constitute it a public corporation, and give it immunity from responsibility for its torts.

In 1 Wood, Nuis. (3d Ed.) § 427, it is said: "The right of a riparian owner to have the water of a stream come to him in its natural purity is as well recognized as the right to have it flow to his land in its usual flow and volume. But in reference to this, as with the air, it is not every interference with the water that imparts impurities thereto that is actionable, but only such as impart to the water such impurities as substantially impair its value for the ordinary purposes of life, and render it measurably unfit for domestic purposes, or such as causes unwholesome or offensive vapors or odors to arise from the water, and thus impairs the comfortable or beneficial enjoyment of property in its vicinity, or such as, while producing no actual, sensible effect upon the water, are yet of a character calculated to disgust the senses, such as the deposit of the carcasses of dead animals therein, or the erection of privies over a stream, or any other use calculated to produce nausea or disgust in those using the water for the ordinary purposes of life, or such as impair its value for manufacturing purposes."

The great principle upon which the law as thus stated rests is that every man must use his own property so as to not injure that of another. It is true, as urged by counsel for defendant in error, that the operation of this principle is qualified by another maxim founded in natural law, that he who exercises only his own legal rights injures no one. The motive, good or bad, which influenced the action complained of is generally of no importance whatever; for it is well stated by an eminent writer upon this subject that, "Whatever one has a right to do, another can have no right to complain of." Cooley, Torts, p. 630, § 6. If, therefore, a lawful act is done in a lawful manner, though another may be injured by it, the law affords no remedy. It is damnum absque injuria.

As was said by the court in Merrifield v. City of Worcester, 110 Mass. 219: "Cultivating and fertilizing the lands bordering on the stream, and in which are its sources, their occupation by farm houses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided, and their occupation and use become multifarious, these causes will be rendered more operative, and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable, but, so far as that condition results

from reasonable use of the stream in ac-
ance with the common right, the lower
ian proprietor has no remedy.
When the population became dense, and
s or villages gather along its banks, the
m naturally and necessarily suffers still
ter deterioration. Roads and streets
ing it, or running by its side, with their
rs and sluices discharging into it their
ce water collected from over large spa-
and carrying with it in suspension the
and light material that is thus swept off,
abundant sources of impurity, against
h the law affords no redress by action."
e wrong complained of in the declaration
r consideration differs widely from that
tion of water incident to the causes ad-
d to in the foregoing quotation. Here
charged not only that privies were erect-
r the accommodation of a great number of
le, but also that the defendant "emptied
e water, urine, and excrement therefrom
the stream," and in other counts it is
ged that this was done by means of sew-
specially constructed for that purpose.
les are prima facie nuisances, and, "al-
gh necessary and indispensable in con-
on with the use of property for the ordi-
purposes of habitation, yet if they are
or are allowed to remain in such a con-
n as to annoy others in the proper enjoy-
of their property, * * * they are
ances in fact, and render the person erect-
or using them liable for all the injurious
equences flowing therefrom."
The pollution of the water by artificial
nage, which causes sewage to flow into
eam, spring, or well, whether done by a
icipal corporation or an individual, con-
tes a nuisance which entitles the own-
damages therefor; the rule being that
unicipal corporation has no more right
jure the waters of a stream or the prem-
of an individual than a natural person."
ood, Nuis. (3d Ed.) §§ 427, 579.

Chapman v. City of Rochester, 110 N.
73, 18 N. E. 88, 1 L. R. A. 296, the de-
ant constructed certain sewers, and
ugh them discharged not only surface
er, but the sewage from houses, and the
ents from a large number of water-
ets, in Thomas creek, above plaintiff's
, so as to render its water unfit for use,
covered its banks with filthy and un-
lesome sediment. "These and other
s," said the court, "well warranted the
lusion of the trial court that the act
he defendant in thus empting its sew-
constituted an offensive and dangerous
ance. * * * The filth of the city
not flow naturally to the lands of the
tiff, as surface water finds its level, but
rried thither by artificial arrangements
ared by the city, and for which it is re-
sible. * * * The case comes within
general rule which gives to a person in-
d by the pollution of air or water, to
use of which, in its natural condition,
he is entitled, an action against the party,
whether it be a natural person or a corpora-
tion who causes that pollution."

The case of Mayor, etc., of Baltimore v.
Warren Mfg. Co., 59 Md. 96, is instructive.
The city of Baltimore asked an injunction
against the defendants to restrain them
from polluting Gunpowder river, the source
of its supply of water for drinking and other
purposes. The defendant was an upper ri-
parian proprietor, and the charge against it
was that it discharged, or knowingly suf-
fered or permitted to be discharged, into
said stream refuse water from its factory,
impregnated with divers injurious ingre-
dients and substances, put into the same by
the defendants at its factory, whereby the
water was rendered less pure and fit for
use by man as drinking water. This charge
was held to be too vague as to the nature
and character of the defilement, but the ad-
ditional charge that he erected, maintained,
and used divers large privies and hog pens
at or near said factory, the excrement and
filth whereof the defendants caused or will-
fully suffered and permitted to be dischar-
ged into the waters of Gunpowder river,
whereby the water of the stream was great-
ly polluted, was held to be cause for the in-
junction.

Tracing the law from the time of Lord
Coke to more recent times, the court, speak-
ing through Judge Alvey, declares that "all
common-law authorities agree that a ripari-
an owner has the right to the natural stream
of water flowing by or through his land,
in its ordinary natural state, both as to its
quantity and quality, as incident to the
right to the land on or through which the
water course runs. * * * If, therefore,"
said the court, "the defendants, being up-
per riparian proprietors, and as such enti-
tled to the ordinary use of the water, in-
cluding the right to apply it in a reasonable
way to purposes of trade and manufacture,
are using the water of the stream in an un-
reasonable manner, and have defiled the
same in such manner and to such an extent
as to operate an actual invasion of the rights
of the complainants, the latter are entitled
to redress by action at law, and, in case the
nuisance be continued, to summary relief
by injunction. * * *

"What nature and extent of pollution of
the stream will call for the active interfer-
ence of the court is not in all cases easy to
define. It is not every impurity imparted to
the water, however small in degree, that will
be the subject of an injunction. All running
streams are, to a certain extent, polluted;
and especially are they so when they flow
through populous regions of country, and
the waters are utilized for mechanical and
manufacturing purposes. The washings of
the manured and cultivated fields, and the
natural drainage of the country, of neces-
sity, bring many impurities to the stream;
but these and the like sources of pollution,

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cannot, ordinarily, be restrained by the court. Therefore, when we speak of the right of each riparian proprietor to have the water of a natural stream flow through his land in its natural purity, those descriptive terms must be understood in a comparative sense; as no proprietor does receive, nor can he reasonably expect to receive, the water in a state of entire purity. But any use that materially fouls and adulterates the water, or the deposit or discharge therein of any filthy or noxious substance, that so far affects the water as to impair its value for the ordinary purposes of life, will be deemed a violation of the rights of the lower riparian proprietor, and for which he will be entitled to redress. Anything that renders the water less wholesome than when in its ordinary natural state, or which renders it offensive to taste or smell, or that is naturally calculated to excite disgust in those using the water for the ordinary purposes of life, will constitute a nuisance, and for the restraint of which a court of equity will interpose."

The case before us measures fully up to the careful statement of the law in the opinion just quoted. If the averments of the declaration before us are true, the water is utterly unfit for its primary uses. It would be disgusting to the senses and injurious to the health. It is a matter of common knowledge that nothing is more susceptible to contaminating influences than milk, and its odor, its taste, and its wholesomeness are alike affected by the conditions to which it may be exposed. It is the principal food of the feeble and the young, and therefore to make it and keep it pure and free from all contaminating influences is of great importance; but, apart from the possible effect upon the health, who would not be nauseated at the idea that the milk he drinks was obtained from cows supplied with water from so foul a source as described in this declaration? It does not set out one of those slight interferences the law passes over as too trifling to be considered, but a substantial, and indeed a destructive, impairment of the value of the water for all of its primary uses.

Defendant in error laid great stress upon the case of Coal Co. v. Sanderson, 113 Pa. St. 126. Its authority is much diminished by the fact that the supreme court of Pennsylvania, upon the same case, between the same parties, had reached an opposite conclusion in 86 Pa. St. 401, and by the further fact that in the last case three of the judges dissented of a court of seven. That was a suit brought by Sanderson and wife against the Pennsylvania Coal Company to recover damages for the pollution by the defendant of a stream of water which flowed through the plaintiff's grounds by the discharge of water into it from the defendant's mines. The syllabus states, among other things, that "the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must ex necessitate give way to the interests of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal."

Whether the right of the individual under like conditions would with us yield to the public interest, except upon payment of proper compensation, is a question which we need not now decide.

That damages resulting to another, from the natural and lawful use of his land by the owner thereof, are, in the absence of malice or negligence, damnum absque injuria, as stated in that case, there can be no question; and there is great force in the position of the court that the defendant did nothing to change the character of the water or diminish its purity save what resulted from the natural use and enjoyment of its own property. Mining coal was a lawful business. It could not be carried on without freeing the mine from the water which percolated into it. All mine water is acidulated and unfit for domestic use. It was pumped out of the mine, and by the force of gravity and the natural conformation of the land it passed into and polluted the stream which flowed through the premises of the plaintiff. As was said by the court: "The defendants having brought nothing on to the land artificially, the water as it poured into Meadow brook is the water which the mine naturally discharged. Its impurity arises from natural, not artificial, causes. A mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharges are necessarily incident to it." It appears, moreover, "that the community in and around Scranton, including the complainant, is supplied with abundant pure water from other sources. There is no complaint as to any injurious effect from this water to the general health. The community does not complain on any grounds. The plaintiff's grievance is for a mere personal inconvenience, and we are of opinion that mere private personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."

We have quoted thus fully from this case, not that we mean to approve, or that we

presume to disapprove, the law as stated in that case, but merely to show that it has no very close analogy to the one before us.

The case of Merrifield v. City of Worcester, 110 Mass. 216, and that of Morse v. Same, 139 Mass. 389, 2 N. E. 604, were suits against the city of Worcester for polluting a stream by emptying into it the sewage of the city, and it was held that there can be no recovery against the city for the pollution so far as it is attributable to the plan of sewerage adopted by the city, but only so far as it is attributable to the improper construction or unreasonable use of the sewers, or negligence or other fault of the city in the care or management of them.

Passages from the opinions in these two cases may be cited as antagonistic to the views hereinbefore expressed, but we think that the case of Washburn & Moen Mfg. Co. v. City of Worcester, 116 Mass. 458, will solve all the apparent difficulties which may be thus suggested. It there appears that the city of Worcester, in the construction of its waterworks, acted under a statute which made provision "for the assessment under special proceedings of damages to all parties whose estates are thereby injured," and the city was, of course, held not to be liable to an action at law or bill in equity for injuries which were the necessary results of the exercise of the powers thus conferred. Said the court: "But if by an excess of the powers granted, or negligence in the mode of carrying out the system legally adopted, or in omitting to take due precautions to guard against consequences of its operation, a nuisance is created, the city may be liable to indictment in behalf of the public, or to suit by individuals suffering special damage." So that these cases are in harmony with the entire current of authority.

We are of opinion that the judgment of the circuit court must be reversed.

GILLESPIE v. COLEMAN.

(Supreme Court of Appeals of Virginia. June 14, 1900.)

APPEAL AND ERROR—FINAL ORDER.

An order sustaining a demurrer to a declaration or amended declaration, without a judgment of dismissal, is not final, so that writ of error authorized by Code, § 3454, in an action at law, only in case of final judgment, will not lie.

Error to circuit court, Wytheville county.

Action by Gillespie against Coleman, sheriff. Demurrers were sustained to the declaration and amended declaration, and plaintiff brings error. Dismissed.

Camm Patteson and A. S. Hall, for plaintiff in error. H. D. Flood, for defendant in error.

BUCHANAN, J. The action of the court in sustaining demurrers to the plaintiff's original and amended declarations is complained of. The order of the court upon neither demurrer was final. In sustaining the demurrer to the original declaration, leave was given to amend, and pursuant to that order an amended declaration was filed. The court was of opinion that the amended declaration was not sufficient, and sustained the demurrer to it, but did not dismiss the case.

From some chancery orders, although there is no final decree in the case, it is provided by statute that an appeal may be taken. Code, § 3454. But the statute makes no provision for a writ of error in an action at law until there is a final judgment. Id.

The sustaining or overruling of a demurrer to a declaration is not final. To make it final in the former case, there must be a judgment of dismissal; and in the latter, a judgment for the amount or thing sought to be recovered, or some order which puts an end to the case. See Hancock v. Railroad Co., 3 Grat. 328; Trevillian v. Railroad Co., Id. 312; Jeter v. Board, 27 Grat. 910; Tucker v. Sandridge, 82 Va. 532; 4 Minor, Inst. (3d Ed.) 1064–1066; 2 Enc. Pl. & Prac. 114 et seq., where authorities generally are collected.

From anything that appears in the record, this case is still pending in the trial court, and another amended declaration might be filed there, and further proceedings had in the case.

No final judgment having been rendered in the case, this writ of error must be dismissed as improvidently awarded.

KOSS et al. v. KASTELBERG et al.

(Supreme Court of Appeals of Virginia. June 14, 1900.)

WILLS—PROPERTY BEQUEATHED—BANK DEPOSIT.

A bequest of "all horses, harnesses, wagons, machinery, and all other personal property used in my butchering business, including all choses in action," does not pass a bank deposit, it appearing that the account was resorted to in connection with testator's general business; that accounts were paid out of it in no wise connected with his butchering business; that it was not at all necessary to the conduct of that business, which was an established and profitable one; that there were motives for opening the account growing out of a contemplated visit abroad; and that there were accounts due by customers to the butcher business satisfying the provision as to choses in action.

Appeal from circuit court, Henrico county.

Suit between Koss and others and Kastelberg and others. From an adverse decree, Koss and others appeal. Reversed.

B. T. Barrett and J. R. V. Daniel, for appellants. L. O. Wendenburg and Anderson & Anderson, for appellees.

KEITH, P. The bill in this case was filed in the circuit court of Henrico county to have the will of Rudolph Kastelberg construed.

The third and fourth clauses of the will are as follows:

"Third. I give and bequeath unto to my four sons, R. L. Kastelberg, Jos. F. Kastelberg, Chas. H. Kastelberg, and William Kastelberg, all my horses, harness, wagons, machinery, and all other personal property used in my butchering business, including all choses in action, to be held by them jointly and in fee simple.

"Fourth. I give, devise, and bequeath unto my beloved wife, Lena Kastelberg, and all our children, all my real estate, as well as any other property not heretofore bequeathed, to be held by them jointly and in fee simple, the share of my said wife being the same as the share of each child; and, should any child die before I do leaving children, then the share of such child shall descend to his or her children per stirpes; and, should my wife fail for any reason to receive or collect the policy of insurance taken out on my life for her benefit in the Mutual Life Insurance Company of New York, then she shall receive her dower interest in my real estate in lieu of the provision made in this clause of my will for her benefit."

The testator had conducted the business of a butcher in the city of Richmond, and at the time of his death, as appears by the report of the commissioner, was possessed of the following personal property: Certain rents that were due him; a balance on deposit in the State Bank of Virginia; cash in safe-deposit box of the First National Bank of Virginia; stock in the United Banking & Building Fund Association; balance in bank to the credit of R. Kastelberg's Sons, but which it is admitted belonged to the testator; certain farm stock and farm implements mentioned in the report; and debts by open account from his customers which amounted to about $1,000.

The commissioner was further directed to report the interest of the parties in this cause in the personal estate. In order to do so, it became necessary to construe the clauses of the will already quoted, and he was of opinion, and so reported, that the third clause passed to the four sons of the testator the horses, harness, wagons, and machinery used in the butchering business, and accounts due to that business by customers, but did not carry the balances in bank and other choses in action.

To this report the executors of Kastelberg filed four exceptions, all of which were overruled except the second, which is as follows:

"Because he reports the $3,973.61 in the First National Bank to the credit of R. Kastelberg's Sons does not pass under the third clause of the will to R. Kastelberg's four sons, but to his estate."

We are of opinion that this exception should not have been sustained. While the account stood in the name of Kastelberg's Sons, the commissioner found, and in this respect the report is not controverted, that this sum belonged to Rudolph Kastelberg, deceased, and passed under his will. It is claimed that it is embraced in the third clause because it is a chose in action. A balance in bank to the credit of a depositor is, strictly speaking, a chose in action. It is often treated, however, as ready money, and whether it is to be regarded in a particular case as the one or the other will depend upon all the surrounding circumstances, and the conclusion reached will be in accordance with the cardinal rule of construction which requires courts to ascertain from the will the true intent of the testator, and, if possible, give effect to it.

The third clause bequeaths to his four sons "all horses, harness, wagons, machinery, and all other personal property used in my butchering business, including all choses in action." Those who claim a balance in bank by virtue of the third clause must show, not only that it constitutes a chose in action, but that it was used in connection with the butchering business; for it is not every chose in action of which the testator died possessed which passes under this clause, but only such choses in action as comply with the other term of the description, and are shown to have been used in the business conducted by the testator. This seems to be conceded by appellees. The term "chose in action" is sufficiently broad to embrace all the items of property set out in the report of the commissioner except the farm stock and farm implements, which were of little value; yet the appellees only excepted to so much of the report as pertains to the balance of $3,973.61 standing in the name of Kastelberg's Sons, $2,571.54 on deposit in the State Bank of Virginia, stock in the United Banking & Building Fund Association amounting to $820.75, and interposed no exception to the amount of cash in safe-deposit box in the First National Bank of Virginia amounting to $4,000. It is very clear from the decree of the circuit court, read in connection with the pleadings, the report, and the exceptions thereto, that the learned judge had the same view with respect to the proper construction of the third clause of the will which we entertain; that is to say, that only such choses in action passed under it as were used in connection with the business of the testator.

In sustaining the appellees' second exception to the commissioner's report, the circuit court seems to have been controlled by the fact that the testator had opened an account with the First National Bank of Virginia in the name of R. Kastelberg's Sons, and was further of opinion that the evidence was sufficient to show that it was opened for the convenience of, and used in connection with, the business, and the evidence, without doubt, lends a good deal of force to that view. Upon the whole record, however, we do not find it conclusive. It appears that that account was resorted to in connection with the general business of the testator; that accounts were paid out of it in no wise connected with his business as butcher; that it was

not at all necessary to the conduct of that business, which was an established and profitable one. When we find that there were other motives for opening this account growing out of his visit to Europe, then in contemplation; that there was other personal property and choses in action which fully answered all the requirements of the third clause of the will,—that is to say, the accounts due by customers to his business as butcher,—we are satisfied that the testator did not intend that this item should pass to his four sons, but that it should be distributable among all of his children.

There is another consideration which is entitled to some weight. All of the testator's children were, it is to be presumed, the equal objects of his care, affection, and bounty. Equity delights in equality, and, while it will do no violence to language or wrest words from their natural meaning to accomplish that result, it will not be without force in a case of doubtful construction.

We are of opinion that the circuit court erred in sustaining the exception to the commissioner's report, and its decree is therefore reversed.

PAYNE v. ZELL.

(Supreme Court of Appeals of Virginia. June 14, 1900.)

BILLS AND NOTES—HOLDER FOR VALUE—HOLDER WITHOUT NOTICE — CONTINUANCE—DEPOSITIONS—NOTICE.

1. A refusal to grant a second continuance because of defendant's absence from the city to keep a business engagement is not a ground for reversal, when no effort was made to have the day set for trial changed until the case was called, though such engagement was made several weeks before.

2. Code, § 3363, prescribes that, in serving the counsel of a party who is a nonresident with notice to take depositions, sufficient time shall be given for conveying, by ordinary course of mail, a letter to the residence of such party, and a reply back to the place of service, and then for the counsel to attend at the place of taking the deposition. *Held*, that service of a notice at Richmond at 3:45 p. m. on May 24th, to take a deposition at Hampton on May 26th, was not within a reasonable time, where nonresident resided in Baltimore.

3. Where the payee of a note, being indebted to plaintiff, indorsed and delivered it to him in part payment of such indebtedness, plaintiff was a holder for value, under Acts 1897–98, pp. 896, 918, § 25, declaring that a pre-existing debt constitutes value.

4. Where the payee of a note was indebted to plaintiff, and assigned the note as collateral, plaintiff was a holder for value for the amount due him, under Acts 1897–98, pp. 896, 918, § 27, declaring that where a holder has a lien on an instrument he is a holder for value to the extent of his lien.

5. The holder of a note indorsed to him before maturity, and before complaint made by the maker to the payee of a failure of consideration, was a holder without notice of such failure of consideration.

Error to circuit court of city of Richmond.

Action by one Payne against one Zell. From a judgment in favor of the plaintiff, defendant brings error. Affirmed.

O'Ferral & Regester, for plaintiff in error. B. Rand. Wellford, for defendant in error.

RIELY, J. The refusal of the court to continue the case, upon the motion of the defendant, constitutes the first assignment of error. A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and, although an appellate court will review the action of the trial court, it will not reverse its judgment upon such motion, unless plainly erroneous. Railroad Co. v. Shott, 92 Va. 45, 22 S. E. 811, and Hite's Case, 96 Va. 489, 31 S. E. 895.

The suit was brought to first rules in December, 1898. The defendant filed no plea, nor entered any appearance, until the 21st of February, 1899, only a few days before the office judgment would have become final. The plaintiff being a nonresident, the defendant, on April 17, 1899, made a motion for security for costs, which was promptly given, and the case set for trial on May 22, 1899. Upon the calling of the case for trial on that day, the defendant being absent from the city, by consent of parties, by counsel, it was set for trial on the 27th of May. When called for trial on the day to which it was so postponed, there was a motion by counsel for the defendant to continue the case. The ground assigned for the motion was that the defendant was unable to attend and testify by reason of an important business engagement in the city of Baltimore, and that his testimony was material. The record contains no explanation of his absence from the city, and not attending the court on May 22d, for which day the trial was first set; and, as to his absence on May 27th, it appears that the business appointment that kept him away was made several weeks before the day fixed for the trial of the case, and yet he made no effort to have the day for the trial of the case changed until it was called. Under the circumstances shown, the court properly overruled the motion for the continuance.

Nor did the court err in rejecting the deposition of the defendant upon the ground of the insufficiency of the notice to take it. The plaintiff resides in the city of Baltimore, and his counsel in the city of Richmond, where the suit was brought. The statute, which authorizes the service upon the counsel of a party who is a nonresident of the state of a notice to take a deposition, prescribes that "the time between the service of notice and taking the deposition shall be sufficient for conveying by ordinary course of mail a letter from the place of service to the place of residence of the party, and a reply from that place back to the place of service, and then for the counsel to attend at the place of taking the deposition." Code, § 3363.

The notice was served on counsel in the city of Richmond at 3:45 p. m. on May 24th, to take the deposition at Hampton, Va., on May 26th, between the hours of 9 a. m. and

6 p. m. It was not practicable within the time intervening between the service of the notice and the date appointed for taking the deposition for counsel to communicate by letter with the plaintiff, and receive a reply, and then attend at the place of taking the deposition. The service of the notice was not within a reasonable time, and was clearly insufficient.

The writing sued upon is a negotiable note made by the defendant, and transferred by the payee to the plaintiff. Upon the trial the plaintiff introduced no evidence except the note, which, under the pleadings, was all that was necessary to make out case.

The defendant put in evidence the depositions of the payee and the plaintiff, which he had taken in his own behalf, and examined orally one other witness. The defense relied upon to defeat a recovery was that there was a failure of the consideration for which the note was given, and that the plaintiff was not a holder for value or without notice, and that, therefore, the note was subject in his hands to any defense existing between the maker and the payee.

The evidence of the defendant proved that the payee was indebted to the plaintiff in the sum of $1,575 on account of the purchase of stock of the Country Club of Baltimore County, and before the maturity of the note sued on indorsed and delivered it to the plaintiff in part payment of the said indebtedness. Whether the plaintiff accepted the note as payment on account of, or as security for, the said indebtedness is not altogether clear from the evidence; but whether the one or the other is immaterial, as in either case he is a holder for value. Brooklyn City & N. R. Co. v. National Bank of the Republic, 102 U. S. 14, 26 L. Ed. 61; Daniel, Neg. Inst. §§ 184, 826, 831(a), 1277, 1278(a); Bigelow, Bills & N. c. 14, § 8; and Crawford, Ann. Neg. Inst. Law, pp. 30, 31.

The entire transaction has taken place since the passage by the legislature of the statute to revise, arrange, and consolidate into one act the laws relating to negotiable instruments, and, although it may not have been previously settled in this state by decision whether or not a pre-existing debt constituted value for the transfer of negotiable paper, that question has now been settled by the said statute. Acts 1897-98, pp. 896, 918. Section 25 of that act declares that "an antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time."

Section 27 declares that "where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien," so that any person to whom a negotiable security has been pledged as collateral would be a holder for value to the extent of the amount due to him.

The plaintiff, therefore, became a holder of the note for value before it matured.

It is equally clear from the evidence that he is also a holder without notice of the failure of the consideration for which the note was executed or of any other infirmity attaching to it. It was indorsed by the payee, and delivered by him to the plaintiff, five days before its maturity, and two days, even, before the date of the letter of the defendant to the payee making complaint for the first time of the failure of the consideration, and objecting to its payment. The evidence fails to establish that the plaintiff at the time the note was transferred to him by the payee knew what was the consideration of the note, or for what purpose it was given, or that it was affected with any infirmity whatever.

The note is complete and regular on its face. The plaintiff acquired it in good faith and for value, before its maturity, and without notice of any infirmity attaching to it.

Upon the motion for a continuance of the case, the deposition of the defendant, which was rejected when offered in evidence on the trial because of insufficient notice to take it, was used in support of the motion in order to show the materiality of his testimony, and was made a part of the bill of exception to the refusal of the court to continue the case. Upon an inspection of the deposition, it is seen that the facts that he relates refer wholly to the transactions between the payee and himself in reference to giving the note, and that he did not undertake to prove that the plaintiff had notice before or at the time the note was transferred to him of any fact tending to invalidate it. So that if the deposition had been admitted in evidence on the trial it contained nothing that could have changed the result.

The court very properly sustained the demurrer of the plaintiff to the defendant's evidence, and gave judgment for the plaintiff for the amount of the note. Its judgment must be affirmed.

BOARD OF NORFOLK COUNTY SUP'RS v. COX.

(Supreme Court of Appeals of Virginia. June 14, 1900.)

COUNTIES—LOCATION OF CLERK'S OFFICE—CONDEMNATION OF LAND IN CITY LIMITS—CONSTRUCTION OF STATUTES.

1. Under Code, § 3176, requiring the clerk's office of the court of every county to be kept at the court house, and under section 3120, providing that no place of session for a county court shall be without the limits of the county of which it is the court, the selection, by the board of supervisors of a county, of land for the erection of a clerk's office, is confined to lands within the limits of the county.

2. The condemnation of land in an incorporated town for a county clerk's office does not subject the land to a conflict of jurisdiction between the city and county courts, as the city court has jurisdiction of the locality and the

ourt does not acquire the same by the ation proceeding.
, § 3178, prohibiting the removal of ds and papers of a court out of the herein the clerk's office is kept, is not where the clerk's office, which was e county limits, was, by an extension nits of an incorporated city, brought e same.
er Code, §§ 834, 925, making it the he board of supervisors of every coun- vide a court house, clerk's office, and authorizing it to purchase such real may be necessary for the erection of sary county buildings, a county whose se and clerk's office are located within s of an incorporated city is entitled to d in the city condemned for the en- t of its clerk's office.

to hustings court of city of Ports-

by the board of supervisors of Nor- nty against Cox for the condemna- certain lot in the city of Portsmouth rection of an extension to the county office. The application for the ap- nt of freeholders to determine the ation to be paid the owner was de- d plaintiff brings error. Reversed.

er & Crocker, for plaintiff in error. Hatton and Richard Cox Barlow, for nt in error.

Y, J. It appears from an act of the assembly establishing the town of uth, in the county of Norfolk, enact- bruary, 1752, that William Crawford, der of the town, in laying it out, site for a court house. 6 Hening's

ourt house of Norfolk county was within the said town, but whether it t upon the said site or not does not from the record. This, however, is rial to the determination of the ques- decision.

year 1858 the town of Portsmouth rporated by the general assembly as f Portsmouth. Acts 1857-58, p. 163. plemental act (page 173) it was pro- at all the real estate accumulated by ty during the union of the town and hould belong jointly and equally to ty and the said city; and it was fur- vided that, until the county court hange the seat of justice from its lo- the city of Portsmouth, the court d jail in the said city should be joint- sed, employed, and appropriated by courts of the county and city and eral officers, and that the county ght continue to hold its terms and in the said court house, and to em- said jail jointly with the courts of city, as they did prior to the passage ct incorporating the city of Ports- Acts 1857-58, c. 266, § 9.
he court-house lot the county of Nor- t its clerk's office, and at a meeting oard of supervisors of the county July 24, 1809, it was resolved as the sense of the board that it was necessary that the clerk's office should be enlarged, and that for this purpose it was necessary to acquire by purchase or condemnation the lot of the defendant in error lying adjacent to and west of the court-house lot. Being unable to agree with the owner on the terms of its purchase, the board made application to the hustings court of the city of Portsmouth, in accordance with the provisions of section 1074 of the Code, for the appointment of five disinterested freeholders to ascertain a just compensation to the owner for the said lot. The court refused to appoint them, and dismissed the application of the board upon the ground that there was no authority to condemn land situate in the city for the purpose of enlarging the clerk's office of the county.

The law makes it the duty of the board of supervisors of every county to provide a court house, clerk's office, and jail; and to that end authorizes the board to purchase such real estate as may be necessary for the erection of all necessary county buildings, which, with what the county has, will make two acres, and so much thereof as may be necessary shall be occupied with the court house, clerk's office, and jail. Code, §§ 834, 925.

Section 3176 provides that the clerk's office of the court of every county and corporation shall be kept at the court house of the county or corporation, unless there shall have been a failure by the proper authority to provide such office there, in which case the clerk's office may be kept at such other place within the county or corporation as the court may direct.

It thus appears that the law, for the subservience of the public convenience, requires that the clerk's office of a county or city shall be kept at the court house of the county or corporation, as the case may be.

When an agreement cannot be made with a person entitled to land, which is needed by a county for the erection thereon of its necessary public buildings, provision is made by section 1074 of the Code for the application to the court of the county or corporation in which such land, or the greater part thereof, lies, for the appointment of commissioners to ascertain a just compensation for such land. This statute has been construed by this court to authorize the application by the board of supervisors of a county to the proper tribunal for the condemnation of land which it may have selected for the location of the court house, clerk's office, and jail of the county. Board of Sup'rs v. Gorrell, 20 Grat. 484.

The statutes referred to do not in themselves confine the selection by the board to land for said purposes within any specified area or to any particular locality, but it results from other statutes that the court house, clerk's office, and jail shall be located within the limits of the county.

Section 3116 is as follows: "Every circuit, county, or corporation court, for any

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county or corporation, shall be held at the court-house of such county or corporation, except where some other place is prescribed by law, or lawfully appointed;" and section 3120 provides that "no such place of session, for a circuit, county, or corporation court, shall be without the limits of the county or corporation of which it is the court."

It follows, therefore, that a clerk's office of a county shall be kept at its court house, and that its court house must be located within the boundaries of the county.

It was urged in argument that the condemnation of the land in question to enable the board of supervisors to enlarge the clerk's office of the county would result in a conflict of jurisdiction over the locality between its court and the court of the corporation; and would also be in violation of the provisions of section 3178, which prohibits the removal of the records and papers of a court out of the county or corporation wherein the clerk's office is kept, except on an occasion of invasion or insurrection, where, in the opinion of the court, or, in a very sudden case, of the clerk, the same will be endangered, after which they are to be returned so soon as the danger ceases; and except in such other cases as are specially provided by law. Neither of these contentions is well founded.

The land which it is sought to condemn being within the territorial limits of the city, and subject to the jurisdiction of its court, the court of the county would not acquire, nor the court of the city lose, its jurisdiction over the locality by the condemnation. The court house and other public buildings of a number of the counties of the state are situated in cities within the territorial limits of the counties, and it has been held by this court that jurisdiction over the locality is in the court of the city, and not in the court of the county. Fitch's Case, 92 Va. 824, 24 S. E. 272, and Chahoon's Case, 20 Grat. 733.

Nor does the keeping of the records and papers of the courts of a county in its clerk's office at the court house of the county, which was duly located at a place within the county that was subsequently embraced within the territorial limits of a city thereafter incorporated, nor would the keeping of a portion of the records and papers in an extension of the clerk's office, offend against the provisions of section 3178. Neither the keeping of the record and papers of the courts of a county in a clerk's office so located, nor the transfer of a portion of them for preservation to an extension thereof, constitutes, in the most technical sense, such removal of them as is prohibited by section 3178. The statute only prohibits the removal of the records and papers of a court out of the county or corporation wherein the clerk's office is kept. The court house and clerk's office, although situate within the limits of the city and the jurisdiction of its court, are nevertheless also within the territorial limits of the county. The fact that a city is established within the territorial limits of a county does not alter the boundaries of the county, nor curtail its territorial limits, although its court, by the incorporation of the city, is deprived of civil and criminal jurisdiction within the limits of the city.

The right of the board of supervisors to have the lot of the defendant in error condemned to enable the board to enlarge the clerk's office of the county to meet its necessities, which is, as is required by law, now kept at the court house of the county, is plain from the statutes relating to the subject; and it is well that this is so, for otherwise the board would have to remove the court house of the county outside of the limits of the city in order to acquire land for the enlargement of the clerk's office to sufficient dimensions to hold the records and papers of the courts of the county, although its court house was duly located, very many years ago, in the town of Portsmouth, long prior to the incorporation of the town as the city of Portsmouth, and although the very act incorporating the town into a city expressly provides that the said court house shall be jointly "possessed, employed, and appropriated" by all the courts of the county and city, and that the county court may continue to hold its terms and sessions in the said court house.

The judgment of the hustings court must be reversed, and the application of the board of supervisors for the condemnation of the lot of the appellee be reinstated, and proceeded with in accordance with the statutes in such case made and provided.

THOMAS v. JONES.

(Supreme Court of Appeals of Virginia. June 14, 1900.)

TAXATION—SALE OF LAND FOR DELINQUENT TAXES—ANNULLING DEED IN EQUITY.

Proceedings for the sale of land for delinquent taxes were defective. Counsel for plaintiff told counsel for defendant, the purchaser, of such defects, upon which counsel for defendant said that he would sue the sheriff for damages for the loss of the land to his client. Counsel for plaintiff then tendered the delinquent taxes to the clerk, informing him of the irregularities, and told him that, to save him harmless, he would apply for an injunction restraining him from executing the deed to defendant, time for which was promised by the clerk. The following day counsel for plaintiff was obliged to leave the city early in the morning, and, on returning, found that a deed had been issued to defendant that day. *Held* that, as plaintiff had been lulled into security by the promise of the clerk and the actions of the defendant, equity would relieve him by annulling the deed.

Appeal from circuit court, Culpeper county.

Suit by G. Wallis Jones against John D. Thomas. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Grimsley & Miller, H. W. Sutherland, and H. G. Peters, for appellant. Barbour & Rixey and G. D. Gray, for appellee.

KEITH, P. A tract of land owned by G. Wallis Jones, in the county of Culpeper, was sold for nonpayment of taxes, and purchased by the state, on the 17th of December, 1894. Two years having elapsed, one John D. Thomas filed an application, and purchased it from the state, and on the 30th of April, 1897, the clerk of the county court of Culpeper executed a deed to him. On the third Monday in May, 1897, Jones filed a bill in the circuit court of Culpeper county, in which he states that this deed is invalid and void, for a number of causes, which he proceeds to set out with much detail, and prays that it may be canceled, and his title quieted and freed from the cloud resting upon it by reason of the deed. Thomas answered this bill, denying all of its material averments; but we do not find it necessary to state the pleadings more precisely, nor to discuss the evidence adduced, save in one particular, which will be presently adverted to, as the facts agreed are in other respects sufficient to enable us to decide the case upon its merits.

"It is agreed that the land books filed in the clerk's office of Culpeper county and in the treasurer's office for the year 1896 were not sworn to by T. O. Yowell, the commissioner of the revenue, and were not examined and certified to by the clerk of the county court for Culpeper county, as required by law, and that these books, as well as the original lists in the clerk's office, may be used as a part of the evidence in this cause.

"That the delinquent list for 1893 was not made off until October 12, 1894.

"That the clerk of the county court of Culpeper county did not, within 60 days after the lists of delinquent lands for 1893 were allowed, under section 608 of the Code, lay a certified copy thereof, or any copy thereof, before the board of supervisors of Culpeper county, as required by section 612. Nor did the board of supervisors cause said lists, or any part thereof, to be published in any of the modes prescribed by section 612, and the order of October 12, 1894, is the only action taken by said board relative to said lists.

"That the clerk of the county court did not furnish to the county treasurer a certified copy of said lists as corrected by the court, nor did he cause a copy thereof to be posted at the front door of the court house, nor did he cause printed copies thereof to be posted at at least five public places in Cedar Mountain district, in Culpeper county, as required by section 637; the only publication being that as shown by plaintiff's Exhibit E, taken from the Culpeper Enterprise.

"That, at the time John D. Thomas filed his application to purchase, he paid no money to the clerk of Culpeper county, and did not tender him any, and did not pay any until April 30, 1897.

"The above facts are admitted without prejudice to the defendant, and without waiving rights to insist that they cannot be inquired into in this proceeding.

"The plaintiff admits that the only tender of taxes for 1893 made by him to the clerk was the tender mentioned in the deposition of John S. Barbour.

"It is admitted that the county court of Culpeper county was in session on April 19, 22, and 23, 1897."

It appears by uncontradicted testimony that counsel for Jones, the appellee, in order to avoid, if possible, the necessity of litigation, had a conversation with counsel for the appellant, Thomas, during the county court of Culpeper commencing April 19, 1897, at which the order was entered directing the deed to be executed to Thomas by the clerk, and informed him that the application of Thomas to become a purchaser had never been served according to law upon his client, G. Wallis Jones, and that the return of the deputy sheriff was untrue. Counsel for Thomas was surprised and indignant when he found that the deputy sheriff had failed to make a return in accordance with the facts, and wrote to him upon the subject. Thereupon the deputy came to Culpeper court house, and stated to counsel for Thomas that he had in truth never served the application on Jones, but had merely inclosed it in an envelope, and addressed it to "G. Wallace Jones, Jr., Burr Hill, Orange county, Va." Counsel for Thomas thereupon declared with much emphasis that he would sue the deputy sheriff for the damages suffered by his client by reason of the loss of this land. Counsel for Jones then went to the clerk, and told him that he was prepared to pay all taxes for which the land was delinquent, and asked for a statement; but the clerk doubted his authority, under the circumstances, to receive the money. He was then informed of the irregularities and omissions in the proceedings by which the title of Jones had been devested and put in the state, and by which Thomas had subsequently become a purchaser from the state; and then counsel for Jones suggested that, in order to save the clerk harmless, he would apply for an injunction restraining him from making the deed, and asked that he be given an opportunity to apply for an injunction before a deed was made to Thomas, which the clerk promised to do. This occurred on the 29th of April, 1897; and on the following day counsel for Jones, being compelled to go to Warrenton on professional business, left Culpeper court house at 6 o'clock in the morning, and returned at 7 o'clock in the evening of the same day. On the 1st day of May he was informed, greatly to his surprise, that counsel for Thomas had obtained a deed for this property on the day

before; that it had been admitted to record and spread on the deed books before 9 o'clock on the morning of April 30th. Counsel, being asked, "What prevented you, or what caused you to postpone applying for an injunction to restrain W. E. Coons from making the deed to John D. Thomas?" answered that counsel for Thomas "led me to believe that there would be no further attempt to get a deed, and Mr. Coons had told me that he would not execute a deed without giving me an opportunity to apply for an injunction. I did not wish to put my client nor Mr. Thomas to the expense of an injunction unnecessarily. I do not wish to be understood as stating that counsel for Thomas intentionally misled me in this matter. I only gathered it from what he said and his manner. I remember his discussing the question of the responsibility of Mr. A. W. Pulliam, the sheriff, and his sureties, for the false return by Garnett, his deputy."

This evidence is wholly uncontradicted, and is to be taken as true, and doubtless is true in all respects.

Section 666 of the Code, by virtue of which the deed was executed, provides that section 661 shall apply to deeds made under its provisions.

Section 661 declares that "when the purchaser of any real estate so sold, his heirs, or assigns, has obtained a deed therefor, and the same has been duly admitted to record in the county or corporation in which such real estate lies, the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made."

It appears, therefore, that section 661 only becomes operative after the deed has been executed and recorded. It is not the lapse of two years which cuts off the former owner from inquiry into the various steps by which his title has been devested; but that effect, according to the terms of the statute, is only produced by the execution of the deed by the clerk, and its recordation by the grantee. We must therefore inquire whether the deed from the clerk to Thomas was procured under such circumstances as rendered it inequitable for Thomas to avail himself of it. It is impossible to read the deposition of the counsel for Jones without being convinced that he was lulled into false security by what occurred between himself, the counsel for Thomas, and the clerk of the court. We do not believe that any fraud was intended, and we do not impute it. We think that counsel, in their zeal to protect and promote the interests of their clients, overstepped the bounds of prudence and discretion, and that, as a result of what they did, Thomas acquired an advantage, in procuring the execution of the deed under the circumstances disclosed, which it would be against good conscience to permit him to enjoy. We do not rest this upon the idea that it was competent for counsel to enter into a contract which would impose an obligation upon their clients, nor that the clerk could by contract disable himself duly to perform the functions of his office; but we do think that what occurred between counsel naturally (indeed, necessarily) induced the belief upon the part of counsel for Jones that the infirmity which existed in the claim of Thomas to the land was recognized as insuperable, that further prosecution of it would be abandoned, and that redress would be sought in a suit for damages against the sheriff and his sureties.

A court can made no contract as to the disposition of cases upon its docket, but, surely, if counsel were to state to a judge that he could not attend upon a particular day, and the judge assured him that his case would not be called or tried on that day, a judgment rendered in contravention of that assurance would operate as a surprise against which a court of equity would give relief. It is true that the clerk is not a court, and the analogy, therefore, is not complete; but the principle is the same, and applies with even greater force to the case before us. "A court of equity always grants relief, even against judgments at law, when it is shown that the reason why the defense was not made was founded in fraud, accident, surprise, or some adventitious circumstances beyond the control of the party." Holland v. Trotter, 22 Grat. 141; Railway Co. v. Wells, 54 Am. St. Rep. 216, 33 S. W. 208, 30 L. R. A. 560, and notes to 54 Am. St. Rep. 216.

As is said (at page 236, 54 Am. St. Rep.) in the case just cited: "We cannot, of course, undertake to specify all the fraudulent acts of this character which may entitle the person against whom they were employed to relief. Such acts may be of infinite variety. It is sufficient, as against any of them, to obtain relief from a judgment produced thereby to show that by such act the prevailing party prevented his adversary from fairly presenting his case in the original action, whereby an unjust judgment was obtained." See, also, McLeran v. McNamara, 55 Cal. 508.

Though no representation be made to a defendant, inducing him not to make his defense, yet if the plaintiff brings on the action without the knowledge of the defendant, and at a time when he knows the defendant has reason to expect the trial of it will not be had, equity will relieve against it. It appeared in one case that a justice of the peace had in the morning announced to a defendant that the trial of the case would not proceed, because of the illness of such justice, and that but for this announcement the defendant would have been present at the hour fixed for the trial, and that the plaintiff, knowing that the defendant had left the court with the belief that his cause would not be called, had afterwards returned and induced the justice to proceed therewith in the absence of his adversary. "In this case, while the plaintiff had not caused the justice

of the peace to make the statements inducing the defendant to forego presenting his defense at the appointed time, he had, in effect, adopted such statements, and employed them for an unconscionable purpose, and had thus brought himself within the rule that no one shall retain an advantage at law thus secured." Miles v. Jones, 28 Mo. 87. It is immaterial that an act was done in good faith and without fraudulent intent; if by it an advantage has been obtained which it is against good conscience to enjoy, a court of equity will relieve against it.

To repeat what we have already said, we do not impute fraud in the transaction under consideration. Were it fraudulent, however, that alone would not entitle appellee to have the deed annulled; for mere fraud is not the subject of judicial inquiry, and cannot, standing alone, be made the basis of relief. If, therefore, Jones, at the time the deed was executed transferring the title from the commonwealth to Thomas, was in such a position that a court would have compelled the clerk to execute the deed, he declining to do so of his own accord, then it follows that Jones was not injured by the conduct of Thomas through his counsel; but if, in the various steps taken to devest his title for the nonpayment of taxes and place it in the commonwealth, there was an omission to do what under the law was necessary to be done to accomplish that result, Jones could at any time prior to the execution of the deed have defeated the title of the commonwealth, and the burden up to this point is upon those relying upon the due compliance with the several requirements of the statute law in such case provided; and, if the deed was procured by any means which a court of equity cannot sanction, if anything was said or done by Thomas or his counsel by which Jones was lulled into a false security, and thereby suffered the loss of any right or remedy, or was placed in a prejudicial position, then we have the case of a wrong accompanied by damage. If, at the instant before the execution of the deed, Jones was in a position to defeat the proceeding against him, then he is not to be prejudiced by the fact that the deed was procured from him by methods which cannot be sanctioned by a court of equity. Turning, then, to the statement of agreed facts, let us suppose that the clerk had refused to execute the deed when demanded, and that Thomas had applied to this court for a mandamus, and it had appeared that section 637 had not been complied with; it cannot be doubted but that such an omission would have been quite sufficient to have justified (indeed, to have demanded) a denial of the writ.

It appears from the facts agreed that in numerous particulars the law regulating the sales of lands returned delinquent for nonpayment of taxes was wholly disregarded; the most material omission, perhaps, being the failure to advertise as required by section 637. If the clerk had furnished copies of the list of delinquent lands as corrected by the court, and caused them to be posted at the front door of the court house, and printed copies thereof to be posted at five public places in the district in which the land lies, appellee might have received notice which would have enabled him to protect himself against loss.

As we have seen, appellant cannot be permitted to rely upon the deed executed to him by the clerk to cure any defects which may exist in the course of the proceeding under which he claims. The burden was upon him to show a compliance with the law, and the undisputed facts in this record are conclusive against him, when he is deprived of the advantage enjoyed by virtue of the deed.

We are of opinion that the decree of the circuit court must be affirmed.

WASHINGTON, A. & M. V. RY. CO. v. CITY COUNCIL OF ALEXANDRIA.

(Supreme Court of Appeals of Virginia. June 14, 1900.)

MUNICIPAL CORPORATIONS—MANDAMUS—CITY ORDINANCE — STREET RAILWAY — REASONABLENESS—QUESTION FOR COURT—JUDGMENT — NON OBSTANTE VEREDICTO — CHANGING RAILS—PAVING.

1. On trial of mandamus by a city to compel a street-railway company to substitute a grooved rail for tram girder rails, as directed by an ordinance, so as to facilitate the paving of a street, questions as to whether or not the tram rails would obstruct the use of the street after such paving, and should not be approved by the city authorities, or whether the grooved rails were a necessary incident to the paving, and whether the tram rails were not of an approved pattern, and had been approved by the city authorities, were submitted to a jury, which found in favor of defendant railway company. *Held*, that a judgment in favor of the city, entered by the court non obstante veredicto, was proper, as questions of the reasonableness of the ordinance were for the court alone.

2. On mandamus by a city to enforce obedience to an ordinance directing a street-railway company to change its rails to facilitate paving, it appeared that the ordinance was not arbitrarily or capriciously passed, but in accordance with a sentiment expressed by a great many citizens, and that the matter had been considered by a committee on streets in conference with the engineer of the railway company, and the new rails recommended to the council, and that such substitute rails were being successfully used in another city. *Held* sufficient to warrant a finding that the ordinance was reasonable, and to sustain a judgment in favor of the city.

Appeal from circuit court of city of Alexandria.

Mandamus by the city council of Alexandria against the Washington, Alexandria & Mt. Vernon Railway Company to compel compliance with an ordinance directing it to change its rails to facilitate paving. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. M. Wilson and J. R. Caton, for appellant. Gardner S. Boothe, for appellee.

KEITH, P. Appellant, with the consent of the appellee, constructed a passenger railway over certain streets in the city of Alexandria in the year 1892; using rails of an improved pattern, known as the "tram girder rail," such as were then commonly in use, and as are still used by many street railways.

The city council of Alexandria, by an ordinance approved July 15, 1898, ordered that a portion of King street (one of the principal thoroughfares of the city) should, for the distance of one square, be repaved with vitrified brick, on a six-inch concrete base; and, by another ordinance of the same date, directed the appellant company to put down, on the said square, rails to be approved by the committee on streets, and to grade and pave on the space between the railroad tracks, and two feet on each side thereof, in a similar manner; and by another ordinance, approved September 23, 1898, further directed the appellant company to take up its rails on said square in King street, and to lay in their stead a grooved rail, with a groove not exceeding 1⅛ inches in depth, and with a tram not lower than 1¼ inches below the head, and with the groove of the outline shown by the full lines of the drawing attached to said ordinance.

The appellant company failing to obey, the city council presented its petition to the judge of the circuit court of the city of Alexandria for a writ of mandamus to compel a compliance with the requirements of said ordinance.

The petition sets forth that the ordinance is a reasonable regulation of the use of the street, which the city has full power to make, under section 33 of its charter, and under the general law, because the paving of King street is greatly needed and desired by the citizens of Alexandria, and a grooved rail is a necessary incident to the improvement, King street being the principal business street of the city, with a heavy wagon traffic upon it, and measuring only 37 feet from curb to curb; that, owing to the narrowness of the street, traffic is compelled to follow the tracks and rails of the appellant company, and therefore any railway track on King street is to some extent an impediment to its free use; and that for these reasons the rail used on King street should be such as to impede general traffic in the least possible degree.

It is further averred that the rail now used upon King street is such as to prevent vehicles from turning out of the railway track, except with great strain to the wheels, axles, and running gear, and jolting in direct crossing. The form of the rails, and the nature and extent of the inconvenience they occasion, are set out with much detail in the petition; and, for the reasons thus stated, the petition avers that the rails as at present laid are a nuisance and an obstruction to the ordinary use of the street.

To this petition the appellant company demurred, and, the demurrer being overruled, it answered, denying the reasonableness of the ordinance; and thereupon issues were framed, to be tried by a jury, as follows:

"(1) Whether or not the several ordinances alleged and set forth in the petition, directing the grading and paving of King street between the west crossing of Fairfax street and east crossing of Royal street, and directing the Washington, Alexandria & Mt. Vernon Railway Company to remove the rail now laid upon said square, and to substitute a grooved pattern set forth in said petition, were duly passed, approved, and published as required by provisions of the charter of the city, and whether or not the conditions to the passage of the ordinances for the improvement of said streets have been complied with.

"(2) Whether or not the present rails in use by respondent on King street between the west side of Fairfax street and the east side of Royal street will obstruct the ordinary use of said portion of King street, provided the proposed improvement of said portion of King street is made by the city of Alexandria as set out in the ordinance approved by the mayor of said city on July 15, 1898, and entitled 'An ordinance to provide for the grading, paving and curbing of King street from the west crossing of Fairfax street to the east crossing of Royal street, and for the assessment of the costs thereof under the thirty-third section of the city charter as amended by an act of the general assembly, approved February 7th, 1898.'

"(3) Whether or not the present rails in use by respondent on King street between the west crossing of Fairfax street and the east crossing of Royal street will be and are of approved pattern; that is, of such pattern, on account of merit and excellence, and adaptation for the purposes for which they are used, as should be approved by the city authorities of Alexandria, provided the proposed improvement of said portion of King street is made by the city of Alexandria as set out in the ordinances approved by the mayor of said city on July 15, 1898, and entitled 'An ordinance to provide for the grading, paving and curbing of King street from the west crossing of Fairfax street to the east crossing of Royal street, and for the assessment of the costs thereof under the thirty-third section of the city charter as amended by an act of the general assembly, approved February 7, 1898.'

"(4) Whether or not the proposed rails mentioned in the ordinance approved on November 23, 1898, and entitled 'An ordinance directing the Washington, Alexandria & Mt. Vernon Railway Company, to take up the rails now laid on King street from the west crossing of Fairfax street to the east crossing

l street and to lay a grooved rail and
e and pave the space between said
d two feet on each side thereof, said
to be done with vitrified brick on a
concrete base,' is a necessary incident
aving and improving of said portion of
reet; that is, whether the public good
reasonable and ordinary use of said
of King street requires that said pro-
ails be used, provided said improve-
King street is made as described in
dinance July 15, 1898, instead of al-
the rails now in use by respondent
portion of King street to remain,
d said improvement of said portion of
reet is made by the city of Alexandria
ribed in said ordinance of July 15,

Whether or not at the time the pres-
s were laid they were of the most ap-
pattern, and such as were then com-
n use.
e said rails so laid without objection
city authorities, and with their ap-
or acquiescence?"
ury found the first of these issues in
f the city council. Upon the second,
ourth, and fifth, it found in favor
appellant. The appellant, therefore,
ot be prejudiced by any instructions
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nission of testimony respecting the
on the issues thus found in its favor.
the cause came on to be heard after
had rendered their verdict, the court
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arded the writ of mandamus, in ac-
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as awarded.
ink the demurrer to the petition was
overruled, and upon this subject we
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ly warranted by the proof. Nor do
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proposed by the city is not a neces-
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present use were at the time they
id of the most improved pattern, and
s were then commonly in use, and were laid, not only without objection by the city, but with its approval and acquiescence.

Now, it may very well be that upon all these issues the jury were justified in all their findings by the evidence submitted to them; it might also be that the court was of the same opinion upon the evidence; and yet it is entirely consistent with both these concessions that its judgment non obstante veredicto should be affirmed.

The real issue to be considered and decided is this: Was the ordinance of the city a reasonable one, regard being had to all the circumstances of the case, or did the city council, in passing the ordinance, act capriciously and arbitrarily?

Its charter and the general law confer upon the city of Alexandria ample power to control and regulate the laying out, repair, and use of its streets. "To do so," said this court in Roanoke Gas Co. v. City of Roanoke, 88 Va. 810, 14 S. E. 665, "is a power essentially incident to the existence and well-being of every municipal corporation, and powers thus delegated are trusts held for the public good, are continuing, and cannot be contracted away; nor can the municipal authorities bind themselves by contract not to exercise them from time to time as the public good may require, * * * and of the necessity and expediency of the exercise of such power the city council, and not the court, is the judge." Richmond, F. & P. R. Co. v. City of Richmond, 26 Grat. 83; Davenport v. Same, 81 Va. 636; City of Charlottesville v. Southern Ry. Co. (Va.) 34 S. E. 98; Town of Harrisonburg v. Roller, Id. 523.

In Burkhardt v. City of Atlanta (Ga.) 30 S. E. 32, the court said: "An incorporated city is a government within a government. It has its own executive, judicial, and legislative branches. It is a creature of the state, and can exercise no power that is not derived from its creator.

"Where legislative power is conferred upon it by the state, it is necessary that a degree of freedom should be allowed in its exercise; otherwise, the city would be so hampered in the government of its people as would defeat the very ends of its incorporation.

"Hence it is that the courts will never interfere with the free exercise of such rights as are left to the discretion of a corporate authority unless such authority should go beyond the scope of power delegated, or unless the discretion given should be abused by an arbitrary exercise thereof, and by a plain and unwarranted violation of private rights."

Dillon on Municipal Corporations (section 95) says: "When a municipal corporation by its charter is empowered, if it deems the public welfare or convenience requires it, to open streets or make public improvements thereon, its determination, whether wise or unwise, cannot be judicially revised or corrected."

Mr. Justice Brewer, in St. Louis v. Western Union Tel. Co., 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 870, delivering the opinion of

the court, said: "The city is given power to open and establish streets, to improve them, and to regulate their use, etc. The word 'regulate' is one of broad import. It is the word used in the federal constitution to define the power of congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be. If the city gives a right to the use of the streets or public grounds, as it did by Ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. If it should see fit to construct an expensive boulevard in the city, and then limit the use to vehicles of a certain kind, or exact a toll from all who use it, would that be otherwise than a regulation of the use? And so it is only a matter of regulation of use when the city grants a telegraph company the right to use exclusively a portion of the street, on condition of contributing something towards the expense it has been to in opening and improving the streets.

"To the same effect, see Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196–203, 5 Sup. Ct. 826, 29 L. Ed. 158. 'The power to regulate commerce,' says Mr. Justice Field, speaking for this court, 'is the power to prescribe the rules by which it shall be governed; that is, the conditions upon which it shall be conducted.'

"If it be said in this case that the city had already regulated the use, by prescribing that there should be two tracks, the answer is that the power of regulation is a continuing power. It is not exhausted by being once exercised, and, so long as the object is plainly one of regulation, the power may be exercised as often as, and whenever, the common council may think proper. The use of the street may be subjected to one condition to-day, and to another and additional one to-morow, provided the power is exercised in good faith, and the condition imposed is appropriate, as a reasonable regulation, and is not imposed arbitrarily or capriciously." See, also, City of Baltimore v. Baltimore Trust & Guarantee Co., 166 U. S. 673, 17 Sup. Ct. 696, 41 L. Ed. 1160.

In Louisville City Ry. Co. v. City of Louisville, 8 Bush, 415, Judge Lindsay, speaking for the court, said: "We will not assume that the city government, in the exercise of the legislative power to regulate the reconstruction of the railway company on Jefferson street, acted capriciously or without sufficient reason. The presumption of the law is that it did not."

It is not necessary to make further citation of authority to show that the city council was clothed with ample power to control and regulate the streets of the city; that this was a continuing power, to be exercised as often and whenever the council may think proper, subject only to the limitation that it must act in good faith; that the regulation must be reasonable, and not imposed arbitrarily or capriciously,—the presumption being in favor of the propriety and validity of what the city has directed to be done.

Dillon on Municipal Corporations (section 327) says: "Whether an ordinance be reasonable and consistent with the law or not is a question for the court, and not the jury, and evidence to the latter on the subject is inadmissible.

"But in determining this question the court will regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country."

Without going into the evidence in detail upon the subject of the reasonableness of the ordinance, we are of opinion that it clearly shows that there was no fraud in its passage; that the city did not act capriciously, but in accordance with what it deemed best to promote the interests confided to it; that the action it took was urged upon it by many of its citizens; that the rail adopted is that in use by the city of Washington as required by an act of congress of the United States.

It further appears that representatives of the appellant were invited to attend a meeting of the committee on streets and the city engineer, where the whole subject was carefully considered, and as a result of their deliberations the engineer and committee recommended the proposed rail to the city council, and they thereupon passed the ordinance requiring its adoption.

In view of these facts, it is manifest that the appellant has not overcome the presumption in favor of the reasonableness of the ordinance which it was ordered to obey; that it has not shown that it was passed arbitrarily or capriciously; and the judgment of the circuit court must be affirmed.

SOUTHERN RY. CO. v. COOPER.

(Supreme Court of Appeals of Virginia. June 14, 1900.)

RAILROAD CROSSING—ACCIDENT—FRIGHTENING HORSES—NEGLIGENCE—DEMURRER TO EVIDENCE.

1. A demurrer to the evidence is the proper mode of taking from the jury the determination of the weight to be given the evidence, and a motion to strike out is equivalent thereto.

2. Failure of the employés in charge of a locomotive to stop it or to give signals when approaching a crossing is not negligence, in case of a horse frightened thereby, but which was seen by such employés approaching the crossing too far off for a collision, and giving no indication of fright.

Error to corporation court of Danville.

Action by George K. Cooper against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Blackford, Horsley & Blackford, for plaintiff in error. Peatross & Harris, for defendant in error.

CARDWELL, J. The defendant in error, George K. Cooper, sued the Southern Railway Company for injuries alleged to have been sustained by him by reason of the negligence of the defendant company, under the following circumstances:

Henry street crosses the Southern Railway near the northern boundary of that portion of the city of Danville known as "North Danville," and is a part of the road leading from Danville to the county of Henry. After leaving the more populous portion of North Danville, the street crosses what is known as the "Still-House Branch," and then, rising a considerable hill, something over 100 yards, crosses the Southern Railway at what is known as the "Henry Street Crossing." After leaving the Still-House Branch, going up the hill, there is a space of about 150 feet upon the right of the street along which a traveler in a buggy can see an engine or train coming from the north upon the Southern Railway. Part of this space has some trees upon it, but the view of an approaching train is not thereby obstructed, and the rest of the distance up to a woodyard is open, and the view of an approaching train is in no wise cut off. At a little over 100 feet from Henry street crossing there was at the time of this accident a woodyard between the street and the railway, with a fence around it, which, with other barriers, it is claimed, obstructed the view of the railway up to within a short distance of the crossing. On the afternoon of May 19, 1898, defendant in error, with a friend, was traveling northward on Henry street in a one-horse buggy. They had crossed the Still-House Branch, and had commenced to ascend the grade towards the Henry street crossing. They both say they were looking out for a passing engine, in order to avoid a collision therewith at the crossing,—one looking up and the other down the railway track,—but saw none and heard none. Henry street is 50 feet broad, and when the horse's head was about at the gate to the woodyard a yard engine of the plaintiff in error, which was moving down grade at a speed variously estimated at from 10 to 15 miles an hour, southward, towards the depot in Danville, as smoothly and noiselessly as an engine could be run, crossed Henry street in front of the defendant in error. As soon as he became aware of the approach of the engine, defendant in error, who was driving, thinking, as he says, the horse was likely to get scared at the engine, turned him so as to get him into the woodyard and keep him out of the view of the engine until he could control him; and in order to get him into the woodyard he backed the horse down the hill, pulling him to the right for the purpose of going through the gate. While in the act of doing this the horse became unmanageable, the buggy was overturned throwing its occupants out, and the horse ran off, whereby defendant in error received the injuries for which he was awarded in the court below $1,000 damages.

It further appears that the persons on the engine saw the buggy and defendant in error and his companion going up the grade towards Henry street crossing at a distance too far from the crossing to make a collision with the engine possible; and a person examined as a witness on behalf of defendant in error was in the woodyard, and also saw the men in their buggy going up the hill towards the crossing,—taking particular notice of the horse, as defendant in error had proposed to sell it to him; and all testify that the horse was going quietly along the street, at a distance from the crossing of about 55 feet, when the engine passed.

The statute in force in Virginia providing for signals at crossings, and requiring every locomotive engine to carry a bell, expressly exempts signals by whistling within the limits of an incorporated town or city; and in Danville, under the ordinance of the town, a whistle cannot be blown. In this case, according to evidence introduced by defendant in error, the whistle on the engine was not blown, nor the bell rung.

After the evidence for both plaintiff and defendant had been introduced, plaintiff in error moved the court to strike out all the evidence introduced by defendant in error, on the ground that, admitting every allegation therein proved to be true, it made no case against it, which motion was overruled, and an exception was taken, which constitutes the first assignment of error relied on here.

The exception is not well taken. Under our practice, the only mode of taking away from the jury the determination of the weight to be given to evidence is by demurring to it. A motion to strike out is not equivalent to a demurrer to the evidence, as counsel for plaintiff in error contends; citing Fowlkes v. Railway Co., 96 Va. 742, 32 S. E. 464. The decision in that case only recognized and applied the universally admitted law that the court determines whether evidence is admissible or not, and in the exercise of this function admits or excludes it, on objection to it when offered, or on motion to strike it out if it has been improperly admitted.

The defendant in error neither alleges in his declaration nor offers proof of any negligent act of plaintiff in error, done in the immediate vicinity of the highway upon which he was traveling, as causing his injuries, but relies merely upon the omission of plaintiff in error to give him signals or warnings of the approach of the engine at which his horse took fright, without a suggestion as to what signals or warnings should have been given him, other than the blowing of the whistle or ringing the bell. He states that he lived in North Danville; was familiar with the Henry

street crossing and its surroundings; that he regarded his horse as gentle and safe; had driven it up to street cars; and that on the occasion of his injury he and his companion were only looking out to avoid a collision with an engine on the crossing they were approaching. The question presented, therefore, is, what duty did plaintiff in error, under the circumstances, owe to defendant in error, and fail to perform?

This may be disposed of in connection with the assignment of error to the rulings of the court below in refusing instructions Nos. 1, 3, 4, and 6 asked for by plaintiff in error, and in modifying its eighth instruction. They are as follows:

"No. 1. The court instructs the jury that under the law of Virginia, Danville being an incorporated city, the defendant had the right to omit the sounding of the whistle in approaching the Henry street crossing, where the accident occurred; and, if the jury believe from the evidence that the accident was caused by the failure to sound the whistle, the defendant was not negligent, and they must find for the defendant."

"No. 3. The court instructs the jury that the defendant had the right to presume that, the less noise made by the train in approaching the crossing, the less danger there was of frightening horses near the track; and, while the defendant would be liable for injuries caused by frightening horses by unnecessary noise, it is not liable for injuries caused by frightening horses too far off for collision, when it makes as little noise as possible.

"No. 4. The court further instructs the jury that, operating railroads by steam being lawful, the defendant had the right to run its engines and trains where they can be seen by man and beast,—the right to make the noises incident to the movement and working of its engines; and the defendant is not liable for injuries occasioned by a horse, when being driven on the highway, taking fright at the sight of an engine, nor at the noises usually made by a running engine."

"No. 6. The court further instructs the jury that the defendant's employés in charge of the engine had a right to presume that horses near the track would not be frightened by an approaching engine, and it was not their duty to stop the engine or to give any signals when the horse was seen approaching the crossing too far off for a collision, and giving no indications of fright when seen by some of the employés on the engine."

"No. 8. The court instructs the jury that if they believe from the evidence in this case that an ordinance of the city of Danville prohibited the sounding of whistles upon the engine, which is charged to have caused the accident in question at the Henry street crossing, or at the point designated at the whistling post, then the failure to blow such whistle was not negligence."

The court struck out of instruction 8 the words "failure to blow such whistle was not negligence," and inserted in their stead, "defendant was not required to sound the whistle as it approached the crossing."

Where the statute imposes upon a railroad company the duty of sounding the whistle on its locomotive engines approaching a crossing of a highway, for the purpose of preventing a collision with travelers on the highway or frightening their teams, and the railroad company fails to perform that duty, it is negligence, for which the company would be liable for injuries resulting therefrom.

In Railway Co. v. Torian, 95 Va. 453, 28 S. E. 569, it was said that a railroad company is liable for injuries inflicted in consequence of sounding its whistle in a careless or reckless manner or at an improper time. This is unquestionably settled law, and it is equally as well settled that, where the violation of an ordinance or a statute is the proximate cause of an injury, the wrongdoer is liable therefor. 2 Elliott, R. R. § 711; Railroad Co. v. Hite, 81 Va. 771. If, therefore, it is negligence to sound, in violation of an ordinance or statute, the whistle on an engine approaching a highway crossing, it cannot, either upon reason or authority, be deemed negligence to omit doing so. In Railroad Co. v. Hite, supra, it was said: "Undoubtedly railroad companies have the right to run engines and cars over their own roads and in their yards, and, as a consequence, they have the right to make the usual and reasonable noises necessarily incident to a running train; and for the making of such noises, therefore, where they are neither negligently nor unnecessarily made, no cause of action will arise, although animals may be frightened thereby, and injury ensue.

"A railroad company is not liable for injuries received from horses becoming frightened upon a highway at the mere sight of its trains or the noises necessarily incident to the running of the train and the operation of the road." 3 Elliott, R. R. § 1264, and cases cited. Among the many authorities there cited is the case of Flint v. Railroad Co., 110 Mass. 222. In that case the plaintiff was injured by his horse becoming frightened by the cars on the defendant's railroad. It appeared that the railroad crossed the highway on which the plaintiff was traveling; that the horse became frightened when about 5 rods from the crossing by the approach of two cars, about 10 rods therefrom; that the cars were coming on a down grade, by the force of gravitation, at the rate of eight or ten miles an hour; and that no signals were given of their approach. Held, that these facts would not warrant the jury in returning a verdict for the plaintiff.

In Favor v. Railroad Corp., 114 Mass. 352, the court lays down the broad doctrine that a railroad company has the right to do lawful acts upon its own premises, and is not

ble for injurious consequences that se from such acts, unless the acts ligently and improperly done; but, ourt adds: "If the defendant in this d done some negligent act in the of the highway, calculated to en- the safety of travelers passing over horses, a very different question e presented." That is to say, that he railroad is using its property in a way, doing no negligent act in the ite vicinity of a highway, calculated nger the safety of travelers passing with horses, and an injury is sus- y reason of horses on the highway g frightened by an engine or train it, the railroad company is not erefor. Railway Co. v. Schmidt, 134 33 N. E. 774; 1 Thomp. Neg. § 15; v. Railroad Co., 156 Mass. 159, 30 9; 2 Wood, R. R. § 324.

nquestionably one of the objects of ance of a city prohibiting the sound- the whistle on locomotives engines the limits of the city to lessen the of teams on the streets becoming ed at passing engines or trains. And is a matter of common observa- which courts will take judicial no- counsel for defendant in error con- nat bells are used on locomotive en- lessen the danger to travelers on a r highway of a collision with an crossing the street or highway, can d that they are intended or useful in persons on the street or highway y may keep such a distance from the as will prevent their horses from g frightened at a passing engine? k not.

nstruing a statute of the state of sland requiring railroad companies to bell upon their locomotive engines stance, at least, of 80 rods from the ere the railroad crossed any turnpike ay upon the same level with the rail- e supreme court of that state held statute was only intended to lessen ger of a collision of the engine or ith individuals, or their horses, car- r teams, on the crossing, and not or useful to warn people elsewhere. ll v. Railroad Co., 6 R. I. 211.

it the purpose of gates at a street to warn persons traveling the street at a sufficient distance to prevent ses from becoming frightened by an r train, as they are only lowered to eet travelers off of the crossing until oaching engine or train passes. As l by this court in Richmond Union y. Co. v. Richmond, F. & P. R. Co., 373, 32 S. E. 787, it is a matter of knowledge that the tendency of gates ate keeper at railroad crossings is to safety; but their utility as a warning ers to keep at a safe distance, to pre- ir horses from becoming frightened, does not appear in the case at bar, nor is it a matter of common knowledge. Had there been a watchman at Henry street crossing, it could not have been reasonably expected of him to stop defendant in error at a greater distance from the crossing than 55 feet, in order to prevent his horse from taking fright at the passing engine. According to his own statement, he was driving his horse quietly along the street, too far away from the crossing to make a collision with the engine possible. Had the man in charge of the engine, seeing defendant in error driving his horse quietly towards the crossing, in no possible danger of a collision, and no noise being made on the engine other than that incident to a running engine, immediately proceeded to sound the whistle, at which the horse took fright, and injury to defendant in error ensued, it might have been reasonably claimed that plaintiff in error was guilty of negligence in recklessly and unnecessarily sounding the engine's whistle. Railway Co. v. Torian, supra.

Instruction No. 8, as asked for by plaintiff in error, simply told the jury that if they believed from the evidence that an ordinance of the city of Danville prohibited the sounding of the whistle upon the engine, which was charged to have caused the accident in question, at the Henry street crossing, or at the point designated as the whistling post, the failure to blow such whistle was not negligence. It correctly propounded the law, and should have been given as asked.

Plaintiff in error's instruction No. 1, refused, was to the same effect, and should have been given.

It follows from what has already been said that we are further of opinion that plaintiff in error's instructions 3, 4, and 6 correctly propounded the law, and should have been given.

Without these instructions to the jury qualifying instruction No. 1 given for defendant in error, that instruction was plainly erroneous, in that it left the jury free to find a verdict for defendant in error on the sole ground that plaintiff in error omitted to sound the whistle on the engine when it approached the Henry street crossing.

The remaining assignments of error will not be considered, as they are either without merit, or are not likely to arise on another trial.

The judgment of the corporation court must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with this opinion.

LAND v. SHIPP et al.

(Supreme Court of Appeals of Virginia. June 14, 1900.)

DOWER—RELEASE—SEPARATION AGREEMENT—VALIDITY—JOINTURE.

1. Married Woman's Act, c. 103 (Code, § 2284), declaring that a married woman may

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contract with reference to her separate estate, which shall consist of her property at the time of marriage, or afterwards acquired, the rents and profits thereof, rights of action, damages for wrong, and compensation for property taken for public use, does not authorize her to release to her husband her inchoate right of dower in his lands, since such right is not a property right, within such provision.

2. A consideration to a wife for a deed of separation between herself and her husband, in which she releases her dower, need not be returned, as a condition for the assignment of dower, at the death of the husband, in lands conveyed by him during life, since the release was absolutely void, and the deed of separation in no way affected her rights.

3. A deed of separation, by which the parties agreed to each control their separate property, and release their rights of dower and curtesy, cannot be considered a statutory jointure, under Code, §§ 2270, 2271, providing that a conveyance or devise may be taken in lieu of dower, which shall constitute a bar thereof, unless on the death of the husband the wife elects to take dower instead of the jointure.

4. A husband and wife executed a deed of separation, mutually releasing dower and curtesy; and subsequently the husband executed a trust deed on real estate, in which the wife did not join. The debt secured thereby was not paid, and the premises were sold on foreclosure, from the proceeds of which the debt secured, as well as a debt secured by a prior trust deed on the same property, in which the wife joined, were paid. *Held* that, since the release of the wife's dower was absolutely void, she was entitled, on the death of her husband, to dower in said land, as if no agreement had been made.

Appeal from circuit court, Princess Anne county.

Action by Laura L. Land against H. E. Shipp and Emerson Land for dower. From a dismissal of the bill, plaintiff appeals. Reversed.

Burroughs & Bros., for appellant. William McK. Woodhouse, for appellees.

CARDWELL, J. This is an appeal from a decree of the circuit court of Princess Anne county, and the case is as follows:

Appellant, Laura L. Land, intermarried with John W. S. Land March 9, 1890, and they lived together as husband and wife till June 27, 1896, when they signed and acknowledged a deed of separation, which was admitted to record in the clerk's office of Princess Anne county court. The deed recites that "owing to an incompatability of temperament, the parties mutually find it impossible for them to live happily and congenially together as husband and wife, and desired that each shall have the same liberty of person and personal rights, and the same power to manage, control, use, alien, or convey their respective separate estates, both real and personal, which they or either of them now own or may hereafter acquire, as if they were unmarried." The consideration stated is the premises, and $400 in cash paid by the husband to the wife, followed with a mutual agreement "that from that date the parties will live separate and apart from each other; that each shall and will refrain from interfering with the person or property of the other; that they mutually and severally release and quitclaim dower, tenancy by the curtesy, and all other rights which they may respectively acquire or may have already acquired, by reason of their marriage, in the property of each other; that each shall enjoy free from molestation or interference of the other, the same freedom of person, the same rights of person and property, and the unrestrained power to manage, control, use, transfer, assign, alien, or convey his or her separate estate then owned or thereafter acquired, as if they had never been married." They further mutually covenanted and agreed that the child born to them should remain in the possession of the mother, free from the management and control of the father, and he to be in no manner held responsible for the support and maintenance of the mother or child.

On the date of the deed of separation the husband executed a deed of trust, in which the wife did not unite, upon a tract of land (about 132 acres) situated in Princess Anne county, and the only real estate owned by the husband, to secure the payment of a debt of $569.47 for borrowed money, and out of which the $400 was paid to the wife.

Default having been made in the payment of the debt secured by this trust deed, the property was sold by the trustee, in the lifetime of the husband, to H. E. Shipp, at the price of $3,050; and after the payment of the costs of sale, a debt of the husband, secured by a former trust deed on the property, in which the wife did unite, and the debt of $569.47, with interest, secured by the deed under which the trustee sold, the balance of the purchase money was paid over by the trustee to the husband. H. E. Shipp sold and conveyed the land on the 26th of May, 1898, to Emerson Land, at the price of $3,500, having previously sold the timber on it for $250; and, her husband having died, appellant instituted this suit against H. E. Shipp and Emerson Land, appellees, claiming dower in the land, and in the proceeds from the timber sold therefrom by Shipp. She alleges in her bill that she was forced by her husband's threats of violence to execute the deed of separation from him, of June 27, 1896, but this is not clearly shown by the proof. Therefore appellees contend: First, that appellant is bound by the provisions of the deed of separation which relate to her dower, and, having relinquished it by deed duly of record, she cannot, after the death of her husband, assert her right of dower in the lands of which he was seised during the coverture; and, second, that, if the deed of separation did not release or relinquish appellant's dower in the land, she cannot assert claim to it, and retain the money paid her in lieu thereof.

To sustain the first contention, it is necessary to regard the wife's inchoate right of dower in her husband's lands as her statutory separate estate, with reference to which

she has the power, under the married woman's act (chapter 103 of the Code), to contract. Sections 2501 and 2502 of the Code provide how deeds or conveyances by the husband and wife may be acknowledged for recordation, and the effect of such conveyances, when recorded, upon the dower of the wife, or her estate in the lands conveyed. They are substantially the same as the provisions in the Codes of 1873 and 1860 relating to the acknowledgment, recordation, and effect of a deed by husband and wife, when recorded, upon the dower of the wife, etc., except that the privy examination of the wife is dispensed with.

In Switzer v. Switzer, 26 Grat. 574, the question was raised as to the effect of the acknowledgment of a deed of separation between husband and wife under these statutes as they formerly stood, and it was held that they only applied to conveyances from husband and wife to a third party. Says the court in the opinion, by Staples, J., "It is the union of the husband and wife, as grantors, that makes the instrument operative." The court in that case, expressly waiving the decision of the general question as to whether any deed of separation was valid to any extent or for any purpose, held that a contract or agreement for separation, made directly with the husband, is void as to the wife, as her legal existence is merged in his, and she is presumed to be acting under his influence.

The married woman's act makes no reference, directly or indirectly, to the rights of the wife in the husband's property, real or personal, acquired by the marriage. It simply enlarges the powers of the wife over property declared in the act to be her separate estate. There is nothing whatever in the act conferring upon the wife the power to contract generally, whether she had separate estate or not. Hirth v. Hirth, 98 Va. —, 34 S. E. 964. Instead of enlarging the scope of the statute as it originally stood, and which makes provision as to how the wife may relinquish her right of dower in her husband's lands, the legislature has, since the passage of the married woman's act, restricted its scope by adding the following words thereto: "Such writing shall not operate any further upon the wife or her representatives by means of any covenant or warranty contained therein which is not made with reference to her separate estate as a source of credit, or which if it relate to her said right of dower, or to any estate or interest conveyed other than her own, is not made with reference to her separate estate as a source of credit. Section 2502 of the Code. The plain purpose of this amendment and its effect are, not the enlargement of the scope of the statute by reason of the married woman's act, but a restriction so as not to affect the separate estate unless the covenants in the deed were made with reference to her separate estate as a source of credit.

In Mason v. Mason, 140 Mass. 63, 3 N. E. 19, the wife, by her deed, made in her husband's lifetime, in consideration of $300 paid her by the husband, or out of his estate, undertook to convey to a son of the husband, and one of the devisees under his will subsequently made, all right, title, and interest which she then had or might thereafter have in her husband's estate; expressly referring to her right of dower. After the husband's death the wife claimed dower in his estate, and the same defense was made to her demand as is made in the case at bar; and it was held that the wife's inchoate right of dower was not separate estate that the wife might dispose of in the life of the husband, that such a conveyance did not bar her dower, and that she was not compelled to refund the $300, as a condition of having her dower assigned. The opinion expressly says that the statute in force in Massachusetts conferring upon a married woman the power to make contracts must be limited in construction so as to exclude the right of a married woman to make contracts for the conveyance of her right of dower.

In White v. Wager, 25 N. Y. 328, it was held that the disability of a husband to take land by conveyance from his wife is not removed by the statute enabling her to devise and convey as if she were unmarried.

In Flynn v. Flynn, 171 Mass. 312, 50 N. E. 650, 42 L. R. A. 98, it was held that, until the husband's death and the actual assignment of the dower, the wife or widow has no "estate" in the land, but her interest is an inchoate charge, of a peculiar nature, which, while it may be released to a vendee of the husband, cannot be assigned or conveyed to any other. In Moore v. New York, 8 N. Y. 110, which was also a proceeding to condemn lands of a married man under the New York statutes, it was insisted that the wife was a necessary party defendant; but the court held, as in the case of Flynn v. Flynn, supra, that she was not, for the reason that, while her inchoate right of dower in the land was an interest which might be released, it was not the subject of grant or assignment, "nor is it in any sense an interest in real estate."

We are cited by counsel for appellees to Jones v. Fleming (decided by the court of appeals of New York) 104 N. Y. 418, 10 N. E. 693, and Rhoades v. Davis, 51 Mich. 306, 16 N. W. 659, as holding that the wife's inchoate right of dower is her separate estate, which she may release to her husband by virtue of the married woman's act.

The case of Jones v. Fleming is very unlike the case at bar. In that case the contract was between the children of the husband by a former marriage, the committee of the husband (a lunatic), and the wife, by which the wife, in consideration of $3,400 and the settlement of certain suits as to

alimony, agreed to release her right of dower in the husband's lands. The contract was with a third party, the children of the husband, not a contract with the husband. Besides, the court had, in several previous cases, decided that a married woman, under their statute, had the power to contract generally, and whether she had separate estate or not at the time of the contract was immaterial. Ackley v. Westervelt, 86 N. Y. 448; Tiemeyer v. Turnquist, 85 N. Y. 516. This is contrary to the views expressed by this court in construing our married woman's act. Hirth v. Hirth, supra.

In Rhoades v. Davis, supra, the supreme court of Michigan, construing the statute of that state very similar to our married woman's act, does hold that a married woman's release to her husband of her dower right, if made for a good consideration and without fraud or improper dealing, is binding upon the wife. In other words, the court took the view that the act permitting the wife to dispose of her interests as if single empowered her to contract with reference to her inchoate right of dower in her husband's estate, regarding her dower interest as her statutory separate estate.

In this view we are unable to concur. It is not in accord with the trend of the decisions of this court holding that the married woman's act gives to the wife such estate as is indicated by the plain words of the statute, and such control of it as the statute directs, and that in all other respects the relations of husband and wife as to property remain unaltered. Section 2284 of chapter 103 (married woman's act) is specific in enumerating the various species of property that constitute the separate estate of a married woman; and it is not possible, we think, by any liberality of construction, to bring the inchoate right of dower in lands of which the husband is seised during the coverture within its provisions.

The only ground upon which appellant could be required to refund the $400 paid to her by her husband, before having dower assigned in the lands in question, is that the deed of separation of June 27, 1896, created a statutory jointure, and that she cannot retain the jointure and have dower in the land. Sections 2270 and 2271 of the Code, as to jointure, differ from jointure at common law only in that under the statute it may be of personal as well as real estate. At common law the essentials of jointure were: It must consist of an estate or interest in land, to take effect in possession or profit immediately on the death of the husband, and must be made in satisfaction of the dower, and so appear in the deed. It is an absolute bar only when made before marriage. If made after marriage, it only puts the wife to her election whether to accept the provision or claim dower.

Under the statute, as well as at common law, a provision in lieu of dower is to take effect at the death of the husband; for it is then that the widow is put to her election as to whether she will accept the jointure, or claim dower in her husband's estate, and the provision of the statute is that, "when she shall elect and receive her dower, the estate so conveyed or devised to her shall cease and determine." Code, § 2271.

If, after the husband's death, the widow accepts the provision made for her in lieu of dower, she bars herself of dower; but if she has received the provision during her husband's life, and has spent or wasted it, she may take the dower as if it had not been made. It is necessary, in order to estop her, that she should have enjoyed the provision, or a part, at least, after her husband's death. 5 Am. & Eng. Enc. Law, 911, and authorities cited.

The deed of separation in this case contains none of the elements of a jointure. It is nothing more or less than an attempt to dissolve the marital relations between the parties, to obtain from the wife a release, directly to her husband, of her inchoate right of dower in his estate, and to place upon her the support of herself and the child of the marriage. In the condition in which the wife was thereby placed, the money consideration for entering into the contract was readily consumed in the use for the support of herself and child.

The wife being without power to make such a contract it is absolutely void as to her, and therefore does not bar her dower in the lands of which the husband was seised during the coverture.

Nor can she, upon equitable grounds, as is contended, be required to refund the $400 paid her as in lieu of her dower. Her claim to dower is a common-law right, which she could enforce at law or in equity. True, she chose to assert her claim in a court of equity, but she is not seeking equitable relief in the cancellation of a release or relinquishment of her dower. She is entitled to dower in the estate of her husband to the extent to which she has not released or relinquished it in a manner authorized by law, and her right is in no way affected by the deed of separation of June 27, 1896.

The learned judge of the court below, having taken the view that appellant was not, by reason of the deed of separation, entitled to dower at all in the lands in question, did not, of course, pass upon the character or extent of her dower interest therein. She claims dower in the lands, and in the proceeds from the sale of the timber thereon by appellee H. E. Shipp. It is contended for her that as the debt secured by the trust deed upon the land made by the husband during the coverture, in which she united, had been satisfied, her right of dower in the land was again in full vigor, although the debt thereby secured was paid out of the proceeds from the sale of the land by the trustee in the subsequent deed of the husband, in

he wife did not unite. In this view not concur. The deed of separation nullity as to appellant, her right of in her husband's estate at his death w are the same as if it had never ıtered into; that is to say, the sale trustee in the subsequent deed of ven by the husband during the cover- l not affect appellant's right of dow- ıe land to any further extent than a conveyance by the husband to the pur- would have affected her right. When d of trust by the husband, under he land was sold, was executed, appel- d her inchoate right of dower in the of redemption in the land, which was husband could convey to the trustee; on the death of the husband this right er became consummate, she not hav- ased or relinquished it in any mode zed by law. Wheatley's Heirs v. Cal- 2 Leigh, 264; and section 2269 of the Sections 2277 and 2278 of the Code ply.

decree of the circuit court dismissing nt's bill will be reversed, and the remanded for further proceedings in accordance with this opinion.

ERN RY. CO. v. GLENN'S ADM'R.

(e Court of Appeals of Virginia. June 14, 1900.)

E—COMPENSATION — INTERLOCUTORY CREE—APPEAL—COMMISSIONER'S REPORT—EXCEPTION.

compensation of the trustees being deed of trust of a corporation convey- its assets to secure creditors, one ap- by the court as substituted trustee, the powers and duties of the original cannot receive extra compensation for g stock subscriptions called for by the ter the substitution; this being a duty by the deed of trust.

decree merely holding that the court ver to allow the trustee compensation ices in addition to that provided for eed of trust, or one approving and con- a report settling the accounts of the representatives of a deceased trustee, ertaining the balance due from dece- state to the trust estate, without judg- gainst him for the same, or making er disposition of it, or without dismiss- case as to him, is not a final decree, interlocutory one, which need not be l from till after final decree.

ere the court has, on exception to a of a commissioner, expressly decided court has authority to allow the trus- ter compensation than provided in the trust, it is not necessary to except to ent reports of the commissioner on the that there is no such authority, in or- resent such question for review.

nere statement, without consideration, rty or his attorney, that there will be al, does not prevent appeal.

ough compensation of a trustee be fixed deed of trust, yet, the trust being of agnitude, he will not be required to free a place in which to give his at- to the business, where his clerk can ad where the mass of books and papers g to the trust estate can be kept.

6. Where the trustee's accounts required to be settled and reported to the court semiannually showed balances in his hands on which no interest was charged, and no exceptions were made to the settlements during the many years of the trust, and no reason appeared why they were not made, claim that he should have been charged with interest cannot be made on appeal.

Appeal from circuit court, Henrico county.

Proceedings between the Southern Railway Company and Glenn's administrator. From adverse decrees, the company appeals. Modified.

B. B. Munford, H. W. Anderson, and John Howard, Jr., for appellant. Chas. U. Williams, for appellee.

BUCHANAN, J. In the year 1866 the National Express & Transportation Company executed a deed of trust conveying all of its assets, of every kind and description, to three trustees for the purpose of securing its creditors. But little was done towards executing the trust until the year 1871, when a bill was filed by one of the creditors, in behalf of himself and such other creditors as became parties and contributed to the expenses of the suit, for the purpose of enforcing the trust. By a decree entered on the 14th day of December, 1880, the surviving trustees, one of the three having died prior to that time, were, by and with their consent, removed as trustees, and John Glenn, the appellee's intestate, substituted in their stead. Mr. Glenn at once entered upon the discharge of his duties, and continued to act as such until his death, March 30, 1896.

The compensation of the trustees for executing the trust was fixed by the deed at 5 per cent. commissions on the moneys received by them. The court allowed the substituted trustee 10 per cent. for his services on the moneys received, and this action of the court is assigned as error.

The contention of the appellant is that, where the compensation of a trustee is fixed by the instrument creating the trust, no greater compensation can be allowed him without the consent of the other parties to be affected by the increased allowance. The correctness of this proposition of law, as a general rule, does not seem to be controverted by the appellee's counsel; but they insist that it has no application to this case, because it became necessary for the court by its decree to create, not only new duties not contemplated by the original trust deed, but to create, in fact, a new trust estate, over which its appointee should perform the duties created by the decree itself; or, in other words, that he occupied the position of receiver, rather than of trustee, to execute the orders of the court in carrying out the purposes of the deed of assignment. This contention we do not think can be sustained. From the fourth and fifth paragraphs of the decree of December 14, 1880, it is clear that the appellee's intestate was substituted as

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trustee in lieu of the former trustees, and not appointed receiver. Those paragraphs are as follows:

"And it appearing to the court that said John Blair Hoge and John J. Kelly, surviving trustees in said deed, are willing, each to resign and renounce the office of trustee under said deed, and that they are so situated as not to be able efficiently to perform the duties of the same, and that it is right and expedient, under all the circumstances, that they be relieved from the said trusteeship, the court doth adjudge, order, and decree that the said John Blair Hoge and John J. Kelly, surviving trustees, of themselves and C. Oliver O'Donnell, under the said deed, bearing date the 20th day of September, 1866, executed to them by the said National Express and Transportation Company, in trust for the benefit of its creditors, be, and they are hereby, respectively, removed from the office of trustee under this deed.

"And it further appearing to the court that John Glenn, Esq., of number twelve St. Paul street, in the city of Baltimore and state of Maryland, is a fit and proper person to execute the duties of said trust, it is adjudged, ordered, and decreed that the said John Glenn be, and he is hereby, substituted and appointed trustee in the said deed in the room and stead of the said Hoge and Kelly, with all the rights and powers, and charged with all the duties, of executing the trusts of said deed, to the same effect as were the original trustees therein. And the said John Blair Hoge and John J. Kelly are authorized and directed to transfer and deliver to the said John Glenn, substituted trustee as aforesaid, all of the books and papers of the said National Express and Transportation Company, of every kind and description, and all of the estate and property of said company of every kind and description, now in possession of them, the said Hoge and Kelly, or either of them, and the receipt of the said John Glenn to them for the same shall be full acquittance and discharge therefor.

"But the said John Glenn is not to take possession of said property, books, and papers, or receive any money, as such substituted trustee, until he, or some one for him, shall enter into bond, with good security, before the clerk of this court, in the penalty of one hundred thousand dollars, conditioned for the faithful discharge of his duties as such trustee."

The substituted trustee, in the language of the decree appointing him, was "clothed with all the rights and powers and charged with all the duties of executing the trusts of the said deed, to the same effect as were the original trustees." All the estate of the company, of every kind and description and wherever situated, including the unpaid and uncalled for stock subscriptions, passed to, and was vested in, the original trustees by the deed of assignment for the benefit of its creditors. This was so declared by the decree substituting the trustee, and was so held by this court in Lewis' Adm'r v. Glenn, 84 Va. 947, 965, 6 S. E. 866. Requiring the trustee to collect stock subscriptions which had not been called for when the deed of trust was made, but which were called for by the court after the substituted trustee was appointed, was not, as the appellee contends, imposing any new duty upon the substituted trustee, but was merely requiring him to perform a duty imposed by the deed of trust. The collection of that asset was as much a part of the duty of the original trustees or of the substituted trustee, when the necessity for its collection arose and calls were made for it by the directors of the company or by the court, as was any other duty imposed by the trust. We are of opinion, therefore, that the duties performed by the substituted trustee were such duties, and only such duties, as were imposed by the deed of trust, and necessary to its proper execution, and that for performing those duties he was entitled to the compensation provided in the deed, and that the court had no more right to increase his compensation beyond that provided for by the trust without the consent of the other parties in interest than it would have had to decrease it without his consent. Perry, Trusts, § 919; Burrell, Assignm. § 418.

But it is insisted that, even if the court had no authority to make the increased allowance, the appellants have lost their rights to have the decrees complained of reviewed and reversed by reason of their failure to object to the court's action at the proper time, and their long acquiescence in what was done.

In determining this question, it will be necessary to refer briefly to the proceedings in the cause.

The substituted trustee retained as compensation for his services the commissions provided by the deed of trust until April, 1880, when he filed his petition asking for increased compensation. At the same term of the court one of its commissioners was directed to inquire and report what additional compensation, if any, should be paid the said trustee for his services in executing the deed of trust.

In December following the commissioner reported that an additional commission of 5 per cent. upon all the trustee's collections, up to May 5, 1886, which amounted to $155,162.03, or $7,758.10 in addition to the compensation allowed him by the terms of the deed, would not be more than what his services were really worth, and recommended that such additional commissions be allowed him if the court had authority to allow any compensation beyond that fixed by the deed of trust, but reported that in his opinion the trustee was bound by the terms of the trust, and that no extra compensation could be charged to the fund, although he was further of opinion that the creditors who had

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allowed him for his services, and confirmed by the court without exceptions.

The commissioner in his reports of June 28 and June 30, 1894, reporting settlements of the trustee's accounts in which 10 per cent. commissions were allowed the trustee, called the court's attention to certain allowances to the trustee, including his commissions, and suggested that under the then condition of the trust they were perhaps not just or proper.

When these reports came before the court, in accordance with the suggestions made by the commissioner, and for the better information of the court and the parties, the commissioner was directed, among other things, to inquire and report as to the suggestions made by him in the reports referred to as to the justice and propriety of allowances to the trustee, in the present and approximate condition of the trust estate, for the following charges, to wit: (1) As to office rent; (2) as to clerical services; and (3) as to 10 per cent. commissions on gross receipts of the trust fund.

In the reports made pursuant to that order, and filed, respectively, April 26 and May 24, 1897, the commissioner was of opinion that, although the court had decided that it had the right to allow the trustee compensation beyond that provided for in the deed of trust, the evidence did not show that his services had been such since January 1, 1893, as to entitle him to increased compensation, and recommended that only the commissions fixed by the deed of trust be allowed. The trustee excepted to these reports on this ground. The court sustained the exception, and continued the allowance of 10 per cent. commissions by its decree of April 9, 1898.

On the 2d day of May, 1898, the appellants filed their petition and supplemental petition, praying the court to rehear and reverse its action in allowing the trustee's compensation in addition to that provided for in the deed of trust, and to correct certain other alleged errors.

The court, by its decree of July 18, 1898, upon the motion of the personal representative of the trustee, refused to grant the relief sought, and dismissed the said petitions, and also dismissed the case as to the trustee's estate.

From that decree this appeal was allowed.

Conceding that the decree of January 18, 1887, which held that the court had the power to allow the trustee compensation for his services in addition to that provided for in the deed of trust, was such a decree as the appellants had the right to appeal from, they were not bound to appeal from it. It was an interlocutory decree, and while, by virtue of section 3454 of the Code, a party is given the right to appeal from certain interlocutory decrees if he desires to do so, he is not bound to appeal from such decrees at the time they are rendered, but may do so at any time within a year after a final de-

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cree has been rendered in the cause, provided all the other requisites for an appeal exist. Jameson v. Jameson's Adm'x, 86 Va. 51, 9 S. E. 480, 3 L. R. A. 773; Harper v. Vaughan, 87 Va. 426, 12 S. E. 785. No final decree was entered against the appellee until the 18th day of July, 1898, when the case was dismissed as to him. The decree of April 9, 1898, was not, as so earnestly insisted by the appellee, a final decree.

A decree approving and confirming a report settling the accounts of the personal representative of a trustee, and ascertaining the balance due from his decedent's estate to the trust estate, without giving judgment against him for the same, or making any other disposition of it, or without dismissing the case as to him, cannot be regarded as a final decree under our decisions.

It is further insisted that, inasmuch as the appellants failed to except to the reports of the commissioner which allowed the additional compensation to the trustee, they cannot raise the question in this court.

If the propriety of the additional compensation allowed depended solely upon the facts before the commissioner, then it would have been necessary to have excepted to the commissioner's reports in which it was allowed; but the question is, had the court, under any state of facts, authority to allow the trustee greater compensation for executing the trust than that fixed by the terms of the trust? This was a question of law, and the commissioner in his report filed in December, 1886, reported that in his opinion the court had no such authority. To this report the trustee excepted, and the court sustained his exception, and held that it had such authority, and decreed additional compensation. This question of law having been thus expressly raised and decided by the court, it was not necessary, even if it would have been proper, to have excepted to the subsequent reports of the commissioner on the same ground. Why require the creditors to raise, and the court to pass upon, the question of its authority to allow additional compensation upon the coming in of every settlement of the trustee's accounts in which such allowance was made, when that question had been before distinctly raised and expressly passed upon by the court?

It is further insisted that the appellants have lost the right of appeal because Mr. Howard, their counsel, agreed that, notwithstanding the fact that he differed with the court as to its power to allow the trustee additional compensation, he would not contest the matter. It is true Mr. Howard does state in his deposition that he did not appeal from the court's action allowing such compensation because he wished the trustee to be fully compensated. Such a statement as this is clearly no such agreement as would prevent the appellants from appealing. There is no pretense that there was any consideration for it. Even if the appellants themselves had told the trustee that they did not intend to and would not appeal, it would not have prevented them from appealing unless there had been a consideration for it or the trustee had acted upon such statement to his prejudice; and of this there is no evidence.

The fact that the appellants received the several sums decreed them from collections made by the trustee was not, as appellee insists, a waiver of their right of appeal as to the sums allowed the trustee as additional compensation for his services. Where a decree is entered for less than the party claims, receiving payment of the sum so decreed is not a waiver of errors, nor does it estop him from appealing from the decree, so far as it does not allow him what he claimed. Morriss v. Garland's Adm'r, 78 Va. 215; Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346.

The second assignment of error is to the allowance made to the trustee for office rent. It is conceded by the stipulation of counsel filed in the cause that no exceptions were made to allowances for office rent prior to February 21, 1895, when the report of the commissioner settling the trustee's semiannual accounts numbered 19 and 20 was excepted to on that ground. Up to that time, only a little over a year before the trustee died, all the parties in interest seem to have thought that the charges made and allowed for the office rent were reasonable and proper. The court, after the matter had been specially referred to and reported upon by the commissioner, considered the allowance proper, and continued it.

The trustee, in administering a trust of the magnitude of that intrusted to him, could hardly be expected to furnish free of cost a place in which he could give his attention to its business, where his clerk could work, and where the mass of books and papers belonging to the trust estate could be kept. Without laying down any general rule upon the subject, we are not prepared to say that, under all the facts and circumstances of this case, the court erred in making the allowance complained of.

The next assignment of error is to the action of the court in allowing to the trustee the sum of $750 per annum for clerk hire. By the express terms of the trust, authority was given to employ, at the expense of the trust, such agents, counsel, attorneys, and servants as the trustee should deem necessary for its proper execution. No objection was made to the allowance for clerk hire until February 21, 1895, although it had been allowed since the 1st of January, 1885. The record shows that the employment of a clerk was necessary, and that the person employed was very efficient and worth the sum paid him. The commissioner thought the allowance proper, and that it ought to be continued. The court was of the same opinion, and very properly so decreed.

ast assignment of error is to the ac- the court in not requiring the trustee interest on the balances remaining in ds at the dates of the various settle- By the terms of the decree by which ostituted trustee was appointed, he ected, after paying the necessary and costs and expenses of executing the to deposit his collections in the Plant- tional Bank of Richmond to the credit court in the cause, and to file certifi- such deposits with the clerk of the o make report to the court from time and to settle his accounts before one commissioners of the court at least ix months. The trustee's accounts, were required to be settled and re- to the court semiannually, showed s in the trustee's hands upon which rest was charged. Why these bal- vere not deposited in the bank to the of the court does not appear. It is ed in argument that the reason why is not done was because the trustee mpelled to bring suits against delin- tockholders for their unpaid subscrip- l over the country; that there were ls of these suits brought; and that necessary for the trustee at all times under his control moneys sufficient the necessary expenses attending igation. Be that as it may, the trus- ained the money in his hands. His ents as reported to the court by the sioner showed this, and that he was rged with interest on them. No ex- was made to any of these reports on ound, and no objection ever made on ound, so far as the record shows, in y, until after the trustee's death, and he commissioner, in making his report ril 26, 1897, was asked by the appel- file a special statement showing the balances left in the trustee's hands settlement. It may be that the trus- not correctly construe the decree of rt, and that he ought to have been with interest on the balances found hands when his accounts were set- ut during the many years the trustee ecuting the trust, and until his death, rties, as well as the commissioners ttled the accounts, and the court approved and confirmed them, seem concurred in the trustee's construc- the decree, and that he was not ble with interest on said balances. eason is shown why the appellants except to the settlements of the trus- counts when they were reported to rt and confirmed; why they did not he question earlier. To allow them nder the facts and circumstances of se, to make the question, and have tee charged with interest on said bal- would encourage the grossest negli- n litigants, and might result in great e to the estate of the trustee, who, the record shows, rendered in the performance of his duties as trustee the most laborious, faithful, and fruitful services. This assignment of error cannot be sustained.

We are of opinion that the decrees complained of must in all respects be affirmed, except in so far as they allowed compensation to the trustee in addition to that provided by the terms of the trust; that in that respect they must be reversed, and the cause remanded to the circuit court, with directions to disallow said additional compensation in settling the accounts of the trustee as to the appellants in this cause.

REED v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 14, 1900.)

HOMICIDE—COURT — JURISDICTION — PLEA OF NOT GUILTY—WITHDRAWAL—EVIDENCE—RES GESTÆ—INSTRUCTIONS—WITNESSES — OFFICER IN CHARGE OF JURY — ADMINISTERING OATH.

1. Transcribing on the minute book of the county court a judgment of the circuit court reversing a judgment of such court was a sufficient compliance with Code, § 4060, providing that the judgment of the appellate court shall be certified to the court to whose judgment the writ of error was allowed, which shall cause the same to be entered on its order book as its own judgment, and the county court had jurisdiction to retry such case.

2. The court's refusal to allow defendant to withdraw his plea of not guilty, and file a plea in abatement on the ground that two members of the grand jury who found the indictment against him were disqualified by reason of being overseers of the road, was a proper exercise of the court's sound discretion.

3. Where defendant, having shot deceased, was stopped by another, who, seeking to restrain him, was also shot by him, and killed, evidence of the other killing was admissible as part of the res gestæ.

4. How a bystander dodged or fell when shot by defendant, who was pursuing deceased, was irrelevant.

5. Where defendant, on trial for the murder of his wife, had testified as to having written her letters, in which he claimed to have reformed his habits, and wished to take her to live with him, evidence that defendant was drunk on his meeting with his wife and for some time previously was admissible in rebuttal.

6. The admission of evidence after the close of defendant's case, though not in rebuttal, was within the sound discretion of the court.

7. An instruction that, to sustain provocation as a defense to murder in the first degree, it must be shown that defendant, at the time of the killing, was deprived of the power of self-control by the provocation received, did not preclude the jury from finding defendant guilty of murder in the second degree, when taken in connection with other instructions defining murder in the first degree, and that a mortal wound without provocation is prima facie evidence of a willful and premeditated killing, and was not erroneous.

8. Where no provocation was shown for a homicide, refusal to give an instruction as to different degrees of provocation was not error.

9. Giving an instruction in a criminal case not applicable to the facts is not ground for reversal, unless the principle stated is erroneous, or might confuse or mislead a jury.

10. The fact that one of the deputy sheriffs

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who had charge of the jury in a criminal case was a witness for the state as to statements made to him by defendant is no ground for reversal of a conviction in such case.

11. Where the record showed that a jury, on adjournment from day to day, was placed in the custody of the proper officer of the court, but did not show that the usual oath was administered to him, a conviction will not be reversed because of such omission.

12. Where defendant, who had separated from his wife, visited her, and, after passing the day in a friendly manner, without provocation picked up a gun and shot her twice, a verdict of guilty of murder in the first degree will not be set aside as contrary to the law and the evidence.

Error from Madison county court.

Grant Reed was convicted of murder in the first degree, and he brings error. Affirmed.

J. L. Jeffries and C. F. McMullan, for plaintiff in error. The Attorney General, for the Commonwealth.

CARDWELL, J. At the April term of the county court of Madison county, 1899, plaintiff in error was indicted for murder of his wife, Minnie Reed. He demurred to the indictment. His demurrer was overruled, and he was thereupon arraigned, and pleaded not guilty, and the case was set for trial on the 4th day of May next succeeding. The trial was then had, and a verdict of guilty of murder in the first degree was rendered, and the prisoner was sentenced to be hanged; but a writ of error was obtained from the circuit court, which set aside the verdict and awarded a new trial. At the July term of the county court the prisoner obtained a continuance of the case to the next term, in August, 1899, when he was again tried and convicted of murder in the first degree, whereupon he applied to the judge of the circuit court for a writ of error, which was refused, and the case is before us upon a writ of error awarded by a judge of this court.

When the case was called for trial at the August term, 1899, the prisoner objected to proceeding with it, on the ground that section 4060 had not been complied with, and therefore the case was not properly in the county court, which objection was overruled, and the prisoner excepted.

Section 4060 of the Code provides that the judgment of the appellate court shall be certified to the court to whose judgment the writ of error was allowed, which shall cause the same to be entered on its order book as its own judgment. In this case the judgment of the circuit court reversing the judgment of the county court was transcribed upon the minute book of the county court on the first day of its July term, 1899. We are of opinion that this was a substantial compliance with the provisions of section 4060 of the Code.

At the August term the prisoner moved the court to allow him to withdraw his plea of not guilty entered at the April term, and to permit him to file a plea in abatement, upon the ground that two members of the grand jury who found the indictment against him were disqualified by virtue of being overseers of the road. The overruling of this motion constitutes prisoner's second assignment of error.

It was said by this court in Early's Case, 86 Va. 924, 11 S. E. 795: "By pleading the general issue alone, a defendant has always been understood to waive the right to interpose afterwards a plea in abatement. The settled doctrine, however, is that the judge may permit a pleading to be withdrawn, and another one to be substituted, wherever by so doing he does not violate any positive rule of law or of established practice. But such discretion will rarely, if ever, be exercised in aid of an attempt to rely upon a merely dilatory or formal defense." In that case the identical exception was made to the disqualification of a grand juror as in the case at bar, but the court, after making the observation quoted, could not see "from the record that this discretion had been improperly exercised" by the trial court, and therefore held that there was no error in overruling the prisoner's motion.

In Curtis' Case, 87 Va. 589, 13 S. E. 73, the same question was again under consideration by this court. There the prisoner upon his arraignment pleaded not guilty, upon which plea alone, as in the case at bar, the trial was had. The verdict was afterwards set aside, and a new trial awarded, and thereupon the prisoner undertook to contest the validity of the indictment on the ground that the grand jury had been improperly summoned. The court, however, citing 1 Bish. Cr. Proc. § 756, and reaffirming its ruling in Early's Case, supra, held that "it is well settled that objections to the mode of summoning a grand jury, or to the qualifications of particular jurors, must be made at a preliminary stage of the case,—that is, before a plea to the merits; otherwise, they will be considered as waived, unless the proceedings be void ab initio."

After the general issue or any plea in bar it is too late to plead in abatement, except on leave to withdraw the former, because the plea in bar admits whatever is ground for abatement. To the same effect is the ruling of this court in Watson's Case, 87 Va. 612, 13 S. E. 22.

In U. S. v. Gale, 109 U. S. 65, 3 Sup. Ct. 1, 27 L. Ed. 857, it was held that, where the objection is founded upon the irregularity in summoning the panel, or upon the disqualification of particular grand jurors, it must be taken before pleading in bar. Says the court in that case: "It would be trifling with justice, and would render criminal proceedings a farce, if the rule were otherwise."

The exception upon which this assignment of error is founded is wholly formal, and, taking fully into consideration the fact urged

by prisoner's counsel that he was comparatively a stranger among strangers when put upon trial for the offense of which he has been twice convicted, it in no way appears that the county court in any wise abused its sound discretion in overruling his motion to permit him to withdraw his plea of not guilty and enter his plea in abatement.

Before entering upon a consideration of the remaining assignments of error, it is needful to make a brief statement of this case.

The prisoner married the deceased in 1894, and they thereafter lived together unhappily in Pittsburg, Pa. In October, 1898, his wife came to Madison county, Va., upon a visit to her parents, where she remained until the homicide. The prisoner visited his wife in January, 1899, and upon this visit conducted himself in a very objectionable manner. His wife then refused to return to Pittsburg with him. On the 30th of March, 1899, he left Pittsburg for another visit to his wife in Madison county. He reached Culpeper on Saturday, April 1st, where he became intoxicated, and was so offensive that he was unable to obtain a conveyance to Madison until the afternoon of that day, and reached the house of his wife's parents about night, where he was received, and given supper, but was refused permission to spend the night. He spent the night at the home of a relation of the family near by, and returned to his father-in-law's the following morning in time for breakfast, and engaged in apparently friendly conversation with his wife before and after this meal. After breakfast, the prisoner, with his wife and child, took a walk into the woods, where they remained some two hours, and on return he ate dinner with his wife, and afterwards walked arm in arm to the fence with her, and kissed her twice good-bye as he was leaving with Peter Jackson, his father-in-law. He and Peter Jackson spent some portion of the afternoon of that day upon the mountain, and returned before sunset; Peter Jackson much intoxicated, but prisoner not so much so. The prisoner then loaded his breech-loading gun, and, with his little child, went into the woods to shoot a bird. He soon returned, went into supper, placing his gun near his seat. After being seated a few moments, upon hearing his wife close the front door of the house, and coming as if to join them at the meal, he at once rose from the table, left the room, taking his gun in hand, remarking that he wished to have a word with his wife. He had gone only five or six steps out of the door when he was heard to ask his wife for the child, and she, in reply, asked him "what he could do with it," when he shot her; whereupon the father rushed from the table to the rescue of his daughter, but before reaching her there is a second shot, and the wife, bleeding, is seen to flee through the house in the direction of a neighbor's, some 400 yards distant. The father endeavors to obtain the gun, and in the altercation the prisoner succeeds in loading it and fatally shooting him, and at once continues the pursuit of his wife, overtaking her within about 100 yards of her destination, where he throws her down, and is apparently endeavoring to do her serious bodily harm. Two men come out of the house to which deceased was fleeing for safety, and attempt to rescue her, but desist at the point of the prisoner's gun and threats to kill them if they did not retire, which they did, followed in a moment or so by deceased, who had in some way extricated herself. She had not gone, however, more than 50 yards, and was about to pass through the gate of said neighbor's house, when prisoner overtook her, and fired at a distance of 6 or 8 feet, the shot taking effect in the back of her neck, producing instantaneous death.

Pauline Jackson, a witness for the commonwealth, while testifying on her examination in chief, began to tell of the killing of Peter Jackson, to which evidence the prisoner excepted, but the court overruled the exception, and this ruling constitutes the prisoner's third assignment of error. The killing of Peter Jackson was but a part of the tragedy in which the prisoner's wife lost her life, and for which he was on trial, and the witness relates these plain but connected facts, which form a vital link in the chain of the evidence as to the general conduct of the prisoner, and essentially a part of the res gestæ. We are of opinion, therefore, that the assignment of error is not well taken.

This witness was asked by the attorney for the commonwealth "whether or not she saw her father dodge or fall after being shot?" to which question counsel for the prisoner objected, and the attorney for the commonwealth withdrew the question, to which the prisoner's counsel also objected on the ground that, if any of the facts as to the killing of Peter Jackson went to the jury, all should go; but the court permitted the question to be withdrawn, and this ruling constitutes prisoner's fourth assignment of error. The conduct of Peter Jackson when he was shot was purely irrelevant matter, and it cannot be conceived how the prisoner could have been prejudiced by this ruling of the court.

The fifth assignment of error relates to the admission of evidence to show that the prisoner was drunk at Culpeper on the day of his arrival, and continued in that condition to the evening of his arrival at the home of his wife. The prisoner had testified and had referred to letters he had written his wife in which he claimed to have reformed his habits and declared his purpose to take his wife back with him to Pittsburg, or live happily with her anywhere, if she would try him one more time. It was in rebuttal of the prisoner's evidence in these respects that the testimony as to his conduct at Culpeper and his condition to the evening of his arrival at the home of his wife was admitted. His whole conduct preceding the murder, as well

as after, could be shown, in order that the jury might be in full possession of all the facts incident to the preparation and consummation of the crime; and we are of opinion that the court did not err in admitting this evidence.

The sixth assignment of error was not argued here, and is without merit.

The seventh error assigned is to the action of the court in permitting Lula Jackson and General Jackson, witnesses for the commonwealth, to testify as to the relations that existed between the accused and the deceased. The principal objection urged to the admissibility of this evidence is that it comes after the evidence of the prisoner had been closed, and not in rebuttal of any evidence which he had introduced. It has over and over been held by this court that the order in which testimony is admitted lies in the sound discretion of the trial judge, and his ruling in this respect will not be reversed unless it is manifest that that discretion has been abused. Burke v. Shaver, 92 Va. 352, 23 S. E. 749, and authorities cited. We see nothing in this assignment of error to warrant us in holding that the county court abused its discretion in admitting this testimony after the prisoner had introduced his evidence; nor can we see that he was prejudiced by its introduction.

The eighth assignment of error relates to the refusal of the court to give instruction No. 6 offered by the prisoner, and the giving of instruction No. 4 asked for by the commonwealth.

The theory of prisoner's defense is that he was crushed by his wife telling him, on the walk in the woods in the morning, that she was pregnant by another man, and, being intoxicated, he was suddenly excited by having his child snatched from him as he was taking it away, and being struck in the back; that, as a consequence, he became enraged, lost all self-control, and without thought or reflection he fired the shot.

Of the 15 instructions to the jury asked for by the prisoner all were given except his sixth, which is as follows:

"The court instructs the jury that if they believe from the evidence that the prisoner committed the homicide charged in the indictment in the heat of passion, excited by a reasonable provocation which caused him to do the act without premeditation, and yet which was insufficient to deprive him of the power of self-control, in that case he is guilty of murder in the second degree; but if the provocation which he received was such as to reasonably deprive him of the power of self-control at the time the homicide was committed, then they should find him not guilty of murder, but of manslaughter."

In lieu of this instruction, instruction No. 4 offered by the commonwealth was given. It is in these words:

"That, to sustain provocation as a defense to murder in the first degree, it must be shown that the prisoner, at the time of the fatal shot, was deprived of the power of self-control by the provocation which he had received; and in deciding the question whether this was or was not the case regard must be had to the character of the provocation, the nature of the act by which death was caused, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during the interval, and all the circumstances tending to show the state of his mind at the time he committed the act."

It is contended that in the refusal to give prisoner's instruction No. 6 and in giving the commonwealth's instruction No. 4 in lieu thereof the jury were precluded from finding the prisoner guilty of murder in the second degree.

Instruction No. 1 offered by the commonwealth defines murder in the first degree as any willful, deliberate, and premeditated killing. By instruction No. 2 the jury were further told what constitutes a willful and premeditated killing. By instruction No. 3 the jury were further told that a mortal wound given with a deadly weapon in the previous possession of the slayer, without any or slight provocation, is prima facie a willful, deliberate, and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances. To these instructions the prisoner makes no objection; and immediately following them is the instruction No. 4 in question, by which the court directs the jury that, to sustain provocation as a defense to murder in the first degree, it must be shown that the prisoner, at the time of the fatal shot, was deprived of the power of self-control by the provocation received.

In view of the fact that there is no evidence in the record even tending to show any sort of provocation for the pursuit of the deceased and the firing of the final and fatal shot, the instruction complained of could not possibly have been construed by the jury as telling them that, unless the provocation the prisoner claimed to have received was such as to naturally and reasonably deprive him of his power of self-control, they must find him guilty of murder in the first degree. They could not have understood the instruction, read in connection with the other instructions given, as telling them more or less than that, if they believed from the evidence that the killing was willful, deliberate, and premeditated, it was murder in the first degree; and in deciding whether or not the prisoner was deprived of the power of self-control by the provocation which he had received regard must be had to the character of the provocation, the nature of the act by which death was caused, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during the interval, and all the circumstances tending to show the state of his mind

me he committed the act. There is, e, nothing whatever in the instruc- ecially when considered in the con- in which it is given, that could have he jury into the conclusion that they ly find the prisoner guilty of man- r or murder in the first degree, and ot find him guilty of murder in the legree.

micides are presumed in law to be in the second degree; and, in order te the offense to murder in the first the burden of proof is on the com- lth; and, to reduce the offense to ghter, the burden is on the prisoner. ase, 32 Grat. 929.

ot claimed that the prisoner's guilt an that of murder in the second de- t that his instruction No. 6 should en given, in order that the jury might t only considered the evidence as to ion, but weighed and considered the f provocation.

ontrol determines malice, and, as self-control exists, the crime is mur- he first or second degree, to be de- l by other facts than the varying de- the provocation. It is true that 's instruction No. 6 is taken from the ons approved by this court in Hodges' Va. 265, 15 S. E. 513, but the evi- that case was very different from ence in this. In Hodges' Case there dence tending to show that the pris- mmitted the homicide charged in the nt in the heat of passion, excited by nable provocation, which caused her e act without premeditation. In this evidence totally fails to disclose any tion whatever for prisoner's pursuit wife and firing at her the final and ot.

ner or not this murder was in the second degree was to be determined rinciples of law fully applied by oth- uctions given in the case, and the ld only have been confused or misled e varying degrees of self-control by oner's instruction No. 6. The 14 in- ns given for the prisoner cover every f the defense relied on by him, and favorable to him as the most favor- w of the evidence given on the trial elf and his witnesses would justify. said by Riely, J., in Gray's Case, 92 22 S. E. 858: "All of the instructions fact the instructions of the court, given at the instance of the com- lth or of the prisoner, and are to be ether."

so read and considered, the instruc- the case at bar set forth the law ase upon the whole evidence correct- airly.

roper, however, that we should con- e exception to the sixth instruction the instance of the commonwealth. follows:

"That if the jury believe from the evidence, beyond a reasonable doubt, that the prisoner gave the deceased the wound from which she died, as charged in the indictment, and that though he was, at the time of committing the act, so intoxicated as rendered him incapable of forming a willful, deliberate, and premeditated purpose, yet if they believe from the evidence, beyond a reasonable doubt, that the prisoner, before becoming intoxicated, or while he was, though drinking, still in a condition in which he was capable of forming a willful, deliberate, and premeditated purpose, had formed a willful, deliberate, and premeditated purpose to kill the deceased, and that he afterwards, in pursuance of that purpose, so formed, gave the deceased the wound from which she died, as charged in the indictment, then they are instructed that such an act upon the part of the prisoner, though he may have been intoxicated at the time of committing it, constituted in the eye of the law a willful, deliberate, and premeditated killing, and as such is murder in the first degree."

It is conceded that the instruction announces a correct legal proposition, but it is claimed that it has no application to the case, inasmuch as there is no evidence tending to show that the prisoner became intoxicated for the purpose of committing the homicide which he had previously designed to commit.

This court says in the opinion in Hodges' Case, supra,—and it has been often repeated,—that the court cannot be required to instruct juries on mere general, abstract principles of law, however correct, unless these principles are applicable to the case. And it is settled law that a judgment of the trial court will not be reversed for the refusal to give an instruction, though announcing a correct principle, where there are no facts in the case to which it applies; but, conceding that there is no evidence in this case tending to show that the prisoner became intoxicated for the purpose of committing the homicide which he had previously designed to commit, the question still to be determined is, does the giving of the instruction constitute error for which the judgment of the court on the verdict should be reversed? We are of opinion that the question must be answered in the negative. The giving of an instruction stating an abstract principle of law in a criminal case is not an error unless the principle stated is erroneous. Sack. Instruct. Juries, p. 17. In Upstone v. People, 109 Ill. 169, where this precise question arose, it was held that the giving of an instruction stating an abstract principle of law not applicable to the case would not be error unless the principle stated were erroneous.

Doubtless, if it could be seen in any case that such an instruction did confuse or mislead, or might have confused or misled, the jury, the giving of the instruction would be ground for reversal of the judgment of the

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trial court; but where this does not appear, as in the case before us, we do not think that the judgment of the lower court should be reversed for the giving of such an instruction.

Marvin Pattie, one of the deputy sheriffs, who, along with the other deputies in whose charge the jury had been placed during the trial, was called as a witness for the commonwealth, testified as to statements voluntarily made to him by the prisoner the evening of and after the homicide, but before witness became deputy sheriff; and on this ground the prisoner, after the verdict, moved for a new trial, which motion was overruled, and this ruling of the court is made the ground of the prisoner's tenth assignment of error. We are of opinion that there is no merit in the assignment. It is an old and frequent practice, it may be said, for sheriffs and their deputies who have charge of juries under like circumstances to testify in cases, but we have no case in the state which sustains the incompatibility here contended for. In the supreme court of Michigan this question was twice passed on, and it was held that a conviction will not be reversed because the officer who attended the jury was a witness for the people. People v. Coughlin, 65 Mich. 704, 32 N. W. 905; People v. Beverly, 108 Mich. 509, 66 N. W. 379.

In State v. Shores, 31 W. Va. 499, 7 S. E. 413, the court says: "The mere fact of the sheriff having the jury in his custody could not disqualify him from being a witness; neither could the fact that he was a witness disqualify him to keep the jury in his custody."

The next error assigned relates to the refusal of the prisoner's motion for a new trial, made on the ground that, upon the jury being adjourned from day to day, and placed in the custody of the sheriff, the record fails to show he was instructed not to speak to them himself, nor to allow any one else to speak to them, touching the trial. In the prisoner's bills of exceptions Nos. 4 and 5 the court certifies that at the beginning of the trial all the officers in charge of the jury were duly sworn with the usual oath to keep the jury during the trial when in the absence of the court. It is not contended in the argument here that the jury were not in the custody of the proper officer of the court at any time during the trial, but it is urged that when the record shows that the jury were adjourned from one day to another it ought also to show that upon such adjournment they were committed to the custody of the proper officer of the court, to whom the usual oath was administered. The case of Polky Barnes, 92 Va. 794, 23 S. E. 784, is cited as supporting the objection made to the record in this case, but we are unable to see that the objection is within the scope of the ruling in that case. The conviction was reversed in that case because the record failed to show affirmatively that upon the adjournment of the court from day to day the jury were placed in custody of the proper officer of the court. Here the point of objection to the record is that it does not show that the usual oath was administered to the officers in charge of the jury on each occasion during the trial when the jury were out of the presence of the court.

In Bennett v. Com., 8 Leigh, 745, it was held that the sheriff is bound ex officio to keep the jury when adjourned in a criminal cause, and it is not indispensably necessary that he be sworn, though it is generally done out of abundant caution. But, if it were admitted to be necessary, the court would be bound to presume that in fact the sheriff was sworn when the record does not show the contrary.

Where the record shows, as it does in this case, that at the beginning of the trial all the officers in charge of the jury were duly sworn with the usual oath to keep the jury during the trial when in the absence of the court, it is to all intents and purposes a compliance with the "salutary and wise rule of practice" recognized and approved in the Polky Barnes' Case, supra.

The remaining assignment of error is to the refusal of the court to grant the prisoner a new trial upon the ground that the verdict was contrary to the law and the evidence.

It is needless to say more of the evidence in detail than is to be found in the statement of the case already made. This was a fiendish murder, perhaps not surpassed in atrocity by any to be found in the annals of the commonwealth. The defense the prisoner attempted to set up is conclusively shown to have been groundless; in fact, it is wholly contradicted by his own confessions. His conduct when the horrible deed was committed was that of a cool, self-contained man; and, when asked the cause of his murderous act, simply replied that the woman was his wife. It is, therefore, plain that the jury could not have found, in accordance with the evidence, any other verdict than that of murder in the first degree.

The judgment of the county court is affirmed.

CRAWFORD v. CLARK.

(Supreme Court of Georgia. June 6, 1900.)

WILLS—CONSTRUCTION — LIMITATION OVER — REMAINDER — NATURE OF ESTATE — SEPARATE ESTATE OF MARRIED WOMAN.

1. Where, in a will probated in 1847, a life estate was bequeathed to testator's daughter, with remainder to her children, followed by an executory bequest to other legatees in the event she "should die without issue," the issue meant was such children, and not issue at large, and so the failure of issue contemplated was a definite, not an indefinite, failure; and, the failure contemplated having happened,—that is, the donee for life having died childless,—the limitation over took effect.

2. A remainder may be created in money, and an executory bequest of money, limited upon a definite failure of issue, is valid. (a) The bequest to the daughter of the life es-

e money, which was required by the paid to her when she arrived at 21 ge or married, did not create a sepa- e in her under the law of force when ook effect, and consequently the mar- of her husband attached, which, on the fund to his possession, entitled use during her life.

erified return of the testator's exec- e before 1852, approved and ordered by the court of ordinary having juris- er the estate, and duly recorded, wed a payment to all the legatees, in- ne aforesaid money bequest to the of the life tenant, is admissible as ie evidence of such latter payment, by an executory legatee, upon the he life tenant without leaving chil- ecover said money from the adminis- he husband, he being a party in in- connected with the testator's estate, pproval and recording of such return order of the court of ordinary being nt de bene esse which affects him. ice showing merely that all the ex- gatees consented to the payment by or to the husband must be construed g only that such legatees consented usband should receive what the law —the right to the use of the money wife's life; and, if any release be- can be shown, it must be based upon sideration, in order to bind the ex- gntees.

dministrator of a remainder-man or cutory legatee may sue the personal tive of the life tenant (and the hus- his case was a life tenant pur autre had in his or her lifetime received a quest from the testator's representa-

'surviving children" who were to take or bequest includes the children who he testator other than the daughter med as the life tenant; but their es- contingent, and vested, not at the the testator, but upon the death of nant without leaving children. Nev- as such estate was not contingent as son of the ulterior legatees, it was an each that was transmissible to the esentatives of those who died after or and before the life tenant. The f he recovers at all, can only recover of his intestate.

s by the Court.)

rom superior court, Muscogee coun- . Butt, Judge.

by A. L. Crawford, administrator, . R. Clark, administrator. Judg- defendant, and plaintiff brings er- ersed.

n, Hatcher & Martin, for plaintiff McNeill & Levy, for defendant in

ONS, C. J. The litigation in this or money bequeathed by Thomas gh to his daughter Sarah Amanda will probated in 1847. This money, ned, was received from the executor mmin W. Clark, who was the hus- Sarah Amanda, and is now the in- epresented by the defendant in er- fourth and sixth items of said will, in substance, one bequest, so far uestion involved is concerned, read ws: "I give and bequeath to my Sarah Amanda, and after her death to her child or children, * * * two hundred dollars in cash, the possession * * * to be given when she marries or becomes of the age of twenty-one years." "It is my will and desire that if my daughter Sarah Amanda should die without issue, that all the property bequeathed by the foregoing items * * * shall revert to, and be equally divided among, my surviving children."

1. Did the daughter of the testator take an estate for life or an estate tail under this bequest? The answer is to be found in the law existing when the will took effect. Hertz v. Abrahams (Ga.) 36 S. E. 409, this day decided. The court below sustained the defendant's contention that the bequest created an estate tail in the daughter, which, under our act of December 21, 1821, gave her the absolute fee to the money. We think this decision of the court below is clearly wrong. It cannot be disputed that a devise to A., and after her death to her child or children (whether she has a child or children at the time of the devise or not), would give a life estate to A., with remainder in fee to her children then in being or afterwards born. See the resolution at end of Wild's Case, 3 Coke (Rev. Ed.) 290, 6 Coke (Old Ed.) 17b; Woodright v. Wright, 10 Mod. 376; Ginger v. White, Willes, 353; Miller's Lessee v. Hurt, 12 Ga. 357, 360, where the resolution in Wild's Case is copied in full; Jones v. Jones, 7 Ga. 76; Jennings v. Parker, 24 Ga. 621; Sharman v. Jackson, 30 Ga. 224; Herring v. Rogers, Id. 615; Sanford v. Sanford, 58 Ga. 259; Gaboury v. McGovern, 74 Ga. 144; Brown v. Brown, 97 Ga. 539, 25 S. E. 353, 33 L. R. A. 816. Such a devise is entirely different from one to A. and her children, she then having no children, as is pointed out in Wild's Case, and in Ginger v. White, Miller's Lessee v. Hurt, Sanford v. Sanford, and Brown v. Brown, supra. And in 3 Jarm. Wills (Rand. & T. Ed.) p. 184, it is said that a devise "to A. and his wife, and after their death to their children, * * * it is now admitted on all hands gives an estate for life to the parents, with remainder to their children, so that the notion as to its being an estate tail (is) clearly untenable." Now, this being true, what is the legal meaning and effect of the subsequent words in this will, "if [she] should die without issue," which follow the remainder in fee to the children? Simply, if she should die without such issue, namely, children. In 3 Jarm. Wills, p. 256, that learned author says: "It is well settled, also, that words importing a failure of issue (without the word 'such'), following a devise to children in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large." On page 260 he quotes as follows from Lord Cottenham: "A gift to A. for life, with remainder to the children of A. in fee,—that is, the children of A. in fee generally,—and a gift over on the death of A. without issue, means such issue; that is,

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children. In such cases the general term 'issue' is construed to mean that particular description of issue before specified, namely, children." The cases cited by him on pages 256–268 amply support his position. On page 281, after a review of all the cases favorable to and apparently against this view, he submits the following conclusion or rule: "That the words, 'in default of issue,' or expressions of a similar import, following a devise to 'children in fee simple,' mean in default of children. * * * This is free from all doubt." In Blackborn v. Edgley (1719) 1 P. Wms. 600, 605, the devise was to A. for life, and after his death to his eldest son in tail, but, if A. should die without issue, to B. The court held, Lord Chancellor Parker delivering the opinion, that the words, "if he should die without issue," following the devise in remainder to the son, must be intended, "if he should die without such issue,"—that is, the son. And in Goodright v. Dunham (1779), 1 Doug. 264, the devise was to A. for life, and after his death to his children, and, in case he died without issue, to B. Lord Mansfield said (page 267): "Neither side thought it could be maintained that A. took an estate tail. The words, 'and in case he dies without issue,' being tacked to the preceding clause, must mean the same thing as, 'and in case he dies without children.'" This case is directly in point. See, also, Morse v. Marquis of Ormonde, 5 Madd. 99, 113; De Haas v. Bunn, 44 Am. Dec. 201. As the above authorities clearly show that the bequest in the case now under consideration gives an estate for life to the daughter, with remainder to her children, but, if she should die without children, then to the testator's other children, the cases of Miller's Lessee v. Hurt, supra; Sanford v. Sanford, supra; White v. Rowland, 67 Ga. 546; and Haddock v. Perham, 70 Ga. 572 (Syl., points 2, 5), 577,—are therefore direct authorities in favor of the plaintiff in error. And hence it also follows, from these decisions, that the claim of the defendant in error that the husband of the life tenant took the bequest as heir of their infant children, the husband and child having both died before the tenant for life, is clearly untenable. If the bequest in this case had been immediately to the daughter and her children (she then having no child), but, if she should die without issue, then over, the contention of the defendant in error would have been correct, under the cases of Brown v. Weaver, 28 Ga. 378, and Wiley v. Smith, 8 Ga. 551; because an immediate devise to A. and her children (she having none) would, of itself, be an estate tail under one of the resolutions in Wild's Case and under all subsequent authority, and, of course, a limitation over, after such an estate, upon A. dying without issue, would not have made a different estate when the testator in this case died. But such is clearly not the bequest in the present case, and none of the cases cited for the defendant in error on the question of an estate tail are applicable to it.

2. A remainder can be created in money. Thornton v. Burch, 20 Ga. 791 (Syl., point 3), 793; Chisholm v. Lee, 53 Ga. 611; Phillips v. Crews, 65 Ga. 274 (Syl., point 2); McCook v. Harp, 81 Ga. 229, 7 S. E. 174; Gairdner v. Tate (Ga.; this term) 35 S. E. 697. In Phillips v. Crews, where the law is clearly stated, the court held as follows: "A life estate in money, with a remainder over, may be created. Money may be lost, but it should not be destroyed in the use." And also that section 2253 of the Code of 1873 (now Civ. Code, § 3088), prohibiting the creation of a remainder in property that is destroyed in the use, "does not allude to money, but to such things as perish with the usage." An executory devise of money, limited upon a definite failure of issue, is valid. Pinbury v. Elkin, 1 P. Wms. 563; Id., 2 Vern. 758, 766; Scott v. Price, 2 Serg. & R. 59, 7 Am. Dec. 629; Rowe's Ex'rs v. White, 16 N. J. Eq. 411, 84 Am. Dec. 169; Smith, Ex. Int. §§ 232, 233. The will directed that the executor should pay the money to the daughter to whom the life estate was given when she should arrive at 21 years of age or marry. The daughter married Benjamin W. Clark. If the bequest had given her a separate estate, the will, which was the law for the executor in this case, expressly required the possession of the money to be given to her. In such event, he could not hold the money, and pay her only the income thereof. But, as the bequest did not create a separate estate in the daughter, under the law as it then stood the marital rights of the husband attached. Bryan v. Duncan, 11 Ga. 67; Wade v. Russell, 17 Ga. 425, where there was a bequest of money payable to daughters when they arrived at 21 years of age or married; Andrews v. Bonner, 26 Ga. 520. This gave the husband an estate for life in the money during the wife's life, with the concomitant right of possession, and this imposed upon the executor the duty of delivering the money to him.

3. The evidence offered by the plaintiff to show the payment by the executor to the husband of the life tenant was a return made under oath of the executor to the court of ordinary having jurisdiction of the estate, and approved and ordered recorded by that court, and duly recorded, prior to 1852. This return was rejected as evidence on the ground that no vouchers accompanied the return, and none had been produced; that all the money required to be paid to all the legatees under the will was lumped by the executor in one item of his return; and that the return was simply a memorandum or statement made by the executor ex parte, and was therefore hearsay, as against Benjamin W. Clark, who was not connected with the estate. The act of 1810 required four things after the executor's return was prepared: (1) that it be submitted in term time; (2) that it

ified by the oath of the executor; (3) t be accompanied with the necessary ers; and (4) that the court of ordinary, examining the return and vouchers, approbate or reject the return, and, vas approved, should order the return recorded. The act of 1820 changed the 1810 in one respect, namely, that the with the necessary vouchers, could be tted in vacation to the clerk of ordi- who could qualify the executor as to rrectness of the return, and, after in- ng the return and vouchers, make a l report thereon to the next court of ry. The court then acted on such re- and, if the court approved it, the re- vas thereupon ordered to be recorded. r of these acts required the original ers to be recorded, but evidently meant he office of the court of ordinary be in their place of naked deposit; e acts do not provide for a return of uchers to the personal representative. s the act of January 21, 1852 (Acts p. 97), which provided for the record original vouchers, and required the ry to return them to the personal rep- ative after they were recorded. Nor e acts of 1810 and 1820 require copies vouchers to be attached to the re- This was first provided for by sec- 2488 and 2490 of the original Code; e act of April 18, 1863 (Acts 1862–63, 8, 139), amended those sections so as ke it optional with executors, adminis- s, guardians, and trustees, in making eturns, to attach copies of their vouch- have their original vouchers recorded eturned to them. When the court of ry approved the return which was tted in the present case, and ordered orded, it was the act of a court of tent and general jurisdiction over the t-matter. Of course, if the return ot been verified by the oath of the or, no presumption could arise in its from the order of the court of ordina- proving it, because the return would on its face that it was illegal. In oth- rds, it would impeach itself, and therefore, not be prima facie evi- of its correctness. Smith v. Griffin, 102. So, if the return had been ver- y the oath of the executor, but had been approved and ordered to be re- by the court of ordinary, it would prima facie evidence of its correct- because it would then be merely the ation of an interested party, and for that reason, be inadmissible as facie evidence. Hudson v. Hawkins, 274, 278, 4 S. E. 682. But when the as in this case, was duly verified by ecutor, and approved and ordered to by the court of ordinary, and there ing apparent upon the return to sug- hat it is fraudulent, especially as the ood before 1852, when the vouchers were not required to be recorded, it is admissible as prima facie evidence in favor of the executor to support his statement of expenditures therein. Brown v. Wright, 5 Ga. 29; Ragland v. Justices, 10 Ga. 65, 68; Barnes v. Stephenson, 22 Ga. 209; Smith v. Griffin, 32 Ga. 102; Saxon v. Sheppard, 54 Ga. 288. In Ragland v. Justices, supra, the court, speaking of a return duly approved and recorded, said: "It is the judgment of a court of competent jurisdiction, * * * and, as such, it is sufficient to admit the return in evidence." And in Saxon v. Sheppard, McCay, J., who delivered the opinion of the court, said: "The whole effect of a return to the ordinary turns on the fact that that officer, whose duty and jurisdiction it is to examine and pass upon it, has done so. It is his judgment, and not the return, which is the evidence." This judgment, in reference to annual or partial returns, is not intended to mean a final, conclusive judgment, but rather a judgment de bene esse, which is to be used in proper cases as prima facie evidence, and such is the law in many of the other states. 11 Am. & Eng. Enc. Law (2d Ed.) pp. 1310–1319; note 86 Am. Dec. 143–146. The object of the acts of 1810 and 1820 requiring the returns to be recorded was "that wards, distributees, legatees, and all other parties in interest may know the condition of, and their rights in, the estate represented by an executor, administrator, or guardian, as the case may be, and that they [the trustees] may have a perpetual memorial for their protection." Ragland v. Justices, supra. No one could doubt that, if Mr. Clark had sued the executor for this money, the return, duly approved and recorded, would have been prima facie evidence of payment in favor of the executor, just as a similar return was decided in Barnes v. Stephenson, supra, to be such evidence for the purpose of reducing a note that the executor in that case had given the husband for his wife's legacy, and upon which suit was brought by the husband against the executor. Likewise, if the executor, after the death of the wife and life tenant, could have sued the husband for his money for the use of either the remainder-man or executory devisees, the return would in such case be prima facie evidence of payment; for it is the judgment of the court of ordinary, approving and passing to record the return, which is the prima facie evidence in favor of the truth of the return, and a receipt is nothing more than such evidence. Hence we know of no legal or substantial reason why a remainder-man or executory legatee, either before or after the executor's death, who is the possessor of the legal title and right of action, may not submit such returns of the executor as prima facie evidence of payment by the executor in a suit by them to recover the money bequest from the personal representative of the life tenant, who,

by reason of his marital rights, had become the tenant pur autre vie, or from his personal representative. The returns are not made evidence in favor of the executor by any statute, and they may be used against him. Section 2490 of the original Code, which says, "The return thus allowed and recorded shall be prima facie evidence in favor of the administrator of its correctness," is not a codification of the act of 1810 or the act of 1820, or even the act of 1852, but is a codification of the decisions of this court rendered before 1852, and from that time to the publication of the first Code, in cases between parties interested in the decedent's estate and his personal representative. And there is nothing in those decisions which expressly excludes the right of all interested persons other than the personal representative to use such returns as prima facie evidence of payments made by the personal representative, such as by heir against heir, by legatee against legatee, by heirs or legatees who are sued by a creditor of the intestate or testator after the death of the personal representative, or by remainder-men or executory legatees who are entitled to bequests of money when they sue the representative of the deceased life tenant for such bequest. In such cases it is simply the use of a judgment de bene esse of the court of ordinary as prima facie evidence between parties interested in, and connected with, the estate. And this ought especially to be the rule where, as in the case now under consideration, a great many years have elapsed since the return was approved by the court of ordinary, and duly recorded, and it was shown that the original vouchers could not be found in the office of the ordinary which was their place of naked deposit under the law of force when the return was made. We therefore think that the return of the executor was admissible for the plaintiff in this case as prima facie evidence only, the effect of which, as decided in Smith v. Griffin, supra, is "to shift the onus,—to establish the fact in issue,—unless rebutted by the party sought to be affected by it." Counsel for the defendant in error admit the payment by the executor in their written argument by saying that the evidence shows that the persons entitled to the ulterior bequest, of whom the intestate of the plaintiff in error was one, had consented to the executor's paying the money to Mr. Clark, which, counsel contended, was per se a release of both the executor and Mr. Clark from all liability to them. Of course, legatees sui juris can divide the estate among themselves in a manner different from that directed by the will, after the testator's legal debts are paid. But was there in this case any legal agreement to do so? The executor needed no release from the ulterior legatees, because, with or without their consent, the will imposed upon him the duty of paying the principal of this money legacy to the life tenant when she married, and, of course, to Mr. Clark, who claimed it under his marital rights as the husband of the life tenant; and this is the extent of the right, namely, the legal right, which the ulterior legatees evidently consented that Mr. Clark should have in the money. We find no evidence of a release by these legatees of the absolute interest in the money to Mr. Clark, and, if such a release exists, it must be based upon some valid consideration to make it binding on the ulterior legatees. Bruton v. Wooten, 15 Ga. 570; Burns v. Hill, 19 Ga. 22 (Syl., point 4).

4. That remainder-men or their personal representatives may maintain an action against the administrator of a life tenant for a money request which had been received by such life tenant from the executor of the testator is not an open question in this state. Phillips v. Crews, 65 Ga. 274. Hence there is no reason for denying this right to an executory legatee who is entitled to the money.

5. If we are correct thus far, the questions then arise: Who finally took under the ulterior bequest to the "surviving children" of the testator? and what was the nature of the estate so bequeathed? According to the spirit of the early English decisions and of our own cases, such as Vickers v. Stone, 4 Ga. 461, there is no doubt that the term "surviving children" included all the children of the testator who survived him, other than the daughter who was described as the life tenant. At the same time, there is also no doubt that as their estate was wholly dependent upon the life tenant dying without children, which was upon an uncertain event, they took a contingent estate, which vested, not at the death of the testator, but at the death of the life tenant without children then living. Olmstead v. Dunn, 72 Ga. 861, 862; Payne v. Rosser, 53 Ga. 663; Smith, Ex. Int. §§ 86, 90, 128, et seq. And such would be the nature of the estate of the executory legatees if they had been expressly named in the will. Olmstead v. Dunn, supra. The bequest is an executory or future estate, and not an executed or present estate. Blackstone's definition of an "executory devise," very frequently cited by courts and adopted by legal lexicographers, is as follows (2 Comm. 172): "An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the devisor, but only on some future contingency." Therefore an executory bequest is such a disposition of personalty or money by will that thereby no estate vests at the death of the testator, but only on some future contingency. That a devise or bequest to A. for life, and after her death to the testator's "surviving children," would give the surviving children a vested remainder from the death of the testator

s v. Stone, supra), has nothing to do
ie time of vesting applicable to this
vhich has an intermediate bequest
n the life estate and the ulterior con-
bequest to the surviving children.
clear distinction drawn in Olmstead
n, 72 Ga. 860–862, on the construc-
the fifth item and the fourth and
tems of the will in that case. Still,
contingency was not as to the person
ulterior legatees, such of the testa-
ildren as died after his death, and
the life tenant, had an estate that
nsmissible to their legal representa-
2 Williams, Ex'rs (7th Am. Ed.) p.
m. & Eng. Enc. Law (2d Ed.) p. 260.
to realty, in contrast with personalty,
de, §§ 3080, 3081, 3101, 3357. The
in Payne v. Rosser, 58 Ga. 662,
with the statement that "the prop-
contest is all real estate." The rep-
tives of deceased children of the tes-
re interested parties with the plain-
testate, and, in the event the plain-
ceeds alone and there is a recovery
case at all, he can recover no more
is intestate's interest, just as in a
ejectment a tenant in common su-
the whole property can recover only
n share. Sanford v. Sanford, 58 Ga.
l., point 2); Wilson v. Chandler, 60
9; Dupon v. McLaren, 63 Ga. 470
oint 2); Baker v. Middlebrooks, 81
, 8 S. E. 320. In other words, the
cannot recover the full sum sued
this case, but as to the due share
of his intestate the decision of the
court was erroneous, and the judg-
therefore reversed. All the justices
ing, except FISH, J., absent on ac-
f sickness, and LITTLE, J., disqual-

HERTZ et al. v. ABRAHAMS.

ie Court of Georgia. June 6, 1900.)

—CONSTRUCTION—ESTATE CONVEYED.

e intention of a testator, if legal, gov-
e construction of his will, and is to be
ned from the words thereof. If he uses
which clearly create one estate, though
gned another, his intention must yield
ules of law.

will is to be construed by the law ex-
hen, upon the testator's death, the will
ffect. (a) Whether words in a will
y a testator who dies before the act
uary 17, 1854, create an estate tail is
ntrolled by the decisions of the English
construing such or similar words in de-
real property in connection with the
de donis conditionalibus.

devise to A. for her separate use, and, in
e has no issue, to B., before the act of
a devise limited upon an indefinite
of issue, which, under the English rules
pretation, created an estate tail by im-
under the statute de donis, and is,
re, enlarged into a fee-simple estate by
of December 21, 1821. (a) An exec-
devise which was limited upon words
g an indefinite failure of issue of the
ker under the law when the will in this case took effect was uniformly held to be void for remoteness.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Action between Emma E. Hertz and others and C. S. Abrahams, administratrix. From a judgment Hertz and others bring error. Affirmed.

U. H. McLaws and Saussy & Saussy, for plaintiffs in error. Garrard, Meldrim & Newman, for defendant in error.

SIMMONS, C. J. The record discloses that Dr. Moses Sheftall, of Savannah, Ga., made his last will in 1849, and died in 1850. By the first item of his will he devised the real property in dispute as follows: "I give and bequeath to my sister, Mrs. Perla S. Solomons, wife of Lizar Solomons, my brick store on Congress street, not subject to her present husband's debts or her future husband's debts; and in case my sister, Mrs. Perla S. Solomons, has no issue, the said store to go to my niece, Miss Nelly Sheftall Cohen, and to be settled on her," which is equivalent to a devise to A. for her separate use, and, in case she has no issue, to B. There are no superadded words explaining the term "issue" in this item. In another item the testator devises a separate piece of real property to Mrs. Solomons, and, in case she leaves no issue, to go to another niece. Mrs. Solomons, several years prior to her death, in 1897, made her will, and devised the property in dispute to the defendant in error, who is her adopted daughter. The plaintiffs in error are the heirs at law of Miss Cohen. The contention of the plaintiffs in error is that Mrs. Solomons, under the first item of the will, took a determinable or defeasible fee, and, upon her death without issue, the absolute title then passed to them as the heirs at law of Miss Cohen, the executory devisee. The contention of the defendant in error is that the devise created an estate tail, which our act of December 21, 1821, converted into a fee-simple estate in favor of Mrs. Solomons, the first taker, and therefore the latter had the full right and power to devise the property in fee simple to the defendant in error. The court below sustained the last given contention, and this is excepted to by the plaintiffs in error.

1. The intention of the testator must govern the construction of his will, if legal; and this intention may be conclusively shown by the unambiguous words of his will. If the intention thus shown is illegal, it must yield to the rules of law. Civ. Code, § 3324; 10 Bac. Abr. 538; Choice v. Marshall, 1 Ga. 102–104; Carlton v. Price, 10 Ga. 497; Robert v. West, 15 Ga. 123, 141; Cook v. Walker, Id. 465; Smith v. Dunwoody, 19 Ga. 259; Carroll v. Carroll, 25 Ga. 260; Felton v. Hill, 41 Ga. 569; Gillespie v. Schuman, 62 Ga. 253. As Judge Lumpkin

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aptly said in Smith v. Dunwoody, supra: "So long as a testator does not infringe the rules of law, he has the right to say, with Staberius, when he imposed an unpalatable condition in his will, 'Sive ego prave seu recte, hoc volui.' But if he proposes doing an illegal act,—as creating a perpetuity,—or uses words to create one estate when he designed another, in these and innumerable other cases which might be cited his intentions will be defeated. How frequently are courts obliged to say, in the construction of wills, in conflicts between intention and technical rules and expressions, 'Voluit, sed non dixit.'"

2. The law governing the construction of this will is that which was in force when the will took effect upon the testator's death, in 1850. Sutton v. Chenault, 18 Ga. 1, 4; Worrill v. Wright, 25 Ga. 657; Bennett v. Williams, 46 Ga. 399; Lofton v. Murchison, 80 Ga. 392, 7 S. E. 322; Stone v. Franklin, 89 Ga. 196, 15 S. E. 47. At that time, as well as when the will was made, the act of December 21, 1821, was of force. The first section of that act reads as follows: "All gifts, grants, bequests, devises and conveyances of every kind whatsoever, whether real or personal property, made in this state, and executed in such manner, or expressed in such terms, as that the same would have passed as estate tail in real property by the statute of Westminster II. (commonly called the statute de donis conditionalibus), be held and construed to vest in the person or persons to whom the same may be made or executed, an absolute unconditional fee-simple estate." Cobb, Dig. p. 169. The statute de donis, which was enacted in the year 1285, is called "the parent of estates tail." Before that statute, there existed no estates tail, express or implied, in England. Estates tail by implication arose in England under devises wherein a greater estate than for the life of the first taker was irresistibly inferred when the devise was to A. without the added words, "and his heirs," and the same estate was limited over upon words importing an indefinite failure of issue; and hence, in such devises as to A., and, if he dies without issue, to B., the devise was construed by necessary implication to be equivalent to a devise to A. and his issue, and, if he die without issue, to B., so as to bring it within the intent, if not the letter, of the statute de donis. Therefore, to ascertain whether the devise in the will now under consideration is "executed in such manner," or expressed in such terms, as that the same would have passed an estate tail in real property by the statute de donis, we must look to the construction placed upon that statute by the English courts, especially prior to the American Revolution. Gray v. Gray, 20 Ga. 804 (Syl., point 3), 809. Such is also the presumed intent of our legislature as to the construction of all English statutes adopted in this state. Brown v. Burke, 22 Ga. 574 (Syl., point 3), 580. And, independently of these decisions, when our legislature used the words in the act of 1821, "as would have passed an estate tail in real property by the statute of Westminster II., commonly called the 'statute de donis conditionalibus,'" they evidently had in mind and referred to the English decisions previously rendered for centuries upon the various expressions held by them to pass an estate tail in real property under that statute, rather than intending to ignore those decisions, or use the words "real property" in a supererogatory or useless sense, and refer this six century old statute to the respective judges of the superior courts, which were the highest courts then existing in this state, for their separate opinions on it.

3. The vital question, then, in this case is: Does the devise under the first item of the will create an estate tail under the statute de donis, which our act of 1821 converted into a fee-simple estate in favor of the first taker? If the term "in case she has no issue" imports an indefinite failure of issue, the devise was an estate tail by implication under the English law, and the executory devise was void for remoteness; and, e converso, if the term means a definite failure of issue, the devise, as the law stood prior to 1821, gave the first taker a defeasible or determinable fee, and the executory devise was valid. In 2 Jarm. Wills (Randolph & Talcott's Ed.) p. 136, it is said: "It has been long settled, however, that a devise, in a will which is regulated by the old law, to a person and his heirs, or to a person indefinitely, with a limitation over in case he die without issue, confers an estate tail, on the ground, in the former case, that the testator has explained himself to have used the word 'heirs' in the qualified and restricted sense of 'heirs of the body,' and in the latter case on the ground that he has, by postponing the ulterior devise until the failure of the issue of the prior devisee, afforded an irrestible inference that he intended that the estate to be taken by the prior devisee under the indefinite devise should be of such a measure and duration as to fill up the chasm in the disposition, and prevent the failure of the ulterior devise, which, as an executory devise to take effect on a general failure of issue, would, of course, be void for remoteness." Such, however, would not be true if the limitation over was upon a definite failure of issue, as "where the devise over is to take effect on the event of the prior devisee dying without issue living at the death." Id. p. 138. That under the old English law (that is, prior to the English Wills Act of 1837) a devise to A., and, if he die without issue, to B., would be an estate tail by implication, as stated by Jarman, see, also, Smith, Ex. Int. § 564; Beach, Wills, § 195; 29 Am. & Eng. Enc. Law, p. 385. And that a devise to A. for life, and, if he die without issue, to B., was also an estate tail by im-

plication, see 2 Jarm. Wills (Randolph & Talcott's Ed.) pp. 136–138; Reese, Ex'rs, p. 307. A devise to A. and his issue, or to A. with remainder to his issue, and, if he die without issue, to B., would be an express estate tail. Smith, Ex. Int. §§ 569–573; 3 Jarm. Wills (1 Randolph & Talcott's Ed.) pp. 94, 206. The only difference between an express estate tail and an estate tail by implication, both being dependent upon a limitation over upon an indefinite failure of issue, is that in the former there is an express devise to the issue, and in the latter such devise is necessarily implied from the ulterior devise being postponed until after a failure of issue generally of the first taker. Therefore "issue" will be a word of limitation or not, as it may be contained in a phrase or term which, under the rules of law, import an indefinite failure of issue or a definite failure of issue, respectively. "'Issue,' when a word of limitation, means lineal descendants indefinitely, and hence heirs of the body." 11 Am. & Eng. Enc. Law, p. 869; 3 Jarm. Wills (Randolph & Talcott's Ed.) p. 200. In England, before the wills act of 1837, the phrases, "if he have no issue," "if he die without leaving issue," "leave no issue," "for want of issue," "in default of issue," "if he die without issue," and other words of similar import, unexplained by the context, when made the contingency in devises of a limitation over of real property, were invariably construed to mean an indefinite failure of issue, and to create an estate tail. 3 Jarm. Wills (Randolph & Talcott's Ed.) pp. 296–301; Beach, Wills, § 105; Smith, Ex. Int. §§ 538, 563; 11 Am. & Eng. Enc. Law, pp. 899, 902, 904, 918. And thus, it is seen, the contention of the defendant in error is well sustained by text writers.

The cases of authority on the question now under review are the English decisions prior to May 14, 1776, in accordance with our adopting act of 1854, and the decisions of this court, and, we may also add, the decisions of the English courts since the American Revolution which are in line with those prior thereto. These decisions, practically in an unbroken line, clearly settle the proposition that the devise under the first item in this will was an estate tail by implication in England, and that such class of entails, as well as estate tail express, were legitimately within the statute de donis. The design of that statute was to favor the issue in the entailment of real property, and hence the English courts always maintained that the only way to carry out this design fully was to apply the provisions of the statute to all devises of real property where the immediate devise to the issue, or the limitation over upon failure of issue of the first taker, unexplained by the context, meant an indefinite failure of issue. In Sonday's Case, 5 Coke (Rev. Ed.) 227, 9 Coke (Old Ed.) 127b (A. D. 1611), the devise was to A., a son, and, if he have issue male of his body, then to such issue, and, if he have no issue male of his body, then to B., another son. Counsel for the first taker contended, and it was so resolved by the court, that the words, "if he hath no issue male, * * * is as much as to say 'if [he] dies without issue male,' which words are sufficient to create an estate tail in him." And in Counden v. Clerke, Hob. 29a (A. D. 1613), the devise was to A., a son, and, if he die without issue of his body, to B.; and the court said: "I am of opinion that the son is, by the proviso of this will, made tenant in tail to him and the heirs of his body; for the implication (which, in a will, is sufficient for that purpose) is plain." These two cases are of special importance as showing that the words "if he has no issue" mean the same as "if he dies without issue," and that these latter words, following a devise to the first taker indefinitely or generally, will raise an estate tail by implication in him and the issue. And, as will be seen later on in this opinion, the case of Counden v. Clerke, defining and upholding estates tail by implication, has been followed by many other decisions. In Boden v. Watson, Amb. 398 (1761); Id., 478 (1764),—there was a bequest to A. for life, and, in case he has no heirs, then to B. Lord Hardwicke, who delivered the opinion in 1764 on the appeal of the case from the master of the rolls, held that the words, "in case he has no heirs," meant an indefinite failure of issue; and, as personalty was not within the statute de donis, the executory devise was declared void for remoteness, and the first taker was invested with the absolute fee to the property. It follows that if this case had been a devise of real property, the words "in case he has no heirs" would, of course, have been held to mean an indefinite failure of issue, and to give the first taker an estate tail under the statute de donis. In Crooke v. De Vandes, 9 Ves. 197 (1803), the devise, under a will made in 1772, was to A. and the heirs of his body, and, if he has no such heirs, to B. Lord Eldon maintained (page 202) that the words "if he has no such heirs" did not point "to any time less indefinite than a general failure of such issue"; and he said (page 203), "There is no doubt, where these words are applicable * * * to freehold * * * estates, they will give an estate tail in the freehold." In Romilly v. James, 6 Taunt. 263, 274–276 (1815), the devise, under a will made in 1734, was to A. and his heirs, and, "in case he die having no issue," then to B., a nephew of the testator. The contentions were similar to those made in the present case. The court held that the devise did not create a defeasible fee in A. with an executory devise over, but did create an estate tail; because the words, "in case he die having no issue," meant an indefinite failure of issue. Gibbs, C. J., said (page 276): "It is urged that this

devise does not create an estate tail, but a defeasible fee simple, with an executory devise over; but we find no authority for supporting that construction." This case is, therefore, practically "on all fours" with the one now under consideration. And in Cole v. Goble, 76 E. C. L. 445 (1853), the devise in a will made in 1826 was to A., a granddaughter, but, in the event of A. "dying without having any lawful issue," then to other granddaughters, to be divided between them share and share alike. The court unanimously held, Jervis, C. J., rendering the main opinion, that the words "dying without having" issue imported an indefinite failure of issue, and that, therefore, A., the first taker, took an estate tail by implication. Cresswell, J., said, in referring to these words in wills devising real property, that "no person could have entertained a doubt that the words are sufficient to convey an estate tail." And Williams, J., said: "This is, in effect, nothing more or less than a devise to a person and her issue, which beyond all doubt gives her an estate tail." In Forth v. Chapman, 1 P. Wms. 667 (1719), Lord Chancellor Parker said that, in a devise of freehold to A., and, if he died leaving no issue, then to B., his nephew, "the construction should be, if A. died without issue generally, by which there might be at any time a failure of issue." This view was unqualifiedly approved by Lord Talbot in Atkinson v. Hutchinson, 3 P. Wms. 258, and by Lord Hardwicke in Southby v. Stonehouse, 2 Ves. Sr. 610; Lord Talbot saying that a devise to A., and, if he die without leaving issue, then to B., applied to real estate, will give A. an estate tail by implication. While these cases also recognize that the words "die leaving no issue," as applied to personal property, mean a definite failure of issue, the reasons for maintaining a different construction of them as to personal property are: First, because personalty is not within the statute de donis, and therefore the probable intent of the testator can be enforced; and, second, because, when applied to realty, which is within the statute, the intent of the testator is to create an estate tail, but, if his intent was otherwise, it could not be carried out against the rules of construction placed upon these expressions, in upholding the design of the statute, as to devises of real property in favor of the issue. See, also, remarks of Sir William Grant, M. R., in Elton v. Eason, 19 Ves. 77. In Sparrow v. Shaw, 3 Brown, Parl. Cas. 120 (1729), which Lord Hardwicke says in Southby v. Stonehouse, supra, was "the case of great argument," the devise was in trust for A. during her natural life, and if she die, leaving issue of her body, then for such issue; but if she should die without issue as aforesaid, then to B., a godson of the testator. A., who claimed an estate tail, levied a fine, and suffered a recovery to the use of herself and her heirs. She then conveyed to Sparrow and others. Upon her death without issue, B., the ultimate devisee, with the heir of the surviving trustee, leased the land to Shaw, who entered under the lease. Sparrow and others thereupon entered on the land, and dispossessed him. Shaw sued them in ejectment at the court of great sessions, and the court, on December 21, 1721, decided in favor of the defendants. Shaw took the case to the court of king's bench, which reversed the judgment of the court below at Easter term, 1728. See same case under name of Shaw v. Weigh, 2 Strange, marg. page 798. Sparrow and others then brought the case in parliament to reverse this judgment of reversal. The contention in their behalf was that under the devise A. had an estate tail, "for that, in construction of law, a devise to one with a limitation over to another if such first person dies without issue, creates an estate tail in that person, as well as if the devise had been to him or her and the heirs of his or her body." The contention for Shaw was that A. did not take an estate tail, and that the decision of the court at king's bench ought to stand. After hearing argument and receiving the report of the lord chancellor as to the views of the judges of the court of king's bench and common pleas and the barons of the exchequer, the house of lords adjourned until April 29, 1729, when the judges were ordered to attend to deliver their opinions. Accordingly, on that date, all the judges attended, and, after they had delivered their opinions seriatim, it was ordered and adjudged by the house of lords "that the judgment given in the court of king's bench, reversing a judgment given in the court of great sessions, * * * should be reversed, and that said judgment of the court of great sessions should be affirmed." In Geering v. Shenton, 1 Cowp. 410, 412 (Feb., 1776), Lord Mansfield held that the words "in case he shall die without leaving issue," in a limitation over of lands after the death of the first taker, "clearly shew it to be an estate tail." In Agar v. Agar, 12 East, 253, 259-263 (1810), the devise was to A. and his heirs, and to pay an annuity to B., and, if both died without leaving child or issue, to C. The unanimous opinion of all the judges was that the words "without leaving child or issue" imported an indefinite failure of issue, and created an estate tail successively in A. and B.. And Justice Le Blanc said (page 261): "There is no case where the words 'die without leaving issue,' simply, have been adjudged to mean 'without leaving issue at the time of the death.'" In Dansey v. Griffiths, 4 Maule & S. 61 (1815), the devise was to D. R. Dansey and his heirs, but, if he should die, and leave no issue, then to testator's son B. The case was argued before Lord Ellenborough, C. J., and Justices Le Blanc, Bayley, and Dampier. These four justices, over their signa-

say: "We have heard this case argued
unsel, and have considered it; and we
the opinion that D. R. Dansey took
tate in tail general in the said es-
under the said will." In Franklin v.
Madd. 258, 260 (1820), the devise was
and, if he should die without leaving
then to B. The vice chancellor stated
no authority would warrant him in
uing the words 'leaving issue' as
ng issue living at the death; that
g issue,' as applied to real estate, im-
a general failure of issue." He
ore sustained the contention that the
aker "took an estate tail by force of
nitation over being on a general fail-
issue." And in Cadogan v. Ewart, 7
& E. 636, 34 E. C. L. 187, 192–202
under a will where the testator died
0, the devise was to A., her heirs and
s, forever; but, in case she should
thout leaving issue, then to B. Lord
an, C. J., who delivered the opinion
court, after reviewing many cases,
hat A. took an estate tail. The only
g break in the line of the English
as to the effect of the words "leaving
ue" was in Porter v. Bradley, 3 Term
, 146 (1789), where the words were
ng no issue behind him," and Lord
n announced his dictum that he
t the words "leaving no issue," alone,
mean a definite failure of issue even
applied to real estate. This dictum was
riticised by Lord Eldon in Crooke v.
ndes, 9 Ves. 203: "When I read the
Porter v. Bradley, speaking with all
eference to the learned judge who ex-
d that dictum, it appeared to me that
t to shake settled rules to their very
ation. I had heard the case of Forth
pman cited for years, and repeatedly
d Kenyon himself, as not to be shak-
never knew it shaken." But Lord
n had, previously to this criticism, in
se of Daintry v. Daintry, 6 Term R.
4 (1795), decided contrary to his afore-
ictum in Porter v. Bradley, and thus
nglish cases remain uniform that a
tion over of real estate if the first
should die leaving no issue, or without
g issue, unexplained, was upon an in-
e failure of issue, which created an
tail.

Goodright v. Cornish, 4 Mod. 256, 258
and in Boehm v. Clarke, 9 Ves. 580
which are two of many similar cas-
e words "for want of issue" and "in
of issue," unexplained by the con-
re respectively held to mean a failure
e generally. And Lord Hardwicke so
"default of issue" in Southby v.
ouse, 2 Ves. Sr. 616. In Walter v.
1 Comyn, 372 (1723), the devise was
A., a son, should die without issue,
nd not otherwise, after A.'s death, the
should go to B., another son; which
urt held to be an estate tail by impli-
cation in A. In Brice v. Smith, Willes, 1 (1737), it is said (page 3): "It cannot be doubted now, after so many solemn resolutions, but that, if a man devises an estate to A. and his heirs, and afterwards in his will give his estate to another in case A. dies without issue, the subsequent words reduce A.'s estate only to an estate tail, and restrain the general word 'heirs' to signify only 'heirs of the body.' So, likewise, if a man devise an estate to A., or to A. for life, without saying more, and afterwards in the same will devise the estate to another in case A. dies without issue, these subsequent words will enlarge A.'s estate by implication, and give him an estate tail." In Beauclerk v. Dormer, 2 Atk. 308 (1742), the devise was: "I make A. my sole heir, * * * and, if she dies without issue, then to go to" B. This Lord Hardwicke held to create an estate tail by implication in A. He said (page 314): "According to the opinion of Lord Hale in King v. Melling, 1 Vent. 228 (decided in 1672), 'a devise to a man, and, if he dies without issue, etc. is always construed to make an estate tail; * * * for the law will carry over the word "issue" not only to his immediate issue, but to all that shall descend from him. * * * The word "issue" is nomen collectivum, and takes in the whole generation ex vi termini. * * * [and] in all acts of parliament "exitus" is as comprehensive as heirs of the body.'" Lord Hale also stated, in his opinion in the above-named case, that "in Westm. II. de donis 'issue' is made a term of equivalence to 'heirs of the body.'" And in Cadogan v. Ewart, hereinbefore cited as to the force and effect of the words "die without leaving issue," Lord Denman said: "When an executory devise is limited to take effect after an indefinite failure of issue, the limitation over is void. Under the rule, if the limitation be to take effect after a dying without heirs, or without issue generally, that is considered to be an indefinite failure of issue, and therefore void." He further said (page 201): "We may here observe that this may perhaps be the last time of the question as to the effect of dying without issue being agitated; for, by the act of 7 Wm. IV. and 1 Vict. c. 26, § 29, which takes effect at the beginning of this year (1838), all these expressions of 'die without issue,' or 'die without leaving issue,' or any other words which may import a failure of issue, shall be construed to mean a want or failure of issue in the lifetime of the party; and therefore the 57 cases alluded to by Lord Ellenborough in Ellis v. Ellis, 9 East, 386, as having been mentioned by Lord Thurlow in Bigge v. Bensley, 1 Brown, C. C. 190, as having occurred on this head, as well as several others since that time, may be considered as out of our reports, except as to wills made before the present year." This observation of Lord Denman will also directly apply to our act of February 17, 1854, which is on a line

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with the above-mentioned English will act of 1837, and serve the double purpose of showing that in England, before the wills act, which took effect on January 1, 1838, a devise like the one in the will now under review would have been held an estate tail by implication, because the real property devised was limited over upon an indefinite failure of issue, and it would, therefore, have been so held in this state before our act of 1854 for the same reason, which would give the absolute fee to the first taker under our act of 1821; and also that the same devise in England, under a will executed after the English wills act of 1837 took effect, and in Georgia, under a will executed after our act of 1854, would pass a different estate to the first taker, because the old law of entails could not then apply.

Any English decisions since May 14, 1776, decided contrary to the English decisions prior to that time, are not cases of authority in this state. Carter v. Jordan, 15 Ga. 87. Like the decisions of courts in other states in this country, they are merely cases of opinion. Thornton v. Lane, 11 Ga. 500. The only other cases we shall refer to upon this question will be those decided by this court upon wills subject to be construed by the law existing before our act of 1854. In Robinson v. McDonald, 2 Ga. 116 (Syl., point 3), 120–123, the bequest was to A., his heirs and assigns, forever; but, if he should die without a lawful heir of his body, the property bequeathed was to be equally divided among three other sons of the testator. The court held, Judge Warner delivering the opinion, that the words "die without a lawful heir of his body" meant an indefinite failure of issue, which made the ulterior bequest a perpetuity, and, in any event, created an estate tail, which our act of 1821 converted into a fee-simple estate in favor of the first taker. In Carlton v. Price, 10 Ga. 495, 498, Judge Warner, who rendered the opinion of the court, said: "When the intention of testators and the laws of the land are in conflict, the latter must prevail. The rule of law is that whenever the testator limits his property to take effect after the death of the first taker without heirs or without issue, subject to no other restriction, the limitation is void, as being too remote. Such a disposition of property is considered as a limitation over upon an indefinite failure of issue, and is, therefore, an estate tail, which is prohibited by our law." In Cook v. Walker, 15 Ga. 465, Judge Lumpkin, who delivered the opinion of the court, said: "Had the property been given to Miss Walker for life only, with remainder to the heirs of her body, and, in default of such heirs, to the present complainants, this being an estate tail, no one would doubt but that the fee would vest in Miss Walker, notwithstanding she took a life estate only by the terms of the instrument: and this, too, simply because the intention must yield to the unbending rules of the law, technical though they may be." In Hollifield v. Stell, 17 Ga. 280, the bequest was to A., and, in case she "should die without an heir of her body," then to be equally divided among her brothers and sister. This was an estate tail by implication under the English rules of interpretation as to devises of real property; and this court held, Judge Lumpkin rendering the opinion, that, the bequest having clearly created an estate tail in the first taker, such estate was enlarged into a fee simple by our act of 1821. In Gray v. Gray, 20 Ga. 804, the bequest was to A. and B., and should they, "or either of them, die without an heir begotten of their bodies, then their parts or part to be equally divided" among C., the testator's named sons, and the survivor. The majority of the court held that the bequest created an estate tail by implication in A. and B.; that such estates tail were within the statute de donis; and that, therefore, the first taker took the absolute fee under our act of 1821. In Hose v. King, 24 Ga. 424, the bequest was to A., a daughter, and the lawful heirs of her body forever. If she should die without leaving a lawful heir of her body, then the property to revert to the testator's estate, and be divided among his other heirs. Judge Lumpkin, who delivered the opinion of the court, said: "According to the construction put upon the statute de donis by the English courts as to real estate, the limitation over in this will is too remote and void; and that under the act of 1821, as expounded by a majority of this court (myself dissenting) in Gray v. Gray, 20 Ga. 804, A., the daughter of the testator, took an absolute fee." In Claxton v. Weeks, 21 Ga. 265, the bequest was: "In case of no heir, I wish A., as executrix, to give the property to B., C., and D. equally, when A., my executrix, thinks prudent." Judge Lumpkin, who rendered the opinion of the court, held (page 269) that the words "in case of no heir" did not create an estate tail,—First, because no estate in freehold preceded the words; and, secondly, because the bequest was to be divided within the lifetime of the named executrix, which made the words mean a definite failure of issue. It is therefore clearly inferable from these two reasons that if the bequest had been to "A., and, in case of no heir, to B.," the court would have held that the bequest created an estate tail beyond all doubt, and that would have made a parallel case with the one now under consideration. In Brown v. Weaver, 28 Ga. 377, the bequest was to A. and B. and their children (they then having no children), and, if they shall die without issue, then over. The court held, Judge Stephens delivering the opinion, that, as the bequest would create an estate tail in real property, A. and B., under our act of 1821, took the absolute fee. In Pournell v. Harris, 29 Ga. 736, the bequest was to A. for life, and at her decease to the heirs of her body lawfully begotten; but, if she should die without issue,

then over. The will was made in Virginia, where in 1776, the legislature had passed an act, like our act of 1821, enlarging estates tail into fee-simple estates. It was held, Judge Lyon delivering the opinion, that A. took an estate tail, which the Virginia act of 1776 converted into a fee-simple estate. In Walls v. Garrison, 33 Ga. 341, the devise was an estate tail by implication under the English law. Judge Jenkins, who delivered the opinion of the court, said: "The dispositive words in the will * * * are, 'I give and bequeath to my beloved wife, Mary Bird, the whole of the balance of my estate; * * * and should my wife, Mary, die without a natural heir of her body, it is my will and desire that the whole of my estate go to my brother, William B. Bird.' Upon the death of Mary Bird, leaving no lineal descendants surviving, is this limitation over good? This is not an open question in Georgia. In Hollifield v. Stell, 17 Ga. 280, Childers v. Childers, 21 Ga. 377, and Brown v. Weaver, 28 Ga. 378, it is held that these and other equivalent words create an estate tail under the statute de donis conditionalibus, and therefore, under our act of 1821 (Cobb, Dig. p. 169), vest in the first taker an absolute unconditional estate, unless there be superadded words excluding the idea of an indefinite failure of issue. Are there such words in the clause under consideration? It is contended that the limitation over to a person in being has that effect. But on that point it is expressly ruled otherwise in Hollifield v. Stell, supra, wherein several authorities sustaining the ruling are cited." In Strong v. Middleton, 51 Ga. 462, the devise was to A. and his heirs forever, and, if he "should die without a lawful begotten heir of his body," then to B. Judge Trippe, delivering the opinion of the court, held that A. took the absolute fee, as the limitation over was void for remoteness. After citing Hollifield v. Stell, Gray v. Gray, Childers v. Childers, Hose v. King, Brown v. Weaver, and Walls v. Garrison, supra, he said: "The question is not an open one. * * * Whatever difficulties may have been created by the two cases referred to in 30 Ga., there have been several later ones which fully recognize the former rulings." And in Lofton v. Murchison, 80 Ga. 391, 7 S. E. 322, Chief Justice Bleckley, delivering the opinion of the court on a will probated in 1847, said: "The law of Georgia inhibits entails, and by the act of 1821 * * * enforces the inhibition by enlarging them into estates in fee simple."

A fee conditional, at common law, whereby an estate was given simply to A. and his issue, or to A. and the heirs of his body, in exclusion of collateral heirs, and A. took the fee as soon as any issue was born, or it reverted to the donor's estate if no issue was born (2 Bl. Comm. 110), was the origin of the statute de donis allowing the entailment of real property in favor of the issue. 2 Bl. Comm. 112; 2 Minor, Inst. (3d Ed.) marg. pages 78, 79; Tied. Real Prop. §§ 45, 46. After the statute de donis, such fees conditional as applied to real property were also invariably declared to be estates tail in England (2 Bl. Comm. 112; 3 Jarm. Wills [Randolph & Talcott's Ed.] pp. 89, 94, 203); and in Georgia, as applied to both real and personal property, they have always been held to be estates tail, and vest the absolute estate in the first taker, under our act of 1821, unaffected by the act of 1854, or any subsequent law. Kemp v. Daniel, 8 Ga. 387 (top); Smith v. Dunwoody, 19 Ga. 237, 258, 259; Childers v. Childers, 21 Ga. 378; Carroll v. Carroll, 25 Ga. 260, 262; Andrews v. Bonner, 26 Ga. 520; Caraway v. Smith, 28 Ga. 541; Whatley v. Barker, 79 Ga. 790, 4 S. E. 887; Craig v. Ambrose, 80 Ga. 134, 4 S. E. 1; Ewing v. Shropshire, 80 Ga. 374, 7 S. E. 554; Griffin v. Stewart, 101 Ga. 720, 29 S. E. 29; Civ. Code, § 3085. An executory devise which was limited upon a definite failure of issue, as then understood, was valid at the time the will in this case took effect. Mayer v. Wiltberger, Ga. Dec. 20, 26, pt. 2; Carlton v. Price, 10 Ga. 498; Groce v. Rittenberry, 14 Ga. 232; Burton v. Black, 30 Ga. 638; Hill v. Alford, 46 Ga. 250, 251. But at that time an executory devise which was limited upon an indefinite failure of issue, as then defined, was void for remoteness. Mayer v. Wiltberger, supra; Robinson v. McDonald, 2 Ga. 116 (Syl., point 3); Carlton v. Price, supra; and the cases hereinbefore cited on the question of estates tail. See, also, Smith Ex. Int. §§ 709, 714; 1 Jarm. Wills (Randolph & Talcott's Ed.) p. 519, and notes "p" and 15, where many cases are collected. Accordingly, an apposite class of a determinable or defeasible fee (called by some judges a "base" or "qualified" fee), with a valid executory devise over, at the time the will now being construed took effect, is one made to A., and, upon his dying without child or children, or dying without issue living at the time of his death, or other words importing a definite failure of issue, then to B., whereby the absolute fee became vested in A.'s estate upon his leaving issue at his death, or passed to the executory devisees if he died without leaving such issue. It seems like grasping at a shadow for persons to claim real property in this state as executory devisees under a devise governed by the law existing before our act of 1854, and which devise created an estate tail by implication in England, on the grounds either that such estates tail were not included in the statute de donis, or that the laws of Georgia at that time construed such estates to pass an estate for life to the first taker, with remainder to his issue, if any, and, if none, over to the executory devisees. If estates tail by implication were not included in the statute de donis, the limitations over in such estates were always made upon an indefinite failure of issue, which of itself, as above shown, defeats the claim of the executory devisees on the ground that such

devise to them was void for remoteness. And it follows that under the law existing before our act of 1854 such a result of cutting up an estate tail by implication in the manner above stated was absolutely impossible. That act, which is on a line with the English wills act of 1837, enacts that "dying without heirs," "dying without issue," and other expressions which had theretofore meant an indefinite failure of issue shall thereafter mean a definite failure of issue, but is silent as to the nature of the estate taken by the first taker and the issue. There is a dictum in one case (Tucker v. Adams, 14 Ga. 583) that the act implies that the first taker is to have a life estate, with remainder to the issue, and, if none, then to the executory devisees; and that this was a declaratory act. But in Ewing v. Shropshire, 80 Ga. 381, 7 S. E. 554, Chief Justice Bleckley, who delivered the very able opinion of the court in that case, after reviewing the laws applicable to this subject, thus speaks about the codification of the law of estates tail by implication in our Code: "This carving up of any and all estates tail by implication into a particular estate and a remainder is wholly new.' His position is undoubtedly correct; and that the act of 1854 is not a declaratory statute of any former law, and that it converted into a defeasible fee what before the act was an estate tail by implication, see, also, Worrill v. Wright, 25 Ga. 657, 659. Therefore, the words in this will, "in case she has no issue," unexplained by the context (the will having been made in 1849, and the testator having died in 1850), must fall within the definition of an indefinite failure of issue. "Issue," in this term, can include an unborn grandchild, or great-grandchild, and so on in infinitum in the line of the first taker's issue, which clearly creates an estate tail under the statute de donis, as ruled by all English decisions, and therefore gives the first taker the absolute fee under our act of 1821. To restrict the meaning of this term to a definite failure of issue, in order to make the executory devise valid, it would be necessary to add words to it so as to make the term read, "in case she has no issue living at the time of her death." This, of course, we have no legal right or power to do, as we must construe the words as we find them in the will, according to the rules of interpretation adopted by the English courts for centuries, and adhered to by many decisions of this court. To disregard these rules of interpretation at this late day "would not only frustrate the great landmarks of property, but would introduce a latitude of construction boundless in its range, and pernicious in its consequences."

The cases cited in the brief of the learned counsel for the plaintiffs in error are distinguishable from the case at bar. We need only refer to those cited from the Reports of this court to show that they do not conflict with the views we maintain in this case. In Sharman v. Jackson, 30 Ga. 224, and Herring v. Rogers, Id. 615, there are no limitations over to executory devisees, and the devises are to A. for life, and at his death to be equally divided between the heirs of his body; which is the same, as held in those cases, as giving a remainder to the heirs of A.'s body living at his death. The case of Wetter v. Cotton Press Co., 75 Ga. 540, which counsel for plaintiff in error contend should have been held to be a defeasible fee in Mrs. Wetter, could only be so construed because the limitations over were upon a definite failure of issue, the devise expressly stating, if she should "die without issue as aforesaid (that is, without leaving issue or lineal heirs), then living." And the reasons which impelled the court in that case to hold that Mrs. Wetter took a life estate are wholly inapplicable to the case now under consideration. The case of Matthews v. Hudson, 81 Ga. 120, 7 S. E. 286, was not only based on a will probated in 1854, but the property was limited over upon the first taker dying without child or children, which would have been a definite failure of issue as well before as after the act of 1854. The cases of Gibson v. Hardaway, 68 Ga. 370, Daniel v. Daniel, 102 Ga. 181, 28 S. E. 167, and Chewning v. Shumate, 106 Ga. 751, 32 S. E. 544, whether rightly or wrongly decided, have no application to the present case, because they are based on wills made not only after the act of 1854, but even since the Code. The cases of Groce v. Rittenberry, 14 Ga. 233; Sheftall v. Roberts, 30 Ga. 453; Forman v. Troup, Id. 496; Burton v. Black, Id. 638; Tennell v. Ford, Id. 707; and Hill v. Alford, 46 Ga. 250,—which are based upon wills made before the act of 1854; and the case of Greer v. Pate, 85 Ga. 552, 11 S. E. 869, which was upon a deed,—all declared defeasible fees in the first takers only because the executory devises were limited in each case upon a definite failure of issue, as is clearly shown in some of these cases by the terms themselves without the aid of superadded words, and in others by the use of such words, though the court seems to have somewhat stretched the superadded words in Forman v. Troup to reach the conclusion of a definite failure of issue in that case. In Sheftall v. Roberts, which is a case especially relied on, the words "leaving no issue" were explained to clearly mean grandchildren of the testator by the superadded words, "they [the issue] shall not inherit their father's or mother's portion of my estate before they attain the age of eighteen years." In Tennell v. Ford, the devise was to A. and B., and, if B. should die before arriving at age, or without issue, his share to go to the survivor. The court held that "or" should be construed "and," so as to mean if B. should die without issue before arriving at age, which would be a definite failure of issue. This ruling was correct, and in no wise affects the contention of the defendant in error. See Smith, Ex. Int. §§ 235, 236, where the reason for the

rule is explicitly stated with ample citation of authority. And in Burton v. Black, Judge Stephens said (page 640) that a devise to A. for life, and, if he die without issue, to B., would create an estate tail by implication. The other cases arising on wills made before the act of 1854, which are more apparently allied to the present case, are Harris v. Smith, 16 Ga. 545, and Griswold v. Greer, 18 Ga. 545. In the former the devise was to A. for life, with remainder to B., provided, nevertheless, if B. should die, leaving no lawful heirs, then, in that case, to be equally divided, share and share alike, between the lawful children of C. Judge Starnes first announced three reasons to support his contention that the words "die leaving no lawful heirs," in a devise of real property, meant a definite failure of issue: (1) "That there is nothing in the statute [de donis] which sanctions the idea that when one was said to die without issue or heirs reference was had to a failure of issue at any remote time after his death." Page 552. To which we answer that the statute, as quoted in part by him, says: "If issue fail (in that there is no issue at all), or if any issue be and fail by death, or heir of the body of such issue failing," that the statute has always been construed in England to an effect just the reverse of his opinion; and that in 1 Washb. Real Prop. (5th Ed.) p. 104, estates tail, the source of which is the statute de donis, are defined to be "estates of inheritance, which, instead of descending to heirs generally, go to the heirs of the donee's body, which means his lawful issue, his children, and through them his grandchildren, in a regular order and course of descent." (2) That while the words "having no issue," "dying without leaving issue," and "die leaving no lawful heirs" were uniformly construed in England to mean an indefinite failure of issue when applied to real property, yet the last two expressions were construed by the English courts to mean a definite failure of issue when applied to bequests of personal property, which latter construction should be adopted in this state as the proper one in cases of both personalty and realty; and that it is not possible "that this double meaning * * * can belong to the same terms of the same law,"—the statute de donis. To this we answer that the English courts, when construing these words as to personalty, did not have before them the statute de donis and the question of an estate tail, because personalty was not within the statute, and could not be entailed, and hence there was nothing in the way of enforcing the probable intent of the testator in such cases; that, when they construed these words as to realty, the statute de donis and the question of an estate tail were before them, the statute having reference to the entailment of real property, and in such cases they held that the probable intent of the testator was to entail the property, and, if not, that the latter intent could not contravene the design of that statute, and the invariable construction of these expressions when applied to devises of real property; and that our act of 1821 says that whenever expressions in gifts, grants, bequests, devises, and conveyances made in this state "would have passed an estate tail in real property by the statute de donis, they are to be held and construed to vest in the person or persons to whom the same may be made or executed (the first taker) an absolute, unconditional fee-simple estate." (3) That the reason for the statute de donis was to give the "heir at law" the property, and hence, as primogeniture had been abolished in this state, the reason for the conventional rule of construction of the statute de donis had been repealed. To which we answer that this reason imputes to the legislature of this state the performance of a useless task in passing the act of 1821, and that the statute de donis itself shows, and it is declared in numerous English decisions, that its design was in favor of the issue, which means all the issue, male and female, unless the devise was specially to male issue or specially to female issue; and hence primogeniture, which was a canon in the law of descent of real property, clearly had nothing to do with this question. Moreover, Judge Starnes seems to have doubted his own premises, because, after saying, "should we be wrong in all that we have said," he finally seized upon the words "then in that case" as superadded words qualifying the words "die leaving no lawful heirs," construed the word "then" to be an adverb of time relating to the death of the first taker, so as to make "lawful heirs" mean "children," and was thus enabled to decide that the first taker in that case took a defeasible fee, subject to be defeated in favor of the executory devises, should he die without then leaving children. The word "then" in the case of Harris v. Smith is referred to in Sanford v. Sanford, 58 Ga. 260, as an adverb of time. It is unnecessary, however, for us to decide whether this construction of the words "then in that case" is correct, as no such superadded words appear in the devise in the case now under consideration, though cases can be cited to show that the very same words have been differently construed. The terms of the will construed in Griswold v. Greer were: "I * * * bequeath and devise to my said wife, for and during her natural life, the whole of the residue of my estate, both real and personal. * * * And at the death of my said wife it is my will that the whole of the above-mentioned residue of my estate result to and vest absolutely in fee simple in my daughter B., if then living, and her issue, if any; but, if my said daughter should at that time be dead, without issue, or afterwards die, leaving no issue, then, and in either of said events, it is my

desire and will that the said residue of my estate be equally divided among the lawful children of" C., D., and E. Here "issue" in the preceding terms, "and her issue, if any," and "dead without issue," having refrence to issue of the daughter living at the death of the testator's wife, manifestly mean a definite failure of issue, viz. children of B., the daughter; and therefore it might, though we do not say it would necessarily, in this particular case make "issue" in the subsequent term "leaving no issue" also mean children of B., the daughter. 3 Jarm. Wills (Randolph & Talcott's Ed.) p. 236, and note "p." Adopting this view, the devise may be paraphrased thus: To A. for life, and after her death absolutely and in fee simple to B. and her issue (children), if any; but, if B. be dead at that time, without issue (children), or dies afterwards, leaving no issue (children), then, and in either of these events, to the children of C., D., and E. And this is the way the devise in this same will is read in Payne v. Rosser, 53 Ga. 662. Moreover, the additional words "then, and in either of these events," are not in the present case. And what we have said above in answer to the three reasons advanced by Judge Starnes in the case of Harris v. Smith will also apply as answers to the same reasons set forth by him in his opinion under the second headnote of the case of Griswold v. Greer. It follows, therefore, as the law of the present case is clearly on the side of the defendant in error, that the judgment of the court below should be affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

PAGE v. CITIZENS' BANKING CO. et al.

(Supreme Court of Georgia. June 6, 1900.)

MALICIOUS PROSECUTION — LIABILITY OF PARTNERSHIP — CONSPIRACY — PLEADING — EVIDENCE—ABANDONMENT OF PROSECUTION —IMPRISONMENT—DEMURRERS.

1. A partnership is liable as such in an action for malicious prosecution, when the same was instituted in furtherance of the partnership's interests, and by direct authority of its members.

2. A partnership, the individual members thereof, and a person not a member may be joined as defendants in an action for a malicious prosecution, if it was instituted as the result of a confederation and conspiracy among them to begin and carry it on.

3. The petition in such an action may appropriately set forth facts showing that the institution of the prosecution was in furtherance of the partnership's interests, and setting forth the transactions out of which the prosecution arose.

4. It is "carrying on" a prosecution to cause a warrant to be issued, having the defendant therein arrested and his goods seized, having him brought before a committing magistrate, procuring continuance of the preliminary hearing, and requiring him to give bond for his appearance before the committing magistrate, notwithstanding the prosecution was finally abandoned in the committing court.

5. Abandoning the prosecution before the committing magistrate, and procuring him to grant an order dismissing the warrant and discharging the accused, on the ground that the prosecutor had no evidence whatever to offer against him, amounts to a termination of the prosecution, when no further action thereon is taken.

6. A partnership may be sued as such in an action for a malicious arrest, when the process under which the arrest was made was sued out in the interest of the partnership, and under the direction of the persons composing the same.

7. An imprisonment resulting from an arrest under a valid warrant will not give a right of action for false imprisonment.

8. In dealing with demurrers or other objections to pleadings, the judge should first dispose of demurrers to petitions; and where, as a result, a petition is dismissed, it is not proper practice at the same term of the court to deal with demurrers to an answer to such petition.

9. The counts in the petition for malicious prosecution and malicious arrest set forth causes of action, and were not subject to the demurrers filed thereto. The count for false imprisonment did not set forth a cause of action. Direction is given that the case be reinstated as to the two counts first mentioned.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. O. Smith, Judge.

Action by J. D. Page against the Citizens' Banking Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

De Lacy & Bishop, for plaintiff in error. Roberts & Milner and W. M. Clements, for defendants in error.

COBB, J. Page brought suit against Ashburn, Peacock, Edwards, Lietch, Williams, Rogers, and the Citizens' Banking Company of Eastman, which was alleged to be a partnership composed of the five persons first above named. The petition contained three counts,—one for malicious prosecution, one for malicious arrest, and one for false imprisonment. The facts alleged in each of the counts were, in substance, as follows: Rogers was the sheriff of the county, and as such had levied a mortgage execution in favor of the Citizens' Banking Company, against petitioner, upon a certain stock of goods which was in the possession of the sheriff under the levy at the former place of business of petitioner. Lietch and Rogers united in making an affidavit that "thirty-one suits of men's clothing have recently been taken from the storehouse lately occupied by J. D. Page, and held in the custody of J. C. Rogers, sheriff of Dodge county, Georgia, under levy of a mortgage fi. fa., and now occupied by W. H. Clements, and the same has been taken by criminal means and carried away, and that they believe, and have probable cause to believe, that the said property is now concealed in the dwelling and premises occupied by J. D. Page, located on College street, in the town of Eastman." On this affidavit a warrant was issued, directing that the house and premises of Page be searched, and, if the property described in

the affidavit be found therein, he be arrested, and, together with the property so found, brought before some judicial officer, to be dealt with as the law directs. It was distinctly alleged in the petition that when Lietch and Rogers made this affidavit they were acting for themselves, as well as for the Citizens' Banking Company, and with the approval and by the direction of each member of that partnership. The warrant issued on this affidavit was placed in the hands of the town marshal and county bailiff, and the house and premises of petitioner were thoroughly searched. None of the property described in the affidavit was found therein, but the officer seized three pieces of dress flannel and two suits of children's clothes, and arrested petitioner. Subsequent to the arrest, the bailiff, with other persons, returned and made another search of the premises, but found none of the property described in the affidavit. Petitioner was taken before a justice of the peace, when Lietch, Edwards, and Williams, acting for themselves and for the other members of the firm, appeared to prosecute plaintiff, with an attorney who was employed by the Citizens' Banking Company, as a partnership, and each and all of the members of the same. In pursuance of that employment such attorney did represent the prosecution against plaintiff from its inception to its termination. Petitioner asked that he be released from custody on the ground that the affidavit upon which the warrant was issued was defective and void, and failed to charge any offense against him, and that for that reason his arrest and detention were unlawful. Lietch, Edwards, and Williams objected to the release of petitioner, and the magistrate refused to order his discharge. He then asked for an immediate investigation or preliminary trial, but the parties just referred to objected to this, and upon their application the hearing was continued to the next day. To avoid being placed in jail, petitioner offered to give a bond for his appearance; but the magistrate held that a bond must be given to appear and answer for the offense of larceny, and petitioner gave the bond to appear for a preliminary hearing on the next day for the offense of larceny. At the time fixed for the preliminary trial, Rogers, Lietch, Edwards, and Williams, acting for themselves and with the approval of Ashburn and Peacock, the other members of the partnership, again appeared with their attorney before the magistrate for the purpose of prosecuting petitioner; and on their motion the case was again continued until the following day, over the objection of petitioner, who was present and demanding a hearing. At the time fixed in this last order of postponement, petitioner appeared with his counsel before the magistrate, and thereupon the prosecution, by their attorney, asked leave of the court to withdraw the warrant, and to restore to petitioner the articles which had been seized by the officer who searched his house; the attorney representing the prosecution stating that it was impossible to make out a case. An order was then granted discharging petitioner from custody, and restoring to him the articles which had been seized. It was distinctly alleged that while Rogers and Lietch, the persons upon whose affidavit the warrant was issued, were the nominal prosecutors of petitioner, Ashburn, Edwards, Williams, and Peacock, and the Citizens' Banking Company, as a partnership, were all jointly and severally the prosecutors in the case. Petitioner alleges that he was innocent of any offense, and that he did not take and carry away any of the articles named in the affidavit, nor were any of them concealed in his dwelling or about his premises, and that the prosecutors had no probable cause whatever to believe that the same were so concealed; that the articles seized by the officer constituted no part of the property mentioned in the affidavit, but were the property of petitioner and his wife and children, and had never been in the possession or custody of Rogers. Petitioner was in actual custody of the arresting officers for several hours, and was in their constructive custody for 43 hours, before he was released. It is alleged that the prosecution was maliciously instituted and carried on without probable cause; the prosecutors having no ground whatever for the proceeding, other than their desire to injure petitioner. As matter of aggravation and as evidence of malice, it is alleged that the defendants circulated disparaging and damaging reports about petitioner, charging that large quantities of goods stolen from the custody of the sheriff had been found by the officers in the house of petitioner, that he had a secret key to the store in which such goods were located, and that he had taken such goods. To this petition the defendants filed demurrers, both general and special. The court sustained the demurrers and dismissed the petition, and this ruling is assigned as error. The plaintiff, during the progress of the hearing of the demurrers, offered an amendment to his petition, which merely set forth with greater particularity than the original petition the facts showing the connection of the Citizens' Banking Company with the mortgage execution which had been levied upon the property of petitioner, and prayed that, if it should be held that the suit could not be maintained against the Citizens' Banking Company as a partnership, the case might be held in court as a suit against Rogers and the individual members of that partnership. The court refused to allow this amendment, and this ruling is also assigned as error.

1. Is a partnership ever liable as such in an action for a malicious prosecution? If so, under what circumstances can such an action be maintained? One partner may be rendered liable for the acts of his co-partner. Whether or not he is so liable is to be determined by the application of the rules

governing the relation of principal and agent; and generally the partnership is liable for the act of one of the partners, if it would have been liable had the same act been committed by an agent intrusted by the firm with the management of its business. 17 Am. & Eng. Enc. Law (1st Ed.) 1066. If a tort be committed by one partner while engaged in a transaction within the scope of the partnership business, and such tort be committed in furtherance of the interests of the partnership it will be liable. But it will not be liable for a tort committed by one partner in a transaction outside of the partnership business, where he acts from his own private malice or ill will unless the act which constituted the tort was authorized by the members of the partnership, or subsequently ratified by them; the act itself having been done in their behalf and interest. Mechem, Partn. §§ 204, 205; T. Pars. Partn. (4th Ed.) §§ 100, 102, 105; 1 Bates, Partn. § 461; 1 Lindl. Partn. §§ 149, 150; 1 Jag. Torts, § 99; Barb. Partn. (2d Ed.) p. 350, c. 2, § 13. The authorities just cited establish simply that, as a partnership is an aggregation of individuals, where each one is the authorized agent of the others to perform any act within the scope of the partnership enterprise, if one of them, in the prosecution of the business of the partnership, be guilty of a willful wrong towards another, the other partners will be liable, and that, if one partner is guilty of an act outside of the partnership business which causes any injury, the other partners will not be liable unless it appear that such act was expressly authorized by them, or, after the same had been performed in their behalf and interest, they had either expressly ratified the same, or knowingly received the fruits of the wrongful act. Applying these principles to the present case, the petition set forth a cause of action as against the individuals who compose the partnership known as the Citizens' Banking Company, and the plaintiff has a right to maintain the action, so far as the count for malicious prosecution is concerned, against the individuals composing that partnership. But the suit is not only against the individuals, but it is against the partnership itself, and a judgment is sought against the partnership itself, as well as against the individual members who compose it. It is well settled that a corporation is liable for torts committed by its agents, such as assault and battery, libel, malicious prosecution, and the like. Behre v. Register Co., 100 Ga. 218, 27 S. E. 986; 1 Lawson, Rights, Rem. & Prac. § 367; Newell, Mal. Pros. § 102; Railway Co. v. Christian, 97 Ga. 56, 25 S. E. 411; Banking Co. v. Richmond, 98 Ga. 490, 25 S. E. 565.

Whether a partnership can be sued as such, and held liable for a tort in the commission of which all of the members united for the purpose of furthering the interests of the partnership, or whether in such a case the individuals only are liable to be sued, either jointly or severally, is a question which is for the first time presented to this court for decision. Can a partnership itself be regarded as being so separate and distinct from the individual members of the same that it may be treated as the wrongdoer, and a judgment rendered against it which would bind partnership assets in the same manner that a judgment rendered against it on a contract would bind such assets? A corporation is a person, and therefore it is clear that the decisions uniformly holding that it may be rendered liable for a tort committed by its agent are undoubtedly sound. "Though a firm or partnership is not a person, it is a legal entity, and for some purposes is recognized as a quasi person, having powers and functions exercisable by one of the partners severally, or all of them jointly." Drucker v. Wellhouse, 82 Ga. 129, 8 S. E. 40, 2 L. R. A. 328. In the opinion in the case just cited, Mr. Chief Justice Bleckley says: "A firm adds nothing to population, and in this respect is unlike a corporation, which augments population in the legal, though not in the natural, world. Still the law does take note, on a wide scale, of partnership as a legal entity, and regards it as a unit both of rights and obligations. Judgment may be entered and execution issue for or against it. Code, §§ 1899, 3576 (Civ. Code, §§ 2638, 5346). Attachment may issue against it as nonresident (Chambers v. Sloan, 19 Ga. 84; De Leon v. Heller, 77 Ga. 740), or as absconding (Hines v. Kimball, 47 Ga. 587). It may be served with process. Peel v. Bryson, 72 Ga. 332. It may be taxed. Mayor v. Hines, 53 Ga. 616. And see many provisions in the session laws imposing taxes. It may be insolvent. Code, § 1918 (Civ. Code, § 2660); Bennett v. Woolfolk, 15 Ga. 213; Daniel v. Townsend, 21 Ga. 155; Pullen v. Whitfield, 55 Ga. 174; Anderson v. Pollard, 62 Ga. 51. It may assign its property to pay its creditors, but whether by general law a single partner can make for it a general assignment seems open to question. Burrill, Assignm. § 67 et seq.; Story, Partn. §§ 101, 310; T. Pars. Partn. (3d Ed.) pp. 165, 166, 400. As to restrictions on limited partnerships in the matter of assignments, see Code, §§ 1939, 1940 (Civ. Code, §§ 2681, 2682). According to T. Parsons (Partn. [3d Ed.] p. 449), there is a 'general tendency of the law at this day to complete its recognition of a partnership as a body of itself, with its own means appointed to its own debts.' In view of this tendency, which is everywhere traceable, and no less in our own local system than elsewhere, we may safely hold that, though a firm or partnership is impersonal or nonpersonal, it is, for some purposes, in contemplation of law, a quasi person, having powers and functions exercisable by one of the partners separately, or all of them jointly. That it may be a debtor or a creditor, within the meaning of modern statutory enactments, we have no question." In that case it was held that an insolvent firm might make an assignment as an insolvent debtor, though the part-

mselves, as individuals, might be sol-
ee, also, Green v. Willingham, 100
28 S. E. 42.

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d every member of the partnership
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one partner maliciously prosecutes
n for stealing partnership property,
is not answerable, unless all the
s are in fact privy to the malicious
ion. Arbuckle v. Taylor, 3 Dow, 160,
Newell, Mal. Pros. § 103. It would
follow from this ruling that, if all
members united in instituting and
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rant v. Rogers, 87 Ill. 508; Rosen-
. Barker (Ill.) 3 N. E. 93; Farrell
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Thomasson, 4 Biss. 99, Fed. Cas. No.
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tnership. In Re Ketchum (D. C.) 1
5, it was held that a firm was liable
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rm the property of another, and that
immaterial whether the other mem-
bers of the firm were ignorant of the wrong, or innocent of any wrongful intent. There was in that case, however, no ruling as to how a suit for such wrongful conversion should be brought,—whether against the partnership as such, or against the individuals composing the same. The only cases to which our attention has been called in which the partnership as such was sued for a tort are the cases of Mark v. Hastings (Ala.) 13 South. 297, and Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089. In the former it was held, "A partner is not liable for a malicious prosecution instituted by his co-partner on a charge of larceny of partnership property, unless he advises or directs it, or participates therein, and then only in his individual capacity." In the latter case it was held that under the facts of that case the firm was not liable, but the judge who wrote the opinion recognized that there were cases in which it might be held liable for the torts of its members. See page 410, 84 Md., and page 1093, 35 Atl. While the prosecution of a person for a criminal offense might not be within the scope of a mercantile partnership, even though such offense consisted of a larceny of the partnership property, as was held in the Alabama Case, supra, still it would seem that any proceeding authorized by law for the purpose of reclaiming property of the partnership which had been stolen would be within the scope of the partnership business, and each partner would be authorized to use such remedies as the law gave for that purpose; and if these remedies were pursued maliciously and without probable cause, and a prosecution for a public offense resulted therefrom, the partnership as such would be liable in an action of malicious prosecution. But, be this as it may, it is not necessary for us to decide this question in the present case; for the allegations of the petition are clear and distinct that every act that was done by the partner who sued out the search warrant was authorized and directed by each and every other member of the firm, acting in behalf of the partnership. Treating the partnership as a legal entity and as a quasi person, as we are not only authorized, but bound, to do, following the decision in Drucker v. Wellhouse, supra, we have no hesitancy in holding that under the allegations of the petition an action for malicious prosecution was maintainable against the Citizens' Banking Company as a partnership, and that the plaintiff is entitled, under his allegations, to recover a judgment which will bind partnership assets.

While the decision in the case of Ozborn v. Woolworth, 106 Ga. 459, 32 S. E. 581, is apparently in conflict with what is now ruled, upon a close examination of that case it will be found that it was, upon its facts, correctly decided; and, when it is thus confined, it is not only not in conflict with the present ruling, but it is, rather, in line therewith. In that case it was sought to hold a partner-

ship liable for slanderous words uttered by one of the partners, upon two grounds: First, because the words were uttered in a transaction within the scope of the partnership business; and, second, that the other partner, after the slanderous words were uttered, had ratified the same. It was properly held that the partnership was not liable upon either ground. If a corporation is not liable for a slander uttered by its agent, although in a transaction within the scope of his agency, unless the corporation directed the speaking of the very words complained of, as was held in Behre v. Register Co., 100 Ga. 213, 27 S. E. 986, it would seem, upon principle, that a partnership would not be liable for a slander uttered by one of its agents, even though that agent be a member of the firm, unless all the partners directed the speaking of the very words complained of. The action was therefore not maintainable upon the first ground. While one may render himself liable by ratifying the tort of another, such liability arises only where the original act was done in the interest, and intended to further some purpose, of the person who ratifies the act of the wrongdoer, as in a case where property of which the ratifier is the owner is seized, and thus passes into the possession of the real owner, or where one, in behalf of another, without authority seizes property which the other has no interest in, and the person in whose interest the seizure was made receive the property thus seized. See Cooley, Torts (2d Ed.) p. 146. It is hard to conceive how this principle can apply to a slander. Uttering without authority a slander in the interest of another, and approving or ratifying such slander for the reason it was so uttered, or because of a benefit supposed to arise from the wrongful act, are transactions which, if at all possible, are beyond legal comprehension. Even if a slander can, in contemplation of law, be uttered, without authority, in the interest of another, or if a benefit can be received from a slander uttered in one's behalf, such interest or benefit would generally, if not in every case, be so remote that a legal investigation should not be entered into for the purpose of connecting the interest or benefit with the slander. The headnote and the language of Presiding Justice Lumpkin in the opinion in Ozborn v. Woolworth must be taken in the light of the questions then under consideration, and there was nothing in that case to call for a ruling on the question whether a partnership would be liable for a tort committed by one of its members under the direction and express authority of all the members.

2. As it was distinctly alleged in the petition that the partnership, the individual members thereof, and Rogers, the sheriff, confederated and conspired together for the purpose of injuring the plaintiff in instituting and carrying on the prosecution which was the foundation of the action, there was no merit in a demurrer that there was a misjoinder of parties defendant. Cheney v. Powell, 88 Ga. 629, 634, 15 S. E. 750.

3. It was not only proper, but in the present case it was necessary, so far as the liability of the partnership was concerned, that the plaintiff should allege that the prosecution was instituted and carried on in furtherance of the partnership's interests; and it was therefore proper that the plaintiff should allege exactly in what way the partnership was involved in the matter which was the foundation of the prosecution. Those portions of the original petition relating to the manner in which the partnership was interested in the prosecution were not subject to the special demurrers filed to the same, and the amendment which was rejected should have been allowed in so far as it related to this matter.

4. Before a criminal prosecution will give rise to a cause of action in favor of the person prosecuted, against the prosecutor, it must not only appear that the prosecution was without probable cause, and that damage ensued therefrom, but it must also appear that the prosecution was maliciously carried on. In Swift v. Witchard, 103 Ga. 193, 29 S. E. 762, it was held that, before a criminal prosecution will be actionable, there must at least have been an arrest and an inquiry before a committing court. The Code declares that an inquiry before a committing court or justice of the peace amounts to a prosecution. Civ. Code, § 3849. Where a search warrant is issued, and under authority of the same the premises of the person named therein are searched, and goods seized which are not described in the affidavit, and the person named therein is arrested and carried before a justice of the peace, and, after the prosecutor is allowed a reasonable time to secure evidence, he fails to do so, and in open court announces that the prosecution cannot make out a case of larceny or receiving stolen goods against the person arrested, and asks that an order be entered discharging the accused from custody, and restoring to him the property which had been wrongfully seized, a prosecution has been "carried on," within the meaning of the statute, and, if the same is malicious and without probable cause, will give the person prosecuted a right of action against those who instituted and carried it on. Especially would this be true where the hearing was continued from day to day, and pending the same the accused was compelled, in order to obtain his liberty, to give a bond for his appearance before the magistrate to answer the charge of larceny.

5. The Code provides that the prosecution must be ended before the right of action accrues. Civ. Code, § 3850. When the attorneys representing the prosecution announced in open court that they had no evidence to offer against the accused, and procured an order dismissing the warrant and discharging the accused from custody, and no further action was ever taken thereon, the prosecu-

was at an end, within the meaning of aw. See, in this connection, Woodruff oodruff, 22 Ga. 237; Horn v. Sims, 92 121, 17 S. E. 670. The ruling in Harts- v. Smith, 104 Ga. 235, 30 S. E. 666, does conflict with this. It was there held though one arrested upon a criminal ant be discharged, the prosecution would e at an end, if the prosecutor with due nce follows up and carries on the prose- n in a court having jurisdiction to try ase upon its merits; this, in effect, being ntinuation of the original prosecution. he present case no further action was by the prosecutors after the warrant dismissed by the magistrate.

If a partnership is liable to be sued as for a malicious prosecution, it will also able to be sued in the same manner, r similar circumstances, for a malicious t, as the two causes of action are of a ed nature. Causes of action for ma- s prosecution, malicious arrest, and false lsonment, all sounding in tort, may be d in the same action, when the plaintiff defendants in each cause of action thus d are identical. Civ. Code, § 4944.

The warrant upon which the accused arrested was neither defective nor void. affidavit complied with the law, which res that a search warrant should not is- except upon probable cause, supported by particularly describing the place or s to be searched, and the person or per- to be seized. Pen. Code, § 1243 et seq. being the case, the imprisonment result- from an arrest under a warrant thus is- was not a false imprisonment. In Joiner eamship Co., 86 Ga. 238, 12 S. E. 361, it held that "where a warrant is regularly properly sued out, and the prisoner has properly and legally arrested under it, imprisonment cannot be false." In the on Mr. Justice Blandford says: "Where arrest is by valid process, regularly sued action for malicious prosecution is the remedy;" citing Melson v. Dickson, 63 82; Riley v. Johnston, 13 Ga. 260; Sewell tate, 61 Ga. 496. "It is a rule of law in connection, which admits of no excep- that, where there is an arrest on a warrant,—one neither void nor voidable, is not a false imprisonment, and no lia- y is incurred by any person whomsoever, ther immediately or only remotely con- ed therewith. And the rule applies, no ter how corrupt or unfounded or mis- n the motives which induced the issu- or execution of the warrant may have ." 12 Am. & Eng. Enc. Law (2d Ed.) 740, and cases there cited. The ruling 3 Ga., supra, does not in any manner con- with the decision in Thorpe v. Wray, 68 359. While the headnote in the latter says that the unlawful detention of an- r, though under a warrant, will give a of action if done in bad faith, an exam- on of the facts of the case and the opin- ion will show that the decision was placed upon the distinct ground that the warrant was void. Even in a case where the warrant is defective or void, the imprisonment thereunder would not give rise to an action for false imprisonment, if the party suing out the warrant acted in good faith, and the officer executing the same acted in like manner. Civ. Code, § 3552. The court below committed no error in sustaining the demurrer to the petition, so far as the count which claimed damages for false imprisonment was concerned.

8. Error is assigned in the bill of exceptions upon the refusal of the court to strike the answer of the defendants. No ruling will be now made on the question as to whether the answer set up a sufficient defense to the action. If the court below passed upon this question at all, it was in an irregular way. It must have passed on the question either before considering the demurrers to the petition, which would have been irregular, or it must have heard demurrers to the answer after the petition was dismissed, which would have been without authority. When the petition was dismissed the whole case went out, and there was nothing left to answer. In either view the question is not properly before this court for decision. The proper practice where there are demurrers filed to both the petition and the answer is to first consider the demurrer to the petition. If this is sustained, the demurrer to the answer need not be considered. Direction will be given that all questions relating to the sufficiency of the answer be left open until another hearing.

9. The court erred in sustaining the demurrers so far as the counts for malicious prosecution and malicious arrest were concerned. These counts were not subject to any of the objections set up in the demurrers thereto, either general or special. There was no error in sustaining the demurrers to the count for false imprisonment. Direction will be given that the case be reinstated as to the counts for malicious prosecution and malicious arrest, and that the count for false imprisonment stand as stricken. Judgment reversed, with directions. All the justices concurring, except FISH, J., absent on account of sickness.

WOOD et al. v. COLLINS.

(Supreme Court of Georgia. June 5, 1900.)

EXEMPTIONS—OBJECTIONS TO ALLOWANCE—AMENDMENT—VALUATION OF HOMESTEAD—APPLICATION BY WIFE—INSTRUCTIONS—NEW TRIAL.

1. A creditor who files objections to the allowance of an exemption on the ground that specified articles of personalty were omitted from the schedule, should, on the trial, be confined to the articles mentioned in his objections, and should not be allowed to show by evidence that other articles of personalty were omitted from the schedule.

2. An amendment to such objections, which merely in loose and general terms alleged that the head of the family owned property not scheduled, some of which consisted of debts owing to him by persons unknown to the objector, without further specifying or describing the property charged to have been omitted, was properly disallowed for want of fullness and certainty in these respects.

3. It is not incumbent on the applicant for a homestead to fix the valuation of the real estate sought to be set apart. This duty devolves upon the surveyor, his valuation being subject to review by appraisers.

4. Though a gift of money or other property by an insolvent to his wife would be void as to creditors, it would be good as to the wife; and, if she had actually disposed of such money or property before applying for an exemption out of the husband's property, her failure to include what was given her in the schedule will not vitiate her application, when it did not appear that the gift was made in anticipation of the application, and for the purpose of concealing the property.

5. A failure to charge a proposition of law applicable to the case cannot be taken advantage of by assigning error on a charge that is abstractly correct.

6. Striking a ground of a motion for a new trial, which alleged an act or omission on the part of the judge, is the equivalent of refusing to certify to its correctness, and so doing is not reviewable here.

7. While the judge should have instructed the jury to find first whether any of the property described in the objections should have been embraced in the schedule, and, if so, was the applicant guilty of a willful fraud in concealing the same, a charge which restricted them to finding what was fraudulently omitted would not be cause for a new trial, when the evidence demanded a finding that none of the property embraced in the objections should have been included in the schedule.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

Application of Catherine Collins for the setting apart of homestead and exemption of personalty. J. S. Wood & Bro., creditors of her deceased husband, appealed from the judgment to the superior court, and from its decision bring error. Affirmed.

J. H. Martin, for plaintiffs in error. H. W. Carswell, for defendant in error.

COBB, J. Mrs. Collins made an application for the setting apart of a homestead and exemption of personalty out of the property of her husband as the head of a family consisting of herself and her minor children, it being alleged that he refused to make the application. The realty sought to be set apart consisted of a tract of land containing 341 acres, and the schedule of personalty consisted of numerous items, with the value of each affixed, aggregating $551. The affidavit of the surveyor was to the effect that the land sought to be exempted was worth $1,000. Wood & Bro., creditors of Collins, filed objections to the proceeding on the grounds that the land was worth $2,500 instead of $1,000, and the personalty contained in the schedule was worth $200 more than the amount therein stated, and that the schedule did not contain "a full disclosure of the personalty of said W. W. Collins, because it does not contain $300 cash, and one pistol, value $15." Appraisers were appointed, who made a return that the realty was worth $1,000, and the personalty $493.75. Wood & Bro. entered an appeal to the superior court. The case came on for trial in that court, and the result was a verdict finding "the land to be worth $1,000, and no personal property fraudulently left out of the schedule." The case is here upon a bill of exceptions sued out by Wood & Bro. assigning error upon the refusal of the court to grant a new trial in the case at their instance.

1. It is the duty of one who claims the benefit of the law allowing the setting apart of a homestead and exemption of personalty to act in perfect good faith, and to that end he must "make a full and fair disclosure of all the personal property, including money, stocks, and bonds of which he may be possessed at the time" his application for exemption is made. If a debtor is "guilty of willful fraud in the concealment of part of his property from his creditors," the law imposes as the penalty upon him that he shall lose the benefit of his exemption, so far as the rights of creditors whose debts were in existence at the date of the application are concerned. Civ. Code, § 2830. The section above cited does not, in terms, apply to a case where the application is made by the wife to have the exemption set apart out of the property of the husband; but it would seem that, when the wife is the applicant, and she willfully omits from the schedule filed by her property belonging to her husband which is subject to the payment of his debts, the penalty which the law imposes upon her husband if he is the applicant and guilty of such conduct should also fall upon her. In having the exemption set apart she claims through him, and, construing the law in relation to homesteads and exemptions in its entirety, it seems clear that when the wife is the applicant she is charged with the same duties and subject to the same penalties that the law imposes upon the husband when guilty of fraudulent conduct. Indeed, the law goes even further than this, and makes the wife responsible for the fraud of her husband in concealing his property; and, if any property be left out of the wife's schedule through the fraud of the husband, even though the wife was no party to the fraud, and was ignorant of it, she will have to suffer the penalty which the law imposes upon the husband when he is the applicant. Kirtland v. Davis, 43 Ga. 318. Creditors are permitted to object to the schedule for want of sufficiency and fullness, or for fraud of any kind, as well as to dispute the valuation of the personalty, the propriety of the survey, or the value of the land; but they are required to "specify" their objections in writing. Civ. Code, § 2836. The purpose in requiring the objection to be thus specified is that the applicant may remove it by amendment if it is

well taken, or may be in a position to intelligently combat it if he does not admit that it is well founded. When the schedule is objected to for want of fullness or sufficiency, the objections must put the applicant on notice of what he is charged with having omitted, describing with reasonable certainty the property claimed to be omitted. When this is done, the issue to be tried is whether the articles described in the objections were the property of the applicant, or person out of whose property the exemption is sought, at the date of the application, and, if so, whether such articles were concealed by the willful fraud of the applicant. If the jury find that the property described in the objections was omitted from the schedule without any fraudulent intent, and it is thereafter delivered up, the fact that it was omitted would not defeat the application. If, on the other hand, the property described in the objections was omitted in consequence of a willful and fraudulent intent to conceal the same, then the application would be defeated, and the applicant would lose the benefit of the exemption so far as "pre-existing creditors" were concerned. Such being the result of a finding that property had been omitted from the schedule, it is not only not unreasonable, but it is entirely proper, that the objections should be so framed that the applicant would know exactly what charge he has to meet; and the objector should be held to strict proof of the charge as made in the objections. The objectors in this case having alleged that the omissions in the schedule consisted of $300 cash and a pistol worth $15, there was no error in requiring them to confine the proof to these items, nor in charging the jury, in effect, that their investigations on this branch of the case must be confined to the question whether either of these items was omitted. The rulings in Torrance v. Boyd, 63 Ga. 23, and McNally v. Mulherin, 79 Ga. 614, 4 S. E. 832, did not in any manner relate to the sufficiency of the pleadings.

2. The objectors offered an amendment to their objections, in which they set forth that sundry parties unknown to objectors were indebted to Collins, and by the collusion and fraud of Collins and his wife all reference to these debts was omitted from the schedule, and that the schedule did not contain a full and fair disclosure of the property of Collins, and that his property had not in good faith been delivered up, but had been in part fraudulently concealed. The court refused to allow this amendment, for the reason that its allegations did not state what property was omitted, and were not sufficient to put the applicant on notice of what she was to meet at the trial. That there was no error in this ruling will sufficiently appear from what has already been said in this opinion.

3. The judge charged the jury as follows: "I charge you that the applicant would have nothing to do with the value of the land. The law requires the surveyor to survey the land, and to value it, under oath, and, if that was done, and the caveators were dissatisfied, then appraisers should be appointed to appraise the land. The applicant could have nothing to do with putting a value on it." The court then read the jury Code, §§ 2828, 2830, 2834, 2836, 2837, and 2838. This charge is assigned as error, "because it misstated the law, and is also an expression of opinion on the evidence in the case." The charge is not subject to either of the objections made. If there is in it any opinion on the evidence in the case, we have not been able to discover it. That it is not the duty of the applicant for a homestead to value the land sought to be set apart, but that that duty devolves upon the surveyor, subject to review by appraisers, clearly appears from the sections of the Code which were read by the judge as a part of the charge excepted to. See Civ. Code, §§ 2828-2834.

4. If a husband, who is insolvent, make a gift of money or other property to his wife, the gift is void as to creditors, but is good as to the wife. If, subsequently to such gift, the wife applies for a homestead and exemption to be set apart out of the husband's property, the failure on her part to include in the schedule the money or other personalty which was the subject of the gift would not invalidate the homestead, unless it be affirmatively shown that the alleged gift was made in anticipation of the application, and was the result of a collusive arrangement between the husband and wife to willfully conceal the property from the creditors. Especially would such omission not affect the application when it appeared, as it did in the present case, that the wife had disposed of the property that had been given her before the filing of the application, and there was nothing to indicate that the property was given to her with a fraudulent intent; at least not so far as the application for a homestead was concerned. The creditors could have followed the property in the hands of the wife if they had seen proper to do so, and this was the extent of their rights under the facts of the present record. The charge of the judge was in substantial accord with what is now ruled, and it was, therefore, not erroneous, as claimed.

5. The motion for a new trial contained an assignment of error upon the following charge: "I further charge you, gentlemen of the jury, that if you find that it was not fraudulently left out, and not done to defraud creditors, and it was done in the utmost good faith on the part of the applicant, it would not void it, if you find that it was not left out for the purpose of defrauding creditors. It is for you to say whether or not it was intended to defraud creditors, if you find anything was left out." The objections to the charge were in the following language: "Articles could not have been left out in good faith. The omission of articles

from the schedule and the failure to put them in after their attention has been called to it, or any effort to do it, was in itself fraud; and it was not a question for the jury to say whether or not it was intended to defraud creditors. The fact of leaving out, by itself, is, under the law, a fraud, unless satisfactorily explained, and the consequences repaired." The charge complained of contained a correct abstract proposition of law. See Torrance v. Boyd, 63 Ga. 23. The complaint is not that what is charged is not the law, or not applicable to the case, but that another principle of law should have been charged in addition to what was charged. A failure to charge cannot be taken advantage of in this way. See Lucas v. State (Ga.) 36 S. E. 87.

6. The bill of exceptions recites that one ground of the motion for a new trial was as follows: "Because the court failed to charge the jury to find whether any of the property had been left out from the schedule, and the legal effect of omitting such property from the schedule without placing it in by amendment, or otherwise, when attention was called to it;" and that "the court struck out this ground," and this action of the court is assigned as error. The matter stands thus: A motion for a new trial is presented to the judge, and he strikes out a ground which alleges that he failed to do a certain thing. This action on his part is equivalent to saying that he did not so fail, and is, in effect, a refusal to certify the ground. The ground, not being certified, cannot be considered; and, as the judge practically says that the statement in the ground is not true, of course he did not err in refusing to certify the ground. The point sought to be raised in this ground is the one which the movant attempted to raise in the ground of the motion dealt with in the preceding division of this opinion.

7. Error is assigned upon the following charge: "If you find that there has been any personal property left out fraudulently, as I have instructed you to mention it, and say that 'We, the jury, find that' such and such personal property 'is left out fraudulently.'" This charge was error, for the reason that the jury should have been instructed to return a verdict finding—First, whether any of the property described in the objections should have been embraced in the schedule; and, second, if so, was the applicant guilty of a willful fraud in concealing the same? The error was, however, harmless in the present case, for the reason that the evidence demanded a verdict that none of the property mentioned in the objections should have been embraced in the schedule.

8. The request to charge which was refused was covered by the general charge in almost the language of the request. On one of the main issues in the case, the evidence, as has been seen, demanded a verdict in favor of the applicant. A verdict in her favor on all of the issues was warranted, and there was no error which required the granting of a new trial. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

WHITLEY GROCERY CO. v. WALKER.

(Supreme Court of Georgia. June 7, 1900.)

WRIT OF ERROR—BILL OF EXCEPTIONS—SERVICE.

An acknowledgment of service of a bill of exceptions entered thereon before the same was certified by the trial judge constitutes no such service of the paper as the law requires. In such a case the writ of error must be dismissed; and this is so, though no notice of the motion to dismiss was given to counsel for the plaintiff in error. Seliger v. Coker, 31 S. E. 185, 105 Ga. 512, and cases cited.

(Syllabus by the Court.)

Error from superior court, Irwin county; C. C. Smith, Judge.

Action between the Whitley Grocery Company and W. M. Walker. From the judgment the grocery company brings error. Dismissed.

D. B. Jay, for plaintiff in error. W. F. May and E. W. Ryman, for defendant in error.

PER CURIAM. Writ of error dismissed.

FISH, J., absent on account of sickness.

EVANS v. NAPIER et al.

(Supreme Court of Georgia. June 7, 1900.)

CONDITIONAL SALE—RECORD—BONA FIDES—CLAIM CASE.

1. Where one delivers to another a certain amount of money with which, as his agent, to purchase live stock, and the purchase is accordingly made, the title to the stock vests in the principal; and if he agrees that the agent shall use the stock for a certain rental, and further agrees that the agent may, whenever he desires to do so, purchase the stock from the principal for the cost, with interest, this latter agreement is not a sale with reservation of title, and need not be recorded, under section 2776 of the Civil Code.

2. The fact that the agent made and delivered to the principal a bill of sale of the stock does not estop the principal to set up the above-stated facts. The intention of the parties and the bona fides of the transaction is a question for the determination of the jury.

3. It was therefore error, in a claim case, to refuse an amendment offered by the claimant, and averring the above-stated facts.

(Syllabus by the Court.)

Error from superior court, Wilkinson county; John C. Hart, Judge.

Action by Napier, Worsham & Co. against one Beck. Judgment for plaintiffs. On levy of execution, Samuel Evans filed claim. Judgment for plaintiffs, and claimant brings error. Reversed.

Allen & Pottle, for plaintiff in error. J. W. Lindsey, for defendants in error.

ONS, C. J. It appears from the rec- Napier, Worsham & Co. obtained, in , 1893, a judgment against Beck, and ecution issued thereon. This execu- as, in December, 1898, levied upon live stock then in the possession of Evans filed a claim, asserting that perty belonged, not to Beck, the de- , but to him. When the claim case for trial, Evans offered to amend his y averring that in April, 1898, Beck to him for live stock with which to a farm; that Evans declined to fur- e stock because he knew of the judg- gainst Beck; that he subsequently with Beck that he would furnish $500 hich Beck was to go into the mar- d, as his agent, purchase the live e desired; that, under the agreement, as to have the use of the stock at a ble rental, and was to be allowed, if in a reasonable time desired to do so, hase the stock from Evans for the ce, with interest thereon; that Beck he money, purchased the stock as and kept possession of it; that he er purchased the stock from Evans, title remained in Evans; that the as purchased from divers and sundry whom Evans did not know; and order to keep a record of the trans- Evans took from Beck a bill of sale tock. This amendment was objected court sustained the objection, and re- o allow the amendment, and there- rected a verdict finding the property Evans filed his bill of exceptions, that the court erred in refusing to he amendment and in directing a against the claimant.

s claimed by counsel for the defend- error that the judgment disallowing endment was right for two reasons: t the facts alleged in the amendment a conditional sale by Evans to Beck, t the contract of sale had never been to writing and recorded, as required ion 2776 of the Civil Code; and (2) ans was estopped to set up this de- because he had received the bill of m Beck, and thereby admitted that to the property was in Beck at the bill of sale was executed.

e facts alleged in the amendment of- d not show that there was a sale of d by Evans to Beck. The former fur- he money to the latter as his agent, owed Beck the use of the property ed. Evans further agreed to sell to e stock, if, within any reasonable desired to make the purchase; Beck neantime paying a reasonable rental. here was no sale to Beck, but only an n Beck's part, with no binding con- Under this agreement, Evans or Beck ther, at any time, have brought their s to an end. The transaction was a ailment. In the case of Wiggins v. Tumlin, 96 Ga. 753, 23 S. E. 75, Copeland delivered to Shannon a wagon and two mules, with the understanding that, if the wagon and mules suited Shannon, they would make a sale of them at an agreed price, and would then execute papers reserving title in Copeland until payment; and this court held that this constituted a mere bailment, and that it did not become a sale until Shannon desired to purchase the property, and executed a note, secured by mortgage, in payment, and that the title did not pass to Shannon until the contract of sale had been thus made and completed. This ruling was approved in Harp v. Guano Co., 99 Ga. 752, 27 S. E. 181. In the present case we think there was no sale at all, under the allegations of the offered amendment. There was therefore no sale with reservation of title, and the agreement was not such as is required by section 2776 of the Civil Code to be recorded.

2. The acceptance by Evans of the bill of sale from Beck does not estop him to set up the true relation between him and Beck and the circumstances surrounding the transaction. It will be remembered that this litigation is not between Evans and Beck, but between Evans and parties who had obtained judgment against Beck long prior to the execution of this bill of sale. The plaintiffs in fi. fa. were not parties to the bill of sale, and did not in any way act upon the fact that Beck executed the bill of sale and that Evans accepted it. They were not in any manner hurt by the conveyance, or led by it to do anything to their disadvantage. It is said by Herman in his work on Estoppel (volume 1, § 7, par. 5): "Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he has said or done, or omitted to say or do." We think that there was no estoppel arising from the facts alleged in the amendment offered by the claimant, and that the latter had the right to show the circumstances under which the bill of sale was executed. He could show that, although he accepted this conveyance from Beck, the latter had really no title to convey. Of course, his acceptance could be treated by the plaintiffs in fi. fa. as an admission that the title had theretofore been in Beck. It would then be for the jury to say what such an admission was worth under the circumstances and facts proved, and to find as to the true relation of the parties and the bona fides of the transaction. We think that the facts alleged made a question for the jury, and not for the judge, and did not in any way estop the claimant to set up the truth of the transaction. This court, in discussing almost this identical question, in the case of Sims v. Dorsey, 61 Ga. 488,

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said: "In the trial of a claim case, the property in question being a crop of corn, cotton, etc., produced on the claimant's land by the labor of the defendant in fi. fa., the claimant is not estopped to set up that the defendant in fi. fa. was not his tenant, but cultivated the land as a mere cropper, though he took from him, while the crop was growing, a landlord's lien thereon for provisions and supplies, and, after the crop matured, sued out a distress warrant against him for rent, and caused said warrant to be levied upon the crop. These acts, though of great force as evidence on the question of title to the crop, did not prejudice the plaintiff in fi. fa. so as to work an estoppel in his favor; it not appearing that they induced him to extend the credit by which the defendant became his debtor, or in any way lessened his security or affected his interest. See Davis v. Collier, 13 Ga. 486. The claimant had a right to explain and account for them, and thus harmonize them with his final position, that the title to the crop was in himself, and so remained." See, also, Darke v. Bush, 57 Ga. 180.

3. For the reasons given, we think that the court erred in refusing to allow the amendment offered by the claimant. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

NICHOLSON v. GORDY.

(Supreme Court of Georgia. June 7, 1900.)

APPEAL—REVIEW.

No error of law having been committed, and the evidence fully sustaining the verdict which was rendered, the court did not err in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Chattahoochee county; W. B. Butt, Judge.

Action between Hunt Nicholson and D. C. Gordy, administrator. From the judgment, Nicholson brings error. Affirmed.

Leonidas McLester and C. J. Thornton, for plaintiff in error. J. E. Chapman and G. Y. Tigner, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

STAPLETON et al. v. MONROE et al.

(Supreme Court of Georgia. June 8, 1900.)

PAROL EVIDENCE—ACTION ON NOTE—REBUTTAL EVIDENCE.

1. An absolute and unconditional promissory note cannot be so changed by evidence of a contemporaneous parol agreement as to ingraft upon it a condition. Civ. Code, § 3675.

2. If, in the trial of a case, one party introduce immaterial and illegal evidence without objection, the other party is not thereby entitled to introduce, over objection, other illegal evidence in rebuttal. There can be no equation of errors in the trial of a case. Woolfolk v. State, 8 S. E. 724, 81 Ga. 552.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by Lawson Stapleton and others against F. E. Monroe and others. Judgment for plaintiffs. Defendants bring error. Reversed.

Eldridge Cutts and Hal Lawson, for plaintiffs in error. Bankston & Cannon, for defendants in error.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

FOUNTAIN et al. v. MILLS et al.

(Supreme Court of Georgia. June 8, 1900.)

ACTION—DISMISSAL—RECEIVER—DISCHARGE—JURISDICTION OF ASSETS.

1. A plaintiff may dismiss his suit which is pending in any court of this state, either in term time or vacation, where some right of the defendant is not prejudiced thereby; but the dismissal by the plaintiff of an equitable proceeding, in which a receiver to take charge of the assets of the defendant has been appointed, does not necessarily operate to discharge the receiver. He is an officer of the court, his possession of the assets of the defendant is possession by the court, and while in such a case the functions of the receiver, as between the parties, are ended, his custody of the assets in his hands continues, subject to the order of the court.

2. Where, in such case, the holder of a lien, or other creditor of the defendant, before the receiver has been ordered to surrender the assets in his hands, makes a claim thereto, the judge may, notwithstanding the dismissal of the original suit, retain jurisdiction over the fund, under a proper petition of the creditor for such distribution as may be legal and equitable, but it is not good practice to order a reinstatement of the original case.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Petition by Coombs & Co. against H. J. Fountain and others in which one Harrell was appointed receiver. Thereafter the action was dismissed, and T. T. Mills and others filed a petition to turn over to them certain moneys. From an order reinstating the case, Fountain and others bring error. Affirmed, with directions.

Albert H. Russell and M. E. O'Neal, for plaintiffs in error. Bower & Bower, for defendants in error.

LITTLE, J. Coombs & Co. filed a petition against Fountain and E. Swindle & Co., in which, after making certain allegations, he prayed, among other things, for the appointment of a receiver to take charge of certain property of Fountain, and after a hearing Harrell was appointed receiver of such property. Subsequently the petition was dismissed by the plaintiffs, and the cost paid.

Thereafter, and before a discharge of the receiver had been ordered, Mills, for himself and as agent of others, filed a petition against O'Neal, Fountain, and Harrell, receiver, in the court where the receiver had been appointed, praying that the defendants turn over to them a certain sum of money. This petition was subsequently amended by incorporating a prayer that the case of Coombs & Co. against Fountain and Swindle be reinstated, and that certain money in the hands of O'Neal be turned over to Harrell, receiver. The petitioner offered evidence of certain attachments and foreclosure of laborer's liens which had been levied upon the property of Fountain, which was originally included in that which the receiver was ordered to take possession of. Reference was had in the original petition to these attachments and foreclosures of laborers' liens, from the existence of which the plaintiffs therein alleged that a receiver should be appointed, and in appointing the receiver the judge referred to same, and directed the receiver appointed to pay them if he realized sufficient funds from the sale of the property. So that not only were the claims presented by Mills recognized by the plaintiffs at the time the bill was filed, but provision was made by the judge for their payment. On the hearing of the petition, O'Neal, one of the attorneys of Fountain, gave certain testimony, which it is not material here to set out, other than that after the dismissal of the case against Fountain and Swindle the property in question was sold, and the proceeds went into his hands for the purpose of making certain settlements. On the hearing of the petition filed by Mills, the court ordered that the case of Coombs & Co. against Fountain and Swindle & Co. be reinstated, and that O'Neal be ordered to deposit the sum in his hands, subject to the draft of the receiver, until final adjudication on this petition was had. To this order Fountain and O'Neal excepted.

It is contended by the plaintiffs in error that the plaintiffs had the legal right to dismiss their action either in vacation or term time, and it is further contended that, when this was done, necessarily the funds in the receiver's hands went to the party from whom they were taken. There is no question but that the plaintiff may dismiss his action in any court of this state, either in vacation or in term time, where some right of the defendant is not prejudiced by such dismissal (Smith v. Smith, 101 Ga. 298, 28 S. E. 665); but we cannot assent to the proposition that on the dismissal of this action the funds necessarily went to Fountain, a defendant to the original petition, from whose estate they were realized, and which are now in the possession of Mr. O'Neal. For the proposition that such a disposition necessarily follows the dismissal, we are referred to the case of Warren v. Bunch, 80 Ga. 124, 7 S. E. 270. It will be noted, however, in that case, that the ruling was made on the principle that the court in which the petition was filed and by which the receiver was appointed had no jurisdiction. If it had not, then, under plain principles of law, all the proceedings taken were absolutely void, and, being void, parties must, upon the plain principles of equity, be restored as nearly as possible to their original status quo. The ruling in the case is that property which has been left in the hands of a receiver, after the bill has been dismissed for want of jurisdiction, ought to be restored to the party from whom the receiver took it. That case can have no bearing upon the question here raised. A receiver is the officer of the court, and the possession by a receiver of property belonging to the defendant is the possession of the court. In his work on Receivers (section 833), Mr. High states the rule to be that the abatement of the action, or the entry of final judgment therein, does not have the effect of discharging the receiver ipso facto; that although, as between the parties to the litigation, the functions of the receiver have terminated with the determination of the suit, the receiver is still amenable to the court, as its officer, until he has complied with its direction as to the disposal of the funds which he has received during the course of his receivership. Mr. Beach, in his work on Receivers (section 800), declares that the determination of the suit will not, of itself, discharge the receiver, but his functions must be terminated by a formal order of the court. In the case of Whiteside v. Prendergrast, 2 Barb. Ch. 471, it was ruled by the court of chancery of the state of New York that the discontinuance of a suit does not discharge a receiver appointed therein. To the same effect, also, see Crook v. Findley, 60 How. Prac. 375. In the case of Field v. Jones, 11 Ga. 413, it was ruled that, on the dismissal of a bill, the functions of a receiver who had been appointed ceased between the parties, but that his amenability continued to the court, and that the fund in his hands was subject to the order of the court, and would be returned to the party from whom it was taken, unless retained upon a claim properly made known and presented to the chancellor. The rule laid down in the Encyclopedia of Pleading and Practice (volume 17, p. 847) is that, "after final disposition of the pending suit, the discharge of the receiver is usually a matter of right; but where other interests than those of the parties to the suit, such as the interests of lienholders or other creditors, have come into the litigation, a dismissal or other final determination of the cause will not preclude the court from taking any action, even to continuing the receivership, if necessary to protect such interests"; and this rule is supported by numerous authorities cited in note 1 on page 848 of the same volume. The appointment of a receiver is a harsh remedy, and is not to be exercised by the court in any case, except where interests of creditors and others concerned can only be

fully protected; but, when exercised, the effect is that the court takes possession of the property of the defendant for the purpose of subserving these interests. The right of the defendant to settle, and of the plaintiff to dismiss his petition, is not to be abridged. With the exercise of these rights the court has but little concern, but neither the settlement by the defendant, nor the dismissal of his suit by the plaintiff, operates to discharge the receiver, or to take the fund in his hands out of the possession of the court. That can only be done by an order of the court, which will not be granted until it has been made satisfactorily to appear that the interests of the creditors of the defendant will not be prejudiced. In this case the plaintiff had a right to dismiss his suit. He did so. It did not operate to discharge the receiver, nor to make disposition of the property which the receiver was directed to take and sell. On the petition of certain creditors of Fountain, claiming to be lienholders and asking for the appropriation of the fund in the hands of the receiver, the court ordered the original case in which the receiver was appointed to be reinstated. This was error. Conquest v. Bank, 97 Ga. 500, 25 S. E. 343. It was further ordered, however, that the fund arising from the sale of property which had been placed in the hands of the receiver, and which was at that time in the hands of Mr. O'Neal, attorney for one of the original defendants, be paid over to the receiver. In this it must be ruled that the court did not err, but it had jurisdiction to make final disposition of that fund among the creditors and holders of lien against Fountain, notwithstanding the dismissal of the original bill, such disposition to be legally and equitably made under the petition filed by Mills and others, but not under the original bill. The judgment is therefore affirmed, with direction. Judgment affirmed, with direction. All the justices concurring, except FISH, J., absent on account of sickness.

GRAMLING et al. v. POOL et al.

(Supreme Court of Georgia. June 7, 1900.)

INSOLVENCY—USURY—ACTION TO RECOVER—LIMITATIONS — APPEAL AND ERROR — INSTRUCTIONS—REFUSAL OF REQUESTS—NEW TRIAL.

1. Any plea or suit for the recovery back of usury voluntarily paid by a debtor to his creditor must be brought within a period of one year after such payment is made. Hence, in a contest between two creditors over the assets of their insolvent debtor, one creditor cannot make the other account for usury voluntarily paid him by the debtor before insolvency, without instituting proceedings for this purpose within 12 months from the time of such payment.

2. The instructions requested, so far as legal and pertinent, were sufficiently covered by the general charge given to the jury, and the failure to charge in the precise language requested is not cause for a new trial.

3. While the evidence upon the sole issue submitted to and passed upon by the jury was decidedly conflicting, that introduced for the defendant in error was sufficient to support the verdict, and it does not appear that the same was contrary to the charge of the court.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Action by Gramling, Spalding & Co. against W. H. Pool and others for an injunction and equitable relief. Judgment in favor of defendants, and from an order denying a motion for a new trial plaintiffs bring error. Affirmed.

J. H. McLarty and J. S. James, for plaintiffs in error. W. A. James and A. L. Bartlett, for defendants in error.

LEWIS, J. It appears that the litigation between the parties to this case has been pending in court for a number of years. The plaintiffs in error in this case filed their bill in December, 1885, as creditors by open account of the firm of Turner & Hudson against said firm, which was composed of G. R. Turner and Allen Hudson, and also against W. H. Pool and others, for injunction, receiver, and other equitable relief. In that bill, among other things, it was alleged that Turner & Hudson were insolvent traders, and attacked as fraudulent and void a deed from G. R. Turner to W. H. Pool, dated March 19, 1884. That case came to this court, and is reported as Pool v. Gramling, 88 Ga. 653, 16 S. E. 52. It seems from that case it was decided that the deed from Turner to W. H. Pool was executed and held for the purpose of delaying and defeating the collection of debts due by Turner & Hudson to complainants and other creditors; that Pool held an absolute deed to the property to secure a debt with his bond to reconvey outstanding; that, upon the debtor afterwards becoming insolvent, Pool took the property in payment of the debt, the value of the property being largely in excess of the debt. On this branch of the case it was decided by this court that the other creditors might have the property administered in equity as the assets of an insolvent, and the proceeds applied first to the secured debt, and the surplus to their own claims. The present case is an ancillary proceeding brought to the May adjourned term, 1896, of court, by the same plaintiffs against the defendants Turner & Hudson, W. H. Pool et al., in which it is alleged that the property described in the original bill in the case has been sold under the decree rendered therein by the commissioner appointed by the court for that purpose, and brought the sum of $2,100, the terms of sale being one-third cash, and the balance in one and two years, payments drawing 8 per cent. interest per annum from date; that the commissioner had collected the cash payment of $700, and had instituted suit on the notes given by Mrs. Mary W. Turner for the balance, due in one and two years after date; that before the final trial

of the case in the supreme court Pool had charge of the premises sold as set out in the original suit, and received more rents and profits arising from said property than his entire debt against Turner & Hudson amounted to, and that he should pay back to complainants the sum of $300 for rent on said property, which he received over and above the amount of the debt claimed by him against G. R. Turner. The petition prayed that the matters therein referred to be inquired of by the court, and a final distribution of the money be had in the case as originally directed in the decree, and that said Pool be required to account for all moneys and rents which had gone into his hands. Petitioners amended by alleging that G. R. Turner gave to Pool his note for $50 as interest on $600 for eight months from date, and that in the fall of 1885 Turner paid off the $50 note, which was $16 more than 8 per cent. per annum on the amount borrowed. This balance was claimed as a set-off against the principal sum of $600. The jury, on the trial of the issue formed by this case, returned a verdict in favor of W. H. Pool for $729.78, whereupon plaintiffs made a motion for a new trial, and except to the judgment of the court overruling the same. In the judgment overruling this motion it was ordered by the court that counsel for Pool write off of said verdict and judgment the sum of $65.80, in obedience to which order that amount was accordingly written off.

1. In one ground of the motion for a new trial it is alleged that the court erred in refusing to charge the jury, as duly requested by plaintiff's counsel in writing, as follows: "If you believe from the evidence that G. R. Turner, on the 21st day of March, 1884, borrowed from W. H. Pool the sum of $600, and gave to Pool his note for $50 as interest on same date, and that this note was given as interest on $600 for eight months' time, beginning on the 21st of March, and due 21st of November, 1884, and you further believe that Turner paid the $50 in fall of 1885, and took up the note, I charge you that all over eight per cent. on the $600 for eight months would be usury, and you ought to credit Pool's debt with such usury at the time it was paid in 1885." Exception is further taken in the motion to the following charge of the court: "I will state here that the $50 note has nothing to do with the case. That has already been paid, settled, and gone into, and you need not consider it in any way." There seems to be no dispute in the testimony introduced on the trial that Pool actually made a loan of $600 to Turner, and that he took his note for $600 principal, and also took another note for $50, due in six months, which was stated by Turner to be a premium for the loan of $600. There is no question but that the $50 note was really usurious, and that, as such, it was paid in the fall of 1885, several years before the institution of this proceeding to make the creditor account for the usury. It does not appear that when Turner paid the $50 note he was insolvent. Hence we think the claim of forfeiture of this usury has long since been barred by the statute of limitations. By the act of February 24, 1875 (Acts 1875, p. 105), entitled "An act to regulate and restrict the rate of interest in this state, and for other purposes therein mentioned," after providing that it should be unlawful to charge or take any interest greater than 12 per cent. per annum, and any one violating this provision should forfeit the interest so charged or taken, it was provided further "that any plea or suit for the recovery of such forfeiture shall not be barred by the lapse of time shorter than one year." The act approved December 11, 1871 (Acts 1871, p. 75), made the period of limitation for a forfeiture of usury charged six months; and the act of 1875, which is embodied in section 2891 of the Civil Code, simply intended to extend the period of limitation prescribed by the act of 1871 from six months to twelve months. In the case of Cheapstead v. Frank, 71 Ga. 549, it was decided that the statute of limitations, in reference to any pleas or suits for the recovery of usury paid, is applicable to suits to recover usury which has been paid, or to a set-off claiming such a demand. This decision had reference to the act of 1875 above cited. In the case of Lilly v. De Laperiere, 76 Ga. 348, there seems to have been a question on the mind of Justice Blanford as to whether this act of 1875 was repealed by the act of October 14, 1879 (Acts 1879, p. 184). This question was finally adjudicated by this court in Johnson v. Association, 97 Ga. 622, 25 S. E. 358, which held that "section 5 of the usury act of February 24, 1875 (Acts 1875, p. 105), now embodied in section 2057(e) of the Code of 1882, was not repealed by the usury act of October 14, 1879 (Acts 1878-79, p. 185), and consequently an action for the recovery of money paid as usury must be brought within one year from the time such payment was made, or the same will be barred." Besides, section 2057(e) of the Code of 1882, construed by that decision, is now embodied in the present Code, and would stand as law even if there had been an effort to repeal the same by the legislature of 1879. It follows from the above that the debtor himself could not have recovered back this usury he voluntarily paid his creditor, either by suit therefor or by plea and set-off, unless he had instituted his action within 12 months from such payment; and, of course, the law confers upon his creditors no greater right than it does upon the debtor in such a matter.

2. Another ground in the motion for a new trial is that the court erred in refusing the written request of plaintiffs' counsel, as follows: "If the jury believes from the evidence that G. R. Turner could have rented the storehouse for the term of five years at $12 per month, and went to W. H. Pool, and tried to get him to allow the storehouse to be rent-

ed, and pay the same on the $600 note held by W. H. Pool against G. R. Turner, and you further believe that Pool refused to do so, and continued by himself or his tenant to occupy and keep possession of the premises, he would be bound to account for the rent for the five years at the rate of $12.00 per month." It is true, the record disclosed that Turner did testify in effect that he had been offered for five years' rent of the premises the rate of $12 per month. It was denied, on the other hand, that such an offer was ever made known to Pool. It appears from the record that in his general charge to the jury the court instructed them to the effect that if they believed from the evidence that Pool had by himself, or those under him, occupied the premises in question, he would be responsible for whatever rent he had received, or ought to have received, by the use of ordinary care and prudence; and, if others occupied the storehouse with his consent, he would be bound to account for whatever rent the evidence shows the same to be worth. He further instructed them that they should determine from the evidence how long Pool held this property after it was turned over to him by Turner, how long any one held it under him, and if, while in his possession and control, any one used the property by his consent, or he allowed it to be done, he would be responsible for the rent while it was so held, and they should charge him rent for whatever amount the evidence may show it was worth. There was considerable conflict in the testimony as to what this property was worth for rent, some testifying to its only being worth four dollars or five dollars per month, and others to sums in double that amount. The request which the court refused to give had reference to the testimony of one of the witnesses for the plaintiffs. It would have been equally as proper for the court to have specially charged a theory upon the testimony of any other witness in the case. Instead of going into details of this sort, where a number of witnesses were sworn on either side, and were in conflict, we think the trial judge pursued the better course in giving the general instructions to the jury above stated, which fully covered the issues involved between the parties touching the amount of rents that should be chargeable against the defendant; and we do not think, therefore, a failure to give this special request with reference to the testimony of a particular witness is cause for a reversal of the judgment refusing a new trial.

8. There are several other grounds in the motion for a new trial, some complaining of the verdict being contrary to the charge of the court, and also contrary to law and evidence. There is also a ground in the motion for a new trial, because the jury failed to allow a credit of $35 paid by Mrs. Turner on January 10, 1888, which Pool admitted should go as a credit on his claim. We do not know by what calculation the jury arrived at its verdict, and cannot say whether they allowed that credit or not in their findings. The evidence in the case was conflicting, not only as to the value of the premises in dispute for rent, but also as to the time in which Pool was properly chargeable with the rent; plaintiffs contending that he was in possession until the sale by the commissioner, which was in 1893,—eight years from the time he first acquired possession; the defendant introducing testimony tending to establish the fact that he abandoned possession of the storehouse in question about the time of the decision by this court in the case, which was rendered in 1891. What amount per month, and for what length of time, the jury credited his claim with rent does not appear from their verdict, which was simply one of a general nature. Besides this, the court required Pool's counsel to write off from the verdict an amount exceeding the credit which plaintiffs claim the jury failed to allow; and it may be that in ordering this deduction the judge intended to provide for the payment of that credit, as well as some others, which, in his judgment, might have been omitted. The sole issue in this case was passed upon by the jury under testimony that was decidedly conflicting, the main issue being as to what rents or profits the defendant Pool was chargeable with under the evidence presented both for plaintiffs and defendants. After carefully reading the testimony, we think that introduced in behalf of the defendant in error was sufficient to support the verdict, and we cannot say that there was anything to indicate that the verdict was contrary to the charge of the court. This was really a jury contest. It does not appear that any error of law was committed on the trial, and where, in an issue of fact, there is any evidence to sustain the finding of the jury, the invariable rule of this court is not to interfere with the discretion of the trial judge in overruling the motion for a new trial, though the record may tend to indicate a preponderance of the testimony in favor of the unsuccessful party. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

HORKAN v. BENNING.

(Supreme Court of Georgia. June 8, 1900.)

EVIDENCE—ADMISSIONS OF ADMINISTRATOR—EJECTMENT.

1. Admissions made by an administrator after his appointment are admissible against the estate of his intestate.

2. The amount of damages or of mesne profits to be recovered is a question for the jury, and not for the court. It was therefore error to direct the jury to find a specified sum as mesne profits.

(Syllabus by the Court.)

Error from superior court, Colquitt county; H. C. Sheffield, Judge.

Action by M. A. Benning, administratrix, against G. A. Horkan. Judgment for defendant. Plaintiff brings error. Reversed.

I. A. Bush & Sons and D. H. Pope & Son, for plaintiff in error. W. C. McCall, for defendant in error.

SIMMONS, C. J. An action of complaint for certain land in Colquitt county was brought by Mary A. Benning, as administratrix de bonis non of the estate of Seaborn Jones, against Horkan. The plaintiff put in evidence a grant from the state to Seaborn Jones, of Baldwin county, Ga., and her letters of administration. Horkan defended, and put in evidence a deed, dated in 1873, from John I. Hall, as administrator of John Hall, to Guzzard; a deed from Guzzard to Henry Banks, dated in 1877; a deed from Henry Banks to James Banks, dated in 1890; and a deed from James Banks to Horkan, dated in 1892. Horkan was shown to be in possession, but there was no evidence as to the length of time he had been in possession. There was evidence that the value of the timber on the land for turpentine purposes had been, before Horkan began to cut it, from $300 to $400, and that it was still worth, for turpentine purposes, from $1.50 to $2 per acre. There appears in the record nothing to show the number of acres in the lot. Horkan claimed that the intestate of the plaintiff was not the grantee named in the grant from the state relied upon by the plaintiff, and he showed by uncontradicted evidence that there had been, at the time of the grant, two men of the name of Seaborn Jones residing in Baldwin county, Ga. He showed that both these men subsequently moved to Muscogee county, where the intestate of the plaintiff resided up to the time of his death. The defendant also offered in evidence an application by the plaintiff to the ordinary of Muscogee county for leave to sell all the wild lands owned by the estate of her intestate, and not in Muscogee county. In this application were set out many and divers lots of land as the property of the estate, but among them did not appear the lot now in controversy. The defendant also offered in evidence certified copies of tax returns, showing that from 1866 to the time of the trial the administratrix of the intestate had never returned the lot for taxes, but that such lot had been returned, and the taxes on it paid by the defendant and those under whom he claimed. This evidence (the application and the certified copies of returns) was, on motion of plaintiff's counsel, rejected. The court thereupon directed a verdict for the plaintiff for the land and for $300 as mesne profits. The defendant made a motion for a new trial, in which he complained of the exclusion of the evidence mentioned above and of the direction of the verdict. This motion was overruled by the court, and the movant excepted.

1. The application to the ordinary, purporting to set out all the wild lands belonging to the estate of the intestate, setting out many such lands, and omitting this particular lot, was in the nature of an admission, and should have been received by the court. It is well settled by decisions of this court that admissions by an administrator or executor, made after he had been clothed with the trust, are admissible against the estate he represents. Sample v. Lipscomb, 18 Ga. 687; Lawson v. Powell, 31 Ga. 681; Floyd v. Wallace, 31 Ga. 688 (Syl., point 4). The court, therefore, erred in excluding the application. For the same reason it was error to exclude the certified copies of tax returns. We hold now simply that this evidence was admissible. What probative force it should have with the jury we are unable to say, and on that matter desire to express no opinion.

2. The present suit was brought for the land, and also for mesne profits. In an action of ejectment, mesne profits are given to a successful plaintiff as compensation in the nature of rent for the period, within the statute of limitations, for which the land has been illegally held by the defendant. What was the rental value of the land involved in the present case should have been determined by the jury. The evidence as to the rental value of the land was merely advisory, and the jury had the right to fix their own valuation. Further than this, the evidence did not point to any fixed or specific amount. It was therefore error for the court to direct the jury to find a verdict for $300 for mesne profits. Under the evidence and in the nature of the question, the determination of the amount of mesne profits should have been left with the jury. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

Ex parte GREGORY.

In re BUFFINGTON.

(Supreme Court of South Carolina. July 3, 1900.)

INSANE PERSONS—JUDGMENT WITHOUT NOTICE—RIGHT TO APPEAL.

Const. 1895, art. 5, § 15, provides that the court of common pleas shall have appellate jurisdiction of cases within the jurisdiction of inferior courts, unless the general assembly shall provide for appeals directly to the supreme court. The general assembly has not made such provisions in regard to appeal from the probate court. Article 5, § 19, provides that the court of probate shall have jurisdiction in cases of lunacy, unless changed by act of the general assembly, and no such change has been made. Code Civ. Proc. § 57, provides that any person injured by any final order or decree of the probate court may appeal to the circuit court. *Held*, that certiorari would not lie to a judgment of the probate court declaring a person to be of unsound mind, but that appeal was the proper remedy.

Appeal from common pleas circuit court of Saluda county; James Aldrich, Judge.

Certiorari by Henrietta Buffington to review a judgment of the court of probate declaring her insane. From an order dismissing the petition, she appeals. Affirmed.

N. G. Evans and E. W. Able, for appellant. C. J. Ramage, E. S. Blease, and J. N. O. Gregory, for appellee.

POPE, J. Henrietta Buffington, without any notice to her, was adjudged by the probate court of Saluda county, in this state, to be a person of unsound mind, and one A. J. Gregory was appointed by such probate court to be the committee of her person and estate. From this judgment of the probate court the said Henrietta Buffington, through her attorney, E. W. Able, Esq., has, within the time prescribed by statute, served notice of appeal, and such appeal is now pending. However, after the notice of appeal above referred to, the said Henrietta Buffington, through her said attorney, E. W. Able, Esq., applied to James Aldrich, while presiding over the court of common pleas for said Saluda county, for the writ of certiorari to be directed to the judge of probate for Saluda county, requiring him to have the records of his court relating to the matter of Henrietta Buffington as a person of supposed unsound mind before Judge Aldrich. Due return was made by said probate judge, whereupon Judge Aldrich dismissed the petition for writ of certiorari, and refused to issue said writ, upon the ground that the petitioner has an ample remedy by appeal, and that said appeal is her proper remedy. She now appeals, and by her appeal, on the grounds thereof,—(1) that the circuit judge erred in holding that Henrietta Buffington had the right of appeal from the proceedings in the probate court; and (2) that the circuit judge erred in holding that an appeal was the proper remedy, and not writ of certiorari,—the appellant concedes that practically but one question is before us, namely, whether there is right of appeal from the probate court in such a proceeding as that testing the soundness of mind of a party who is alleged to be of unsound mind, when such person so charged is served with no notice of such proceedings. We may remark that since the recent case of State v. Moore, 54 S. C. 556, 32 S. E. 700, it is not an open question in this state that when a right of appeal is provided from an inferior jurisdiction writ of certiorari will not be allowed also, except, possibly, in very exceptional cases. Let us see if there is a right of appeal from the probate court to the court of common pleas. Our constitution of 1895 (section 15, art. 5) provides: "They [courts of common pleas] shall have appellate jurisdiction in all cases within the jurisdiction of inferior courts, except from such inferior courts from which the general assembly shall provide an appeal directly to the supreme court." It is admitted that there has been no legislation in this state by which appeals may be taken from the orders, judgments, decrees, or other proceedings of a court of probate directly to the supreme court of this state. Such being the case, the courts of common pleas have appellate jurisdiction in all cases within the jurisdiction of probate courts. Our next inquiry is, have probate courts jurisdiction of matters relating to persons non compos mentis? Section 19 of article 5 of our constitution of 1895 provides: "The court of probate shall remain as now established in the county of Charleston. In all other counties of the state the jurisdiction in all matters testamentary and of administration, in business appertaining to minors and allotment of dower, in cases of idiocy and lunacy and persons non compos mentis shall be vested as the general assembly may provide, and until such provision such jurisdiction shall remain in the court of probate as now established." It is admitted that there has been no provision by the general assembly of this state vesting jurisdiction in the cases enumerated in this section of the constitution in any other court than the probate. Both under the constitution of 1868 and the laws pursuant thereto courts of probate were intrusted with jurisdiction "in cases of idiocy and lunacy and persons non compos mentis." See Const. 1868, art. 4, § 20; 14 Acts Gen. Assem. § 38; also 2 Rev. St. § 37.

To show that Henrietta Buffington, though not served with process in the proceedings affecting her in the probate court, and not made a party to such proceeding, has the right of appeal preserved to her therefrom, we have but to cite section 57 of the Code of Civil Procedure of this state, which supplies the machinery to carry into effect the "appellate jurisdiction in all cases within the jurisdiction of inferior courts" confided to courts of common pleas in this state by article 5 of section 15 of our constitution of 1895. It is the judgment of this court that the judgment of the circuit court be affirmed.

STATE v. JAGGERS.

(Supreme Court of South Carolina. June 19, 1900.)

DYING DECLARATIONS—EVIDENCE IN REPLY—THREATS.

1. The statement of deceased, after he was shot, that "he was shot, and shot bad," does not show that he was aware that death was imminent, so as to admit statements as dying declarations.

2. That deceased, just after he was shot, used language indicating that he then feared that the shot would prove fatal, will not authorize the admission, as dying declarations, of statements made five to seven hours later, when he seemed to be resting perfectly easy, and did not manifest any concern about himself; nor is their admission authorized by the fact that five or six hours later he had no hope of recovery.

3. Testimony for defendant that deceased had made threats to injure him does not authorize the state, in reply, to prove threats made by defendant against deceased prior to the homicide.

al from general sessions circuit court
: county; O. W. Buchanan, Judge.
am Jaggers was convicted of murder,
peals. Reversed.

F. & John R. Hart, for appellant.
r Henry, for the State.

ER, C. J. The defendant was indict-
the murder of one George Burris, and
nnd guilty, with a recommendation to
The defendant appeals upon the sev-
ceptions set out in the record, which
ut two questions: (1) Whether there
rror in receiving certain statements
y the deceased as dying declarations;
ther the circuit court erred in admit-
e testimony of one Wilson, offered in
y the state, tending to show that the
nt had made threats against the de-

as to the admissibility of the so-
lying declarations: For a proper un-
ding of this question, it will be neces-
make the following statement, gath-
om the "case," as prepared for argu-
ere, as well as from the supplemental
ny embraced in the argument of the
r, which was consented to by counsel
ellant, provided they be allowed 20
n which to submit "additional testi-
nd further argument," of which pro-
owever, the appellant's counsel have
ailed themselves. It seems that the
d was shot on the morning of the 3d
ber, 1899, between 9 and 10 o'clock;
e witness Cato Williams who found
ne 10 or 15 minutes after he was shot,
n the yard, near the well, heard him
t "he was shot, and shot bad." This
, in the supplemental testimony em-
in the argument of the solicitor, is
nted as saying that he saw the de-
again that afternoon at his house,
or 4 o'clock, and, when asked wheth-
rge (the deceased) said anything about
replied: "He never said anything to
ut dying, except at the well. He said
shot, and did not expect to live. He
was shot bad, and didn't expect to
r it." This manifestly refers to what
tness heard the deceased say in the
g at the well, a very short time after
shot; for he adds to his testimony
oted the following: "And the other, at
I don't know anything about that."
xt witness offered to prove the alleged
declarations was C. H. Sandifer, a
rate, who reduced the statement of de-
to writing. This witness testified
e was in company with the sheriff
or 4 o'clock in the afternoon of the
which deceased was shot, and found
eping under the influence of opiates."
aked him up,—shook him,"—and then
de the statement in question. But,
examined as to whether the deceased
onscious of his condition, he testified as follows: "Q. The boy, George, said nothing to you about whether he was going to die or not? A. No, I told him that he could make it [referring to the statement] if he wished; that he might die; that, if he had any statement to make, to make it now. Q. You told him he might die? A. Yes, sir. Q. He didn't say whether he was going to die or not? A. No, sir; he didn't say. Q. You say he was under the influence of morphine at the time? A. Seemed so. He was breathing pretty heavy, and seemed resting. Q. Didn't seem concerned about himself? A. No, sir; we had to shake him to keep him awake. Q. But he didn't seem to manifest any concern about himself,—whether he would get well or not? A. No; he seemed to be perfectly easy." It seems that another witness (J. N. Gillespie) had previously testified that he had seen the deceased in the morning after he was shot, and when asked if deceased had said anything about dying, replied: "Yes, sir; he just told me he had no hope of himself." But, there being some doubt as to the time when the deceased made this statement, the witness Gillespie was recalled, when he said that this statement was made to him by the deceased after dark, about 9 or 10 o'clock at night of the day deceased was shot; and that the deceased lived until about 12 o'clock the next day.

The rules in regard to the admissibility of dying declarations are well settled: (1) That death must be imminent at the time the declarations in question are made; (2) that the declarant must be so fully aware of this as to be without any hope of life; (3) that the subject of the charge must be the death of the declarant, and the circumstances of the death must be the subject of the declarations. State v. Johnson, 28 S. C. 153, 1 S. E. 510, and the cases therein cited, recognized and followed in the subsequent cases of State v. Bradley, 34 S. C. 139, 13 S. E. 315, and Same v. Banister, 35 S. C. 295, 14 S. E. 678. Now, while the third of these requirements was met in this case, and possibly the first, also, although the death did not occur until the next day, yet we are unable to discover any evidence that the second requirement was met; for there is nothing to show that the deceased, at the time he made the declarations in question, was so fully aware that his death was imminent as to have lost all hope of recovery, but the testimony, rather, tends to show the contrary. The deceased was sleeping quietly,—"he seemed to be perfectly easy,"—and, when roused up and asked if he did not want some milk, sat up in bed and drank a glass of milk, and then made the declarations admitted in evidence. He certainly said nothing and did nothing tending to show that he was conscious of impending death. The doctor, who had seen him and given him some powders, was not examined as to his condition, nor asked his opinion as to whether death was imminent, so far as the record before us shows. Even when told by

the witness who took the statement that he might die, and if he wished to make any statement he could do so, the deceased expressed no apprehension, and in no way indicated that he was uneasy about his condition. On the contrary, when the witness was asked whether deceased seemed to be concerned about himself, he replied: "No, sir; we had to shake him to keep him awake. Q. But he didn't seem to manifest any concern about himself,—whether he would get well or not? A. No; he seemed to be perfectly easy." This certainly is not such evidence as the rule contemplates. But it is contended that the testimony of Cato Williams, copied above, is sufficient to show that deceased had lost all hope of recovery. This witness seems to have been the first person who reached the deceased after he was shot,—a very few minutes afterwards; and, when first asked what the deceased said, did not say that the deceased said anything about dying, only said "he was shot, and shot bad." Subsequently, when asked: "Q. Did George [the deceased] say anything about dying? A. He never said anything to me about dying, except at the well. He said he was shot, and didn't expect to live. He said he was shot bad, and didn't expect to get over it. And the other, at home, I don't know anything about that." This conversation between the witness and the deceased, thus amplified beyond his first statement of such conversation, manifestly occurred at the well, but a very short time after the deceased was shot down, and several hours before the deceased was removed to his home; and while it may be true that, under the excitement of the moment, he may have used the language last attributed to him by the witness, indicating that he then feared that the shot would prove fatal, yet, several hours afterwards, when he had been removed to his house, and seemed to be resting "perfectly easy," it does not at all follow that he still entertained the same apprehensions. On the contrary, the witness who took the statement offered in evidence says that he did not then seem to manifest any concern about himself, which he undoubtedly would have done if he then supposed that death was imminent. Again, it is said that his declaration to the witness Gillespie that "he had no hope of himself" shows that he was conscious of his condition; but it is manifest that such declaration was made some four or five hours after the witness Sandifer took down the statement offered in evidence, and it might well be that he had then lost hope of himself, though it is far from showing that he had lost hope when he made the statement to Sandifer, several hours before. It is true that Gillespie, when first on the stand, did testify that the statement made to him was before Sandifer had seen the deceased; but, when recalled to the stand for the purpose of explaining when it was that he heard deceased say that he had no hope of himself, he not only says that it was after Sandifer had seen the deceased, but fixes the time specifically, as after dark (about 9 or 10 o'clock at night), which was some four or five hours after the statement was made to Sandifer about 3 or 4 o'clock in the afternoon. Now, in view of the fact that dying declarations constitute one of the exceptions of the rule rejecting hearsay evidence (1 Greenl. Ev. § 156), and in view of the following language in section 158 of the same volume, "It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death," it seems to us that there was error in receiving in evidence the statement taken down in writing by the witness Sandifer as the dying declaration of the deceased.

The second question is whether there was error in receiving the testimony of one Wilson, when offered in reply by the state, tending to show that defendant had made threats against the deceased prior to the homicide. This testimony was objected to by defendant's counsel upon the ground that it was not in reply to any testimony offered for the defense, but the objection was overruled. It does not appear in the "case," as prepared for argument here, or from the supplement found in the argument of the solicitor, that the defendant had offered any testimony to which the testimony of the witness Wilson could, in any sense, be regarded as a reply. Nor does it appear in any part of the record before us that the testimony of Wilson tended to contradict anything testified to by the defendant. Indeed, it nowhere appears that defendant was ever examined as a witness in his own behalf. All that we can find in the "case" in regard to threats is the following statement: "After the state had rested its case, the defendant introduced his testimony, showing, among other things, that deceased was unfriendly to him [the accused], and had made threats to do him injury at various times before the homicide. The state, in reply, offered, also, to prove threats made by the accused, and for this purpose examined Steve Wilson,"—followed by the testimony of said Wilson to the effect that the accused had said, "When I meet George [the deceased] again, I am going to shoot his heart strings out." This testimony, while, no doubt, competent if it had been offered by the state when developing its testimony in chief, when the defendant would have had an opportunity to contradict or explain it, was clearly incompetent in reply; for it was not in reply to any testimony adduced by the defendant. It certainly was not in reply to the testimony offered by the defendant tending to show that the deceased had made threats to do him (the defendant) injury at various times before the homicide; for it might be perfectly true that each of the parties had made threats against the other, and the fact, if fact it be, that the de-

had made threats against the defend- not in any way tend to show that fendant had or had not made threats the deceased. The testimony of Wil- as clearly incompetent when offered state in reply, and upon this ground, here should be a new trial. The judg- of this court is that the judgment of rcuit court be reversed, and the case led to that court for a new trial.

CHEMICAL CO. v. YOUNGBLOOD et al.

(Supreme Court of South Carolina. June 27, 1900.)

NT STATED—CONSTRUCTION — FRAUD — ADING—FAILURE OF CONSIDERATION.

here an account stated contains no of doubtful meaning, the court is to e it, and instruct as to its force and ef-

defense of fraud and misrepresentation allege knowledge on the part of plain-

l matters of contract growing out of a ing merged in an account stated, and not being shown to render the account a nullity, the question of failure of con- on by reason of breach of implied war- n the sale cannot be considered in an on the account stated.

eal from common pleas circuit court of vood county; R. C. Watts, Judge.

on by the Gem Chemical Company t A. G. Youngblood and others. Judg- or plaintiff. Defendants appeal. Af-

l, Cothran & Cothran, for appellants. on & Giles, for respondent.

Y, A. J. As the questions raised by ceptions involve the construction of adings, the material allegations of the int and answer will be set out. They follows:

plaint: The first paragraph alleges rporate existence of the plaintiff. The paragraph alleges the co-partnership defendants. "(3) That on the 11th July, 1898, at Greenwood, S. C., an t was stated between the said plain- d the said defendants, and upon such ent a balance of two hundred and sev- dollars and sixty-four cents was found due from the said defendants to this ff. (4) That thereupon on the same wit, the 11th day of July, 1898, the laintiff made its bill of exchange in , dated the 21st day of June, 1898, d to the said defendants, under their ame of Youngblood & Cothran, at vood, S. C., and thereby required the efendants to pay to the order of the f two hundred and seventeen dollars xty-four cents, sixty days after said or value received, a copy of which exchange is hereto attached as a part complaint, and marked 'Exhibit A.'" th paragraph alleges the acceptance of the draft by the defendants on the 11th of July, 1898. The sixth paragraph alleges that no part of said bill of exchange has been paid.

Answer: "(1) The defendants admit that they accepted the plaintiff's draft as set forth in the complaint, and that no part thereof has been paid. (2) They deny the third paragraph of the complaint. (3) The defendants allege that the said acceptance was executed by them in consideration of the sale to them by plaintiff of 162 gallons of Kola Pepsin, and for no other consideration, under a representation and warranty by the plaintiff at the time of sale that the said Kola Pepsin was a fit and proper material for soda-water drinks, and suitable for such purposes. (4) That the defendants then accepted and purchased said goods for sale to proprietors of soda fountains, trusting in the said representation and warranty of the plaintiff, all of which the plaintiff then knew. (5) That the said goods were not fit or proper for said purpose, but altogether unsuitable, and have always been and are altogether useless to the defendants." The defendants also set up in their answer a counterclaim for $100 arising out of the facts alleged in paragraphs 3, 4, and 5 of their answer.

The jury rendered a verdict in favor of the plaintiff. The defendants appealed upon exceptions, which will not be considered in detail, as the argument of the appellants' attorneys shows that they raise practically but three questions, to wit: "(1) Did the circuit judge err in deciding the issue of account stated? (2) Did he err in excluding evidence to the effect that the alleged account stated was procured by misrepresentations and fraud? (3) If defendants are precluded from attacking the account stated, were they entitled to show that there was a failure of consideration in the acceptance of the draft, which was brought about by the misrepresentations of plaintiff?"

We will first consider whether there was error on the part of his honor, the presiding judge, in his ruling as to the account stated. The account stated is as follows:

"Baltimore, Oct. 1st, 1898.

"Youngblood & Cothran, Greenwood, S. C., bought of Gem Chemical Co., of Baltimore city:

1898.			
June 21st, Kola Pepsin.....			$243 00
	Cr.		
July 12th, freight.....		$ 9 36	
" rebate 10c. per gallon		16 00	
			25 36
			$217 64

"Rec. accepted draft, $217.64, dated 60 days from June 21st, and accepted by Y. & C. on July 11th, 1898."

The only grounds upon which the defendants relied to defeat the plaintiff's recovery herein were fraud, misrepresentation, and

want of consideration in the acceptance of the draft. The circuit judge ruled that under the pleadings these grounds could not be considered. The construction of the account stated presented a question of law to be determined by the court, as it does not contain any words of a doubtful meaning, which required the jury to decide in what sense they were used. If the circuit judge was correct in ruling that the grounds relied upon by the defendants could not be considered, as they did not properly arise under the pleadings, it was his duty to instruct the jury as to the force and effect of the said instrument of writing. After the ruling of the circuit judge hereinbefore mentioned, there was no testimony before the jury from which they could find that the instrument of writing had any other effect than that which appeared upon its face.

This brings us to a consideration of the second question, whether the presiding judge erred in excluding evidence to the effect that the account stated was procured by fraud and misrepresentations. In 9 Enc. Pl. & Prac. pp. 684, 685, it is said: "Fraud is never presumed, and in order to entitle a party to relief, either at law or in equity, on that, it is essential that the fraud be distinctly alleged in the pleadings, so that it may be put in issue, and evidence thereof given. This rule is applicable as well to the pleadings of the plaintiff as to those of the defendant. In the absence of such an allegation, evidence of fraud will not be received at the trial." On pages 686 and 687 of the same volume we find the following: "In alleging fraud it is well settled, both at law and in equity, that the mere general averment, without setting out the facts upon which the charge is predicated, is insufficient. Whether the fraud be alleged in the declaration, complaint, or bill, or set up by way of defense in the plea, answer, or replication, it is essential that the facts and circumstances which constitute it should be set out clearly, concisely, and with sufficient particularly to apprise the opposite party of what he is called upon to answer." In order to constitute a defense to the plaintiff's cause of action, on the ground that the defendants were deceived by misrepresentation and fraud, it was necessary to allege the scienter on the part of the plaintiff. Wood v. Ashe, 3 Strob. 64; Read v. Duncan, 2 McCord, 167; Houston v. Gilbert, 3 Brev. 64. The words, "all of which the plaintiff then knew," in paragraph 4 of the answer, do not refer to the allegations set forth in the fifth paragraph thereof, but to an entirely different state of facts. The answer failed to allege fraud and misrepresentations, and there was no error in rejecting the evidence offered to prove them.

We will now consider the third question, which is as follows: "If defendants are precluded from attacking the account stated, were they not entitled to show that there was a failure of consideration in the acceptance of the draft, which was brought about by the misrepresentation of plaintiff?" The defense of failure of consideration, in the absence of deceit on the part of the seller, arises ex contractu. All matters of contract growing out of the sale, whether express or implied, were merged in the account stated. Until the jury reached the conclusion that the account stated was a nullity, they could not consider the question of failure of consideration by reason of the breach of warranty implied by law. It is the judgment of this court that the judgment of the circuit court be affirmed.

MARCHBANKS v. MARCHBANKS.

(Supreme Court of South Carolina. June 28, 1900.)

CONSTITUTION—CONSTRUCTION—MAGISTRATES—INSTRUCTING JURY.

Magistrates are within Const. art. 5, § 26, providing that judges shall not charge juries in respect to matters of fact, but shall declare the law; they being included in the word "judge" in section 6, and there being nothing to show a different intention in section 26.

Appeal from common pleas circuit court of Greenville county; R. C. Watts, Judge.

Action by S. P. Marchbanks against S. S. Marchbanks. Judgment for defendant, and plaintiff appeals. Affirmed.

Blythe & Blythe, for appellant. Adam C. Welborn, for respondent.

GARY, A. J. The appeal herein raises the question whether magistrates are included within the terms of section 26, art. 5, of the constitution, which provides, "Judges shall not charge juries in respect to matters of fact, but shall declare the law." Generally, when the constitution refers to the members of the supreme court, they are mentioned as "justices of the supreme court." Circuit judges are referred to as "judges of the circuit court," while those formerly known as "trial justices" had their title changed to "magistrates." Delk v. Zorn, 48 S. C. 149, 26 S. E. 466. The word "judge," without the superadded words "of the circuit court," is sometimes used in the constitution so as to embrace "magistrates" as well as "justices of the supreme court." For instance, section 6, art. 5, of the constitution is as follows: "No judge shall preside at the trial of any cause in the event of which he may be interested or when either of the parties shall be connected with him by affinity or consanguinity within such degrees as may be prescribed by law, or in which he may have been counsel or have presided in any inferior court. In case all or any of the justices of the supreme court shall be thus disqualified or be otherwise prevented from presiding in any cause or causes the court or the justices thereof shall

certify the same to the governor of the state, and he shall immediately commission specially the requisite number of men learned in the law for the trial and determination thereof. The same course shall be pursued in the circuit and inferior courts as is prescribed in this section for causes in the supreme court. * * *" Having shown in this part of the constitution that the intention was to include "magistrates" when using the word "judge," it is but reasonable to suppose that, when this word is found in other parts of the constitution, it has the same meaning, unless the context showed otherwise. There is nothing in section 26, art. 5, of the constitution tending to show that the word "judge" was intended to have a different meaning from that which it had been shown to have in section 6 of said article. Any other construction of the constitution would deprive a litigant of the important right to have the jury instructed by the court as to the law of the case. If the magistrate knows the law, it is his duty to instruct the jury; and, if he is not sufficiently versed in the law to charge the jury, he should not hold the office. Our construction of the constitution renders unnecessary consideration of the additional grounds upon which the respondent relied. It is the judgment of this court that the judgment of the circuit court be affirmed.

STATE v. WINE et al.

(Supreme Court of South Carolina. June 28, 1900.)

CRIMINAL LAW—HANDING LETTER TO JUROR—INSTRUCTIONS.

1. In the absence of anything to show prejudice, it will not be held error that, a letter addressed to a juror having been received by the clerk during the trial, the judge, without examining it or asking counsel if there was any objection, allowed the juror to receive it.

2. Counsel having submitted to the court certain propositions of law, not with the request to charge them, but simply as a suggestion to him as to what the law is, it is enough that he charges substantially the law applicable to the case.

Appeal from general sessions circuit court of Orangeburg county; J. C. Klugh, Judge.

Warby Wine and Major Green were convicted of murder, and appeal. Affirmed.

Wm. C. Wolfe, for appellants. W. St. J. Jervey, for the State.

GARY, A. J. The following preliminary statement is set out in the argument of the appellants' attorneys: "On the night of December 17, 1898, one H. H. Pauling was found intoxicated and wounded near the town of Ft. Motte, in Orangeburg county. Pauling died from his wound the next day. Warby Wine, Major Green, Dick Duncan, and John Taylor were arrested and lodged in jail, charged with the homicide. At the trial the solicitor elected to put only Wine and Green on trial for murder, Duncan and Taylor having been since released. The theory of the state was that Wine, Green, Duncan, and Taylor had conspired together to rob Pauling, and that during the consummation of the robbery Wine shot, killing Pauling, and that hence all were guilty of murder. The theory of the defense was: (1) That Pauling, deeply intoxicated, was making his way to the house of Jessie Parker; but on account of his intoxication failed to reach the house, and fell and lay on the ground where he was afterwards shot. (2) That Wine, Green, Duncan, and Taylor, also more or less intoxicated, going to their homes, passed near where Pauling lay; that some one of the party, seeing the object (Pauling) on the ground, called attention to it; whereupon Wine shot at it with the intention of scaring it, or making it move, in order that they might know what it was. (3) That when Wine shot Pauling made some exclamation, or it became known to these men in some way that it was a man instead of an animal. (4) That, even if Pauling had been robbed as charged by the state, such robbery was committed after the firing of the shot, and that the robbery was not the ulterior design, nor was there any connection between the robbery, if there was such, and the firing of the shot. (5) That the possession of Pauling's watch by Green could be accounted for and explained by several more reasonable hypotheses than a conspiracy to rob and murder, as charged by the state. The defendants were convicted. New trial was refused by circuit judge, and they appealed."

The first exception is as follows: "For that the juror C. N. Zeigler, who resides in or near the community where the homicide occurred, was allowed during the trial, and while the evidence was being heard, to receive a letter or some written communication." It seems the facts are as follows: Some one handed a letter to the deputy clerk addressed to Zeigler, one of the jurors. Upon the judge's attention being called to it, he directed that the letter be handed to the juror. It was not examined by the presiding judge, nor did he ask counsel if there was any objection to allowing the juror to receive the letter. The conduct of a trial must, in a great measure, be left to the sound discretion of the presiding judge. There are no facts in this case tending to show that the appellants were prejudiced by the action of the circuit judge. The exception is therefore overruled.

The second, third, and fourth exceptions are as follows: "(2) For that the court erred in charging the jury: 'And so in this case, if the evidence satisfied you that the defendants, or either of them, took the life of H. H. Pauling intentionally, without just cause or excuse, it constitutes a malicious killing, or a killing with malice aforethought, which the law holds to be murder.' (3) For that the

court erred in charging the jury: 'The killing of a person for the purpose of committing an unlawful act, the other unlawful act being the ulterior design and moving cause, is murder.' (4) For that the court erred in charging the jury: 'And so, if a person shoot at an object supposing it to be some article of property, and not a person, and it turns out that he is mistaken, unless he is grossly negligent and careless in the doing of that act the law would not hold it to be more than manslaughter.'". These exceptions fail to specify the particular errors which the appellants desire to bring to the attention of the court. But waiving this objection, these exceptions, when considered in connection with the other parts of the charge, will be found to be free from error.

The fifth, sixth, seventh, eighth, and ninth exceptions are as follows: "(5) For that the court erred in refusing to charge the jury: 'Before the jury can convict Green of any offense in this case, the state must prove beyond a reasonable doubt, and to your satisfaction, that Green and Wine conspired together to rob Pauling, and while both of them were actually engaged in the very act of robbery Wine fired the fatal shot.' (6) For that the court erred in refusing to charge the jury: 'There must have been an actual agreement, intention, or conspiracy, either express or implied, between Green and Wine to rob Pauling previous to the firing of the fatal shot, else the jury cannot convict Green in this case.' (7) For that the court erred in not charging the jury as requested: 'It is absolutely necessary that there be a community of intention or interest, proven beyond a reasonable doubt by the state, between Green and Wine to rob Pauling, during the consummation of which Wine fired the fatal shot, before the jury can convict Green of either murder or manslaughter in this case.' (8) For that the court erred in refusing to charge the jury: 'If Green and Wine acted separately and distinctly in the commission of the robbery or the shooting, or either, then each must answer separately and distinctly for his offense. Wine must answer for the shooting and Green for the robbery, if there was such.' (9) For that the court erred in refusing to charge the jury: 'Finding of stolen property no legal presumption of guilt of murder or manslaughter.'" The presiding judge at the conclusion of his charge used the following language with reference to the appellants' attorneys: "They have submitted to the court some propositions of law, not with the request that I charge them to you, but simply as suggestion to the court as to what the law is, and some of them I deem it proper for me to read to you as being law applicable to this case in some of its aspects, and which you may apply to the facts, if you should take the view of the facts which these propositions contemplate." The presiding judge was not requested to charge the propositions of law just mentioned. And as he charged substantially the law applicable to the case, the exceptions cannot be sustained. It is the judgment of this court that the judgment of the circuit be affirmed, and the case remanded to that court for the purpose of having another day assigned for the execution of the sentence.

MASON v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. June 27, 1900.)

RAILROADS—ACCIDENT ON TRACK—INFANTS—NEGLIGENCE—PROXIMATE CAUSE—EVIDENCE—CONTRADICTING WITNESS—DAMAGES—INSTRUCTIONS.

1. Under a complaint for the killing of a child on a railroad, alleging that there was a highway crossing a mile away; that, when the statutory signals were given for that crossing, the mother, whose house was near the place of the accident, was accustomed to look out on the track to see if any of the children were in danger; and that on the occasion of the accident no signals were given,—evidence of the omission of the signals is admissible on the question of proximate cause.

2. A witness, being sworn, may be cross-examined, though not examined in chief.

3. Testimony that a witness made a certain statement just after the accident is admissible to contradict him; he having been asked if he made the statement, and having denied it.

4. Under Rev. St. § 2316, providing that the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties for whom such action shall be brought, a pecuniary loss need not be shown in an action for death of the infant.

5. It is immaterial that an illustration in the charge is inapplicable, where it is not misleading.

6. While an infant 16 months old may be technically a trespasser, he cannot be guilty of contributory negligence.

7. Where the direct and proximate cause of the death of an infant 16 months old, killed by a train, is negligence in failing to keep a reasonable lookout and to discover the child in time to have prevented the injury, the railroad company is liable, the same as though its negligence had been after discovery of the child on the track.

8. The jury having been instructed at the time evidence was admitted that it was to be considered only to contradict a witness, such an instruction need not afterwards be given.

Appeal from common pleas circuit court of Greenville county; Ernest Gary, Judge.

Action by Robert Mason, administrator, against the Southern Railway Company, for death of intestate, an infant 16 months old. Judgment for plaintiff. Defendant appeals. Affirmed.

T. P. Cothran, for appellant. A. H. Dean and Jos. A. McCollough, for respondent.

GARY, A. J. The facts of this case are thus succinctly set forth in the preliminary statement prefacing the argument of the appellant's attorneys, and admitted to be correct by the respondent's attorneys, to wit: "Action for damages, $1,999.99, instituted in the court of common pleas for Greenville county September 29, 1899, by Robert Mason, as administrator of Clara Belle Mason.

deceased, for alleged negligent killing of intestate by defendant, Southern Railway Company, near South Tiger trestle, in Spartanburg county, on Atlanta & Charlotte Air-Line Railway, August 21, 1898. The intestate was a child sixteen months old, and was killed on the track, about 70 yards from a neighborhood crossing, near the house of her father, the plaintiff in this suit. Tried before Judge Gary and a jury at Greenville November 24, 1899. Verdict for plaintiff, $1,999.99. The plaintiff alleges that on the day named the child crawled, unobserved, from the plaintiff's house, which is near the track and in full view, and got upon the track, the mother at the time having no servants about the place, and being herself engaged in domestic duties; that the plaintiff was away from home at the time; that, about a mile from the point of collision, defendant's track crosses a public highway, and the mother was accustomed to watch upon the track for her children when the signals for that crossing were given; that upon the occasion in question the defendant failed to give the signals, and, if the signals were given, the mother did not hear them; that, while the child was seated upon the track, one of the defendant's trains, which was behind time, and run at an unusually rapid speed, recklessly and with grossest negligence ran over the child and killed it; that at the time the child was seated on the track at a point where a neighborhood road or 'traveled place' crosses said track, and the required signals were not given; that the agents of the defendant knew the location of the plaintiff's house, and for almost a mile in the direction from which the train approached the track was straight; that the engineer and fireman saw the child upon the track in ample time to have stopped the train before striking it, and, if they did not actually see and recognize it, they could, by the exercise of ordinary care in keeping a lookout, have seen and recognized it, and stopped the train in time to avoid striking it. The specific acts of negligence recapitulated in the complaint are stated to be (1) in not stopping the train, after having observed the child, in time to avoid the collision; (2) after first seeing the object, in not keeping a strict watch upon it, by which they would have recognized it as a human being in time; (3) in not keeping a proper lookout along this stretch of track, which ordinary care and a proper regard for life (human and animal) demanded, as well as the law of the land, which would have enabled the fireman or engineer to have seen the child in time. The remaining allegations of the complaint are formal, referring to the incorporation of defendant, the heirs at law of the intestate, the appointment of the plaintiff as administrator, and the amount of damages. The answer of the defendant admits its corporate existence, that the child was killed by its train, and denies the other allegations of the complaint. It alleges that the child was a trespasser upon the track at a place where she had no legal right to be, and where the servants of the company had no reason to suppose she would be; that as soon as she was discovered they did all in their power to avoid the accident; that the defendant owed no duty to the child, save to exercise ordinary care to avoid injuring it after discovery; that it was impossible for the engineer to have seen the child in time to avoid striking it, as the child crawled upon the track on the left side of the engine, when the train was not more than 150 feet away, and too close for the engineer to avoid the collision. The defendant also pleads the contributory negligence of the parents." The appellant has argued the exceptions under the heads of "Evidence," "Motion for Nonsuit," "Burden of Proof," and "Judge's Charge."

Subdivision "a" of the first exception assigned error as follows: "(a) The presiding judge erred in admitting evidence to the effect that the defendant failed to ring the bell or blow the whistle for the Burnett crossing, a mile from the scene of accident, for the reason that said testimony was irrelevant to the issue. This exception applies to the testimony of Robert Mason, T. J. Burnett, Ida Mason, Henry Pinson, and William Smith upon this point, and the ruling of the presiding judge to this effect: 'I think the failure to blow the whistle or ring the bell is, according to law, evidence of negligence.'" The complaint alleges gross negligence and recklessness on the part of the defendant in running its train at the time the accident occurred, and the answer sets up the defense of contributory negligence on the part of the infant's parents. The complaint also alleges that the highway crosses the defendant's track about a mile from the place where the collision took place, and that when the statutory signals were given when approaching said crossing the mother of the child was accustomed to look out upon defendant's track to see if any of the children were in danger; that the defendant failed to give the statutory signals (at least, she did not hear them) on that occasion. Under these circumstances, the circuit judge properly allowed the jury to consider this testimony in determining the proximate cause of the injury. Mack v. Railroad Co., 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679.

Subdivision "b" alleges error as follows: "(b) The presiding judge erred in refusing to allow the witness J. D. Pettus to answer the question: 'If it had been one of your own children on that track at the time, could you have done anything to prevent striking it?'—such question being competent and relevant to show that degree of care exercised by the engineer after he discovered the child crawling upon the track." This question merely called forth an expression

of opinion, and, even if it could be regarded as erroneous, it was harmless.

Subdivision "c" is as follows: "(c) The presiding judge erred in refusing to allow the defendant to cross-examine the witness Ed. James, who was put up by plaintiff." When a witness is sworn, he becomes subject to examination in chief and to cross-examination. The right of cross-examination is not destroyed by the failure to examine in chief. This error was, however, cured when the defendant's attorney thereafter was permitted to cross-examine the witness.

Subdivision "d" is as follows: "(d) The presiding judge erred in overruling defendant's objection to, and allowing the witness Ed. James to answer, the question: 'Did Mr. Pettus say, down there at the track, that he thought that it was a dog or a chicken until he got too close? Answer. Yes, sir; he did,'—upon the ground that the declaration was not a part of the res gestæ and was irrelevant to the issue." When Pettus was on the stand he was asked if he did not say to Mason, the father of the child, when the train backed to the place where the collision took place, at the time Mason climbed up in the cab, that he thought it was a dog or a chicken on the track, and that he did not have time to stop then. He answered, "No." The foundation was properly laid for contradicting the witness, and the testimony was at least admissible for that purpose.

Subdivisions "e," "f," and "g," are as follows: "(e) The presiding judge erred in overruling defendant's objection to, and allowing the witness Hampton Mason to answer, the question: 'Did you hear the fireman say to the engineer, "If you had paid attention to me when I told you that there was something on the track, maybe this thing would not have happened"? Yes, sir,'—for the same reason as in 'd,' supra. (f) The presiding judge erred in overruling defendant's objection to, and allowing the witness Robert Mason to answer, the question: 'And did he [engineer] say, "I thought it was a dog or a chicken until I got up close to it"? Yes, sir,'—for the same reason as in 'd,' supra. (g) The presiding judge erred in overruling defendant's objection to, and allowing the witness Ida Mason to answer, the question, 'Did you hear the engineer say to your husband that he thought that the child was a dog or a chicken until he got too close to it'? for the same reason as in 'd,' supra." They are disposed of by what was said in considering subdivision "d."

The second exception is as follows: "The presiding judge erred in overruling defendant's objection for a nonsuit: (a) There was an entire failure of proof of negligence on the part of the defendant. (b) The evidence shows that the child was upon the track at a point where it had no legal right to be, and where the defendant is not presumed to have supposed that it would be. It was incumbent upon plaintiff to offer testimony tending to show that the child was discovered by defendant's agents in time to avoid striking it, and that they negligently failed, after such discovery, to avoid the disaster. There is a total failure of the testimony upon both of these points. (c) It was error to hold that a child could not be a trespasser on a railroad track. (d) It was error to hold that the child was not wrongfully on the track. (e) It was error to apply the rule in Danner's Case to the facts of the case at bar. (f) It was error to hold that the burden of proof was upon the defendant to show that the accident was unavoidable; that it could not be helped. (g) There was no proof of damages." The defendant made a motion for a nonsuit on two grounds: "(1) Because there was no negligence on the part of the railroad company; and (2) that there was no proof of damages resulting to the plaintiff in this case from the death of the child." The presiding judge, in overruling the motion for nonsuit, stated somewhat at length the reason that induced him to refuse the motion. The only questions, however, that are properly before this court for consideration, are whether there was error in refusing the motion for nonsuit on the grounds that there was an entire failure of testimony showing negligence, and that there was no proof of damages resulting to the plaintiff from the death of the child. Without stating the different circumstances tending to show negligence, this court is satisfied that there was evidence tending to prove that fact. We will next consider the second ground of the motion for a nonsuit. Section 2316, Rev. St., provides that "the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought." In the case of Petrie v. Railroad Co., 29 S. C. 308, 7 S. E. 515, cited with approval in Strother v. Railroad Co., 47 S. C. 375, 25 S. E. 272, the court says: "Again, it will be noticed that our statute, unlike many others of a similar character, does not speak of a pecuniary loss or injury, which might possibly tend to show that the injury for which damages are allowed was confined to the deprivation of some legal claim, susceptible of measurement by a pecuniary standard; but its language is much broader, and gives to the jury the right to award such damages as they may think proportioned to the injury resulting from such death." The statute and the cases construing it show that the second ground of the motion for nonsuit was properly overruled. We have not considered whether the circuit judge erred in his interpretation of the rule in Danner's Case, as his remarks in reference thereto were made in refusing the motion for a nonsuit. We are not, however, to be

tood as approving his construction

third exception alleges error as fol- "The presiding judge erred in hold- on motion for a nonsuit, that the of proof was upon the defendant to that the accident was unavoidable, at it could not help it; thus depriving fendant of the option of putting up ny, or not, as it may have been ad- This exception is disposed of by as said in considering the second ex- . But, even if it be conceded that as error, it was harmless.

ivision "a" of the fourth exception is ows: "(a) The presiding judge erred trating the law applicable to the case hypothetical case stated to the jury, reason that in the case stated by him iver upon the highway and a child he highway had the same right to be whereas in the case at bar the rail- ompany, at the point of accident, had ve right to the use of its track. The tion, therefore, was inapplicable." ly error of which the appellant com- is that the illustration was inapplica- ven if it was inapplicable, it was not to mislead the jury.

ivisions "b," "c," "d," "e," "f," and as follows: "(b) The presiding judge n refusing defendant's first request to which was as follows: 'A railroad ay owes no duty to a trespasser upon k until the employés actually see him sition of danger,'—and in holding, 'An cannot commit a trespass'; it being ted that said request embodied a cor- rinciple of law, applicable alike to and children, and that an infant may a trespasser. (c) The presiding judge n refusing defendant's third request rge, which was as follows: 'The law s upon a railroad company no duty passers upon its track, except the duty rcising reasonable care not to inflict upon them after they are discovered,' in holding: 'A child cannot become asser. A child can do no wrong. It appreciation of right or wrong, and re can do no wrong;' it being submit- at said request embodied a correct le of law, applicable alike to adults ildren. Every animate object upon ack must occupy the relation either passer or of one lawfully there. (d) residing judge erred in refusing de- t's fifth request to charge, which was ows: 'A railroad company owes no o trespassers, to be on a lookout for at a point where they have no legal o be, and where the company has no that they will probably be.' It is sub- that this request embodied a correct le of law applicable to the case. (e) residing judge erred in refusing de- t's sixth request to charge, which s follows: 'The above rules apply equally to adults and children of very tender age. Up to the point of discovery of the trespasser by the employés of the company, the duty of railroads to adults and children of tender years is exactly the same.' It is submitted that the request embodied a correct principle of law, applicable to the case. (f) The presiding judge erred in modifying the defendant's seventh request to charge by adding the following: 'That is true, unless they had been negligent in not discovering the child.' It is submitted that the defendant was entitled to the charge unqualified; the rule being that, up to the point of discovery, the defendant owed the child trespassing on its track no duty, and consequently could not be guilty of negligence in not discovering it. The seventh request is as follows: 'Seventh. After discovery of a child by the employés of the company, the duty of the company to children incapable of realizing their danger is higher than that due to adults. The employés may assume that an adult will heed the signals of danger and get off the track. An infant, however, cannot be assumed to possess this capacity, and the employés, upon discovering it, must use all reasonable efforts to stop the train. This duty, however, does not arise until the perilous position of the child has actually been discovered by the employés.' (g) The presiding judge erred in modifying the defendant's ninth request to charge by adding the following: 'That I charge you, unless they were negligent in not seeing the child.' It is submitted that the defendant was entitled to the charge unqualified; the rule being as stated in 'f,' supra. The ninth request is as follows: 'Ninth. If the jury believe from the evidence that the employés of the company made every reasonable effort to avoid striking the child after discovering it upon the track, the company is not liable, and their verdict should be for the defendant.'" The exception of these subdivisions raises two questions, to wit: (1) Was there error on the part of the presiding judge in charging the jury that the infant, by reason of its tender years, could not be a trespasser? (2) Was there error in refusing to charge the jury that the law does not impose upon a railroad company any duty to trespassers upon its track, except the duty of exercising reasonable care not to inflict injury upon them after they are discovered? We will first consider whether the presiding judge erred in charging that the infant, by reason of its tender years, could not be a trespasser. While, in strictness of law, an infant may be a trespasser when it goes upon the track of a railroad company without its permission or without lawful authority, there are, nevertheless, well-defined distinctions between an adult and an infant trespasser. An infant 16 months of age does not know right from wrong, and therefore when it goes upon a railroad track it cannot be said that it intended to commit such an act as in an adult

would make him a trespasser or wrongdoer. It cannot be guilty of contributory negligence. It is not answerable to the criminal law, and is not liable in damages when an adult would be under similar circumstances. When all the remarks of the presiding judge are considered together, it will be seen that he drew the attention of the jury to this distinction, and, although he was technically in error in saying that an infant could not be a trespasser, the jury, after his explanation, could not have been misled. We will next consider whether there was error in refusing to charge that the law does not impose upon a railroad company any duty to trespassers upon its track, except the duty of exercising reasonable care not to inflict injury upon them after they are discovered. The ruling of the presiding judge must be considered with reference to the fact that the infant was of very tender years, to wit, only 16 months of age. The question whether a railroad company owes any duty to an infant trespassing upon its track, until it discovers the infant, has given rise to much discussion, and the authorities upon this subject are in irreconcilable conflict. Even conceding that a railroad company is not bound, as a general proposition, to look out for trespassers upon its track, it nevertheless is bound to exercise ordinary care in running its trains. The law imposes upon it the duty of keeping a reasonable lookout for obstructions on its track. The safety of its passengers and the rights of the public generally demand the enforcement of this rule. It is a general rule of law that a railroad company is liable in damages for an injury inflicted by it, when its negligence was the direct and proximate cause of the injury. If the direct and proximate cause of the infant's death was negligence of the defendant in failing to keep a reasonable lookout, and to discover the child in time to have prevented the injury, it is as much liable in damages as if the proximate cause of the injury had been its negligence after discovering the child upon its track. Bottoms v. Railroad Co. (N. C.) 19 S. E. 730, 25 L. R. A. 784; Gunn v. Railroad Co. (W. Va.) 26 S. E. 546, 36 L. R. A. 575; Wood, R. R. pp. 1275–1280.

Subdivision "h" is as follows: "(h) The presiding judge erred in not charging defendant's eleventh request to charge, which was as follows: 'If the jury believe from the evidence that an employé of the company has made a statement or declaration after the accident, and not a part of the res gestæ, inconsistent with his testimony in this case, they may consider such inconsistency as tending to discredit his testimony, but not as independent evidence of the company's negligence;' it being submitted that such request embodied a correct principle of law, applicable to the case." The plaintiff, in opening his case, offered in evidence the said declarations; but they were held to be inadmissible, on the ground that they did not form part of the res gestæ. The employés, when examined in behalf of the defendant, were cross-examined by the plaintiff in regard to the said declarations, and they denied making them. The plaintiff, in reply, then offered the witnesses originally produced to prove the declarations. The record shows that the following took place: "Mr. Cothran objects on the ground that this question is irrelevant, and that counsel proposes to contradict the witness upon an irrelevant point, and submits that it can't come in unless it is part of the res gestæ, and within the proper scope of his agency. The Court: The testimony must be relevant. I think it is competent. Mr. Cothran excepts. By Mr. Dean: Did Mr. Pettus say that you went back there to see whether the track was straight or curved? Mr. Cothran: I ask that your honor will instruct the jury, upon the delivery of that testimony, that they can consider that testimony only for the purpose of discrediting the witness, if they believe this evidence. If they believe the statement to be true, and that the engineer is mistaken, then they can consider this testimony only to the extent of discrediting the engineer, and not for the purpose of introducing it as independent evidence. The Court: Yes, gentlemen of the jury, Mr. Cothran has stated the ground upon which the testimony is to be considered, clearly, to you, and it is correct." The request was not read to the jury, and there was no necessity to charge the proposition therein stated, as the jury had already been instructed upon the subject.

Subdivision "i" is as follows: "(i) The charge of the presiding judge was inconsistent, contradictory, and confusing to the jury. For instance, he charged the fourth and eighth requests, which we submit were good law, and qualified the seventh and ninth requests by holding that the defendant may have been guilty of negligence in not discovering the child." When the charge of the presiding judge is considered in its entirety, it will be seen at a glance that the objections urged by the appellant are unfounded. It is the judgment of this court that the judgment of the circuit court be affirmed.

BRAMLETT v. CITY OF LAURENS.

(Supreme Court of South Carolina. June 27, 1900.)

ALTERING SIDEWALK—DAMAGES—LIABILITY OF CITY.

A city charter conferring on the mayor and aldermen power, with the consent of the adjacent landowners, to "close or change" all streets, as they may deem conducive to the public convenience, and to sell the freehold of any street they may "close," and to "lay" out, adopt, open, and keep in repair all such "new" ways as they may deem necessary, with a proviso that they first obtain the consent of the landowners through whose land the same may

run, and, if their consent cannot be obtained, then the street may be "opened" in the same way as provided for opening of public roads by county commissioners, does not make the city liable for damages to an abutting owner for raising the sidewalk in front of his property without his consent.

Appeal from common pleas circuit court of Laurens county; O. W. Buchanan, Judge.

Action by A. W. Bramlett against the city of Laurens. Judgment for defendant. Plaintiff appeals. Affirmed.

Ball, Simkins & Ball, for appellant. F. P. McGowan and W. R. Richey, for respondent.

GARY, A. J. As the appeal herein is from an order sustaining a demurrer to the complaint, it will be necessary to set it out. It is as follows: "The plaintiff complains, and alleges: (1) That the plaintiff, at and before the times hereinafter mentioned, was the owner of a lot on Harper street, and the dwellings and buildings thereon, in the city of Laurens. (2) That the city of Laurens is a municipal corporation, organized under the laws of the state of South Carolina, with power to sue and be sued. (3) That formerly for more than twenty years, and for time immemorial, a sidewalk, suitable and convenient for pedestrians, existed and was maintained on the eastern side of the said street, of which street it was a part, and that the lot of said defendant was immediately adjacent to, and abutted upon, said sidewalk, and that access to the said sidewalk from the said lot was easy and unobstructed, as well as access across it by horses and vehicles, to that part of the street traveled by horses and vehicles. (4) That the plaintiff was and is entitled to easy and unobstructed access, both to the sidewalk of the said street and to that part used for travel by horses and vehicles. (5) That during the year 1898 the defendant, through its officers and servants, changed and altered the said street without the consent of the plaintiff, and against his will, destroying the said sidewalk, and building a new sidewalk in another part of the street, building the said new sidewalk a considerable height above the level of the old sidewalk, and above the level of the plaintiff's lot; thus rendering the new sidewalk difficult and inconvenient of access, and rendering access from the said lot to that part of the street used by horses and vehicles impracticable. (6) That the said alterations and changes in the said street were made by the defendant negligently, and without reasonable care and skill, to the injury of the plaintiff, and in wanton disregard of the right of the plaintiff. (7) That the said changes and alterations in the said street greatly injured and impaired the appearance of the said lot, thereby diminishing its value. (8) That the defendant elevated, and thereby altered, the grade of that part of the street used for horse and vehicle travel, without the consent of the plaintiff, and against his will, rendering impracticable his access thereto. (9) That by the changes and alterations in the said street by the defendant, and by the negligent manner in which they were made, without reasonable care and skill, the defendant has been damaged five hundred dollars."

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in the following particulars: "(1) In that the action is predicated upon a claim for consequential damages, alleged to have been caused by the grading of the public street and sidewalk within the limits of said street, and that no right of action exists at law for said alleged damage, in the absence of any statute to that effect, and there is no statute giving such a right of action in this state. (2) Because the charter does not give any right of action for damages which any abutting landowner may sustain in consequence of work or repairs done upon public streets by the municipal authorities. (3) Because no right of action is given against the city of Laurens by any act of the legislature for any damage sustained away from and off the street. (4) Because the complaint does not state the facts connected with the repairs referred to in the complaint, from which any negligence occurred in the raising the grade of the street or sidewalk." The circuit judge sustained the demurrer on the aforesaid grounds, and the appeal herein brings in review the correctness of his ruling.

If the complaint states facts sufficient to constitute a cause of action, it did not arise ex contractu, but ex delicto. A municipal corporation cannot be sued for a tort unless it is made liable by statute, and, when this is the case, the statute must provide the remedy; otherwise, the action cannot be maintained. Black v. City of Columbia, 19 S. C. 412; Young v. City Council of Charleston, 20 S. C. 118; Garraux v. City Council of Greenville, 53 S. C. 575, 31 S. E. 597; Fuller v. Edings, 11 Rich. Law, 245; McLauchlin v. Railroad Co., 5 Rich. Law, 597.

Section 12, p. 925, Act 1890, chartering the city of Laurens, contains the following provisions: "The mayor and aldermen shall have full and exclusive control over all streets, roads, and ways in the said city, and it shall be their duty to keep them open and in good repair. They shall have power, with the consent of the adjacent landowner, to close or change all such roads, streets, or ways within the said city as they may deem conducive to the public convenience, and may sell the freehold of any such street, road, or way as they may close, either at public or private sale, as they may deem best. And they shall have power to lay out, adopt, open, and keep in repair such new ways, roads, or streets, as they may deem necessary for the improvement and convenience of the said city: provided, that they first obtain the consent of the landowners through whose land the same shall run; or, if their consent cannot be obtained, that the said street or way be opened

in the same way as provided by law for the opening of public roads by county commissioners. * * * And said city council shall have all the powers over the streets, roads, or ways therein which are now given, or may hereafter be given, to county commissioners over the roads in the several counties, subject, nevertheless, to the limitation herein prescribed."

It will be observed that the foregoing confers upon the mayor and aldermen (1) power, with the consent of the adjacent landowners, to "close or change" all such streets as they may deem conducive to the public convenience, and to sell the freehold of any street they may "close"; and (2) it confers upon the mayor and aldermen power to "lay out, adopt, open, and keep in repair" all such "new" ways as they may deem necessary. There is a proviso which requires that they first obtain the consent of the landowners through whose land the same may run, and, if their consent cannot be obtained, then the said street may be "opened" in the same way as provided by law for the opening of public roads by county commissioners.

The foregoing act is quite different from that incorporating Gaffney City. The act incorporating Gaffney City (St. at Large 1894, p. 1002) confers upon the city council power to "open" new streets in said town, and to "close up, widen, or otherwise alter" those in use. That act further provides that, if the owners through whose premises such streets run refuse their consent to the action of the city council in "opening, closing up, widening or altering" such streets, the said city council shall have the right to condemn such land according to the provisions of the law of force for condemning land for public use. In construing said act in Wilkins v. Town Council of Gaffney City, 53 S. C. 199, 32 S. E. 299, this court says: "The intention of the act was to confer upon the abutting landowners the right to compensation for damage to their property in consequence of opening, closing up, widening, or altering the streets. The right to condemn according to the provisions of the law imposes the corresponding duty to render compensation for the damages sustained. The provisions of the law for condemning land for public use show that compensation must be made to the landowners before the highway is established. Rev. St. § 1179. It would be an alteration and a partial closing of the street for the railway company to lay its track through it."—citing Paris Mountain Water Co. v. City Council of Greenville, 53 S. C. 82, 30 S. E. 699; Garraux v. City Council of Greenville, 53 S. C. 575, 31 S. E. 597. Under the statute incorporating the city of Laurens, compensation is allowed the landowner when the new street is "opened," while in the statute chartering Gaffney City compensation is allowed, not only for "opening," but for "closing up, widening, or altering," the streets. As the case herein is not for damages for "opening" the streets, plaintiff is not entitled to compensation. While it is true the statute does not make the municipality liable for damages, it by no means follows that the individuals committing the alleged wrongful act are exempt from liability. It is the judgment of this court that the judgment of the circuit court be affirmed.

TOWN OF WESTON v. RALSTON.

(Supreme Court of Appeals of West Virginia. June 12, 1900.)

CANCELLATION OF DEED—CLOUD ON TITLE—PUBLIC EASEMENT.

1. The supreme court of appeals having determined that a certain strip of land, adjacent to a property owner's lot, was part of a public highway, and subject to the public easement therein, and directed a mandatory injunction to place the public in possession of such easement to be awarded by the circuit court, and such court refusing to award the same, and such property owner, in total disregard and in contempt of such adjudication, proceeding to purchase other pretended titles to such strip of land, for the purpose of beclouding the public easement therein and further litigating the same, a court of equity will cancel such deeds in so far as they operate as a cloud upon the public easement, and will perpetually enjoin the further litigation of the public's right, as an effort to maintain and continue in force a public nuisance in derogation of the sovereignty of the people of the state.

2. When a public easement has once been lawfully established over land for a public highway, either by dedication to the use of the general public by individuals, and acceptance by the proper authorities, or by the exercise of the right of eminent domain, such easement is good against any and all titles.

(Syllabus by the Court.)

Appeal from circuit court, Lewis county; W. G. Bennett, Judge.

Bill by the town of Weston against Er. Ralston. From an order dissolving an injunction restraining defendant from further litigating the title to certain real estate, complainant appeals. Reversed.

Edward A. Brannon, for appellant. W. W. Brannon, for appellee.

McWHORTER, P. The town of Weston, by its mayor and common council, undertook, by means of its authority, to remove from Water street (one of the public streets of said town) certain obstructions maintained thereon by Er. Ralston, who enjoined in the circuit court the action of said town authorities, upon the hearing of which the circuit court perpetuated the injunction, when the defendant appealed to the supreme court, and upon the case there being heard the decree of the circuit court was reversed, the court finding that plaintiff was maintaining a public nuisance, subject to abatement either by the municipal authorities, under their statutory powers, or by an appeal to a court of equity; and said cause was "remanded to the circuit court, with direction that plaintiff's injunction be dissolved, and a mandatory injunction be awarded the defendant, at the plaintiff's costs, directing the plaintiff to abate the nuisance

maintained by him thereon, and that the strip of ground in controversy be restored to Water street, and made subject to the public easement therein." The case is reported in 46 W. Va. 544, 33 S. E. 326. The circuit court not only failed and refused to award the mandatory injunction directing the plaintiff to abate the nuisance maintained by him on said street, as required by said decree, but, on the other hand, when the municipal authorities undertook to abate the nuisance the said circuit court entertained an action by said plaintiff of trespass on the case for damages against said town for removing the obstructions from said street, and also another action by him against said town of unlawful entry and detainer for the possession of said strip of ground upon which plaintiff had maintained the said nuisance, and which strip was by the decree of the supreme court ascertained to be a part of the said Water street; said plaintiff having, after the decree of the supreme court aforesaid, obtained two deeds conveying said strip of ground,—one from W. B. McGary, special commissioner in the case of George C. Cole, trustee of James P. Cole, and others, dated May 15, 1899, and the other from James P. Cole, dated May 13, 1899,—and under which plaintiff claimed that he had a right and title to said strip of land, and to the possession thereof, notwithstanding said decision adverse to his rights as they existed when the case was heard, and also adverse to any and every title and claim of any and every person whomsoever. The town of Weston filed its bill in equity in the said circuit court, praying that said Ralston be perpetually enjoined from prosecuting said actions of trespass on the case and unlawful entry and detainer, and compelled to dismiss the same, and that a decree be entered setting aside the deeds from W. B. McGary, special commissioner, and James P. Cole, to said Er. Ralston, and declaring said deeds null and void as against the rights of the town to the strip thereby conveyed as a part of its said Water street, and for general relief. The defendant, Ralston, answered the said bill; setting up title to said strip of ground, and claiming that he was not holding under the Flesher title, so as to estop him from his present claim, as alleged in the bill, but that since the decision of the supreme court he had acquired what he was advised was a perfect and indefeasible title to said strip of land; averring that in July, 1889, the town of Weston instituted a suit in equity against James P. Cole, M. S. Holt, and others, one of the chief objects of which was to cancel and annul a deed dated April 10, 1889, from M. S. Holt to James P. Cole, whereby said Holt conveyed to Cole a tract of land, running as described, so as to include the strip of ground, and, indeed, all of Water street from First street to Fourth street. Said bill sought to enjoin the building of a large livery stable by the said Cole on what the plaintiff, the town of Weston, contended was ground which had been dedicated to the use of the town for a street; claiming that "all the land known and used as Water street, and embraced by said deeds, was * * * included in a grant from the commonwealth of Virginia to —— Flesher, and that said grant was made while an act passed by the general assembly of the commonwealth of Virginia was in full force and effect, which act provides that all unappropriated lands on the bay of the Chesapeake, on the sea shore, or on the shores of any river or creek, and the bed of any river or creek in the commonwealth, which remained ungranted by the former government, and which has been used as a common to all the good people thereof, shall be, and the same are hereby, excepted out of this act, and no grant issued by the register of the land office for the same either in consequence of any survey already made, or which may hereafter be made, shall be valid or effectual in law, to pass any estate or interest therein." And plaintiff averred that the greater portion of the land conveyed by the deeds is the shore of the West Fork river; that it remained ungranted by the former grant, and that shore was used as a common to all the good people of the commonwealth; and that said shores were by the provisions of the said act excepted and excluded from the said grant to the said Flesher, and were passed thereby to him or any other person. And plaintiff therefore claimed that by virtue of the dedication by Flesher of the street on the bank, and the exception and exclusion of the shore by said act, all the land lying between the lots which extended towards the river from their front on Main street, 150 feet, and the river, constituted Water street, and had been for more than 40 years known, treated, held, used, and occupied as Water street; that said James P. Cole had commenced to deposit material, such as stone and lumber, on Water street, along between lot No. 12 (which ran from Main street back towards the river 150 feet) and the river, as represented by the plat of the town just above the bridge, and near Second street and the Staunton and Parkersburg turnpike; and that he had commenced to dig and excavate for the foundation of a large building, to be used as a livery stable, etc. James P. Cole answered the bill, denying the most of the material allegations of the bill, and that he had deposited material and excavated on Water street, and says: "Moreover, the defendant, in excavating as aforesaid and depositing material, left a space between the river and a point 150 feet from Main street, of 40 feet, to allow the said town of Weston, should it see proper to do so, to open, construct, and keep in repair a street as provided in the deed from Woffindin and McBride to O. H. P. Washburn, and is still willing to allow such street to be maintained." And after denying that his livery stable, as he proposed to build and maintain it, would

be a nuisance, he says "that it is not the habit of defendant to allow manure or other filth to accumulate about his stable, but as fast as it is accumulated it will be conveyed to the extreme end of said stable, 150 feet from Second street, and nearly 200 feet from Main street, on the river bank, when it will be hauled away as fast as a wagon load accumulates. * * * This defendant alleges that the said stable will be so constructed as to keep his horses in the basement thereof, and, by its close proximity to the river, all surplus filth, if there be any, can easily be drained off. There is to be a rock wall on the upper side of said basement, next to the proposed Water street, and a water-tight floor over the same," etc. Upon the hearing the injunction was dissolved, the bill dismissed, and the building was erected on the west line of Water street, 40 feet from the back line of the lots fronting on Main street. A copy of Cole's said answer was filed with plaintiff's bill in the case at bar. When the cause of Ralston v. Town of Weston was reversed by this court, the plaintiff, Ralston, procured a stay of execution of the decree on the 5th of May, 1899, for the period of 90 days, for the alleged purpose of taking an appeal therefrom to the supreme court of the United States; but, instead of executing the bond required, and taking the proper steps to obtain his appeal, he immediately set to work to place himself in position, if possible, to avoid the effect and force of the decree against him, and to reopen and relitigate the questions that had been settled by the decision of the court of appeals. On the 13th day of May, 1899, eight days after Ralston procured a stay of 90 days of said decree, he took from James P. Cole a deed, with special warranty, for the strip of ground which by the said decision was decreed to be a part of Water street, which Ralston had in actual possession himself for many years, and which Cole never claimed, and of which he never had possession; and in the cause of the town of Weston against him, 10 years before, he had admitted the existence of Water street, 40 feet wide, and that such part of it as he might have claimed as being covered by the deed from M. S. Holt to himself, of April 10, 1889, belonged to, and was a part of, the public street. And, further, under a decree entered in the cause pending in the circuit court of Lewis county of George C. Cole, trustee of James P. Cole, and others, on the 11th day of May, 1889, appointing W. B. McGary a special commissioner to make sale of the several lots, tracts, and parcels of land, or any of them, belonging to said James P. Cole in the town of Weston, said Ralston purchased from said Commissioner McGary the said same strip of ground, which sale was reported to said circuit court by said commissioner on the said 13th day of May, 1899, and confirmed by said court on the same day, and said W. B. McGary was appointed a special commissioner to execute a deed to said Ralston for said strip of ground; and by deed dated May 15, 1899, said Special Commissioner McGary conveyed the same to said Ralston, both of which deeds were admitted to record the day on which they were executed; thus manifesting a determination to relitigate the questions already so decided in the courts of the state, instead of taking the same to the supreme court of the United States, as he had proposed. And the circuit court seems to have been willing to reopen the matters settled by the first decision of the court of appeals, as upon the hearing of the case the court dissolved the injunction, from which decree dissolving the injunction the plaintiff, the town of Weston, appealed to this court; assigning as error the dissolving of the injunction.

Counsel for the parties have filed very elaborate and well-prepared briefs, which would reflect credit upon any counsel, as far as the research and industry necessary to their preparation are concerned. They have thoroughly discussed the questions already settled, and forever settled, whether right or wrong, in the case of Ralston v. Town of Weston; and the only question to be determined in this case is whether, after it has been finally determined that the title under which Ralston sought to hold the property, as against the town's easement therein for the purposes of a street, was insufficient as against the town, while it had been for half a century held by him and his vendor in actual adverse possession as against all the world beside, he can, by procuring paper titles, which never pretended to claim the particular strip of ground in controversy, and under which possession of said strip was never held for a single hour, successfully contest the rights of the town. The decision in the case of Ralston v. Town of Weston forever settled the question that the town has an easement over the strip of land inclosed by Ralston, and which was in said cause in controversy, which, under the rulings in said case, is good against any and all titles, and is binding on the world. I deem it wholly unnecessary to enter into a discussion of the many questions argued in the briefs. It seems to me that a statement of the case alone is sufficient, the matters at issue having been fully and finally disposed of in the said case of Ralston v. Town of Weston. The circuit court should have perpetuated the injunction against said Ralston further litigating the title of the town of Weston to the public easement over the strip of land in controversy, and from prosecuting his said actions of trespass on the case and unlawful entry and detainer set out in plaintiff's bill, and annulled and set aside the deeds mentioned, from James P. Cole and from W. B. McGary, special commissioner, to Er. Ralston, in so far as they becloud the title or affect the public easement over said strip of land. The decree of the circuit court is set aside, reversed, and annulled, and, this court proceeding to render

such decree as the circuit court should have rendered, it is adjudged, ordered, and decreed that the injunction granted in this cause on the 12th day of June, 1899, by the Honorable G. W. Farr, judge of the Fourth judicial circuit of West Virginia, be, and the same is hereby, made perpetual; that the actions of trespass on the case and of unlawful entry and detainer brought by Er. Ralston against the town of Weston, as set out in the bill, be dismissed; and that said deeds from James P. Cole to Er. Ralston, dated May 13, 1899, and from W. B. McGary, special commissioner for Er. Ralston, dated May 15, 1899, conveying the strip of land in controversy, be, and they are hereby, set aside and annulled in so far as they becloud the public easement over said strip of land, and said Er. Ralston is perpetually enjoined from further litigating the public right to said easement, as an effort to maintain and continue in force a public nuisance, in derogation of the sovereignty of the people of the state.

BRANNON, J. I fully concur in the foregoing opinion. We are asked to reconsider and overrule the decision of this court in Ralston v. Town of Weston, 46 W. Va. 544, 33 S. E. 326; holding that the statute of limitations, under adverse possession, does not bar the right of a town or city to its streets. I have carefully examined this subject, and the opinion has constantly grown upon me that that decision is only the expression of sound law,—law that is held all over the United States, with the exception of 4 or 5 states. At least 30 states have considered this question, and announced the same law as that stated in Ralston v. Town of Weston. I consider the exposition of the law given in the opinion by Judge Dent as a correct, able, and unanswerable one. He bases it upon the sovereign right of the people to retain, against private claim without title, the use of their streets and roads for public and necessary easement. There can be no more vital principle than the preservation of the highways of the people for their use, against those who, without color of title, would set up a private claim by mere possession, ripening into title only from sheer negligence of the public officers of the city or town. It is of the highest public interest to preserve such public right for the many over the claim of the few. Against this public interest there is no statute of limitation. Sovereignty is not barred by limitation, and ought not to be. You must show a statute infallibly applying to it. And in addition to this sovereign right, to which no statute applies in terms, there is the consideration that the obstruction of a street or other highway is a public nuisance, which no length of time will ripen into a right, because that would be to make a public offense give good title against the public right. Statutes of limitation, operative upon the private right of individuals, are wise, to prevent private strife and litigation; and they largely proceed on the theory that the private individual who has the better right has been sleeping, and allowed his adversary, by possession, to take away his right. But that cannot be said of cities and towns,—there being no private right, no private vigilance, to watch and protect the public weal,—and it cannot be said that the public right has been abandoned. No one but the officers can act, and their negligence should not destroy the public right, and cannot justify the claim that a party has slept upon his rights, as in the case of a private individual. The books all tell us that this is the very reason why time does not run against the king or commonwealth. In this state the statute makes limitation run against the state, but that does not apply to the public interests in its highways; and, moreover, a town is not the state, and that statute does not apply the bar of limitation to the public right held in trust by the town for the people. I repeat that the occupation of a street or other highway by an individual is a public nuisance, and no time gives right to continue a public nuisance. The supreme court of the United States, in Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036, only expresses what all the books have long said, and continue to say, in defense of the public interest, in speaking of a public nuisance, that: "In such cases prescription, whatever the length of time, has no application. Every day's continuance is a new offense." How, then, can a public nuisance ripen into vested title against public weal, the public right,—against sovereignty itself?

A case decided April 23, 1900, by the supreme court of South Carolina (Chafee v. City of Aiken, 35 S. E. 800), is very apt in this particular case, and surely expresses the law almost universally accepted in America. It holds: "No rights against a municipality, in a street dedicated to it, can be acquired by adverse possession. Mere nonuser of a street by a municipality will not amount to such an abandonment as will destroy its right to open the same." It is suitable to this case, in the fact that Ralston is a privy in estate with Flesher, who dedicated this street to the town, and Ralston holds by title derived from him. Flesher could not claim against his dedication by adverse possession. Neither can one holding title under him, as does Ralston. "No length of nonuser bars a right granted by deed." Washb. Easem. § 6, p. 550. The very deed under which Ralston claims derivatively from Flesher dedicates this street to the town, and limits the rights of its grantee by it. This is conclusive as to the title held by Ralston under Flesher. See the number of states that hold that time will not give title to a public street by adverse possession, cited in Judge Dent's opinion in Ralston v. Town of Weston. Thus, there are two reasons, distinct reasons, which I have just mentioned, that deny that adverse posses-

sion will destroy the public right in a street or other highway. One is that the statute does not run against sovereignty. The other is that such possession is a public nuisance, a public offense, and, no matter how long it continues, it does not mature into right. "Once a highway, always a highway," is found in all the books,—those musty with age, and those that are new. Instead of this doctrine changing in favor of the individual against the public as time goes on, just the reverse is the case; for a critical examination will attest that states which once held that time would bar this public right have flatly overruled their own decisions, and now hold that time will not bar this public right. It is stated in the opinion in City of Wheeling v. Campbell, 12 W. Va. 36, that the courts of New York, Maryland, Virginia, South Carolina, Mississippi, Ohio, Illinois, and Iowa hold that time will bar the public right in streets; but if they ever so held, their recent decisions have overruled former ones cited in City of Wheeling v. Campbell, supra, as shown by the following cases: Driggs v. Phillips, 103 N. Y. 77, 8 N. E. 514; Ulman v. Avenue Co., 83 Md. 130, 34 Atl. 366; Taylor v. Com., 29 Grat. 780; Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. 818; Depriest v. Jones (Va.) 21 S. E. 478; Buntin v. City of Danville, 93 Va. 200, 24 S. E. 830; Crocker v. Collins, 37 S. C. 327, 15 S. E. 951; Chafee v. City of Aiken (S. C.; 1900) 35 S. E. 800; City of Vicksburg v. Marshall, 59 Miss. 563; Witherspoon v. City of Meridian, 69 Miss. 288, 13 South. 843; Heddleston v. Hendricks (1895) 52 Ohio St. 460, 40 N. E. 408; City of Quincy v. Jones, 76 Ill. 231; Board of Logan Co. Sup'rs v. City of Lincoln, 81 Ill. 156; City of Chicago v. Middlebrooke, 143 Ill. 265, 32 N. E. 457; City of Sullivan v. Tichenor, 179 Ill. 97, 53 N. E. 561; Rae v. Miller, 99 Iowa, 650, 68 N. W. 899. Some of the states did hold otherwise, but they have reversed their former holding in the cases cited. The state of New Hampshire once held against the public right, but has changed its former ruling. The court, in State v. Franklin Falls Co., 49 N. H. 256, overruled Webber v. Chapman, 42 N. H. 326; the judge who wrote the former opinion requesting the judge who prepared the later opinion to announce his change of opinion. Heddleston v. Hendricks, 52 Ohio St. 460, 465, 40 N. E. 408. It seems that Nebraska has changed its former ruling, by the late case of Krueger v. Jenkins (Neb.; 1900) 81 N. W. 844, holding that title to a part of a county road cannot be acquired by adverse possession. The above cases show that Virginia has changed, if she ever held contra; but, though so cited, she never did so.

This court has received, to some extent, criticism for its action in Ralston v. Town of Weston, overruling City of Wheeling v. Campbell; but it would seem, from cases just cited from other states, that courts considered worthy of authority have chosen to assume the responsibility of overruling their former decisions because, in their opinion, on re-examination of the subject, they deemed it proper that unsound law, hurtful for all future time to the public weal, and law which did not spring from the legislature, but from erroneous ruling of the courts misapplying the statute of limitations, should no longer prevail, to the destruction of public right. That erroneous ruling sprung from erroneous decisions, and the same authority which announced it had equal authority to renounce it, it being a judicial decision, not a legislative act; and, when convinced that such former decisions were unsound, those courts were justified in overruling them, as their further continuance would be highly detrimental to the public interest. So this court thought when deciding the case of Ralston v. Town of Weston, and it is clear that it only did the same thing upon this subject-matter which has been done upon that same matter by courts of eminent authority. We still think that decision is right, and we do not see our way to retract it. If the former rule had continued, private individuals would have, year after year, invaded the highways of the people, and held them forever from their use. The public would have to condemn and purchase, time after time, what justly belonged to it. Judge McWhorter well says in Lovings v. Railway Co. (W. Va.) 35 S. E. 962, 965: "It is better to be right, than to be consistent with the errors of a hundred years." No legal principle is ever settled until it is settled right. The true rule is laid down in 23 Am. & Eng. Enc. Law (1st Ed.) 36: "No prior decision is to be reversed without good and sufficient cause; yet the rule is not in any sense ironclad, and the future and permanent good to the public is to be considered, rather than any particular case or interest. Even if the decision affects real-estate interests and titles, there may be cases where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well-settled principle of law can be violated by any decision for any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. Where vital and important public and private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty as well as the right of the court to consider them carefully, and to allow no previous error to continue, if it can be corrected. The reason that the rule of stare decisis was promulgated was on the ground of public policy, and it would be an egregious mistake to allow more harm than good to accrue from it. Much, not only of

legislation, but of judicial decision, is based upon the broad ground of public policy, and this latter must not be lost sight of." The reason given in City of Wheeling v. Campbell, supra, is that a statute in this state applies limitation to the state. I have already shown that this statute does not apply to the sovereign rights of the people in their public highways; but, anyway, in states where like statutes exist applying limitations to the state, yet hold, in their decisions, that time does not bar the public right to the streets and other highways, namely, Alabama, New York, Massachusetts, Mississippi, North Carolina, and South Carolina.

There is another reason why the town's right is not barred. Ralston occupied only 13½ feet of the 40-foot street, the balance being always open and used as a street. Now, in some of those states which still hold, and in some which once held, that the statute of limitations bars the public right where the whole street is adversely occupied, yet they held that, where the occupation extended over only a part of the street, the statute did not apply in bar of the public right. This distinction is quite reasonable. Why? Because, when a man entirely closes up a street, there can be no more decided notice to the world of his adverse claim; but where he obstructs it only partially his act is equivocal, and does not so signally notify the world of his claim, and no one notices it as he would if the obstruction was total. He may not really intend finally to claim it. His act does not put the town or city authorities and the public on their guard. Generally, in the case of streets like Water street, in Weston, at one time very little used, no one thinks of opposing a partial obstruction, and takes no steps against it. In such case the states referred to have decided that the town or city may let its rights lie dormant until there is public need for the whole width of the street, and that when that time comes the town or city may open the whole width. Such is the case in Water street, in Weston. Such was the holding in Krueger v. Jenkins (Neb.; 1900) 81 N. W. 844; Fox v. Hart, 11 Ohio, 414; Lane v. Kennedy, 13 Ohio St. 42; McClelland v. Miller, 28 Ohio St. 488; Davies v. Huebner, 45 Iowa, 574.

There is still another reason why the right of Weston is not barred. The right of a town or the public in a street or highway is not ownership of the body of the land, but only the right to use it for passage,—an easement. The statute of limitations never applied to an easement. Jones, Easem. § 161, says: "The statutes of limitation do not directly apply to actions in which incorporeal hereditaments, such as easements, are involved, but only to actions for the recovery of land." Newell, Ej. 53, says: "Ejectment does not lie for an easement, as an incorporeal hereditament. This rule is founded upon the principle that the action lies for something tangible, so that in case of recovery the possession of the property may be delivered on a writ of possession." Consistently with this view, we find that in the late great work, 10 Am. & Eng. Enc. Law (2d Ed.) p. 432, where the modes in which easements may be lost are given, limitation is not mentioned. Abandonment is mentioned as a means by which the public may lose its highway. So, Washburn on Easements does not given limitations as a means of loss of a public easement, but does give abandonment as the cause of loss of such easement. You will find the books treat abandonment as a cause of such loss, but they do not apply the statute of limitations to easements. The books do treat nonuser as working, under certain circumstances, the destruction of a public easement; but they say that such nonuser must amount to an abandonment, and mere silence, mere inaction, by municipal authorities, unattended with circumstances displaying and plainly manifesting an intentional abandonment, will not prejudice the right to the easement. Washburn on Easements, speaking of nonuser, in section 6, subsec. 1, uses this language: "Here, as in case of acts of abandonment, the nonuser must be of such a character and duration as to show an intent to abandon the easement, or it must have induced another to expend money upon the supposition of such abandonment, which is known and acquiesced in by the one who might otherwise claim it, and where to enforce the right of easement would work injustice upon an innocent party." Now, just here, note that the town council passed resolutions in 1879, and several times since, directing the opening of Water street to its full width; and Ralston was informed and notified of such resolutions, and of the continued claim of the town. He did not flatly assert a claim when so notified, but practically admitted the town's right. Where is there anything to show an abandonment by the town of its clear right to this strip? Nothing. On the contrary, the evidence shows the opposite. It shows that the town did not intend to abandon its right, and so notified Ralston. It is well established that mere nonuser will not destroy an easement, where its owner sets up a continuous claim, or protests against a use of the locus by the other party that is inconsistent with such claim to an easement. Field v. Brown, 24 Grat. 74. "Nonuser of a highway by the public for many years is prima facie evidence of abandonment, but the abandonment must be voluntary and intentional." City of Hartford v. New York & N. E. R. Co. (Conn.) 22 Atl. 37; Chafee v. City of Aiken (S. C.; 1900) 35 S. E. 800. "Acts of the owner of the dominant estate, relied upon to constitute an abandonment, must be voluntary, and must be of such decisive and conclusive a character as to indicate and prove his intention to abandon the easement." 10 Am. &

Eng. Enc. Law (2d Ed.) p. 435. Many cases are there cited. "But nothing short of an intention so to abandon the right would operate to that effect." Washb. Easem. § 5, subsec. 1. Thus, only abandonment, not the length of time fixed by the statute of limitations, can destroy a public easement. That statute has nothing to do with the subject, but abandonment has, as it is the only way, unless it is by release or merger of estate, by which the servient estate can be released from the easement. Ralston held the estate, the soil, the land, that was burdened with this public easement. His grantor dedicated that easement, and so stated in the deed under which Ralston derivatively claims, and this land of Ralston could be relieved of this easement only by the intentional abandonment by the town. Instead of abandoning, the town still claimed. What act of the town evinces an intention to abandon? Mere silent nonuser will not work an abandonment. Board of Logan Co. Sup'rs v. City of Lincoln, 81 Ill. 156. A private individual owning an easement might much more readily lose his right by nonuser and abandonment, than a city or town. How can you show acts by a town amounting to an abandonment? It must be, in the language of the law above quoted, "acts of so decisive and conclusive a character as to prove his intention to abandon the easement." How can you prove such acts by a town? It would be a very difficult task. Mere inaction by its officers would not, should not, work such public detriment. If its acts are to be resorted to to establish abandonment, they could only be recorded acts of its council, and that attempt would be met by the inflexible rule that a town council cannot grant away the public right in a street without legislative authority. It would be an ultra vires and void act, not binding on the public. Therefore I am unable to realize how you can fix a binding act of abandonment upon a city or town, though you may do so as to an individual. Under the head of "abandonment," Taylor v. Pearce, 179 Ill. 145, 53 N. E. 622, is strong in favor of the town. "The opening of a highway its full length, and its use by the public, protect the public right to its full width, and repel any presumption of abandonment which might arise from the fact that the fence of an adjoining owner has stood within the line of the highway for over twenty years." So in Maine, Missouri, and Ohio. Heald v. Moore (Me.) 9 Atl. 734; State v. Culver, 65 Mo. 607, 27 Am. Rep. 295; Kelly Nail & Iron Co. v. Lawrence Furnace Co. (Ohio) 22 N. E. 639, 5 L. R. A. 652. See Elliott, Roads & S. 658. Vacation by authority is requisite to discontinue. No mere implied abandonment will do. The statute says how a street may be vacated. That excludes implied abandonment. Driggs v. Phillips, 103 N. Y. 77, 8 N. E. 514. I therefore repeat that, as the right of the town is an easement only, the statute of limitations does not apply. This is an important consideration in the matter; for in a state where limitation does run against the state, and it is claimed that a city or town is the same as the state, and therefore the statute runs against a town or city, yet this cannot apply to an easement of the town or city, because the statute never runs against an easement. Hence the reason given in City of Wheeling v. Campbell, 12 W. Va. 36, for the position that the statute will bar a city or town of a right to a street (that is, that limitation runs against the state, and therefore also against a city or town), was never good. But while this court might retract the principles settled in the case of Ralston v. Town of Weston, namely, that limitation does not bar the right of a city or town to a street, if this court were now convinced that such decision were error, yet it could not alter the actual decision of this case, for the reason that that decision is res judicata, and forever settles, between Ralston and the town of Weston, that the strip of land in controversy is a part of Water street, and still subject to the public easement.

But Ralston claims that, after said decision in Ralston v. Town of Weston, he obtained a new right to that identical strip by a conveyance from J. P. Cole. This cannot change the result, and why? (1) Ralston's long inclosure had barred Cole's right, if he had any right, and vested Cole's title in Ralston, by force of the statute of limitations; for the statute would bar the private right of Cole, but not the easement of the town, Cole being a private individual. Thus, when this court decided that said strip was not free from the easement of the town, but was still subject thereto, that Cole's title was at that date vested in Ralston by reason of limitation, and the adjudication bound all titles, no matter how many distinct ones he then had, good or bad, and settled that all titles, however derived, vested in Ralston at that date, were subject to this public easement. The conveyance from Cole passed nothing to Ralston, for such title as he had had already vested in Ralston. (2) If Cole had any title to that strip, as he had not, it was subject to the public easement; and, even if the statute could run against that easement, it would not run in favor of the Cole title, because it is not pretended that Cole ever had any possession of that strip, or set up any claim contrary thereto. Where did Cole have any possession to bar the town right, which nobody denies was once good? Ralston had an inclosure, but his right and Cole's right were distinct, and not in privity, and Ralston's possession would not inure to the benefit of the Cole title. And the same rule of law, moreover, which, under principles above

stated, would prevent Ralston from using the bar of the statute, would forbid Cole's so doing, and all other persons having any claim to that ground. That was an easement over that ground against all titles, by whomsoever owned. (3) In a suit between the town of Weston and Cole in 1889, the town contested Cole's right to build a stable on the bank of the river, on the west side of Water street, if counted at only 40 feet, and on the opposite side of Water street from the strip now in controversy between Ralston and the town; the town claiming the whole space to the river. Cole, by an answer, claimed that the land between the west side of a 40-foot street and the river had never been a part of the street, and also claimed some grant from the town; but his answer distinctly conceded the existence of a street of 40 feet width, which included the 13½ feet inclosed by Ralston, and now in controversy. If Cole ever had a shadow of claim to that 13½ feet along the east side of Water street, his answer renounced all right to it, in favor of the town, and conceded that the public street included it; that is, that Water street began 150 feet from Main street, and was of the width of 40 feet, which would include the strip now in controversy. He thus, by solemn pleading in a court of record, recognized the pre-existing street over that ground, and also made a fresh dedication of it for the public use, and moreover, for years thereafter (ever since 1889) suffered the public to use the street as such, and the town to work it, and thus made it a lawful street, if it never had been such before, by suffering such user, as section 31, c. 43, of the Code says, "Every road, street or alley used and occupied as a public road, street or alley shall in all courts or places be taken and deemed to be a public road, street or alley." Upon the faith of that answer, conceding this public right, Cole had a decree allowing him to build a stable on the western side of Water street, opposite the ground in controversy. He obtained that decree upon this renunciation of all claim to the ground covered by the street, adverse to the town, and that is an estoppel upon Cole. It is res adjudicata between Cole and Weston to show the existence of that street there; and this answer of Cole, and the decree upon it, as acts of disclaimer, concession, and dedication of a street over this ground, are res judicata in favor of the town against Cole; and, as they bind Cole, so they bind Ralston, as a privy in estate with him. Indeed, Ralston, under his conveyance from Cole, took subject to such renunciation and dedication. He got nothing from Cole adverse to the town, because, as Cole's answer bound him, as an act of renunciation and dedication, so Ralston took subject thereto. Riddle v. Town of Charlestown, 43 W. Va. 796, 28 S. E. 831. The decree is res judicata on both Cole and Ralston, his privy in estate. Cole's answer is an estoppel by record, and more solemn than a private writing, because made in a pleading, and constituting a concession and waiver of a point that might have been in issue but for such waiver. Steph. Pl. 204. "When a pleading is made under the oath of the party, it is especially competent evidence against him, as a solemn admission of the truth of the facts stated." 14 Enc. Pl. & Prac. 21. "An admission made during the course of judicial proceedings, whether it be direct, or by inference from the position assumed, the relief sought, or the defense set up, will estop the one who makes it from subsequently asserting any claim inconsistent therewith." 4 Am. & Eng. Dec. Eq. 304. "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining it, he cannot thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." Davis v. Wakelee, 156 U. S. 680, 15 Sup. Ct. 555, 39 L. Ed. 578. An estoppel "may be availed of by privies in blood, estate, or law, as well as by all the parties to the transaction, and is equally binding upon them." 4 Am. & Eng. Dec. Eq. 356. "Where one succeeds to the same rights of property formerly enjoyed by another, there is often such privity that the rights of the owner in such property may be affected by the statements of the latter." Jones, Ev. §§ 240, 241. See Railway Co. v. Ohle, 117 U. S. 129, 6 Sup. Ct. 632, 29 L. Ed. 837; Delaware Co. Com'rs v. Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674; Pope v. Allis, 115 U. S. 370, 6 Sup. Ct. 69, 29 L. Ed. 393; Bigelow, Estop. 526. "A party cannot recover on a statement of facts entirely at variance with, and inconsistent with, claims set up by him in a prior suit for the same cause." 7 Am. & Eng. Enc. Law (1st Ed.) p. 3, note 3. Cole's answer was itself a solemn dedication as a street,—alone enough to make it a street,—and he could not retract the dedication. Board v. Holly, 169 Ill. 9, 48 N. E. 149.

Due Process of Law. It is claimed that the decision of this court in Ralston v. Town of Weston violates the constitution, federal and state, in depriving Ralston of property without due process of law. I regard this question as not relevant to this case. To me it is inconceivable how a party who has himself brought a suit in a state court, and that court has, in the due and regular course of judicial proceeding, heard both parties and rendered judgment, can say that the court violated the federal constitution by taking property without due process of law. If so, then such is the case in every suit where the state court affects the right of property. A regular hearing in a regular suit is the clearest instance of the exercise of due process of

law. When a party has been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law. Marchant v. Railroad Co., 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751; Land Co. v. Laidley, 159 U. S. 103, 16 Sup. Ct. 80, 40 L. Ed. 91. If the court erred in failing to observe the federal constitution (though the question was not raised), the only redress is in the federal supreme court, by appeal, because it would then be simply error of law, not a void decree; and this court could not, for error in a past and closed term, nullify its former final decree. Both of said Ralston's titles (his original one and the Cole claim), being vested in him at the date of said decree, are foreclosed by it, and that decree is res judicata upon them both, and beyond the power of recall by this court. In the present case the facts do not sustain or present a federal question, even colorable. This Cole title was unquestionably charged with the street right, and under it there never was one hour's possession of the strip in controversy adverse to such street right,—never any possession. On the contrary, Cole conceded that street right in his answer, and by its subsequent user. If he had not conceded it, he never had any possession to take it away. How, then, could he have any property, except in the soil? How have any vested property to be devested without due process by the exercise of the street right? Ralston's possession under his other claim could not be tacked to the Cole separate title. Jarrett v. Stevens, 36 W. Va. 445, 15 S. E. 177. So Ralston by the pretended Cole title acquired no vested property to be taken by the street easement,—no property hostile to it. This claim of deprivation of property is only colorable, and raises no federal question, under decisions. Wilson v. North Carolina, 169 U. S. 586, 18 Sup. Ct. 435, 42 L. Ed. 865. I can see no shadow to claim any basis under this head, except the theory that the decision in City of Wheeling v. Campbell, that limitation bars a right to a public street, makes a law, and that under it title had already vested in Ralston before this court overruled that decision, and that the overruling decision devested a vested right of property in Ralston. This cannot be, unless we can say that Ralston had a vested right of property under the facts and the law. This he had not. Even if we could regard the first decision (City of Wheeling v. Campbell) as making a law, still Ralston would have no vested property under it, in the view of a federal court or of a state court, for the simple reason that Ralston's possession was never adverse to the town's easement, as held upon the facts by this court in the case of Ralston v. Town of Weston, and thus Ralston did not acquire vested property by adverse possession. But suppose Ralston's possession had been adverse in character; would it give him title? Not unless we can say that the first decision of this court, holding that limitation applies to bar a town or city of its easement in a street, was a law, just like a statute, and that title vested under it. There must be law, to vest a title to property. A decision of a court is not a law, so that by its force alone property may vest. Property will vest under the law, but not under a mere decision, an erroneous decision, except in the particular case; and that is not because such decision is a law, but because it is res judicata upon the subject-matter. A court cannot originate, cannot make, law. It only expounds and applies pre-existing law. In Wayman v. Southard, 10 Wheat. 46, 6 L. Ed. 253, Chief Justice Marshall, in a few words, laid down the cardinal rule, in saying, "The difference between the departments [of government] undoubtedly is that the legislature makes, the executive executes, and the judiciary construes, the laws." The Virginia court of appeals, in Griffin's Ex'r v. Cunningham, 20 Grat. 51, said: "The law is applied by the one, and is made by the other. Cooley, Const. Lim. 92. 'To declare what the law is or has been, is judicial power; to declare what the law shall be, is legislative.'" In Swift v. Tyson, 16 Pet. 18, 10 L. Ed. 871, the court, by Justice Story, defined the meaning of a law as follows: "In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves whenever they are found to be either defective, ill founded, or otherwise incorrect." This declaration of the court has been reaffirmed in words. Railroad Co. v. National Bank, 102 U. S. 29, 54, 26 L. Ed. 75; New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co., 125 U. S. 18, 8 Sup. Ct. 741, 31 L. Ed. 607. The federal constitution contains a clause that no state shall make any law impairing the obligation of a contract. Again and again the United States supreme court has decided that under that provision a decision of a court is not a law, and that only an act of the legislature is a law. Cases just cited, and Land Co. v. Laidley, 159 U. S. 103–112, 16 Sup. Ct. 80, 40 L. Ed. 91, and Brown v. Smart, 145 U. S. 454, 12 Sup. Ct. 958, 36 L. Ed. 773. Now, what is the difference between the two cases? It requires a law for property to vest. There cannot be a deprivation of property without due process of law, unless the party has vested property, and he cannot have that unless he has a law to vest it in him. Law is of the same nature in both cases. Therefore I repeat that the first decision of this court, in City of Wheeling v. Campbell, is not a law under which property could vest, as if it were a legisla-

tive act. Moreover, that decision has been adjudged erroneous, and it and Teass v. City of St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802, and Forsyth v. City of Wheeling, 19 W. Va. 318, overruled. The last two simply followed the first, without reconsideration. What is the effect of such overruling? Mr. Justice Miller undoubtedly stated the true law in Gelpcke v. Dubuque, 1 Wall. 205, 17 L. Ed. 527, speaking of the effect of overruling former decisions, when he said: "I understand the doctrine to be, in such cases, not that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never was, the law, and is overruled for that very reason." 1 Bl. Comm. 70, says: "But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation; for, if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence is bad law, but that it was not law." Wood v. Brady, 150 U. S. 18, 14 Sup. Ct. 6, 37 L. Ed. 981. The cases of Allen v. Allen (Cal.) 30 Pac. 213, 16 L. R. A. 646, and Ray v. Gas Co., 138 Pa. St. 576, 20 Atl. 1065, 12 L. R. A. 290, both say that when a former decision is overruled the law is not altered, changed, or amended, but that the erroneous decision never was law, and that the principle of the later decision was the true and sound law at the very time when the first erroneous decision was rendered. So Rockhill v. Nelson, 24 Ind. 424; Frink v. Darst, 14 Ill. 304; Paul v. Davis, 100 Ind. 422. Decision is not a law,—only evidence of what the law is. I assert that the true principle is that when a former decision is overruled the law is, and always was, as it is stated in the later decision. It is different where there is a valid statute which is afterwards repealed. While that statute was in force, title could vest under it; but not so with an erroneous decision, when overruled. It never vests under a decision, but under law. There are decisions, such as Gelpcke v. Dubuque, 1 Wall. 205, 17 L. Ed. 520, and Douglass v. Pike Co., 101 U. S. 687, 25 L. Ed. 968, exceptional in character, holding that where contracts are made under judicial decisions, and on the faith of them, before they are overruled, their subsequent overruling will not affect such antecedent contracts. This doctrine applies to commercial contracts. An examination of the United States supreme court cases will show that such cases are properly limited to commercial contracts, because they are comraercial contracts. See Justice Brown's opinion in Travis Co. v. Wade, 174 U. S. 508, 19 Sup. Ct. 715, 43 L. Ed. 1060. Justice Miller said in Gelpcke v. Dubuque that the whole membership of the United States supreme court limited this exception to commercial contracts, and conceded that, if the case were one involving title to real estate, the matter would be tested by the later decision, and that it would furnish the true test of what the law always was. Now, remember, as a material point in this case, that Ralston's title set up under adverse possession was not a title acquired by any sort of contract, but by a continued violation of the law in obstructing a public highway, and thus maintaining a public nuisance,—a public offense. Is it possible that the former erroneous decision can be appealed to as a law under which a title to land could vest by the commission of a public wrong,—that a party could be thus aided by an erroneous decision to take advantage of his own wrong? There is a difference between this case and a title acquired by contract. In the Gelpcke Case there was a strong equity of an innocent purchaser of negotiable bonds, good under the first decision, to call upon that decision to shield him from the effect of the later overruling decision,—a strong equity and call for justice; but can one who has taken up a street, without color of title, and thus committed an indictable offense, present any such claim for protection? He ought not and cannot be allowed to do so.

To enable a party to say that he has been deprived of property without due process of law, he must be able to show a law under which the property could vest. He must show a right of property under the law, recognized by the law. New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; Board v. Skinkle, 140 U. S. 334, 11 Sup. Ct. 790, 35 L. Ed. 446. Ralston's only show of title against the easement (for he owned the soil) was by an adverse possession; and he could not get title by it, because there could be no adverse possession against a public easement in a street. Possession ever so long contrary to law (a nuisance) cannot give title. Clearly, this shuts out all claim of Ralston existing at the date of the decree in Ralston v. Town of Weston. How as to Ralston's claim derived from Cole? I repeat that that colorable claim is barred by the former decree, as res judicata. But, for argument's sake, say that it was a title acquired after the former decree. There is no color for claiming title by possession under it against the town's easement, because Cole never had any possession of this strip. All admit that the street was once valid to cover this strip with the public easement, and Cole never acquired any title by possession against that easement, as he never had possession at any time, and Ralston could not get from him a right which Cole himself did not possess. So there is no pretense for Ralston to say that he is deprived of property under this Cole claim without due process of law, since he had no vested property to be deprived of without due process of law. "There can be no vested right to do wrong." Grinder v. Nelson, 9 Gill, 300, 52 Am. Dec. 694.

After writing to this point I come across

the case of Alferitz v. Borgwardt, 126 Cal. 201, 58 Pac. 460. The supreme court of California had held that, under a certain kind of mortgage, title vested, but later held that it did not, and in the case cited the court said: "But appellant contends that it [the first decision] states the law upon the subject, and that law was not changed until the decision of Shoobert v. De Motta, 112 Cal. 215, 44 Pac. 487, 53 Am. St. Rep. 207, in 1896, and in the meantime this mortgage was made. It is said that to apply the rule declared in the last case, rather than that laid down in the first, would be to impair the obligation of contracts. Douglass v. Pike Co., 101 U. S. 687, 25 L. Ed. 968, and many other cases cited. In the case named it is said: 'After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much part of the statute as the text itself, and a change of the decision is to all intents and purposes the same in its effect on contracts as the amendment to the law by means of a legislative enactment.' No rights are acquired here under a statute, in the meaning of that line of authorities which seem to refer to laws authorizing the government, or some subdivision or department thereof, to contract certain obligations. Beyond this the cases cited do not go. I hardly think the rule would be applied to decisions of state courts in regard to general rules of law, although they may affect contract rights. At best, they but lay down a rule for the federal courts as to how far they will be governed by decisions of state courts in the construction of state statutes. Laws are not made by judicial decisions. The court simply determines the rights of the parties in that particular controversy. Courts have never thought themselves bound by it as they are by a valid statute. No doubt, an appellate court assumes a very grave responsibility when it reverses a former decision which has become a rule of property or the law of contracts; and whenever this is done it must be understood that the court has not only considered the objections to the former decision, but the evils which may follow from its reversal. The matter is ably discussed in Hart v. Burnett, 15 Cal. 530, and the views there expressed have been frequently affirmed. The mere fact that an error has been made in a decision of the supreme court is no reason for perpetuating it, but, in a given case, to correct it may be productive of more evil than to permit it to stand. And, as stated in the above case, justice is not always on the side of him who claims under the erroneous decision. Why should one who has honestly acquired property according to the law of the land lose it because a judge, relying upon imperfect presentation, has erred? Or why should the policy of the government, adopted upon great deliberation, be so defeated? And especially so where a decision was never deemed to have the force of absolute law. If the supreme court of the United States shall finally go with the appellants in holding that the courts are prohibited from reversing an erroneous construction of a state statute because such decision is a law which impairs the obligation of contracts, then the courts can never change the erroneous construction; for a court can only pass upon existing rights, and must always look to the past for its law, and, so far as it declares the law, it declares what it was and is, but cannot enact what it shall be. I do not think that august tribunal will adopt this view, which, if adopted, can result only in the perpetuation of error." In Hart v. Burnett, 15 Cal., beginning at page 597, is an able discussion of stare decisis; and it is shown that where a renunciation of erroneous decisions, though several in number, and though they concern title to real estate, will promote public interest, they often have been, ought to be, renounced.

Equity Jurisdiction. This is clear in this case. The right of the town to the street being valid, settled by adjudication, as shown by Judge McWHORTER and above, shall it be called upon to relitigate its right in two suits brought against it in denial of that right? If its title to that street is good, those actions are groundless. If judgments were recovered in them, could this court sustain them? Clearly not. To do so would nullify its own decision. This court held the right of the town good, and made a mandatory injunction to enable the town, authorizing the town, to do the very thing for doing which it is now sued. The town only executed its decree. Had this court not adjudged the matter, equity might take jurisdiction on the mere ground of avoiding multiplicity of suits, but the town has established its right by adjudication. Is Ralston to be allowed to recover from the town damages for doing an act held by this court to be a lawful act? Is he to be allowed by his action of unlawful entry to recover possession and stop up this street, and thus perpetuate a public nuisance? Courts of equity have an ancient and unquestionable jurisdiction to prevent or abate public nuisance, and this alone would give jurisdiction, even if it had not been decided that this was a public nuisance, and more clearly so as it has been decided to be a nuisance on a street owned by the town. Hartley v. Henretta, 35 W. Va. 222, 13 S. E. 375. "Courts of equity interfere to restrain and prevent public nuisances threatened or in progress, as well as to abate those already existing." 14 Enc. Pl. & Prac. 1119, note. "In regard to public nuisances, the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth. * * * An indictment lies to abate the nuisance and punish the offender, but an information also lies in equity to redress the grievance, by way of injunction." Story, Eq. § 921; Kansas v. Ziebold, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Beveridge v. Lacey, 3 Rand. 63; Bridge Co. v. Summers, 13 W. Va. 484;

opinion in Hartley v. Henretta, 35 W. Va. 238, 13 S. E. 375. "Where a municipality has control of streets it may in its corporate name institute judicial proceedings to prevent or remove obstructions thereon." Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. 818; Dill. Mun. Corp. § 659; 3 Pom. Eq. Jur. §§ 1349, 1350; 1 High, Inj. §§ 768, 769; Wood, Nuis. § 729. Another plain ground of equity jurisdiction is to quiet title by removing the cloud over the town's right caused by the conveyances from Cole and McGary, commissioner, and give peace against litigation, especially as its right has been adjudicated. The town was in possession, and for this reason, and because it had a mere easement, could not bring ejectment, and had no remedy to give adequate relief but in equity. Smith v. O'Keefe, 43 W. Va. 172, 27 S. E. 353; Davis v. Settle, 43 W. Va. 17, 37, 26 S. E. 557; Christian v. Vance, 41 W. Va. 754, 24 S. E. 596; Clayton v. Barr, 34 W. Va. 290, 12 S. E. 704. In the Davis Case, Judge Dent held that equity would plainly interfere to prevent an act to defeat an adjudication of this court. Even if Ralston's procurement of these deeds be ever so free from an intentional obstruction of the former decision, yet if they are in fact such an obstruction, unwarranted in law, equity will step in to cancel and give peace. "The jurisdiction is now maintained to the fullest extent, and these decisions are founded on the true principle of equity jurisprudence, which is not merely remedial, but also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it for some sinister purpose." 2 Story, Eq. Jur. § 700. In no view should Ralston be upheld in using these deeds to defeat the public right, to becloud the public right, fixed and settled by actual adjudication. Equity should say, "Peace, be still." "Jurisdiction in equity will be exercised to enjoin nuisance, and avoid vexatious litigation and a multiplicity of suits." 4 Enc. Pl. & Prac. 1126. Ralston's action cannot be successfully predicated on any idea of forcible entry, because an officer making an entry under process is not guilty of forcible entry. Ogg v. Murdock, 25 W. Va. 139. The order of the council to make such entry to remove such nuisance was warranted by chapter 47, Code, by the actual adjudication of this court, and was due process, even without such statute and adjudication, it being a nuisance. The council order is the writ of process. Driggs v. Phillips, 103 N. Y. 77, 8 N. E. 514. Any one may remove an obstruction on a highway. 2 Tuck. Pl. 4, note; Dimmett v. Eskridge, 6 Munf. 308. A town surely has a plainer right inherent in it. It is commanded to do so, and may do so in a summary way, and destroy the thing creating the nuisance. Yates v. Town of Warrenton, 84 Va. 337, 4 S. E. 818; Yeager v. Carpenter, 8 Leigh, 454; Young v. Gooch, 2 Leigh, 646; Baker v. Boston, 22 Am. Dec. 421; Hart v. Albany, 24 Am. Dec. 165; 2 Beach, Pub. Corp. 1022. As equity has jurisdiction on several grounds, it is useless to cite law to show that no common-law jury right is invaded. Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. Full discussion. State v. Saunders, 66 N. H. 39, 25 Atl. 588. The federal constitution gives no right to jury trial in state courts. Walker v. Sauvinet, 92 U. S. 90, 23 L. Ed. 678.

PEARCE et al. v. BORG CHEWING-GUM CO.

(Supreme Court of Georgia. June 8, 1900.)

SALE — RIGHTS OF PURCHASER — RESCISSION FOR FRAUD.

Where the purchaser of goods seeks to avoid the contract of purchase on the ground of fraud, he must, upon the discovery of the facts constituting the fraud, upon his first opportunity to do so, announce his purpose to rescind. If he remain silent, and retain possession of the goods received under the contract, without complaint, until long after the discovery of the facts, he will be held to have waived the objection, and will be bound by the contract as though there had been no fraud. Smith v. Organ Co., 28 S. E. 392, 100 Ga. 628, and cases cited. This is especially true where the purchaser endeavors to rescind the contract in part only. Maynard v. Render, 28 S. E. 194, 95 Ga. 652.

(Syllabus by the Court.)

Error from city court of Columbus; J. L. Willis, Judge.

Action by the Borg Chewing-Gum Company against Pearce & Williams. Judgment for plaintiff. Defendants bring error. Affirmed.

Chas. R. Williams and W. A. Wimbish, for plaintiffs in error. W. H. McCrory, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

OCONEE ELECTRIC LIGHT & POWER CO. et al. v. CARTER et al.

(Supreme Court of Georgia. June 7, 1900.)

EMINENT DOMAIN — CONDEMNATION OF WATER POWER—ELECTRIC LIGHT COMPANIES.

1. The act of December 7, 1897 (Acts 1897, p. 68), confers the power to condemn the property of others upon such corporations or individuals only as own or control any water power in this state or location for steam plant. It confers no power to condemn a water power, but only to condemn rights of way or other easements upon the lands of others in order to run lines of wire, maintain dams, etc., or for other uses necessary to transmit electricity for the purpose of lighting towns or cities, or supplying motive power to railroads or street-car lines, or heat or power to the public. It confers no power to condemn an undivided interest or easement in a water power the remainder of which is owned by the electric light corporation which is seeking to condemn.

2. There is no general law giving electric light companies power to condemn the private property of others.

(Syllabus by the Court.)

Error from superior court, Baldwin county; John C. Hart, Judge.

Suit by W. C. Carter and others against

the Oconee Electric Light & Power Company and others. Judgment for plaintiffs. Defendants bring error. Affirmed.

Allen & Pottle and J. R. L. Smith, for plaintiffs in error. Jos. S. Turner, for defendants in error.

SIMMONS, C. J. It appears from the record that the Oconee Electric Light & Power Company, a corporation chartered by the superior court of Baldwin county, owned land in that county on both sides of the Oconee river, in which there is a water power. In one of the deeds made to the company there was a reservation of the grantors' interest in the water power. The company gave notice to the persons reserving this interest that it intended to condemn their interest in the water power. These persons filed an equitable petition in which they sought to have the condemnation proceedings enjoined. The company answered, admitting that the plaintiffs held an undivided interest or an easement in the water power. The trial judge granted the injunction, and the company excepted. Whether the reservation in the deed of the plaintiffs was a reservation or an exception it is not necessary to decide, nor whether there was reserved the soil over which the water flowed, or only the force or power of the water. We put our decision solely upon the power granted in the act of 1897 (Acts 1897, p. 68). That act, in substance, gives the right to an electric light company which owns or controls a water power, or location for steam plant, to condemn rights of way or other easements over the lands of others, where it is necessary in order to carry out the purposes of its organization, to wit, to light towns or cities, supply the motive power to railroads, or supply the public with power or heat. Under this act, it is a condition precedent to the exercise of the power of eminent domain, by a company which is to run its plant by water power, that the company shall exclusively own or control the water power. The act does not expressly or by necessary implication give the corporation the right of eminent domain except where it has such exclusive ownership or control. The whole object of the act is to give to a corporation "owning or controlling" any water power, or location for steam plant, the right to condemn rights of way, etc., upon the lands of others, in order to be able to transmit the electricity to a place distant from that where it is generated. It is given solely to secure a means of utilizing the water power or location and of transmitting the power generated. Acts giving to corporations or individuals the right to condemn the property of others must be construed strictly, and, unless the power is conferred expressly or by necessary implication, it is not conferred at all. The legislature by this act certainly did not contemplate giving to one of two co-tenants the right to condemn the interest of the other in a water power. The act, in so far as it related to water powers, was predicated upon the exclusive ownership or control of the water power by the corporation or individual seeking to condemn. The record discloses that the plaintiffs and the company were tenants in common of this water power, one having as much right to use it as had the other, and we are clearly of the opinion that it was not the intention of the legislature to confer upon one of two co-tenants of a water power the right to condemn the interest of the other therein. The plaintiffs, as individuals, if they had desired to erect a plant to generate electricity for public use, would have had as much right to condemn the interest of the company as had the latter to condemn theirs, if it should be held that this act applied to cases of this kind. We hold that the act does not apply, and that the company derived no power from it to condemn the interest of the plaintiffs in the water power.

2. Other than the act just discussed, we have been able to find no act of the legislature of a general nature which confers upon an electric light and power company the right to condemn the property of others, nor have we had any such act or provision of law pointed out to us. There are, it is true, acts giving power of eminent domain to railroads, mining companies, etc., but they do not in any way apply to electric light or power companies. As before remarked, the power cannot be conferred except by express terms or necessary implication, and where it has not been so conferred it cannot be exercised. For these reasons we affirm the judgment of the trial judge granting the injunction sought by the plaintiffs. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

GEORGIA S. & F. RY. CO. v. SANDERS.

(Supreme Court of Georgia. June 8, 1900.)

RAILROADS—KILLING STOCK—EVIDENCE.

When it is shown by a plaintiff, in an action against a railroad company to recover damages for killing a cow, that the animal was killed by the running and operation of a train of cars, the law raises a presumption of negligence against the company, and, without more, the plaintiff is entitled to recover the value of the animal killed. Such presumption, however, may be rebutted; and when the evidence of the engineer and fireman on the locomotive which struck the animal is to the effect that she came upon the track suddenly, and immediately in front of the locomotive, and that all reasonable and ordinary diligence was used to prevent striking the animal, but without avail, such presumption is successfully rebutted; and, when there is no evidence disproving or tending to disprove this evidence of the train men, the owner is not entitled to recover.

(Syllabus by the Court.)

Error from superior court, Lowndes county; J. S. Candler, Judge.

Action by J. G. Sanders against the Georgia Southern & Florida Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

John I. Hall and J. G. Crawford, for plaintiff in error. A. T. Woodward and Edward R. Austin, for defendant in error.

LITTLE, J. If there is any one question settled by general law and the interpretation by this court of our statutes, it is, we think, that of the liability of a railroad company to respond in damages to the owner for the killing of live stock by the running and operation of the engines and cars of a railroad company. There are duties owing by the railroad company to the owners of stock, and by such owners to the railroad company. The latter is entitled to the free and unobstructed use of its track, while the owner is entitled to have redress for the willful or negligent killing or injury to his stock, and, while the owner may not be compelled to keep his stock so that they will not trespass on the railroad track, so a railroad company, in an effort to prevent the injury or killing of stock which has wandered on the track, cannot be held liable for such killing or injury when it has been guilty of no negligence, but in good faith has endeavored to prevent such injury or killing. When stock has been injured or killed by the running of a locomotive or train of cars, and such fact is shown, the law presumes that the company was guilty of negligence in injuring or killing such stock, and, if nothing more appears by the evidence, the owner, resting on such presumption, is entitled to recover. This presumption, however, is subject to be rebutted, and when rebutted, and there is no conflict in the evidence, the owner is not entitled to recover. Railroad Co. v. Wall, 80 Ga. 202, 7 S. E. 639.

In the present case it was clearly shown on the part of the plaintiff that a cow of the value of $50 belonging to him was killed by the running and operation of a train of cars of the plaintiff in error in the county of Lowndes. When these facts were shown the plaintiff rested his case, and in rebuttal the engineer and fireman on the train which struck and killed the cow were examined as witnesses for the defendant. It appears from the testimony of these witnesses that the cow suddenly came upon the railroad track in front of the engine; that these employés were on the lookout, and could not discover this particular cow until she made her appearance on the track, and that then the engineer used all ordinary and reasonable diligence by putting on the brakes and otherwise attempting to prevent striking the cow, but that the distance between where she came on the track and the engine was so short that the train could not be stopped, and so she was struck and killed. This evidence fully rebutted the presumption of negligence which the law raised in this case against the company. No other testimony was offered by the plaintiff, according to the record, and, under the well-known rules of law cited above, the plaintiff was not entitled to recover. Had there been a conflict of evidence on the question as to whether there was negligence on the part of the employés of the company in striking and killing the animal, all parties would have been compelled to yield to the determination of the question of negligence made by the court or jury trying the case. But, as there was no conflict of evidence on the question of negligence, it must be ruled that, as the presumption was overcome by the evidence of the witnesses for the defendant, no right to recover rested in the owner of the cow. Railroad Co. v. Walker, 87 Ga. 204, 13 S. E. 511. The court, therefore, committed error in overruling the certiorari, and the judgment is reversed. All the justices concurring, except FISH, J., absent on account of sickness.

CUTLIFF et al. v. BURK.

(Supreme Court of Georgia. June 7, 1900.)

APPEAL—REVIEW—REFUSAL OF INJUNCTION.

Where the evidence on the hearing of an application for injunction is conflicting, and there is no principle of law involved which should control the action of the judge, this court will not reverse a judgment refusing the injunction, unless it appears that the judge abused the discretion with which he is invested.

(Syllabus by the Court.)

Error from superior court, Dougherty county; W. N. Spence, Judge.

Suit by M. F. Cutliff and others against W. P. Burk, guardian. Judgment for defendant, and plaintiffs bring error. Affirmed.

Walters & Wallace, for plaintiffs in error. S. J. Jones, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

BERRY v. BURGHARD et al.

(Supreme Court of Georgia. June 8, 1900.)

EQUITY—RELIEF FROM JUDGMENT—LACHES.

Equity will not grant a new trial in a case which has proceeded to judgment in a court of law, when the petition therefor shows that the plaintiff was negligent in making his defense in the court where the judgment was rendered.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Suit by M. O. Berry against August Burghard and others. Judgment for defendants, and plaintiff brings error. Affirmed.

B. S. Miller, for plaintiff in error. Eugene Ray and Charlton E. Battle, for defendants in error.

SIMMONS, C. J. In a justice's court in Muscogee county, Burghard obtained judgment against Jerallie. Execution thereon was levied upon certain personal property in the possession of the defendant. It was claimed by Berry. On the trial of the claim case the property was found subject. Berry filed an equitable petition for the purpose of setting aside the judgment finding the property subject and of obtaining a new trial. He alleged that there had been one trial before a jury in the justice's court, resulting in a mistrial; that, after several continuances, the case was finally set for trial before another jury; that his counsel were the Messrs. Miller; that on the day before the trial the member of the firm who had theretofore represented him in the matter informed the magistrate that he would be engaged in another court, and would be unable to represent the claimant, but that his brother would appear in his stead; that on the day of the trial this brother did not appear, the reason being that he was in attendance upon a sick relative, and could neither attend court nor notify the justice that he would be absent. The case went to trial, and the jury found the property subject. By an amendment the claimant set out the facts upon which he based his claim to the property, and alleged that if his counsel had been present, and the evidence brought out, the verdict of the jury would in all probability have been different. The judge refused to allow this amendment, on the ground that there was nothing to amend by. He then sustained a demurrer to the petition, which contained special grounds, and also the objection that there was no equity in the petition. The plaintiff excepted to the refusal to allow his offered amendment, and also to the ruling sustaining the demurrer and dismissing the case.

This court will not reverse a judgment because of the refusal to allow an amendment to a petition when it appears that the petition and amendment, taken together, do not set forth a cause of action. Treating the amendment as having been allowed, and considering it with the petition, we think that the judge did not err in sustaining the demurrer. Equity will never set aside a judgment at law and grant a new trial to a person who has been negligent in the defense of his case in the courts of law, or who has been negligent in the assertion of his rights in such courts. In the present case, while it is asserted that the petitioner's counsel was absent because of providential cause, the petition does not in any way explain the absence of the petitioner himself. From the facts stated in the amendment which was offered, and which was not allowed by the judge, it seems to us that it would have been absolutely necessary for him to have appeared in order to establish the facts upon which he based his claim, or to put his counsel in possession of these facts. It is the duty of a claimant, where a levy has been made and the sale stopped by a claim affidavit, to be in a position to give the proper attention to his case when it is to be called. Had the petitioner in this case performed his duty and appeared at the trial of the claim case, he could have informed the court of the failure of his counsel to appear, and that he could not safely go to trial without counsel. The court would then doubtless have continued the case or postponed it to another day. Instead of doing this, he remained away from the court, and relied entirely upon his counsel. This was such negligence on his part as to debar him from relief in a court of equity. In the case of Mullins v. Christopher, 36 Ga. 584, it was held by this court that "if a party have a good defense at law, and from negligence fail to set it up at the proper time, he must take the consequences of his own laches; he cannot go into equity to be relieved from the consequences of such negligence." See cases cited in the opinion of Walker, J., and also Donaldson v. Roberts (Ga.) 35 S. E. 277, and cases there cited. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

HARRELL v. CITIZENS' BANKING CO.

(Supreme Court of Georgia. June 7, 1900.)

PLEDGE—CONVERSION OF COLLATERAL—ACTION ON NOTE—DEFENSES.

1. Where the payee of a promissory note secured by a collateral converts the same to his own use by an unauthorized sale thereof, he becomes liable to the maker of the note for the actual value of the collateral at the time of the sale. Waring v. Gaskill, 22 S. E. 659, 95 Ga. 731.

2. Inasmuch as the purchaser of a negotiable promissory note after its maturity takes it subject to the equities between the original parties, the maker, in a case of the nature above indicated, may, in defense to an action against him by such purchaser, recoup the value of the collateral at the time of its conversion by the original payee.

3. Applying the rules above announced to the facts of this case, the verdict was contrary to law and to the evidence, and the court ought to have granted a new trial.

(Syllabus by the Court.)

Error from superior court, Dodge county; C. C. Smith, Judge.

Action by the Citizens' Banking Company against B. H. Harrell. Judgment for plaintiff. Defendant brings error. Reversed.

Roberts & Milner, for plaintiff in error. W. M. Clements, for defendant in error.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

BENNETT v. MITCHELL COUNTY.

(Supreme Court of Georgia. June 8, 1900.)

DEDICATION—EVIDENCE—DIRECTING VERDICT.

1. In the trial of an issue as to whether or not certain land was by a county dedicated to the public, it was not error to exclude the testimony of a witness as to what "the public understood" on the day of sale in regard to the dedication of the land by the county authorities, no act or declaration of such authorities being shown on which such an understanding could have been predicated.

2. There was sufficient evidence admitted to authorize the jury to infer a dedication of the land by the county authorities, and it was error to direct a verdict to the contrary.

(Syllabus by the Court.)

Error from superior court, Mitchell county; H. C. Sheffield, Judge.

Action between P. A. Bennett and Mitchell county. From the judgment, Bennett brings error. Reversed.

S. S. Bennett, for plaintiff in error. I. A. Bush & Sons, for defendant in error.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

FINNEY v. EQUITABLE MORTG. CO.

(Supreme Court of Georgia. June 7, 1900.)

ACTION ON NOTE—USURY AS DEFENSE—EVIDENCE.

1. When the defendant in an action upon a promissory note admits enough to make out a prima facie case for the plaintiffs, and sets up the defense of usury, it is incumbent upon him to establish the same by evidence, and, if he fails to do so, the court may direct a verdict for the plaintiff.

2. Where, in such a case, it affirmatively appeared that the plaintiff, to whom the defendant had applied for a loan of the money for which the note in suit was given, remitted to a named person a check for the full amount of the note, less a sum which the defendant had agreed to pay to a corporation for negotiating the loan, the check being payable to the order of the person named therein as agent of the defendant, evidence which showed merely that this person was not the defendant's agent to borrow the money, and that he paid over to the defendant a sum less than that named in the check, was not sufficient to show that the transaction was usurious. It was incumbent upon the defendant to show further that the payee of the check was in fact the plaintiff's agent, and that as such he kept a portion of the money with a view to exacting usury on the loan.

(Syllabus by the Court.)

Error from superior court, Dooly county; Z. A. Littlejohn, Judge.

Action by the Equitable Mortgage Company against W. B. Finney. Judgment for plaintiff. Defendant brings error. Affirmed.

Guerry & Hall, for plaintiff in error. E. A. Hawkins, for defendant in error.

COBB, J. The Equitable Mortgage Company sued Finney upon a promissory note, the payment of which it was alleged was secured by a deed which had been by the defendant executed and delivered to the plaintiff. The petition prayed for a judgment setting up a special lien on the land described in the deed. The defendant filed a plea setting forth that the deed was invalid, for the reason that the debt which it was given to secure was infected with usury. At the trial the defendant admitted the execution of the note and deed, assumed the burden of proof, and undertook to establish the truth of his plea of usury. From the evidence it appeared that the defendant had made application in writing to the Georgia Security Investment Company to negotiate a loan for him for $400, that company being described in the application as the agent of the applicant, and it being agreed therein that the applicant was to pay to such company the sum of $75 as commissions for negotiating the loan. The loan negotiated was represented by the note sued on, which was for $430. The defendant testified that he received only $354 of this amount. It appeared that a check for $355 had been forwarded to R. D. Smith, who is described in the check as the agent of the defendant, and the amount of the check is stated therein to be the "amount of loan negotiated by the Georgia Security Investment Company." The $354 which reached the defendant was paid to him by Smith. Upon this state of facts the judge directed a verdict in favor of the plaintiff, and this is assigned as error in the bill of exceptions sued out by the defendant.

It is contended on the part of the plaintiff in error that as the agreement with the Georgia Security Investment Company was that the commission for negotiating the loan should be $75, and, as $76 was retained, the amount of the note, less this sum, being the amount received by the defendant, the truth of his plea was established. Even if it be conceded that a difference of one dollar in the transaction would authorize the setting aside of a deed on the ground that the debt which it was given to secure was infected with usury, still the defendant failed to carry the burden which he assumed in undertaking to establish the truth of his plea. It does not distinctly appear, except from the recitals in the check, that Smith was the agent of either party. He was the person through whom the money reached the defendant, but just what his connection with the transaction was is not at all clear. The burden of proof was upon the defendant, and therefore, even if Smith retained one dollar of the amount in his hands, before the defendant can be said to have established his plea of usury, he should have shown that Smith was the plaintiff's agent, and as such kept the difference between the amount of the check forwarded to him and the amount actually paid over to the defendant with a view to exacting usury on the loan made to

the defendant. As this did not appear, the plea was not established by evidence, and the court did not err in directing a verdict for the plaintiff. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

MORRISON et al. v. ANDERSON.

(Supreme Court of Georgia. June 7, 1900.)

EXECUTION—RIGHTS OF CLAIMANT—PROCEDURE.

A claimant of property levied upon has no right to make a motion to quash the attachment or judgment upon which the execution is based, or the execution itself. His only concern being that the process shall not be enforced by a seizure and sale of his property, his remedy, in a case where such a motion would be good if presented by the proper party, is to move to dismiss the levy. Bosworth v. Clark, 62 Ga. 286; Morton v. Gahona, 70 Ga. 569; Krutina v. Culpepper, 75 Ga. 602; Gazan v. Royce, 3 S. E. 753, 78 Ga. 512; Davidson v. Rogers, 7 S. E. 264, 80 Ga. 287.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

Trial of claim of property levied on under execution between H. K. Anderson and Morrison & McRae. Verdict for claimant, and plaintiffs appeal. Reversed.

J. B. Geiger, for plaintiffs in error. C. D. Loud, for defendant in error.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

HANNAH v. JOHNSON.

(Supreme Court of Georgia. June 8, 1900.)

ACTION ON NOTE—PAYMENT.

1. When, in his answer to an action upon promissory notes, the defendant set up that he had made various payments thereon, and claimed credit for the same, it was incumbent on him to prove his defense as laid.

2. Where, to this end, he introduced testimony which merely tended to show that he had made certain payments on these notes, but which did not affirmatively establish the fact that he had made any one or more of the payments alleged, a verdict in the plaintiff's favor for the full amount sued for was not unwarranted, and there was no abuse of discretion in refusing to set it aside.

(Syllabus by the Court.)

Error from superior court, Clinch county; Joseph W. Bennet, Judge.

Action by W. B. Johnson against C. C. Hannah. Judgment for plaintiff. Defendant brings error. Affirmed.

S. C. Townsend, for plaintiff in error. W. H. Griffin and R. J. Dickerson, for defendant in error.

PER CURIAM. Judgment affirmed.

FISH, J., absent on account of sickness.

MAYOR, ETC., OF EASTMAN v. CA ERON.

(Supreme Court of Georgia. June 7, 190

TOWN TREASURER—RIGHT TO COMMISSIC

A petition for the recovery of com sions which alleges that the plaintiff is tled to a specified per cent. on a named "for receiving the same," and to a like cent. "for paying the same over," but w does not unequivocally aver that the p tiff actually received and disbursed the referred to, is demurrable for evasiveness uncertainty.

(Syllabus by the Court.)

Error from superior court, Dodge cou C. C. Smith, Judge.

Action by J. B. Cameron against the m and council of Eastman. Verdict for pl tiff, and defendants bring error. Reverse

Jas. Bishop, Jr., and D. M. Roberts, plaintiffs in error. J. E. Wooten and W. Clements, for defendant in error.

LUMPKIN, P. J. The material porti of the petition of J. B. Cameron against mayor and council of the town of Eastı are as follows: During the years 1895, 1 and 1897 he was the clerk and treasure said town. It was his duty to receive pay out all money coming to the mayor council from every source. He was e tled, under the charter and ordinances of town, to commissions of 2½ per cent. on sums received and paid out by him. Ur an act approved December 15, 1894, the m or and council were authorized to is school bonds to the amount of $10,000. pursuance of said act and the election thereunder, the said mayor and council, August 26, 1897, declared the provisions said act to be in force, and provided for issue of the said bonds. And on the 1st of September said mayor and council iss said bonds to the amount of $10,000, negotiated them at par, and the proc thereof were turned over to the board of cation of said town; all of which was d as required by the provisions of said Petitioner avers that he being, at the t said bonds were issued and negotiated, clerk and treasurer of said town, and only officer of said town authorized by law to receive the proceeds of the sal said bonds and pay the same over to board of education, is entitled to a com sion of 2½ per cent. on said sum of $10 for receiving the same, and 2½ per cent said sum for paying the same over to board of education. Petitioner avers, th fore, that said mayor and council of the t of Eastman, a corporation as aforesaid indebted to petitioner in the sum of $500 his commissions, as aforesaid, besides in est thereon from the 1st day of Septem 1897, the date on which the said bonds v issued and disposed of." The defendant murred to this petition on several grou and, its demurrer having been overruled,

plaintiff had a verdict. The defendant subsequently sued out a bill of exceptions, alleging error in not sustaining its demurrer, and in denying its motion for a new trial. Without dealing with this motion, or with all of the questions raised by the demurrer, we shall confine ourselves to a brief discussion of the merits of so much thereof as is embraced in the following words: "Because the petition shows that the commission to which the plaintiff alleges that he was entitled was 2½ per cent. on money received by him, and 2½ per cent. on money paid out by him, as clerk and treasurer, but it is not distinctly alleged, either expressly or by necessary inference to be drawn from the adroit language employed, that the $10,000 for which plaintiff alleges the bonds were negotiated was ever actually received by him or that it was paid out by him; * * * because said petition is evasive, and does not put the court in full possession of all the material facts in reference to the subject-matter of the suit, so as to enable the court to clearly understand the case intended to be made by plaintiff, and expressions are used in the petition from which different inferences may be drawn."

We think the attack thus made upon the petition was good, and that the demurrer ought to have been sustained. As it directly called upon the plaintiff to say, without evasion, whether or not he actually received and paid out the $10,000, it was incumbent upon him to do so. The evident design of the pleader, so far as the same can be gathered from the allegations contained in the petition framed by him, was to ask for a recovery upon the theory that the facts set forth would warrant an inference that the plaintiff did receive and disburse the money, and was therefore entitled to the commissions claimed; yet, when put to the test, he would not squarely and unequivocally aver that the plaintiff actually received and paid out the money, or that he had really performed any service with respect to this fund. The failure to do this justified the defendant's position that the petition was "evasive," and did not "put the court in full possession of all the material facts in reference to the subject-matter of the suit, so as to enable the court to clearly understand the case intended to be made by plaintiff." If the clerk actually rendered any services in connection with the proceeds of the bonds, or ever in any manner handled the same, it was a very easy matter to say so; and the fact that his counsel, instead of endeavoring to meet the defendant's demurrer by a proper amendment to the petition, deliberately elected to stand upon the same as originally framed, is significant. We therefore have no hesitation in holding that the plaintiff was not entitled to go to trial without curing the defects in his petition which were so plainly and distinctly pointed out by the defendant's demurrer.

This ruling may, at first glance, seem somewhat technical, but the soundness of it is illustrated by the result of the case. It appeared at the trial that the plaintiff had never, in point of fact, received one dollar of the proceeds of the bonds, and therefore his recovery, if sustainable at all, could not possibly be based upon the theory that he had actually rendered services for which he was entitled to compensation. Indeed, his counsel, in a written argument presented to this court, sought to uphold the verdict on an entirely different ground, viz. that the evidence showed that, "to avoid paying this commission, an ordinance was subsequently enacted providing that the mayor and council should deliver the bonds to the board of education of the town of Eastman, which said board negotiated the bonds, and thereby, for the time being, defeated the collection by the said clerk of his commission." In this connection, the case of Beard v. City of Decatur, 64 Tex. 7, 53 Am. Rep. 735, was cited and relied on. As will have been observed, however, there is no hint in the petition of a fraudulent purpose on the part of the mayor and council to defeat the plaintiff's rights in the premises by passing an ordinance the effect of which was to prevent the school fund from passing through his hands. Nor does the plaintiff undertake to therein allege that, although he was ready and willing to discharge the duties of his office, he was by any other means or device prevented from receiving, safely keeping, and paying out the fund, and thereby defrauded out of his just commissions. Had the petition been framed on this line, the case laid would have presented an altogether different aspect.

The necessity of observing at least a semblance of good pleading is apparent from what has just been said. The refusal of the trial court to sustain the defendant's demurrer has brought about the anomalous result of the plaintiff obtaining a verdict upon a theory not even remotely hinted at in his petition. While, of course, it is not permissible to look to the evidence in any case with a view to testing the sufficiency of the pleadings, the probable consequences of not requiring good pleading should never be lost sight of, and what transpired on the trial of the present case may very properly, by way of argument, be referred to as illustrating to what bad results defective pleading, if allowed, must inevitably lead. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

VICKERS v. HAWKINS.

(Supreme Court of Georgia. June 8, 1900.)

TAXATION—LEVY ON WILD LAND—TAX EXECUTION—ALTERATIONS—PRESUMPTIONS.

1. The levy of a wild land tax fi. fa. cannot be attacked on the ground that it is excessive, when the fi. fa. is issued, not against the own-

er, but against the particular lot of land levied upon, and commands the levying officer to sell that lot for the taxes due upon it.

2. Where it appears that alterations or changes have been made in the entry of levy upon a tax execution, it will be presumed that such alterations or changes were made at the time of the original entry and before the sale, and the burden is upon the objecting party to show the contrary. (a) The evidence in the present case was not sufficient to rebut the presumption.

(Syllabus by the Court.)

Error from superior court, Worth county; W. N. Spence, Judge.

Action by A. H. Hawkins, by his next friend, against E. L. Vickers. Judgment for plaintiff. Defendant brings error. Reversed.

C. W. Fulwood, J. J. Forehand, and Fulwood & Murray, for plaintiff in error. Perry & Tipton, for defendant in error.

SIMMONS, C. J. In the year 1888 the tax collector of Worth county issued a tax execution against lot of land No. 211, in the Fourteenth district of Worth county, as unreturned wild land. The execution commanded the levying officer to levy upon and sell this particular lot in order to raise the unpaid state and county taxes due thereon. On January 30, 1889, a proper officer levied this fi. fa. upon the lot, and, after legal advertisement, exposed the lot for sale on May 7, 1889. At that sale Dixon purchased the lot, and afterwards conveyed it to Vickers. In 1897, A. H. Hawkins, by his next friend, brought suit to recover the land from Vickers. He showed a grant from the state to Horne of this lot; a deed from Horne to S. H. Hawkins, made in 1887; and a deed from him to his son, the plaintiff in the present action, made in 1893. The defendant offered in evidence the deed of the sheriff, made in May, 1889, together with the wild land tax fi. fa. and the entries thereon. The plaintiff's counsel objected to the admission of this evidence upon the grounds (1) that the entry of levy upon the fi. fa. showed that the levy had been excessive; and (2) that the original entry of levy appeared to have showed a levy upon lot "221," and that this had been canceled, and the number "211" inserted instead. The court excluded the evidence, and directed a verdict for the plaintiff. The defendant filed a bill of exceptions complaining of the exclusion of the evidence offered.

1. We think the judge erred in excluding the deed and fi. fa., upon the ground that the entry of levy showed on its face that the levy was excessive. The execution issued for the amount of $3.26, with costs. It was levied upon the lot of land, the value of which the witnesses estimated at from 50 cents to $1.50 per acre. In the case of an ordinary execution against the person, such a levy would be excessive, but we think there is a difference between an execution issued in personam and an execution in rem. This execution was issued, by virtue of an act of the legislature, against unreturned wild lands. A great quantity of the wild land of the state appears to have been unreturned, and the legislature, in order that the state might not lose the taxes on such land, inaugurated a system by which the tax officers were required to issue executions against the land itself where it had not been returned. This was doubtless for the purpose of collecting the taxes already due, and of placing the title in persons who would return the land and pay the taxes. It was in the nature of a proceeding in rem against the land, and the execution directed that the lot be sold for the taxes and costs. The sheriff was obliged to levy upon the whole lot in obedience to the command of the execution. There being no known owner of the land, and no person returning it for taxes, it was right and proper to levy upon and sell the entire lot in order to place the title in some one who would return the lot for taxes. Had the sheriff sold only a sufficient quantity of the lot to pay the amount of the fi. fa., the balance would have still been without a known owner, and remained unreturned for taxes. This would have rendered ineffectual the policy of the state to put the title in some known person, who would return the lot for taxes. We think that an execution in rem against certain specific property may properly be levied upon that property, and that the levy will not be void for excessiveness, though the value of the property be far greater than the amount of the execution. We therefore think that where a tax execution is issued against a particular lot of land, commanding the levying officer to levy upon and sell that lot, a levy of the execution upon the entire lot is not excessive. This was intimated by Mr. Justice Lewis in Hilton v. Singletary, 107 Ga. 826, 33 S. E. 717, where he said: "We question very much whether this doctrine of excessiveness [of levy] can be applied to a case of this sort, where the fi. fa. issued in rem against specific property, namely, a certain wild-land lot, for taxes due thereon. The sheriff is ordered to seize the identical property levied upon and sold, and in the mandate to him there is no implied authority to seize a greater or less quantity than that specified in the fi. fa. It is in the nature of a proceeding in rem."

2. Nor was the other objection to the evidence good. It was that the entry of levy had been changed by canceling the number "221," originally written therein, and writing the number "211" above, below, and over it. The execution was issued against lot 211, in the Fourteenth district of Worth county. The sheriff advertised lot 211, and made the deed to lot 211. There was some evidence introduced by the plaintiff and defendant as to the change or alteration in the entry of levy. The clerk of the court who recorded the deed testified that he did not know whether the change or alteration had been made at the time of the record. The other evidence

was to the effect that the change or alteration had been made before Dixon conveyed the land to the defendant. There was really no evidence tending to show whether the alteration was made at the time of the original entry and before the sale, or whether it was made subsequently thereto. This entry of levy purported to be an official one by the sheriff. He was the person charged by law with the execution of the fi. fa., and, when alterations in his entry appear, it will be presumed that he made them at the time of the original entry, and consequently before the sale. This presumption must be rebutted by the person attacking the levy. Otherwise, the official entry of the officer will stand as correct, and the levy will not be invalidated by the alteration, although the same appear on its face. Collins v. Boring, 96 Ga. 360, 23 S. E. 401. For these reasons we think the court below erred in excluding the evidence offered by the defendant. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

McCULLOUGH EXPORT LUMBER & WAREHOUSE CO. et al. v. NATIONAL BANK OF BRUNSWICK et al

(Supreme Court of Georgia. June 8, 1900.)

BILL OF EXCEPTIONS—CORRECTION BY JUDGE—VERIFICATION—SALE BY COMMISSIONER—VALIDITY.

1. Section 5528 of the Civil Code requires a judge, when a bill of exceptions is presented to him for his certificate, to change it, if needful, so as to make it conform to the truth. It is better practice, where corrections are made or suggested, to have the paper rewritten; but if the judge makes erasures or interlineations, or writes in the margin or below the signature of counsel for the plaintiffs in error, and then certifies the bill of exceptions, as corrected, to be true, such corrections will be considered as a part of the bill of exceptions, wherever they precede the certificate of the judge.

2. Where such bill of exceptions is thus corrected by interlineations, and by a note immediately preceding the certificate of the judge, and that certificate verifies the "bill of exceptions as corrected by the court," this court will not dismiss the writ of error because of such certificate, where the interlineations and note do not in any way contradict any statement or recital remaining in the bill of exceptions, but merely add additional facts.

3. A commissioner appointed by the court, with the consent of all the parties at interest, to sell the assets of an insolvent company at a sale to be reported by him to the court for confirmation, cannot make a valid sale to a banking corporation in which he is a stockholder and director; and this is true although it is not shown that the property brought less than its value, and there is no allegation of unfairness in the sale. Such a sale is contrary to public policy, and will be set aside upon objection promptly urged.

(Syllabus by the Court.)

Error from superior court, Glynn county; P. E. Seabrook, Judge.

Action by the National Bank of Brunswick and others against the McCullough Export Lumber & Warehouse Company and others. Judgment for plaintiffs. From the confirmation of an order of sale of property of defendants, they bring error. Reversed.

Courtland Symmes and Spencer R. Atkinson, for plaintiffs in error? Goodyear & Kay, for defendants in error.

SIMMONS, C. J. 1, 2. Before proceeding to a discussion of the merits of this case, we will consider a motion made by counsel for the defendants in error to dismiss the writ of error on the ground that the trial judge's certificate to the bill of exceptions does not conform to the requirements of section 5532 of the Civil Code. In this connection we will also notice the contention of counsel for the plaintiffs in error that a certain note or correction of the judge should not be considered as a part of the bill of exceptions. The bill of exceptions is typewritten, but contains two or three interlineations in pen and ink, which seem to be in the handwriting of the judge, though in no other way identified as his corrections. Further than this there is, immediately following the signature of counsel for the plaintiffs in error and immediately preceding the certificate of the judge, a "note" signed by the judge, and containing a statement of fact additional to what is stated in the bill of exceptions proper. The certificate of the judge is in the usual form, except that it certifies the "bill of exceptions, as corrected by the court." It was urged by the plaintiffs in error that the note made by the court below the signature of the counsel for the plaintiffs in error could not be considered; that the law requires bills of exceptions to be signed by counsel, and nothing appearing below such signatures is any part of the bill of exceptions. Section 5528 of the Civil Code requires that the judge to whom is tendered a bill of exceptions in a case where no motion for a new trial has been made "shall, if needful, change the same so as to conform to the truth and make it contain all the evidence, and refer to all the record, necessary to a clear understanding of the errors complained of." While it is the better practice for the judge to suggest what changes are necessary, and have the bill of exceptions rewritten before he signs it, still it is in his power to make, by erasures, interlineations, marginal notes, or other notes which precede his certificate, the changes in the bill of exceptions which is presented to him. If he does so, and then certifies the bill of exceptions as true, the changes will be considered as a part of the bill of exceptions. Smith v. Railroad Co., 83 Ga. 671, 10 S. E. 361; Joseph v. Railway Co., 92 Ga. 332, 18 S. E. 294. It would, of course, be much better and safer for counsel for the plaintiff in error, and less troublesome to this court, for the paper to be rewritten so as to come here without marginal or other notes or extensive inter-

lineations; and we would respectfully urge the trial judges to have this done, rather than to so mutilate the bill of exceptions by erasures, interlineations, and marginal notes that it is difficult for the court to read it or to determine the errors complained of. In the present case the certificate is not in the usual form, but certifies the "bill of exceptions, as corrected by the court." This, we think, makes no difference in the present case, for the reason that the corrections do not in any way contradict anything remaining in the bill of exceptions. Taking the whole bill of exceptions, in its entirety, there is nothing in any one part to show that any other portion is not true. We are clear, therefore, that the note of the court must be considered a part of the bill of exceptions, inasmuch as it precedes the certificate of the judge, and is expressly certified as a part of the bill of exceptions. See Preetorius v. Barnes, 75 Ga. 313; Masland v. Kemp, 80 Ga. 365, 10 S. E. 124. Indeed, we think that the corrections to which the judge's certificate refers must be taken to include this note, and that, unless the note be considered as a part of the bill of exceptions, there is no certificate that the remainder is true. The bill of exceptions must be considered as certified only when corrected by this note, and, unless we should consider the note, this court could not construe the certificate as certifying the bill of exceptions proper, without the correction made in the note of the court. As before remarked, an examination of the bill of exceptions and of the note of the court shows that the latter does not contradict any statement made in the former, but merely adds to it another fact. We think that we cannot sustain the motion to dismiss the writ of error. The corrections made by the judge are simply additional statements of facts which had been omitted by counsel, and which the judge thought necessary to a clear understanding of the case. The material part of the corrections was to state that a certain decree or order was taken in open court by consent, with counsel for all parties present. This does not contradict anything stated in the bill of exceptions as presented to the judge. One of the interlineations simply specifies this decree as part of the record to be sent to this court, and the note of the court states that the decree was taken by consent. The bill of exceptions, as corrected by the judge, is certified to be true. The certificate is substantially in conformity with that prescribed by the Code, and the case is controlled by the decision in Pusey v. Sweat, 92 Ga. 809, 19 S. E. 816. Counsel for the defendants in error relied upon the cases of Hawkins v. City of Americus, 102 Ga. 786, 30 S. E. 519; Fort v. Sheffield (Ga.) 33 S. E. 660; and Sanges v. State (Ga.) 34 S. E. 327. These cases differ materially from the present one. In Hawkins v. Americus the certificate of the judge verified the bill of exceptions in part only, and showed it to be in part untrue. The opinion of Little, J., in that case showed that this court had no jurisdiction of a writ of error when the judge did not certify that the bill of exceptions was entirely true. In Fort v. Sheffield the certificate was that the bill of exceptions, as modified by the note of the court, was true, and the note showed that the bill of exceptions was in large part not true. The note in that case sought to correct statements in the bill of exceptions, without their having been canceled or erased; and we had before us two contradictory statements of facts,—the bill of exceptions proper, and the note of the court. It followed that the certificate of the judge did not verify the bill of exceptions as being entirely true. The case of Sanges v. State was very similar, and the writ of error was dismissed for the same reasons. In the present case the corrections of the judge did not change or contradict a single allegation or statement in the original bill of exceptions. It merely added to it, leaving the whole consistent in all of its parts, and the certificate verified it all as true. The motion to dismiss is therefore overruled.

3. Coming now to a consideration of the case on its merits, we find the facts to have been substantially as follows: Judgment was rendered against the McCullough Export Lumber & Warehouse Company, and by a decree of the court, to which all the parties at interest consented, Mark Verdery was appointed commissioner to sell the assets of the company. The decree instructed him to advertise the sale for a certain length of time in a certain newspaper, to sell the property at public outcry not earlier than a certain date, to knock off the property to the highest and best bidder, and to report the sale back to the court for confirmation. In compliance with the terms of the order, he duly advertised the sale, and sold the property at public outcry; the National Bank of Brunswick being the purchaser. The commissioner made his report to the court; stating that he had complied in every way with the court's instructions, and had sold the property to the highest and best bidder,—the National Bank of Brunswick,—and praying that the sale be confirmed. Objections to the sale were filed by the defendant company and McCullough on the grounds that the property sold for a sum far below its value; that Verdery was a shareholder and director in the bank, and therefore interested in the bank's purchase; that, being so interested, he was disqualified to act as commissioner to sell; that the counsel for the commissioner was also counsel for the purchaser, the bank, and was one of the shareholders of the bank; that the sale was made at a date earlier than was authorized by the decree of the court; and that the sale was for these reasons void, and should not be confirmed. The issue was heard upon an agreed statement of facts, which was, substantially, that it was an

open question whether the amount for which the property sold was more or less than its value, or more or less than it would bring upon a resale; that the purchaser, the bank, was and is a duly-created corporation, and was and is the holder of a large part of the bonds upon which the suit had been brought; that Verdery, the commissioner, was and is a shareholder and director of the bank; and that the counsel for the commissioner was also counsel for the bank, and a holder of stock of the bank. It also appeared that the date of the sale was the very day earlier than which the court's decree had directed that the sale should not take place. After argument, the court overruled the objections and confirmed the sale. To this the objectors excepted. We think that the court should have sustained the objections filed, and have refused to confirm the sale. It is recognized as a general rule that a trustee cannot act for his own benefit in matters connected with the trust, and it is held that, where a trustee becomes himself the purchaser of the trust estate, the cestuis que trustent may set aside the sale, though it was at public auction, bona fide, and for a fair price. The reason of the rule is that the trustee, as the representative of the trust estate, is interested in selling for the highest possible price, while he is at the same time, as the purchaser, interested in buying for the lowest possible price, and that it is against public policy to allow him to assume positions so inconsistent and so full of temptation; there being a direct conflict between interest and duty. So careful are the courts to place the trustee beyond the reach of all temptation, that the sale will be set aside without a consideration of the question whether or not there has been actual fraud, or whether the property did, as matter of fact, bring an inadequate price or sell for its full value. "The cestui que trust is not bound to prove, nor is the court bound to judge, that the trustee has made a bargain advantageous to himself. The fact may be so, and yet the party not have it in his power to distinctly and clearly show it. There may be fraud, as Lord Hardwicke observed, and the party not able to prove it. It is to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule does and will permit the cestui que trust to come, at his own option and without showing actual injury, and insist upon having the experiment of another sale." Davoue v. Fanning, 2 Johns. Ch. 251. See, also, Harrison v. McHenry, 9 Ga. 164. If this be the rule where the trustee purchases for himself, it would seem to apply with equal force where he is only part purchaser or is interested in the purchase. Had the commissioner in the present case been the holder of all of the stock of the corporation purchasing the property, he would practically have been himself the purchaser; and the fact that he held an amount of stock less than all could make no difference in principle, but only in degree. The same reason would necessarily control and demand the application of the same rule. The temptation might be lessened, but it would not be removed; and it is not against its existence in any specified or certain degree, but against its existence at all, that courts must guard. As was said by Chancellor Kent in Davoue v. Fanning, supra, "The distinction of its being a weaker temptation is too thin to form a safe rule of justice." In the present case there is no proof that the property brought less than its full value, and no allegation whatever of any fraud or irregularity in making the sale; but, as is said in High, Rec. (3d Ed.) § 194, the rule "is entirely independent of the question whether any fraud in fact has intervened." In the same section it is also stated that the rule applies "notwithstanding the sale is a judicial sale." In Railroad Co. v. Bowler's Heirs, 9 Bush, 468, where a judicial sale was set aside, the court said that "an agent or trustee cannot rightfully place himself in a position exciting in his own bosom a conflict between self-interest and the duty he owes to those for whom he acts." And in the case of York Buildings Co. v. Mackenzie, 8 Brown, Parl. Cas. 42, decided in 1795 by the English house of lords, and denominated by Chancellor Kent as "high and authoritative," the sale was a judicial one, and was at public auction. The court had fixed an upset price, and confirmation by the court was necessary to complete the sale. The property was bid in by the "common agent" of the court, on whose information the upset price had been based; and it was held that he was in the nature of a trustee, and incapacitated to become the purchaser, although the sale was a judicial and public one, and the minimum price fixed by the court. Thus, the fact that the sale was a judicial one, not to be complete until after confirmation by the court, is no reason why it should not be set aside. There was still an opportunity for fraud on the part of the commissioner which might not have been discoverable by the court. In such case disqualification is worked by the bare chance or opportunity for fraud. We have no reason to believe that Mr. Verdery did not, as matter of fact, act solely for the best interests of the owners of the property, and without being in the slightest degree influenced by his personal interest in the purchase, but this cannot affect the question at all. In the case of Dimes v. Grand Junction Canal, 3 H. L. Cas. 759, a decree was held voidable because the lord chancellor of England, who was disqualified from interest because a shareholder in an interested corporation, presided. This case was cited with approval in Livingston v. Cochran, 33 Ark. 294, where a sale was set aside because the purchaser was the probate judge who had ordered the sale, although the court said that he might have been perfectly inno-

cent of any willful or intentional wrong in the matter.

It was urged by counsel for the defendants in error that the confirmation of the sale was proper because the defendant had, knowing that Verdery was a shareholder and director of the bank, and that the bank held a large part of the bonds, and that the bank might be compelled, in order to protect itself, to become the purchaser, consented to the decree appointing Verdery as commissioner. We think that a consent to the appointment of Verdery as commissioner to sell is in no sense a consent that he might become the purchaser at his own sale, or that the property might be bid in by a corporation in which he was pecuniarily interested. A knowledge that the bank held bonds was not knowledge that it would in any event become the purchaser at the sale. It was to be presumed that the property would, at public and open sale, bring its fair market value; and no one was chargeable with knowledge that the bank would be compelled, for its own protection, to buy in the property for more than it was worth.

For these reasons, we think that the objections to the sale should have been sustained, and the sale set aside. We cannot see any merit in the remaining grounds of objection to the sale, to wit, those relating to the disqualification of the commissioner's counsel and to the date of the sale; but, as we decide that the sale should be set aside upon other grounds, it is unnecessary to rule upon these. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

CLYATT v. BARBOUR et al.

(Supreme Court of Georgia. June 8, 1900.)

LANDLORD AND TENANT—LEASE—RENT—PAYMENT—CONDITION PRECEDENT—INJUNCTION.

1. Where a landowner leased to another the timber on three named lots of land "for turpentine purposes," for three years from the time boxing began, and the lease expressly stipulated that the money should be paid before boxing began, the payment of the amount due for all of the lots was a condition precedent to the lease becoming operative. Where, in such case, the landowner claimed that the money for but two of the lots was tendered him, and he thereupon leased the lots to a third party, and the first lessee filed an equitable petition for injunction against the second lessee, and claimed therein title to the timber, and on the hearing before the judge the evidence was conflicting as to whether the petitioner had tendered the money for all three lots, or for only two, the judge, having found in favor of the latter contention, did not abuse his discretion in refusing the injunction.

2. Not having complied with the condition precedent by tendering the whole amount due, the petitioner had no such "perfect title" as would authorize an injunction in his favor under section 4927 of the Civil Code, as amended by the act of 1899, without proof of irreparable damage, or of the insolvency of those whom he sought to enjoin.

(Syllabus by the Court.)

Error from superior court, Irwin county; C. C. Smith, Judge.

Suit by D. T. Clyatt against one Fletcher and Barbour Bros. & Co. to restrain defendants Barbour Bros. & Co. from operating under a lease of turpentine lands. From a judgment denying the injunction, plaintiff brings error. Affirmed.

Fulwood & Murray, for plaintiff in error. J. H. Martin, for defendants in error.

SIMMONS, C. J. On October 28, 1895, Fletcher leased the timber on three certain lots of land to Clyatt, for turpentine purposes, for the term of three years from the date of cutting the boxes. The lease fixed the price of the timber at $1.50 per acre, and expressly stipulated that the "timber was to be paid for before boxing." The record discloses that when Clyatt got ready to box the timber, and had in fact commenced boxing, Fletcher appeared, and stopped him because he had not paid for the timber. Subsequently Fletcher leased the same timber to Barbour Bros. & Co., who commenced boxing the timber. Clyatt filed an equitable petition against Fletcher and Barbour Bros. & Co., setting up his lease, and praying that the defendants be restrained from boxing or cutting the timber. The evidence for the plaintiff tended to show that at the time of the original lease the title to one of the lots was in dispute, and that Fletcher and Clyatt had agreed that the price of the timber on this lot should be deposited in a certain bank, to await the termination of the litigation in regard to the lot. The plaintiff's evidence also tended to show that subsequently to the lease this agreement was ratified and renewed; Fletcher agreeing that the money might be deposited in another bank, and agreeing to receive the certificate of deposit in lieu of cash. His evidence further tended to show that, upon the occasion when plaintiff commenced boxing, he tendered Fletcher the price of the timber upon two of the lots and this certificate of deposit of the price of the timber upon the lot to which the title was in litigation. Fletcher denied having made such an agreement, and insisted that he had demanded the cash to be paid into his hands before the boxing should commence. He positively denied making any agreement in regard to any certificate of deposit, and testified that the price of the timber upon the three lots had never been tendered him. This is the substance of the evidence. The judge, after hearing it, refused the injunction, and Clyatt excepted.

As has been shown, the evidence as to the tender of the price of the timber was conflicting. The lease was of the timber on three lots, without any special mention of the lot which was in litigation. There was an express stipulation that the timber should be paid for before the boxing began. This was made a condition precedent by the agreement of the parties. The estate, therefore, did not

vest in Clyatt until the whole price was paid or tendered. Civ. Code, § 3137. If Fletcher's contention be true,—that he had never agreed to receive a certificate of deposit in lieu of the money,—a tender of such certificate would not be a compliance with the condition. The money itself should have been tendered or paid. Clyatt, not having paid for the timber or made a proper tender of payment, had no such title as would authorize a court of equity to grant an injunction without proof of insolvency or irreparable damage. There is no allegation in the petition that the damages are irreparable. On the contrary, they are estimated in dollars and cents, at an amount which the petitioner alleges he is ready to prove. The testimony shows that both Fletcher and Barbour Bros. & Co. are abundantly solvent. Of course, we do not intend to express any opinion as to the truth of the contention of either party as to making tender. That will be a matter for the determination of the jury on the final trial. We simply hold that where the evidence is conflicting, and the judge accepts as true that of one party, we will not control his discretion in so doing. In the present case, taking as true that portion of the evidence which the judge accepted as true, the refusal of the injunction was not improper. Judgment affirmed. All the justices concurring, except FISH, J., absent on account of sickness.

WALTON GUANO CO. v. McCALL et al.

(Supreme Court of Georgia. June 7, 1900.)

PRINCIPAL AND AGENT—BILLS AND NOTES—COLLECTION—PAYMENT TO AGENT—POSSESSION OF NOTE—AUTHORITY—TRIAL—VERDICT—EVIDENCE.

1. Agency to sell does not necessarily carry with it authority to collect.

2. If the debtor by promissory note makes a payment thereon to one claiming to be an agent for collection, it is incumbent on the former to see that the latter is in possession of the security; for, if he is not, the debtor will be liable to pay again, unless the person making the collection had authority to collect the sums due his principal, or the money actually reached the owner.

3. Such authority is not shown by proving occasional instances of receiving partial payments upon a promissory note, in each of which the person so doing produced the paper and entered the credit.

4. The defense of payment set up in the present case was not sustained by evidence, and consequently the court erred in not setting aside the verdict returned in favor of the defendant.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by the Walton Guano Company against J. M. McCall and others. From a judgment in favor of defendants, plaintiff brings error. Reversed.

Hal Lawson and Eldridge Cutts, for plaintiff in error. J. L. Bankston and Bankston & Cannon, for defendants in error.

LEWIS, J. This was a suit brought in the county court of Wilcox county against the defendants upon a promissory note given for $256 for a certain quantity of guano bought by defendants from plaintiff. The suit was for a balance of $47.30 due on the note, besides interest and attorney's fees. Upon the note were divers credits, which seem to have reduced the principal amount to the amount sued for. To the suit an answer was filed, denying that there was anything due on the note, and claiming that defendants had fully paid to one Nasworthy, agent of plaintiff, besides the credits appearing on the note, the following items: January 5, 1895, tie timber, $42.57; March, 1895, 100 bushels cotton seed, $12.50; November, 1894, 17 cross-ties, $2.06. The case was appealed to the superior court of Wilcox county, and, after the evidence was introduced, the jury returned a verdict for defendants. Plaintiff moved for a new trial upon the general grounds that the verdict was contrary to law and the evidence, and excepts to the judgment of the court below overruling this motion. Plaintiff introduced in evidence the note sued upon, and closed its case. The testimony in behalf of defendants was substantially as follows: Nasworthy sold guano in 1894, and defendants bought guano from him, giving the note sued on. It seems that Nasworthy was an agent of plaintiff for the sale of guano. At various times defendants made payments to Nasworthy in property as shown by the credits on the note. These payments were credited on the note, and he always had the note when the payments were made. Defendants had never heard that plaintiff was engaged in buying and selling ties, and they did not know whether it was engaged in that business or not. In addition to the credits that appeared on the note, in the fall of 1894 or first of 1895 one of the defendants paid Nasworthy in cross-ties to the amount of $42.57, which he agreed to credit on the note, but he never did so. Nasworthy was at that time engaged in cutting and shipping cross-ties, and was buying cross-ties from others. He had these cross-ties cut. Defendants did not know that he expected to ship them to plaintiff. Another defendant testified that he paid Nasworthy 100 bushels of cotton seed at 12½ cents per bushel, who stated that he would credit the value of this cotton seed, to wit, $12.50, on the note. It was not known that the cotton seed was to be shipped to plaintiff. They were simply sold to Nasworthy, with an agreement on his part that they were to be credited upon the note. Another defendant testified that he paid Nasworthy 17 cross-ties at 18 cents each; that Nasworthy was at that time engaged in the cross-tie business. There was no agreement that these ties were to be shipped to plaintiff. They were simply bought by Nasworthy with an agreement that he would credit them on the note. The note was turned over

to plaintiff's attorney for suit by Nasworthy.

1, 2, 3, 4. We do not think the evidence in this case was sufficient to sustain a verdict for the defendants. An agency to sell does not necessarily carry with it authority to collect. The evidence clearly established that the party with whom the defendant dealt was an agent of the plaintiff for the sale of its guano, but there is nothing in the testimony to show that he was its general agent to collect these debts. There was, however, proof that he had this note in his possession, and that he made the entry of credits which appear thereon. There is no dispute about these credits, but the fact that this agent had occasionally received partial payments upon a promissory note is not proof of his authority to receive the credits claimed in the defendants' answer to have been paid in addition to what appears on the note. It seems those payments were made by sales of property to Nasworthy for his individual use and purpose. There was no evidence that Nasworthy then had the note at all, or that the property ever reached the hands of the plaintiff, or was ever bought for the plaintiff. As a general rule, a special agent or attorney to collect a debt is not authorized to receive anything as a payment thereon except actual cash, and a payment to him by settling his individual debt or turning over property to be used by him would not be a payment to his principal. Kaiser v. Hancock, 106 Ga. 217, 32 S. E. 123; Hodgson v. Raphael, 105 Ga. 480, 30 S. E. 416; Sonnebom v. Moore, 105 Ga. 497, 30 S. E. 947; Bank v. Tuck, 96 Ga. 456, 23 S. E. 467; Mitchell v. Printup, 68 Ga. 677; Bostick v. Hardy, 30 Ga. 836. When these defendants, therefore, claim to have made payments on the note by selling to this agent for his individual use cross-ties and cotton seed, diligence would require of them to find out whether or not, to say the least of it, he had the note for collection at the time; and even this would not have bound the principal without some special authority given the agent to receive payments in this way. The evident purpose of defendants was to cancel the note by selling to the agent property for his own use, and not that of his principal, and, of course, without ratification of the principal, such method of payment would not constitute a valid credit upon the note. There was not only no evidence of the ratification by plaintiff of these payments insisted upon by defendants, but not even any proof that plaintiff had any knowledge that any such payments were ever made, or ever derived any benefit therefrom. See the case of De Vaughn v. McLeroy (Ga.) 10 S. E. 211, where it is said, "To bind a person by a ratification of an illegal or void act, it must be shown that such person had full knowledge, at the time of the alleged ratification, of the facts which make such act illegal or void." We therefore conclude that the defense of payment set up in the present case was not sustained by evidence, and the court erred in not setting aside the verdict returned in favor of defendants. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

WARD v. REASOR.

(Supreme Court of Appeals of Virginia. June 28, 1900.)

MALICIOUS PROSECUTION—ACQUITTAL—NOLLE PROSEQUI—DISMISSAL—COMPLAINT.

A complaint in an action for malicious prosecution which alleges, as the termination of such prosecution, that it was dismissed by a justice of the peace without hearing any evidence, is bad on demurrer; for such dismissal was equivalent to the entry of a nolle prosequi, which is not such an acquittal of the offense charged as will enable the defendant to maintain this action.

Error to circuit court, Lee county.

Action by one Ward against one Reasor for malicious prosecution. From a judgment sustaining a demurrer to the complaint, plaintiff brings error. Affirmed.

Duncan & Hyatt and Bullitt & Kelly, for plaintiff in error. R. T. Irvine and Pennington Bros., for defendant in error.

CARDWELL, J. This is a writ of error awarded the plaintiff in error to a judgment of the circuit court of Lee county rendered against him on behalf of the defendant in error in an action for malicious prosecution.

The sole question for decision is whether or not the court below erred in sustaining the defendant in error's demurrer to the declaration filed by the plaintiff in error.

There are two counts in the declaration, and it appears that the defendant in error on the —— day of ——, 1898, caused to be issued by one J. D. Ollinger, one of the justices of the peace in and for the county of Lee, a warrant charging the plaintiff in error with having feloniously stolen three certain hogs, the property of the defendant in error; that the plaintiff in error was arrested and brought before the said justice, who required him to give bond, with security, in the penalty of $300, for his appearance for trial before said justice, or such other justice of said county as might be then there on the —— day of ——, 1898; that the plaintiff in error on the day named appeared before one James Smith, another of the justices of the peace for the county of Lee, who, without hearing any evidence whatever as to the guilt or innocence of the plaintiff in error of the offense charged in the warrant, discharged him, and dismissed the warrant.

The ground upon which the demurrer was sustained is that the declaration does not sufficiently allege the termination of the prosecution; that is, that it ended in the final acquittal and discharge of the accused.

The allegation of the first count of the declaration on this subject is:

"Without the introduction of any testimony, the said defendant had the said justice to dismiss said warrant, and the said defendant has not further prosecuted his said complaint, but has deserted and abandoned the same, and the said complaint and prosecution is now wholly ended."

The allegation of the second count is: "The said defendant, without the introduction of any testimony against the plaintiff, and without giving to the said plaintiff the opportunity of defending himself against said false and malicious charge and showing his innocence therein, caused said plaintiff to be discharged, and not prosecuted for said offense."

Counsel for the plaintiff in error say that the action taken before the justice—the dismissal of the warrant—was equivalent to a nolle prosequi, and contend that it is a final determination of that prosecution, whereby this action may be maintained.

There are a number of decisions by courts of other states holding that a nolle prosequi is sufficient to maintain an action of malicious prosecution, but the text writers, as far as we have been able to investigate, hold the contrary view. Mr. Greenleaf (2 Greenl. Ev. § 452) says: "It must appear that the prosecution is at an end. If it was a criminal prosecution, it must appear that the plaintiff was acquitted of the charge. It is not enough that the indictment was ended by the entry of a nolle prosequi."

Burks, J., in Scott v. Shelor, 28 Grat. 891, quotes with approval 1 Hilliard on Torts: "Although an action cannot be maintained unless the plaintiff has been fully acquitted, and a nolle prosequi is not sufficient, the plaintiff is not bound to prove that he was acquitted by the jury promptly, without hesitation, delay, or deliberation."

The doctrine that the plaintiff must allege and prove that he was fully acquitted, and that a nolle prosequi is not sufficient, is sustained by our own eminent text writers. 4 Minor, Inst. 478; Bart. Law Prac. 183.

In Scott v. Shelor, supra, where there was a verdict and judgment for the plaintiff for a malicious prosecution, and the judgment was affirmed by this court, the opinion says: "To have warranted the verdict of the jury, it must have been proved on the part of the plaintiff—First, that the prosecution alleged in the declaration had been set on foot and conducted to its termination, and that it ended in the final acquittal of the plaintiff," etc. Womack v. Circle, 32 Grat. 335. In the last-named case a peace warrant had been sworn out by the defendant against the plaintiff, and, upon hearing the evidence adduced for and against the accused, the justice required her to enter into bond with security to keep the peace for one year; and she appealed to the county court, where the attorney for the commonwealth abandoned and dismissed the prosecution. Circle then instituted her suit against Womack for malicious prosecution, and obtained a verdict and judgment. Upon a writ of error to this court the judgment was set aside for misdirection of the jury by instructions, and a new trial awarded. It was said by Anderson, J., in the opinion: "The attorney for the commonwealth was not the arbiter of the guilt or innocence of the accused, and his opinion, however honestly formed, was not evidence of her guilt or innocence. A judgment so obtained, not upon evidence, but upon an abandonment of the prosecution by the commonwealth's attorney, could not establish the innocence of the plaintiff in this suit, and lay the foundation for this action. Much less would it show want of probable cause for the prosecution; and, it most probably having influenced the verdict of the jury, the judgment should be reversed on that ground."

The opinion cites Bacon v. Towne, 4 Cush. 217, where it was held that a discharge from an indictment by a nolle prosequi is not sufficient to maintain an action of malicious prosecution, and that the mere abandonment of the prosecution, and the acquittal of the accused, are no evidence of a want of probable cause. The opinion in that case, by Shaw, C. J., says:

"It must appear, before this action will lie, that the defendant in the indictment has been fully acquitted."

Notwithstanding the warrant in the case at bar charges that the larceny committed was felonious, the justice before whom the accused (defendant in error) was brought for trial was clothed with power to convict or acquit him upon hearing the evidence. The offense charged in the warrant is a misdemeanor, under our statute; the word "feloniously" being used to characterize the intent with which the taking and carrying away were done,—a felonious intent being an essential ingredient in the crime of larceny, whether grand or petit, distinguishing it from a mere trespass. Wolverton v. Com., 75 Va. 911.

In this case, therefore, the justice, with full power, upon hearing the evidence, to convict or acquit the defendant in error of the charge made in the warrant, without hearing any evidence, dismissed the warrant and discharged him. This action amounted to no more than the assent of the justice to a cessation of the proceedings, without any examination whatever of the cause upon its merits. It was the equivalent of a nolle prosequi,—nothing more,—and could not establish the innocence of the defendant in error, nor show want of probable cause for the prosecution.

The case of Jones v. Finch, 84 Va. 207, 4 S. E. 342, very much relied on by counsel for defendant in error, was a similar action to this; and it was there held that a discharge of the accused, brought before a

commissioner of the United States court upon the charge of robbing the United States mail (the commissioner being clothed with the power to send the accused on for trial or discharge him), was a sufficient termination of the prosecution to maintain an action of malicious prosecution; but the court, in reaching that conclusion, emphasizes the fact that the declaration alleged that the commissioner discharged the accused and dismissed the warrant upon hearing the evidence. That is not this case.

While the declaration here does allege that the prosecution upon which this action is founded "is now wholly ended," it is but an allegation of a conclusion of law, not warranted by the facts recited and upon which it is made. They do not convey the idea of trial and acquittal, but import only a cessation of the proceedings, without any examination whatever of the case upon its merits, and it was, therefore, no bar to the institution of another prosecution for the same offense. McCann v. Com., 14 Grat. 570.

We are of opinion that there is no error in the judgment complained of, and it is affirmed.

RIELY, J., absent.

SANDS' ADM'R et al. v. DURHAM.

(Supreme Court of Appeals of Virginia. June 28, 1900.)

PARTNERSHIP—JUDGMENTS—PAYMENT BY ONE PARTNER—SUBROGATION—PURCHASER—STATUTES.

1. Where one partner has paid judgments against the partnership, he is not entitled to subrogation to the security of the judgment, in the absence of an agreement of the partners creating the relation of principal and surety between them, since the partners are equally liable for partnership debts.

2. Where judgments against a partnership are paid by one partner without an agreement making him a surety for his co-partners, such judgment cannot be enforced by him against the property of a co-partner in the hands of a purchaser.

3. Code, § 2855, making partnership debts joint and several, does not change the rule that one partner who pays a partnership debt out of his private means is not entitled to be subrogated to the creditor's right without an agreement making him a surety for his co-partner.

Appeal from circuit court, Giles county.

Suit by John H. Durham against D. L. Whittaker, D. A. Early, and A. J. Sands' administrator. Decree for plaintiff, and defendants appeal. Reversed.

Wysor & Gardner, for appellants. W. J. Henson and S. W. Williams, for appellee.

CARDWELL, J. In the year 1886, John H. Durham, D. L. Whittaker, and D. A. Early formed a partnership for conducting a mercantile business in Giles county, under the style and firm name of D. L. Whittaker & Co. Whittaker furnished the capital of a stock of goods amounting to $3,000, which he was to get back out of the concern, and they were to be equal partners, dividing equally the profits and losses. The firm, after doing an unsuccessful business, dissolved in October, 1887, by selling out their stock of goods to one G. L. Bane. Judgments had been obtained against the firm, which were unpaid, and many outstanding claims not in judgment were also against the firm. The accounts, notes, etc., were turned over to J. H. Durham for collection. He collected all he could, and applied the collections to the firm debts, and the residue of the judgments against the firm he paid out of his own means. These judgments were duly docketed on the lien docket of Giles county court, and were not marked satisfied. Durham brought this suit in October, 1885, for a settlement of the partnership accounts, and not only to have contribution from his partners, Whittaker and Early, but to be subrogated to the lien of the judgments which he had paid out of his private means to the extent his partners might fall in arrears to him on settlement, and to subject the lands owned by Early at the time of the rendition and docketing of the judgments against the firm to the extent that Early might be indebted to him on the settlement. Early and wife having on the 5th of March, 1890, sold and conveyed to Mrs. Ann J. Sands three small tracts of land in Giles county, five-eighths of which belonged to Early, and the remaining three-eighths to his wife, complainant claimed the right by subrogation to subject the five-eighths interest in those lands, formerly owned by Early, to the payment of one-half of the judgments against the firm discharged by complainant out of his private means, amounting to $4,574.87; the other partner, Whittaker, being insolvent.

The circuit court decreed that Durham was entitled by subrogation to the rights of the judgment creditors whose judgments he had paid off, and subjected to the payment of one-half of them to Durham, not only the property owned by Early at the time of his death, but the five-eighths interest in the land which he had conveyed to Mrs. Sands in March, 1890. From this decree the administrator and heirs of Mrs. Sands, who had died, obtained an appeal to this court.

It is well settled that one partner who has paid out of his own means debts of a partnership of which he is a member may, upon a settlement of the partnership accounts, have contribution from the other partners of their due proportion of the debts so paid. It is also well settled that, where one in the situation of surety pays the debt of him who is primarily liable, equity will put him in the place of the creditor whose debt he has discharged, and give him the benefit of the securities which the creditor has obtained from the principal debtor, and, though no assignment is actually made, equity treats it as having been done. Grubbs v. Wysors, 32 Grat. 129.

Subrogation is the equity by which a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor, in order to enforce the right of exoneration as against the principal debtor in the same rank with himself. To entitle a party to subrogation, his equity must be strong and his case clear. It is an equity called into existence for the purpose of enabling a party secondarily liable, but who has paid the debt, to reap the benefit of any securities which the creditor may hold against the principal debtor, and by the use of which the party paying may then be made whole. Bisp. Eq. 393. But says this learned author (page 396): "The principle of subrogation is a general one, and will apply to every instance (except in the case of a mere stranger) where one man has paid a debt for which another is primarily liable. The right will not, however, exist between parties who are equally bound; as, for example, co-partners, co-obligors, and co-contractors, except, of course, by virtue of a special contract. Such special contract may exist, for example, where an outgoing partner takes a covenant from the remaining members of the firm to pay the partnership debts and save him harmless. He stands, under these circumstances, in the position of a surety, and may be subrogated to the remedies of the creditor, if the covenant be not fulfilled."

A partner who retires from the firm, and for a valuable consideration is indemnified by the remaining partners against all debts and liabilities of the firm, will in equity be considered a surety for them, and subrogated to the rights of the creditor to whom he has been compelled to pay a firm debt. 24 Am. & Eng. Enc. Law, 237. Among the authorities cited in support of this text is the case of Buchanan v. Clark, 10 Grat. 164.

In that case G., B. & K. were principal obligors in a bond. B. and K. put money in the hands of G. to pay the bond, and he bound himself to pay it, but failed to do so, and became insolvent. A judgment was recovered on the bond against the three, and B. paid it. After the judgment G. conveyed his land to S. to secure a debt due to him and another debt due to C. Upon a bill by B. and K. against S. and C. to subject the land conveyed in the deed to S. to satisfy the debt B. had paid, the court held that it was competent for G., B. & K. to contract that, as between themselves, G. should be the principal, and B. and K. his sureties, and that this had been done; that as between B., K., and G. the former were entitled to be subrogated to the lien of the judgment creditor upon the land; and that they were equally entitled as against purchasers from G., who did not show a better equity. The opinion of the court recognizes that partners ordinarily do not have the right of subrogation to the rights of the firm's creditor holding a security for a debt of the firm paid by one of the partners out of his own means, and puts its adjudication in that case whereby B. and K. were subrogated to the rights of the judgment creditor, whose judgment they paid, solely upon the ground that B. and K. and G. had contracted that, as between themselves, G. should be the principal, and B. and K. his sureties, in the debt; for the opinion says: "As between the partners and the creditor, they were all equally bound, and no understanding and agreement between themselves could change that relation so as to impair his right. But there was nothing in that relation which would prevent the partners, as between themselves, from assuming the relation of principal and securities."

The ground upon which some of the adjudicated cases hold that a partner of a losing concern, paying a debt of a lien creditor of the firm, cannot have subrogation to the rights of the creditor, is that payment by a co-principal extinguishes the debt, and leaves no right of subrogation. It is more accurately stated by Strong, J., in the well-considered case of McCormick's Adm'r v. Irwin, 35 Pa. St. 111, thus: "The reason why subrogation is not allowed to one partner as against his co-partner, or to one merely a joint debtor as against his co-debtor, is because, as between them, there is no obligation to pay the debt resting upon one superior to that which rests upon the other." See, also, Dering v. Earl of Winchelsea, 1 Lead. Cas. Eq. 148, pt. 1, and Sheld. Subr. §§ 170, 171.

Counsel for appellee contends that the rule is changed by the statute (Code, § 2855) passed in 1849, whereby partnership debts are now joint and several; and also cites Morris' Adm'r v. Morris' Adm'r, 4 Grat. 293, in support of the further contention that, because the partnership debts are now joint and several, one partner who pays off the creditor's debt with his own private means is entitled to be subrogated to the creditor's right. That case only held that a surviving partner, having paid the partnership debts of a losing concern, is entitled to be substituted, for the amount that the estate of the deceased is indebted to him on that account, to the rights of the creditors of the firm whose debts he has paid; that is, the surviving partner paying the debts is entitled to share in the separate estate of the deceased partner. But this, as was said by Sheldon in his work on Subrogation (section 171, supra), is upon the ground that by virtue of the partnership agreement to contribute to losses the partner paying a firm debt out of his private property may in equity enforce contribution from his co-partner, rather than by way of subrogation. In other words, the doctrine of subrogation does not ordinarily apply as between co-partners, though the right exists to have contribution

from each other, where one has paid out of his private means a debt of the firm, which is not repaid to him out of the social assets. To entitle a partner, paying out of his private means debts against the firm, to be subrogated to the rights of the creditors whose debts he has so paid, the relations ordinarily existing between co-partners must have been changed by an agreement between them whereby they assumed the relation of principal and surety. Buchanan v. Clark and other authorities, supra. There was no such agreement in the case at bar, and appellee was therefore not entitled to be subrogated to the rights of the judgment creditors whose judgments against the firm of D. L. Whittaker & Co. he paid.

Much stress is laid by counsel for appellee upon the constructive notice to Mrs. Sands of the rendition and docketing of these judgments, and the actual notice she is claimed to have had when she bought the land from Early; but leaving out of view the testimony going to show that she was misled by the statements made by appellee to her agent, Hall, who purchased the land for her, and conceding that she had both constructive and actual notice of the judgments at the time of the purchase, it does not alter the case; for she may have actually known of the existence of the judgments on the docket, yet she also knew that they were judgments against the partnership of D. L. Whittaker & Co., that each member of the firm was primarily bound for their payment, and that appellee was solvent. The only risk she ran in taking a conveyance of Early's portion of the land from Early and wife was that the judgments would not be paid by the firm or either of the partners, and could not be made out of either of them. They, however, having been paid by appellant, without a special contract or agreement changing the relations ordinarily existing between co-partners, whereby he became surety for the other partners, are no longer enforceable on the lands alienated by Early to Mrs. Sands. Therefore the decree appealed from, in so far as it holds the contrary, is erroneous, and will be reversed and annulled, and the cause remanded to the circuit court for such further proceedings herein as may appear proper, in accordance with the views expressed in this opinion.

RIELY, J., absent.

REPASS v. MOORE.

(Supreme Court of Appeals of Virginia. June 21, 1900.)

TAXATION—PAYING ANOTHER'S TAXES—SUBROGATION.

Where a county treasurer, without any previous request or subsequent promise of indemnity, voluntarily paid taxes on the land of another, he was not entitled to be subrogated to the rights of the state and county.

Appeal from circuit court, Wythe county.

Creditors' suit by J. Winton Repass and others against R. R. Moore. From a decree refusing to subrogate Repass to the rights of the state and county in delinquent taxes on defendant's land, he appeals. Affirmed.

C. B. Thomas and W. B. Kegley, for appellant. J. C. Wysor, for appellee.

KEITH, P. The case before us is the sequel of that reported in 96 Va. 147, 30 S. E. 458. Repass, who was treasurer of Wythe county, paid certain taxes due by Moore for the years 1884, 1885, 1886, and asked to be subrogated to the lien of the county and state. The case was then reversed and remanded to the circuit court, that Repass might be given an opportunity to prove his claim; the court being of opinion that, if he paid the taxes under circumstances which entitled him to be subrogated to the rights of the state and county, it would be gross injustice to shut him off from the opportunity of producing such proof.

The question before us has never been directly decided by this court. In Lipscomb's Adm'r v. Littlepage's Adm'r, 1 Hen. & M. 453, a sheriff who indulged the taxpayer, who in consideration thereof agreed to indemnify him by paying all damages which the commonwealth might recover in consequence of his failing in due time to pay the taxes into the treasury, recovered a judgment at law for such taxes, with lawful interest. The defendant in this judgment came into a court of equity alleging that the verdict at common law was obtained by surprise; that he could, as he thought, have satisfied the jury that nothing was due,—and he therefore prayed an injunction to the judgment, and for general relief. The chancellor, being of opinion that it was contrary to public policy to permit a sheriff to recover for taxes paid by him in order to indulge the taxpayer, perpetuated the injunction to the judgment. This decree was reversed in this court, consisting at the time of three judges, of whom Judge Tucker dissented in an earnest and able opinion. He considered the agreement on the part of the taxpayer to indemnify the sheriff for the indulgence extended him in the collection of taxes a contract in violation of public policy. "It is," said he, "destructive of the revenue, ruinous to all public creditors, pernicious to the public credit, and fatal to the energies of the commonwealth, under the greatest emergencies. The record accordingly exhibits a series of judgments against the high sheriffs for whom he acted, for upwards of 19,500 pounds,—an evil of sufficient magnitude to show the pernicious consequences of such illegal and nefarious contracts, if, indeed, such a one ever was made on the part of Lipscomb, of which there is no proof whatever. No court of equity that

understood even the elements of its functions could sustain a suit founded on such a contract."

The majority of the court did not seem to controvert this view of the case, but rested their conclusion upon the fact that there had been a trial at law, in which this defense might have been made, and that no sufficient reason appeared why a court of equity should disturb the judgment then obtained.

A kindred question was presented in the case of Clevinger v. Miller, 27 Grat. 740. It was there held that a sheriff or other officer who pays an execution in his hands for collection, without an assignment at the time of the judgment or debt on which it is founded, is not entitled to be subrogated to the lien of the creditor whose debt he has paid, as against other creditors having judgment by liens or otherwise. Judge Staples, discussing the general doctrine of subrogation, states that, at law, payment extinguishes the debt and every security given for it; that a court of equity will interpose to keep alive the debt in certain cases; that a surety is subrogated to all the rights and remedies of the creditor, and entitled to enforce his liens, priorities, and means of payment. He points out that the doctrine of subrogation does not stand upon contract, express or implied, but upon principles of natural justice; that, as it is purely a creature of equity, it is only enforced in those cases where its application is just, and sanctioned by the obligations of good faith and sound policy. He declares at page 741 that "it is only enforced in behalf of sureties and others who are required to pay in order to protect their own interests, and never in favor of mere volunteers." He quotes with approval the language of Judge Marshall in Bank v. Winston, 2 Brock. 254, Fed. Cas. No. 944, who said: "There was no case in which the doctrine of subrogation has been enforced in favor of one not bound by the original contract, who discharged it as a volunteer. He would not say it might not be done, but, if it may, equity will consider all the circumstances, and impose equitable terms."

Judge Staples reviews a number of cases in other courts in which it has been held that "an officer charged with the collection of moneys due individuals or the government, who pays the taxes or debts of another person, cannot maintain an action to recover the same in the absence of a prior request or a subsequent promises"; and, upon a careful consideration of them, he concludes that a sheriff could not, in that case, be subrogated to the lien of the creditor, because there was no duty imposed upon him to pay the debt, nor any assignment to him by the creditor.

In Sherman's Adm'r v. Shaver, 75 Va. 1, Judge Burks, speaking of the principle of subrogation, says that it is very comprehensive, and is broad enough to include every instance where one pays a debt for which another is primarily liable, and that in equity and good conscience should have been discharged by him. He quotes with approval from the opinion in Wilkes v. Harper, 2 Barb. Ch. 338, where it is said: "Wherever one is liable in person or estate to a charge which ought to be borne primarily by another or his estate, the person first named will have the equity of a surety, and he is entitled to the securities and remedies of a creditor, as a means of carrying that equity into effect." Judge Burks then continues: "Under the influence of these liberal principles, which appear to me to be sound and just, I am not prepared to say that an officer, who, for default, has been compelled to pay the debt of another, is not in any case, under any circumstances, entitled to relief by subrogation as against the debtor alone. There may be cases in which no fraud is imputable to the officer, no moral turpitude of any description, no semblance of bad faith or even gross negligence; cases in which he is held simply for the failure to exercise the exact care and diligence which the law requires; cases, it may be, in which his liability has been incurred by honestly but indiscreetly reposing in the debtor a confidence which he knavishly abused to his own gain,—in which the parties are not in pari delicto. And yet, even in such cases, considerations of public policy may perhaps require the denial to the officer of any active assistance by the courts against the debtor, though the interests of third parties are not involved."

Every consideration of public policy which requires a sheriff to collect money due upon an execution in his hands, or to levy and sell, and pay the proceeds into court or to the plaintiff, or make prompt return upon it, applies with equal force to the officer whose duty it is to collect the taxes due to the commonwealth. The course which he should pursue is clearly marked out by the statute law. He is clothed with ample power to discharge it, and he and his sureties can incur no liability unless he is guilty of a voluntary deviation from the prescribed course of duty.

In the case before us the treasurer, without any previous request or subsequent promise of indemnity, with no assignment of the tax lien (if it be capable of assignment), voluntarily paid the tax which he now seeks to recover, into the treasuries of Wythe county and the state of Virginia. There was certainly no such duty imposed upon him by law. He was under no obligation whatever, and was bound in no degree or order, to pay or advance the taxes. It was his voluntary act, in derogation of the duty imposed upon him by law; and he is therefore not within the broadest and most comprehensive definition of the right of subrogation as stated by any text writer or decided case that has been brought to our attention. We will not undertake to say that a case may not arise in which the right of subrogation would

be enforced for the protection of a collector of taxes. It is not necessary, and would therefore be unwise and improper, to do so. We prefer to walk in the path indicated by the decisions which we have cited, and refrain from adjudicating a question not involved in the controversy before us.

We are of opinion that the circumstances shown in evidence in this case do not warrant the relief for which appellant seeks, and the decree of the circuit court is affirmed.

RIELY, J., absent.

PAYNE'S EX'RS v. HUFFMAN.

(Supreme Court of Appeals of Virginia. June 21, 1900.)

ASSIGNMENTS—ASSIGNEE—RECOURSE AGAINST REMOTE ASSIGNOR—DILIGENCE.

A solvent debtor lived ten years after the assignment of a trust deed conveying land in which he owned an interest. If the deed had been foreclosed promptly after the assignment, his interest in the fee would nearly have paid the debt secured thereby, and the balance could easily have been made out of his life estate. The assignee did nothing until two years later, when he accepted the debtor's note, payable in six months, in consideration of which a sale under the deed was postponed. Plaintiff, an indorser of the note, paid it some time after maturity, and took an assignment, but did not foreclose until about six years later. The debtor died before the sale, thus extinguishing the life estate; and, the proceeds of the sale of his interest in fee being insufficient to pay the debt, plaintiff filed a bill to recover the deficiency from the executors of his remote assignor, on the ground of failure of consideration. *Held*, in the absence of any agreement exempting either of the assignees from diligence in collecting the debt, that plaintiff was not entitled to recover, since his loss resulted from his own and his immediate assignee's delay in enforcing the security.

Appeal from circuit court, Giles county.

Bill by Martin Huffman against the executors of W. A. Payne. From a decree for plaintiff, defendants appeal. Reversed.

W. J. Henson and J. M. Payne, for appellants. S. W. Williams, for appellee.

CARDWELL, J. This is an appeal from a decree of the circuit court of Giles county.

In the view we take of the case, it is unnecessary to consider the questions arising on the demurrer to the cross bill filed by appellee, so elaborately argued at bar.

The case is as follows: On the 16th day of September, 1878, John L. Sartin and wife executed a deed of trust to John A. Echols, trustee, conveying real estate in Giles county to secure and indemnify Charles H. Payne as surety for John L. Sartin on certain bonds executed by Sartin to one J. D. Johnson, commissioner. These bonds were paid by Payne, and he was proceeding to enforce the deed of trust when Sartin prevailed on one W. A. French to buy Payne's interest in the deed of trust (French paying Payne therefor $430.30), for the purpose of holding it up and giving Sartin more time; and on April 30, 1883, Payne assigned all right, title, and interest he had in the deed of trust to French, and French, as he had previously agreed to do, held up the deed some two years, when he caused the property to be advertised for sale under the deed. On the day of sale, Sartin and the appellee, Martin Huffman, made an agreement with French whereby Sartin was to execute to French a negotiable note for the amount claimed under the deed, with Huffman as indorser, payable six months after date, in consideration of which French was to postpone the sale under the deed until the maturity of the note; and it is alleged, though not clearly proved, that French agreed to assign his interest in the deed of trust to Huffman if the note should be paid at maturity by Huffman. Huffman did not pay off the note at maturity, but finally paid it, and on October 3, 1891, French assigned his interest in the deed to Huffman. In the meantime Charles H. Payne had died, and one Sibold had filed a bill and an amended bill in the circuit court of Giles county to subject to the payment of a judgment he had against John L. Sartin the land conveyed in the deed, making Sartin and wife, Payne's executors, Echols, trustee, French, and Huffman, parties defendant thereto. The bill alleged that, while Huffman claimed to be the owner of the trust deed, it was untrue, and that in fact the deed was no longer a valid lien on the land in question. Upon the bill taken for confessed, an account of liens on the land was ordered, and a commissioner reported that Sibold's judgment was the only lien on the land, and that the rental value of the land was $100 per annum, and that the rent would pay off the judgment in less than five years, which report was confirmed. Huffman, without having answered the bill filed by Sibold, or excepting to the commissioner's report, caused the land to be advertised for sale under the deed of trust; but the sale was stopped by an injunction obtained upon a bill filed by Sartin and wife, to which Huffman and Echols, trustee, were made parties defendant. Sibold's debt having been paid off, and John L. Sartin having died, a sale of the land was decreed for Huffman's benefit, and it was sold April 18, 1893; Huffman becoming the purchaser, at the price of $350. He then let the matter lie for four years, when he had the sale confirmed, and filed his cross bill in the first-named suit to have recourse on the executors of Charles H. Payne, his remote assignor, for the balance due on the debt he claimed was secured to him by the trust deed, after crediting the net proceeds from the sale of the land; and the court decreed in his favor against Payne's executors for this alleged balance, amounting to over $500.

The record shows that the deed of trust was valid as to one-sixth interest in the estate conveyed, and as to the life interest of John L. Sartin in the other five-sixths, and

that even the rental value of the land was worth $100 per annum, so that, if these interests of John L. Sartin in the land had been subjected in his lifetime (certainly within a reasonable time after the assignment by Payne to French), the debt secured by the deed would have been paid in full; and even if the one-sixth interest had been subjected immediately after the assignment by Payne, and it had only brought the price it finally sold for, and the proceeds applied then to the debt, they would have nearly extinguished it. But there was a delay of nearly ten years. In the meantime John L. Sartin's life estate in five-sixths of the land was diminishing in value by reason of his advancing age, and finally extinguished by his death; and no sort of effort is shown to have been made to make the money out of the personal estate owned by Sartin, in his lifetime, or after his death.

We leave out of view the question whether or not, by the extension of time given by both French and Huffman to Sartin, Charles H. Payne was released from all liability to either of them on the assignment by him of his interest in the deed of trust; for, while no amount of passive indulgence will relieve an absolute surety, the contract of a guarantor of collection and of an assignor is very different from that of a surety. Due diligence must be used to charge either a guarantor or an assignor. The assignee being entitled to recover of the assignor on the ground of failure of consideration, it will devolve on him to show, unless by agreement it be otherwise arranged, that he used due diligence to collect the debt of the debtor, and used it in vain. What is due diligence is not susceptible of a precise definition. An immediate suit, duly followed up by an execution, etc., is always due diligence, even though it may not be the surest way to make the money. Still, immediate suit is not indispensable, if the assignee can show that, by reason of the debtor's insolvency or otherwise, a suit would have been unavailing. 3 Minor, Inst. 437, pt. 1, and authorities there cited. Says this learned author: "Two years' delay to sue will discharge the assignor in all cases, unless the debtor be insolvent, or the assignee be exempt by agreement from the obligation of diligence." Thompson v. Govan, 9 Grat. 695; 2 Rob. Prac. (2d Ed.) 276, 277.

In the case at bar there is not only a total absence of an agreement exempting either French or appellee, Huffman, from the obligation of diligence, and of allegation or proof of the insolvency of John L. Sartin during the eight years he lived after the assignment by Payne to French, but, on the contrary, the record clearly shows, as we have seen, that, if the deed of trust had been with promptness enforced, the one-sixth interest in the land conveyed would have nearly paid the debt secured and that, if any effort had been made, within a reasonable time, to collect of Sartin the balance, if any, of the debt secured by the deed, it could have been made out of Sartin's life estate in the five-sixths interest in the land owned by his wife, if not out of his personal estate, as this life estate or usufruct in Sartin is shown to have been worth $83.33 per annum, which, added to the one-sixth interest in the land owned by Sartin in fee, would have, in 1883, and for several years thereafter, more than repaid the amount paid Payne by French.

Appellee has not shown, and it is manifest that he could not show, that no loss or damage has resulted from his or his immediate assignor's lack of diligence. As was said by Staples, J., in Wilson's Adm'r v. Barclay's Ex'r, 22 Grat. 542,—a case very similar to the case at bar: "Under such circumstances, a court of equity should refuse to afford a remedy, though no statute of limitations may directly affect the right of recovery."

We are of opinion to reverse the decree appealed from, and this court will enter such decree as the circuit court should have entered; dismissing appellees' cross bill, with costs to appellant.

RIELY, J., absent.

CROCKETT v. GRAYSON.

(Supreme Court of Appeals of Virginia. June 21, 1900.)

BROKER—SALES—COMMISSIONS.

1. Defendant agreed with plaintiff that if plaintiff could sell defendant's land he would give plaintiff all he obtained therefor over $11,000. Thereafter, through efforts of plaintiff, S. agreed with defendant to give him about $10,000 for the land, and pay liens on the property, which defendant represented amounted to $4,000, but S. reserved the right to declare the agreement void if the liens were of greater amount. They did exceed $4,000, and S. avoided the agreement. *Held*, that defendant was not liable to plaintiff for the difference between $11,000 and $14,000.

2. Defendant could not be held liable to plaintiff for the difference on the ground that the sale was lost through a misrepresentation of the vendor, as defendant's representation as to the liens did not damage plaintiff, since, if not made, S. would not have made the agreement.

Error to circuit court, Bland county.

Action by J. R. Crockett against Charles Grayson. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

J. H. Fulton and J. J. A. Powell, for plaintiff in error. S. W. Williams and F. Kegley, for defendant in error.

KEITH, P. The defendant in error, wishing to dispose of a tract of land lying in Bland county, entered into a contract with the plaintiff in error as follows:

"This contract, made and entered into between Charley Grayson of the first part and J. R. Crockett of the second part, is that J. R. Crockett is to have all, over and above eleven thousand dollars, he can sell seven hundred acres of the said Grayson's farm, including all

of the cleared land, and balance of the seven hundred acres is timbered land adjoining the cleared land. Witness my hand and seal this April 22d, 1896. Charles Grayson. [Seal.]"

Acting under this authority, Crockett entered into a negotiation with William H. Spiller, which resulted in an agreement between Grayson and Spiller, in which the latter agreed to purchase 700 acres of land from Grayson, with the buildings, improvements, and growing crop of hay thereon, and to pay for the same the sum of $14,000, as follows: About $10,000 to be paid by Spiller in property belonging to him in the town of Wytheville, and certain notes due to him secured upon real estate; and the contract then provides "that the said W. H. Spiller is to assume for payment for said Grayson the sum of four thousand dollars, which the said Grayson represents as being the whole amount of the liens against the said property hereby sold the said Spiller, and which said sum the said Grayson states will give a clear title to the land hereby sold; but if the amount of liens, by judgment or otherwise, against the said Grayson, exceeds the sum of four thousand dollars, then the said Spiller is at liberty to declare this agreement null and void."

This contract was duly executed by Grayson and Spiller. When the attorney for Spiller came to examine the title, it was ascertained that the liens upon Grayson's land amounted to more than $40,000; and thereupon Spiller exercised the right which he had reserved to himself under his contract, and declared the agreement entered into with Grayson null and void. Crockett brought suit upon his covenant with Grayson to recover the compensation to which he conceived himself to be entitled. He demands in his declaration the sum of $3,000, being the amount in excess of $11,000 which Spiller had agreed to pay. There was a verdict and judgment for the defendant, and the case is before us upon a writ of error.

There is no question here as to Crockett having been employed to make the sale, nor as to the compensation to which he would have been entitled had his undertaking been performed. The sole question is, does it appear from the evidence that he has negotiated a sale which entitles him, in accordance with a just construction of the terms of his employment, to the stipulated compensation?

It is true that, owing to the efforts of plaintiff in error, Spiller was induced to enter into a contract for the purchase of the land in question upon terms satisfactory to Grayson; but that, we conceive, is not sufficient, for that contract contained a provision by virtue of which Spiller reserved to himself the privilege of annulling it if a fact was made to appear over which Grayson had no control. It was a fact that the liens upon Grayson's land amounted to more than $4,000. They approach, as appears from the record, the sum of $40,000. From this fact there was no escape, and its existence, by the very terms of contract by which Crockett induced the bu and seller to make the agreement, and for procurement of which he demands compe tion, gave to Spiller the absolute and unq tioned right to avoid it at his pleasure. G son seems to have been anxious to cons mate this contract. He made every effor induce Spiller to abide by it. There is dence in the record tending to show th greater part of the liens against him were parent, rather than real. There is evid tending to show that very little more $4,000 would have satisfied the debts w constituted the liens upon Grayson's la for which he was primarily liable; but contract procured through the agency of plaintiff in error reserved to Spiller the p lege of annulling his liability under it, this privilege he saw fit to exercise.

A real-estate broker, to be entitled to pensation, must complete the sale. He find a purchaser in a situation ready willing to complete the purchase upon terms agreed upon, before he is entitle his commissions. When he has found a purchaser who has entered into a contract, his right to compensation ca be defeated by the fault of the seller, by misrepresentation, or by his whimsica unreasonable refusal to comply with contract. McGavock v. Woodlief, 20 H 221, 15 L. Ed. 884; Kock v. Emmerling How. 69, 16 L. Ed. 292; Tombs v. Alexan 101 Mass. 255; and Mechem, Ag. § 86 seq.

It is claimed in this case that Croc found a purchaser who entered into a tract in exact accordance with instruct which he received from his principal, Ch Grayson; and in one view of it, this is Grayson was ready to sell his property $14,000, and Spiller was able to pay fo The terms of payment were agreed upon a contract signed; but, as we have see that contract there was a right reserve which it was subsequently defeated. contention of Crockett upon this poi that it was defeated by the misrepres tion of Grayson, and that therefore h entitled to the compensation for whic had contracted.

There are, perhaps, cases in which a ker may be entitled to compensation w a negotiation for the sale of real estate been broken off by reason of a misrepr tation made by the seller. Such a ca referred to in Mechem on Agency, but authority is not accessible to us. It fundamental principle that the frau which one complains must be accomp by damage to constitute a cause of ac It is true that Grayson represented $4,000 would satisfy the liens upon his l and this statement appears to have bee true; but it is plain that, so far as i fects Crockett's right to recover in thi tion is concerned, it did not injure hi

the least degree, for, if the representation had not been made, Spiller would never have entered into the agreement. Had Grayson disclosed the precise state of the record with respect to the liens upon his property, it is safe to say that the negotiation between himself and Spiller would at once have ended.

We do not deem it necessary to enter into a critical examination of the instructions given and refused upon the trial, for upon the facts presented to the jury they could not, with propriety, have found any other verdict than that at which they arrived.

We are of opinion that the judgment of the circuit court must be affirmed.

RIELY, J., absent, prevented from attending term at Wytheville by sickness.

WISE v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 21, 1900.)

CRIMINAL LAW—DESTROYING FENCE—PROOF OF CLAIM—VERBAL PURCHASE —BONA FIDES.

1. Under Code, § 3729, providing that if any person shall unlawfully, but not feloniously, destroy or injure property not his own, he shall be subject to a fine, where defendant was accused of unlawfully tearing down the fence of the prosecutor, evidence that, according to a survey made on the prior transfer of the farm now owned by the defendant, the boundary line was found at one point to extend slightly onto the land of the prosecutor, and the grantee in such transfer took such title to the disputed land as the grantor possessed, which the grantee subsequently conveyed to the defendant, was admissible to show that defendant acted in good faith.

2. Where defendant was accused of unlawfully tearing down the fence of the prosecutor, to refuse an instruction that if the defendant tore down the fence under a claim of right, believing it to be his own, then the jury should find for the defendant, was erroneous.

Error to Washington county court.

John Wise was unlawfully convicted of tearing down a fence, and he brings error. Reversed.

J. J. Stuart, for plaintiff in error. A. J. Montague, Atty. Gen., for the Commonwealth.

KEITH, P. This is a writ of error to a judgment of the county court of Washington county, sentencing Wise to pay a fine of five dollars for unlawfully tearing down and leaving open a fence of one H. A. Mann.

Section 3729 of the Code provides: "If any person unlawfully, but not feloniously, take and carry away, or destroy, deface, or injure any property, real or personal, not his own, * * * he shall be fined not less than five nor more than five hundred dollars."

In support of his plea of "not guilty," prisoner offered to show that the land upon which he resided had formerly belonged to White, who sold to Counts. When a view was made with a view to the making of a deed to Counts by White, the lines of the survey were run at one point upon land claimed by H. A. Mann, the prosecutor in this case. He making objection, White said to Counts that he would not convey to him any part of the disputed land, not because he meant to abandon any right he had, but because he did not consider the subject worthy of controversy, but at the same time agreed verbally with Counts to transfer to him any claim he might have to the parcel of land in dispute. Counts sold to Lilly, and Lilly to Mitchell, the immediate grantor of the prisoner. At the trial the prisoner offered, but was not permitted, to prove by Counts that this verbal contract with respect to the disputed land had been transferred to him. It is not pretended, of course, that this verbal contract or understanding passed title, but it does bear upon the bona fides of a claim of right asserted by the prisoner, and should have been admitted.

The prisoner asked the court to instruct the jury as follows: "The court instructs the jury, if they believe from the evidence that the defendant, John Wise, pulled down the fence and left it down under a claim of right, believing it to be his own, and believing that he had a bona fide right thereto, then the jury shall find for the defendant."

This instruction propounds the law correctly, and should have been given. Ratcliffe's Case, 5 Grat., at page 658; 2 Whart. Cr. Law, § 1072a. The county court seems to have recognized this principle in the instruction which it gave, and it might have been unnecessary to have reversed its judgment upon this ground if it stood alone; but, as the case must go back for a new trial on account of the error committed in the exclusion of evidence, it will be proper, upon a subsequent trial, to give the instruction as requested by the prisoner.

The other objections are not well taken.

The judgment of the county court must be reversed, and a new trial awarded.

RIELY, J., absent.

VIRGINIA & TENNESSEE COAL & IRON CO. v. McCLELLAND et ux.

(Supreme Court of Appeals of Virginia. June 28, 1900.)

HOMESTEAD—DEED—HUSBAND AND WIFE—VENDEE—STATUTES.

1. Under Code, § 3634, providing that real estate set apart as a homestead shall not be aliened by the householder, if a married man, except by the joint deed of himself and wife, a deed of the homestead by the husband alone is void, and conveys nothing to the grantee.

2. Const. art. 11, which gives the homestead right, gives the general assembly power to provide on what conditions the head of a family

shall hold such homestead, but restrains the assembly from impairing or defeating the benefits intended to be conferred by that article of the constitution. *Held*, that Code, § 3634, providing that the homestead of a married man shall not be aliened except by the joint deed of himself and wife, is not an unreasonable restriction of the power of alienation of the homestead, and does not impair the benefits intended to be given by the constitution.

Appeal from circuit court, Wise county.

Suit by M. L. McClelland and Frances E. McClelland, his wife, to set aside a deed from M. L. McClelland to O. Barrett, Jr., and one from O. Barrett, Jr., to the Virginia & Tennessee Coal & Iron Company. Decree for plaintiffs, and defendant appeals. Affirmed.

Fulton & McDowell and D. D. Hull, Jr., for appellant. R. T. Irvine, for appellees.

HARRISON, J. In 1883, M. L. McClelland, a householder and head of a family, executed and had recorded his deed, describing a certain tract of about 100 acres of land, and claiming the benefit of the same as a homestead, pursuant to the provisions of the statute in such cases made and provided.

In 1886, being still a householder and head of a family, he made a deed, in which his wife did not unite, conveying the coal and timber in and upon the land, theretofore claimed as a homestead, to O. Barrett, Jr. Subsequently, O. Barrett, Jr., sold and conveyed the same to the appellant.

This suit is brought by M. L. McClelland and Frances E. McClelland, his wife, seeking to have set aside and declared void the deed from M. L. McClelland to O. Barrett, Jr., and also the deed from the latter to appellant. In support of the prayer of their bill, appellees rely upon section 3634 of the Code, which, so far as now material, reads as follows:

"The real estate, set apart as aforesaid, shall not be mortgaged, encumbered, or aliened by the householder, if a married man, except by the joint deed of himself and his wife."

There was no error in overruling the demurrer to the bill. No reason has been assigned in its support, and we see no ground for sustaining it. The chief contention of appellant is that the statute (Code, § 3634) is unconstitutional, because contrary to the express language of the constitution, and contrary to the intent of its framers; the argument being that the statute puts a check upon the free alienation of the homestead, and thereby impairs the benefits intended to be secured by the constitution.

Article 11 of the constitution, in so far as now material, reads as follows:

"Section 1. Every householder or head of a family shall be entitled * * * to hold exempt from levy, seizure, garnishing or sale, under any execution, order or other process, * * * his real and personal property, or either, * * * to the value of not exceeding two thousand dollars to be selected by him."

"Sec. 5. The general assembly shall, at its first session under this constitution, prescribe in what manner and on what conditions the said householder or head of a family shall thereafter set apart and hold for himself and family, a homestead out of any property hereby exempted. * * * But this section shall not be construed as authorizing the general assembly to defeat or impair the benefits intended to be conferred by the provisions of this article."

"Sec. 7. The provisions of this article shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out."

We cannot concur in the view that the legislature has gone beyond its power in enacting that the real estate set apart as a homestead shall not be aliened by the householder, if a married man, except by the joint deed of himself and wife. By section 5 of the article under consideration, the broadest powers are given the legislature in the matter of prescribing the conditions upon which the homestead should be set apart and held. The restriction placed by section 3634 upon the right to alien real estate set apart as a homestead is not unreasonable, and does not impair the benefits intended to be secured by the constitution. The manifest purpose of the constitution was to secure the family a home, notwithstanding the misfortune of the husband, and it tends in a high degree to accomplish that object to provide that real estate set apart as a homestead shall not be aliened except by the joint deed of the husband and wife.

The learned counsel for the appellant has pressed with much earnestness the view that to declare valid section 3634 is to hold that the framers of the constitution, in drafting article 11, had two irreconcilable intents. The ground of this argument is that in holding the statute, now carried into section 3647, to be a valid exercise of legislative power, this court has held that the constitutional intent was to give the holder of the homestead the unrestrained power of alienation. Reed v. Bank, 29 Grat. 719.

The right to waive the benefit of the homestead exemption in a bond, bill, note, or other instrument is expressly given by section 3647, and the single question decided in the case cited was whether a householder or head of a family had a right under the constitution to waive the benefit of the exemption. The court held that the statute was constitutional, and that the householder or head of a family had the right to waive the benefit of his homestead exemption in the manner prescribed by the statute. The court said that there was neither an express nor implied prohibition of a waiver of the homestead exemption in the constitution, nor was there any interdiction of the powers of the legislature to provide for such a waiver, or

the mode in which it may be exercised. As already stated, the legislature is given very broad power and discretion by article 11 in the matter of prescribing the conditions upon which the homestead shall be set apart and held, and we see no sufficient reason why it could not provide, as a basis of credit, that the householder might in a bond, note, or other instrument waive the exemption, and at the same time provide, as a means of protecting, to some extent, the family, that in the case of real estate set apart as a homestead it should not be alienated except by the wife uniting with the husband in the conveyance. It must be remembered that when a householder takes the benefit of the homestead exemption he not only impairs the rights of his creditors, but he surrenders at the same time some of his own rights. He takes the property set apart upon the terms prescribed as the conditions upon which he is permitted to hold it. He is not compelled to take the homestead, but, if he does, the benefit secured is to free the property selected from the attack of his creditors, and in return for this benefit the statute requires him to surrender his former dominion over the land set apart, only to the extent of providing that he cannot alien the same except by his wife uniting with him in the conveyance. In Hatorff v. Wellford, 27 Grat. 356, Judge Staples says that the policy which dictated these homestead exemptions was suggested by considerations both of a political and a benevolent character; "benevolent, because the possession of the homestead is the security of the family against the improvidence, the follies, and the imprudences of the husband or father." This benevolent intent has been carried out in a meager way, for it is a very small protection to the family against the improvidence and follies of the husband to limit his power of alienation only to the extent provided by section 3634. If any conflicting intent is attributed to the framers of the constitution by the decision construing section 3647, and the view here taken of section 3634, it is more apparent than real. Certainly, there is no such conflict as would warrant this court in holding unconstitutional a statute so plainly valid and reasonable as that now before us. We invoke here for our guidance the same rule laid down in Reed v. Bank, supra, that "upon the most familiar principles, repeatedly declared by the decisions of the supreme court of the United States, and by the supreme courts of all the states, and by none more emphatically than by this court, every statute is presumed to be constitutional. It cannot be declared by the courts to be otherwise, unless it be made clearly so to appear. The whole lawmaking power is vested in the legislature, which is omnipotent unless restricted by the express or implied provisions of the state or national constitution."

It is further contended that while section 3634 forbids, it does not invalidate, a conveyance made by the householder alone; that such a deed is not declared by the statute to be void or voidable; and that the statute is to be strictly construed, and nothing can be added to it by intendment.

Homestead statutes are always construed liberally, in order that their purpose may be more certainly accomplished. Section 7 of the article of the constitution now under consideration expressly provides that the provisions of said article "shall be construed liberally, to the end that all the intents thereof may be fully and perfectly carried out." The framers of the constitution are presumed to have known the general rule of interpretation now contended for, and it is a most reasonable presumption that they inserted section 7 into article 11 in order to prevent the application of that rule to the statutes enacted for the purpose of carrying out the provisions of that article. Further, the legislature must have had in mind the constitutional provision for a liberal construction of these statutes when it enacted section 3634, and therefore knew that it was not necessary to declare such a deed as that in question void; otherwise, why should the section have been enacted at all? To give the statute the construction contended for would make it nugatory, and defeat the plain purpose of the legislature. To hold that the householder cannot convey the land set apart, except the wife unite in the conveyance, and then to hold that if he does do it the deed must be held valid, would destroy the law. The only way to carry out the legislative intent is to hold the deed of the husband solus void. This construction is, we think, amply justified by the language of the section and the constitution.

It is further contended that M. L. McClelland owned the land in question in fee simple, and that, inasmuch as the homestead estate must expire after the death of McClelland and his wife and the majority of his youngest child (section 3635), the deed should not be held void as to the remaining or underlying estate, but should be held to operate as an alienation of such right or interest therein as the grantor might lawfully convey. The fallacy of this position is found, we think, in the assumption that there is an estate remaining after or underlying the homestead that the husband can lawfully convey. The "homestead estate" is a unit. It does not consist of a life estate in the land with remainder over. The claimant, when the law is complied with, gets the whole estate in the land, and it is the entire estate thus acquired that he is forbidden to alien, except his wife join in the deed. It would greatly impair the benefits intended to be secured by the constitution were any part or interest in this estate to be vested in the appellant under the deed in question. If appellant held a vested interest, to take effect upon the death of the husband and wife and the majority of the youngest child, the estate

created by the law would be greatly depreciated in value. The husband has a right, the wife uniting, to sell and convey the homestead estate, or to consume such estate in any other way recognized by the law. He would be deprived of this right, because unable to make title, if a remaining or underlying part of the homestead was vested in appellant. We conclude, therefore, that no right or interest has been acquired by appellant under the deed in question that the grantor could lawfully convey.

For these reasons, the decree complained of is affirmed.

RIELY, J., absent.

FRY et al. v. STOWERS et al.

(Supreme Court of Appeals of Virginia. June 28, 1900.)

DISPUTED TRACT—PARTIAL ADVERSE POSSESSION—EJECTMENT—PAROL DISCLAIMER—ADMISSIONS AS EVIDENCE—INSTRUCTIONS NOT CONFLICTING—VERDICT—CONFLICTING EVIDENCE—APPEAL—EXCESSIVE RECOVERY—INACCURATE DISCLAIMER—NEW TRIAL—IMPOSITION OF TERMS—DISPOSITION ON APPEAL.

1. Where a senior claimant is in actual possession of land, and a junior claimant to a portion thereof enters on and incloses a part only of the interlock, and holds his inclosure adverse to the senior claimant, such adverse possession will confer title on the junior claimant only to so much of the interlock as he actually occupies, and will not be extended to embrace constructively all of the disputed portion, as against the actual occupancy of the senior claimant.

2. Instructions in an ejectment suit that disclaimer of title can only be made by deed or court record, and that while a parol disclaimer is ineffectual, yet a solemn admission by the landowner in regard to the boundary disputed is entitled to the same weight in evidence as in any other case, are not in conflict, and it is not error to give them both.

3. Where a verdict settling a boundary dispute is rendered on conflicting evidence, it will not be disturbed on appeal.

4. Where plaintiff in ejectment recovers an excessive verdict, and judgment is rendered accordingly, a disclaimer entered of record in court, which fails to accurately describe the excess, will not prevent the granting of a new trial, or the imposition of terms on plaintiff to execute an accurate release in order to avoid a new trial.

5. Where, in ejectment involving a boundary dispute, plaintiff recovered a verdict for the entire interlock, and judgment was rendered accordingly, and it was conceded that defendant had gained title by adverse possession to a portion of the interlock, it was error not to grant defendant's motion for a new trial unless plaintiff should release such portion; the practice of imposing terms on the party achieving an excessive recovery as a condition for refusing a new trial being applicable to ejectment equally with other actions, notwithstanding the verdict fixes the boundaries of the land recovered.

6. Where plaintiff in ejectment has recovered an excessive verdict and judgment, the judgment will be reversed on appeal, with direction to award a new trial unless plaintiff will release on the record, by proper description, the excess recovered.

Error to circuit court, Bland county.

Action by one Stowers and others against one Fry and others. From a judgment in favor of plaintiffs, defendants bring error. Reversed, with directions.

J. H. Fulton, for plaintiffs in error. S. W. Williams and F. Kegley, for defendants in error.

HARRISON, J. This is an ordinary action of ejectment. The land in controversy is an interlock of grants. The plaintiff claims under a grant from the commonwealth to Daniel Robinett in the year 1808, and the defendant under three grants from the commonwealth to James Devor, dated, respectively, in 1826, 1840, and 1842.

It appears that the plaintiff has been in the actual possession of the land embraced in the patent under which he claims for many years, having cleared and cultivated a large part thereof and built a house thereon. It further appears that, while the plaintiff was thus in the actual possession of the land covered by the Robinett patent, the defendant, whose later grant overlapped that of the plaintiff, entered upon and inclosed a small part of the interlock created by the overlap, and held the same adversely to the plaintiff for the statutory period. It is conceded by the plaintiff that the defendant is entitled, by reason of his entry and adversary possession, to so much of the interlock as may be within the actual inclosure made by him, but that his right extends no further than the limits of such inclosure. On the other hand, the defendant contends that, by virtue of his inclosure of part of the interlock, his right extends to the limits of his grant, and includes the whole of the interlock. The contention of the parties is presented by instructions Nos. 1, 2, 5, and 7 given for the plaintiff, and No. 5 asked for by the defendant and refused. The question presented, though much discussed, has never been settled in this state.

It is very clearly stated by Judge Buchanan in Stull v. Iron Co., 92 Va. 253, 23 S. E. 293, to be this: "Does the adverse possession of a claimant under a junior title extend to the whole of his tract, or only to the extent of his inclosures, where there are conflicting grants or deeds to lands causing an interlock, the claimant under the older title being in actual possession of a part of his land outside of the interlock when the claimant under the junior title entered upon and took actual possession of a part of the interlock, claiming title to the whole extent of his boundary?"

Much has been said by judges and learned writers upon this question. It would, however, add nothing to the value of this opinion to review the authorities, or repeat here what has been so well said by others. In the decisions of our own state, as well as learned articles in our Law Register, all has been said by way of discussion that need be said. Proceeding, then, directly to a decision of the question presented, we are of opinion that

where a senior patentee settles upon any portion of his land, claiming title to the whole, whether inside or outside of the interlock, before the junior patentee has settled upon any part of the interlock, the senior patentee is in possession to the extent of his grant, and a subsequent entry of the junior patentee upon the interlock only ousts the senior patentee to the extent of the land actually in the occupancy of the junior patentee by residence, improvement, cultivation, or other open, notorious, and habitual acts of ownership.

The conclusion reached is supported by the better reason, and is in accordance with the great weight of authority.

It follows, from what has been said, that there was no error in giving instructions Nos. 1, 2, 5, and 7 for the plaintiff, nor in refusing instruction No. 5 asked for by the defendant.

It is further objected that instruction No. 3 given for the plaintiff is in conflict with instruction No. 8 given for the defendant, and should not have been given.

We are of opinion that both instructions correctly state the law and were properly given. The instruction for the defendant told the jury that a disclaimer of a legal title could only be made by deed or by record in court, and the instruction for the plaintiff informs the jury that while there can be no parol disclaimer of title to land, still, where the owner of land makes a solemn admission in regard to a disputed question of location or boundary, or in regard to the time, location, and existence of a disputed corner, then such admissions are entitled to the same weight in an ejectment case that would be given to them by the jury in any other case. There is no conflict between the two instructions. That for the plaintiff admits the correctness of the instruction for the defendant, and propounds, in addition, a sound proposition touching the weight of admissions as to a disputed boundary or corner.

Instruction No. 8 given for the plaintiff is objected to upon the ground that there was no evidence tending to support it. We think the record in the trespass case, which was introduced by the plaintiff without objection, and read to the jury, was sufficient to justify this instruction.

The last assignment of error is to the action of the court in refusing to set aside the verdict as contrary to the law and the evidence.

The real controversy before the jury was the true boundary lines of the Robinett patent, under which the plaintiff Stowers claimed. Upon this question the evidence was conflicting. The jury have established the true lines to be as contended for by the plaintiff, and upon well-settled principles the verdict must stand, unless some other valid objection can be shown thereto. The record shows that the verdict was in favor of the plaintiff for the entire tract within the boundary of the Robinett survey. This included the whole interlock, whereas, as already seen, the defendant Fry was entitled to that portion of the interlock actually inclosed and occupied by him. The court rendered its judgment in accordance with this verdict.

After the judgment was entered, the plaintiff appeared in court, and, by order entered of record, released and disclaimed title in favor of the defendant to that portion of the land within the interlock which was in the actual inclosure and occupancy of the defendant. This release, if accurate, would have accomplished the ends of justice, and secured to the defendant all of his rights. It is, however, contended that this disclaimer does not accurately describe such inclosure, and that the error of the court in giving judgment for the whole cannot now be corrected, and that the verdict of the jury must therefore be set aside and a new trial awarded.

It does not clearly appear from the record what the area of the defendant's inclosure is. It was certainly very small,—less, probably, than an acre. Its trifling value, no doubt, caused no importance to be attached to it except as a basis for claiming the entire interlock, and hence the failure to refer to it in the verdict.

New trials being addressed to the discretion and authority of the court, in order to prevent a material and manifest injustice, the court, as the alternative of a new trial, may impose terms upon the party, requiring him to consent to such a modification of the verdict as will meet the substantial justice of the case. So, the new trial may be limited to a single point, as to a single issue in the case or a particular question, without reopening the whole case, or even, it seems, as to part of the demand sued for, letting the judgment stand for the residue. The new trial may be granted upon any terms which, in the discretion of the court, shall seem requisite to achieve the ends of justice in the particular case. 4 Minor, Inst. pt. 1, p. 930, and the cases there cited.

We do not approve the rule announced in Shiflet v. Dowell, 90 Va. 745, 19 S. E. 848, that the principle stated does not apply in the case of an action of ejectment, because of the statute which requires that the verdict shall "specify the land, particularly as the same is proved, and with the same certainty of description as is required in the declaration." The practice of putting a party upon terms where the verdict is plainly erroneous in part is a wise and salutary one, saving delay, costs, and, above all, ending strife; and we perceive no good reason why the ends of justice are not as much subserved by the application of the principle in an action of ejectment as in any other case.

In 1 Grah. & W. New Tr. p. 609, it is said: "It may be safely asserted that no case can occur, presenting circumstances, timely addressed to the court, in which the rights of the parties may not be fully protected by the imposition of conditions meeting the exigency."

We are therefore of opinion that the court, before entering its judgment, should have put the plaintiff upon terms, so as to have excluded from his recovery that part of the interlock in the actual inclosure of the defendant.

For the foregoing reasons the judgment is reversed, and the case remanded, with directions that unless the plaintiff will release on the record, by proper description, that portion of the interlock in the actual possession of the defendant, the verdict be set aside and a new trial awarded; but, if the plaintiff accepts the terms prescribed and makes such release, the motion for a new trial shall be overruled, and judgment rendered for the plaintiff, with costs. Buena Vista Co. v. McCandlish, 92 Va. 297, 23 S. E. 781.

The defendant in error, being the party substantially prevailing in this court, is entitled to recover his costs.

BLANKENSHIP et al. v. ELY.

(Supreme Court of Appeals of Virginia. June 21, 1900.)

INJUNCTION—STAY — BOND — DECREE — VARIANCE—DEFENSE—ESTOPPEL—SPECIAL PLEAS —SUFFICIENCY OF GENERAL ISSUE—SIGNING —SUFFICIENCY.

1. Where a bond is executed pursuant to a decree in chancery requiring it in order to stay the issuance of an injunction, the fact that the bond does not conform to the requirements of the decree is not ground for demurrer to a declaration on the bond, since the obligation does not derive its efficacy from the decree, but, to determine the liability of the parties, the court must look to the instrument alone.

2. Parties executing a bond in pursuance of a decree in chancery requiring it in order to stay the issuance of an injunction are afterwards estopped to deny the recitals of the bond in a suit thereon, though they contradict the chancery record.

3. Where, to a declaration on a bond, the plea of non est factum was interposed, together with certain special pleas setting up defenses which were also available under the general issue, and the record shows that defendant introduced evidence pertaining to the special defenses under the general issue, it was not error to reject the special pleas.

4. Where, in a suit on a bond given to stay injunction proceedings, the defense relied on is that defendants signed as sureties under an agreement that the principal should also sign, and it appears that the principal's husband signed her name to the bond at her request, and that the bond was filed in the injunction suit and proceedings therein accordingly stayed to the principal's benefit, such signing by the husband is a sufficient compliance with the agreement to bind the sureties.

Error to circuit court, Lee county.

Action on a bond by G. H. Ely against George W. Blankenship and others. From a judgment in favor of plaintiff, defendants bring error. Affirmed.

C. T. Duncan, for plaintiffs in error. Pennington Bros. and M. G. Ely, for defendant in error.

HARRISON, J. The court is of opinion that the demurrer to the declaration was properly overruled. The bond sued on was executed in pursuance of a decree of the circuit court of Lee county. The defendants craved oyer of the bond and of the decree directing its execution, and then demurred upon the ground that the bond did not conform to the requirements of the decree. The bond does not derive its efficacy from the order. It would be a valid and binding instrument, even though the record of the chancery case had been silent with respect to its execution. In determining the liability of the parties to the bond we must look to the instrument alone, and not to the order of the court in regard to its execution; and, although the instrument may contradict the record, the parties executing it are estopped to deny its recitals. Caskie's Ex'rs v. Harrison, 76 Va. 85.

The court is further of opinion that the four pleas tendered by the defendants were properly rejected. Whether or not these pleas were good we need not inquire. The plea of non est factum, the general issue, was put in. Under this plea it was competent to show any fact that could have been proven under the special pleas, had they been admitted, and it is apparent from the character of the evidence that the defendants availed themselves of their rights in this respect without objection from the plaintiff.

Where the general issue has been pleaded, special pleas that set up matter of defense which can be proved under the general issue should be rejected. Campbell Co. v. Angus, 91 Va. 438, 22 S. E. 167; Richmond Union Pass. Ry. Co. v. New York & S. B. Ry. Co., 95 Va. 386, 28 S. E. 573.

The court is further of opinion that the plea of nul tiel record was properly rejected. The object of this plea was to contradict the recitals of the bond with the record of the chancery suit. This question has been considered in disposing of the demurrer, and what is there said need not be repeated here. Franklin's Adm'r v. Depriest, 13 Grat. 257.

The court is further of opinion that there was no error in giving the two instructions asked for by the plaintiff. The chancery suit in which the bond sued on was executed and filed was brought for settlement of partnership accounts and a dissolution of the firm of M. E. Woodward & Co., composed of M. E. Woodward, one of the parties defendant, and G. H. Ely, plaintiff in the suit at bar. The partnership assets were in the hands of M. E. Woodward and her husband, J. W. Woodward. The bill asked for a receiver, and prayed for an injunction restraining M. E. Woodward and J. W. Woodward from disposing of the stock of goods on hand, or collecting any debts due the firm. Upon the hearing of the motion to grant an injunction and appoint a receiver, the court required M. E. Woodward to exe-

cute to G. H. Ely, before the clerk of the court, a bond with approved security in the sum of $600, conditioned to indemnify and save harmless said Ely, and to secure him whatever sum might appear to be due on final settlement of the partnership accounts; the decree further providing for the injunction and receiver, unless such bond was executed within 10 days. It is admitted that on final settlement more than $600 was due G. H. Ely on account of debts against the firm paid by him, and it is not denied that the sums so paid were intended to be secured by the bond sued on. It is, however, contended by George W. Blankenship that he signed the bond with the agreement and understanding that M. E. Woodward and F. A. Munsey were to sign and acknowledge the same before the clerk of the court, and a like contention is made by F. A. Munsey that he signed it with the understanding that M. E. Woodward and George W. Blankenship would sign and acknowledge the same, and that, inasmuch as M. E. Woodward did not sign and acknowledge the bond, they are not bound.

The ground of objection to the instructions under consideration is that they make no reference to these respective agreements touching the execution and delivery of the bond by Blankenship and Munsey. The bond is on its face, in all respects, a complete instrument, duly signed by each of the obligors named in the body of the bond, including M. E. Woodward. It appears from the uncontradicted testimony of John W. Woodward that he signed the bond for his wife, M. E. Woodward, at her request. The bond thus executed was filed in the chancery cause, as shown by the indorsement of the clerk thereon, was acted upon by M. E. Woodward receiving and enjoying the benefits resulting from its execution, and was relied upon by G. H. Ely as his protection in lieu of the injunction and receiver asked for by him. If, therefore, the defendants had the right, in this action, to rely upon the conditions mentioned, which we by no means concede (Miller v. Fletcher, 27 Grat. 403), such conditions were substantially complied with. All of the parties contemplated did sign the bond, and M. E. Woodward has been held liable by the judgment complained of, so that no one has been injured by reason of her failure to sign and acknowledge the bond in proper person.

The court is further of opinion that there was no error in refusing the several instructions asked for by the defendants. Without prolonging this opinion to comment upon these instructions in detail, it will suffice to say that they are based upon the erroneous theory entertained by the defendants, that the bond sued on derives its efficacy from the decree directing its execution. The questions raised by these instructions have already been disposed of in considering other assignments of error.

The court is further of opinion that the evidence was ample to sustain the verdict of the jury, and that it was not error to refuse to set the same aside as contrary to the law and the evidence.

Upon the whole case, we are of opinion that there is no error to the prejudice of the plaintiffs in error, and the judgment is affirmed.

RIELY, J., absent.

BROWN v. COMMONWEALTH et al.

(Supreme Court of Appeals of Virginia. June 21, 1900.)

LICENSES — MERCANTILE BUSINESS — WHAT CONSTITUTES—CITY ORDINANCES—STATUTES—CONSTRUCTION.

1. Under Acts 1889–90, c. 244, §§ 27, 28, declaring who shall be required to obtain a state license to conduct business as a merchant, providing that a license shall not be required of any person who may canvas any county or corporation to buy articles designed as food for man, unless he shall keep a place of business for the purpose of selling such articles in or within a half mile of a city or town; and sections 32 and 33, providing that a peddler's license shall not be required of any one for the privilege of selling family supplies of a perishable nature, farm products, etc.; and Act March 3, 1896 (Acts 1895–96, p. 685), making it unlawful for any city or town to collect a tax from any person selling farm and domestic products within the limits of any such city or town outside the regular market houses and sheds,—a person selling on the market square of a city, from his wagon, country produce, some of which was raised on his own farm, and the balance acquired in the course of his business, is not liable to a fine for doing business as a merchant in such city without a license from the commonwealth.

2. The city of Roanoke charter (Acts 1895–96, p. 549) § 104, specifying various kinds of business or employment on which the city may levy a license tax, and providing that a license may be required of any person doing business in such city, whether the business be of a like character as that specially mentioned or not, and whether a license is required therefor by the state or not, does not apply to a person selling on the market square country produce from his wagon.

3. Laws imposing a license or a tax are strictly construed, and where there is doubt as to their meaning or scope they are construed more strongly against the government and in favor of the citizen.

4. General Ordinances City of Roanoke, § 70, imposes on the merchant doing business in the city a tax, including dealers in dry goods, lumber, furniture, groceries, merchant tailors, or persons engaged in any other mercantile business whatsoever, except where otherwise herein specified. Section 472 imposes a curbage tax on the sale of country produce at the city market, and by section 474 the sale of such produce is confined to the city market. *Held*, that a person selling on the market square country produce from his wagon, and who has paid a curbage tax, is not required to pay a license tax as a merchant.

Error to hustings court of Roanoke.

W. C. Brown was convicted for violating the state license law and for doing business

as a merchant in the city of Roanoke without a license, and brings error. Reversed.

Hansbrough & Hall, for plaintiff in error. A. J. Montague, Atty. Gen., for the Commonwealth. C. B. Moomaw, for defendant in error city of Roanoke.

CARDWELL, J. W. C. Brown is a merchant in the county of Franklin, and has the license required by law for the privilege of doing business as a merchant in that county. In the course of his business he acquires by barter country produce, such as eggs, butter, fowls, and vegetables, which he often gathers up by sending his wagon around among his customers; and from time to time he brings the country produce raised on his farm and acquired through his store to the city of Roanoke for sale. Such produce is sold by him from his wagon on the city market, in accordance with the market regulations of the city, which regulations impose what is known as a "curbage tax" for the privilege of selling each load of produce on the market square, and confines the sale of such produce to the market square. On October 4, 1899, Brown came to the city of Roanoke with a wagon load of country produce, some of which was raised on his own farm and the balance was acquired by him in the course of his business. He paid the curbage tax required by the market laws of the city, and on the market square sold his load of produce to a merchant doing business in the city. After having sold his produce, he was cited to appear before the police justice for the city to show cause why he should not be fined for doing business as a merchant in the city without having first obtained a license from the city and from the state of Virginia to conduct such business. Upon the hearing of these warrants the police justice dismissed them, holding that Brown was not conducting business in the city in such a manner as to make it necessary for him to obtain a merchant's license in the city. From this judgment the commonwealth and the city of Roanoke appealed to the hustings court of the city, and upon the hearing of the causes on appeal the hustings court imposed a fine of $30 on Brown for the violation of the state license law and $2.50 for doing business as a merchant in the city without a license from the city.

By agreement, one bill of exceptions was taken to the rulings of the hustings court, made applicable to both cases, and they are before us upon a writ of error awarded by one of the judges of this court.

We will first consider the question whether or not plaintiff in error, under the facts and circumstances stated, was required by the revenue laws of the commonwealth to take out a merchant's license for the privilege of selling his country produce upon the market square of the city of Roanoke.

Section 549 of the Code requires that a merchant's license shall designate some definite place for the transaction of such business within the district of the commissioner granting the license.

The statute imposing a license tax upon merchants provides that the tax shall be graduated according to the amount of their purchases during the period for which the license is granted, and the section which fixes the amount of the tax declares that merchant tailors, lumber merchants, furniture merchants, butchers, greengrocers, hucksters, dealers in coal, ice, or wood, shall be embraced in that section; but, it further provides that nothing contained in the section shall be so construed as to require a license of any person who may canvass any county or corporation to buy lambs, pigs, calves, fowls, eggs, butter, and such like small matters of subsistence designed as food for man, unless such person shall keep a place of business for the purpose of selling such articles in or within a half mile of a city or town in the state. Sections 27, 28, c. 244, Acts 1889–90. Sections 32 and 33 of that act also expressly provide that a peddler's license shall not be required of any one for the privilege of selling or offering for sale family supplies of a perishable nature, farm products, wood, or coal. And by an act approved March 3, 1896 (Acts 1895–96, p. 685), it is declared unlawful for any city or town, or of any agent or officer of such city or town, to impose or collect any tax, fine, or other penalty from any person selling their farm and domestic products within the limits of any such city or town outside of and not within the regular market houses and sheds of such cities and towns.

It is, therefore, clearly the policy of the law to exempt persons who deal in country produce, as plaintiff in error does, from the payment of a license tax either as a merchant or as a peddler, or any tax for buying or selling outside of the market of a city or town such produce. He does not come under the exception in the statute above referred to by keeping a place of business for the sale of country produce in or within a half mile of the city of Roanoke, but such sales as were made by him in the city of Roanoke were made from his wagon on the market square.

A merchant's license contemplates that the merchant is to have a fixed place of business within a county or city,—a store or shop for the sale of goods. This is the common acceptation of the term as given in 2 Bouv. Law Dict. p. 155. The same author defines the word "merchant" in its legal acceptation to mean one whose business it is to buy and sell merchandise, and says that it applies to all persons who habitually trade in merchandise. Neither in the legal nor common acceptation of the word "merchant" was plaintiff in error conducting a mercantile business in the city of Roanoke when selling on the market square of the

city, from his wagon, country produce, and therefore was not liable to a fine for doing business as a merchant in the city without having first obtained a license from the commonwealth to conduct such a business.

It is claimed that section 104 of the charter of the city of Roanoke (Acts 1895–96, p. 549) furnishes authority in the city to impose a merchant's license tax upon plaintiff in error. This section, after specifying various kinds of business or employment upon which the city may levy a license tax, provides that a license may be required of any person whatsoever doing business in said city, whether the business or employment be of a like character or kind as that specially mentioned or not, and whether a license is required therefor by the state or not. Can it be said that plaintiff in error was doing business in the city of Roanoke, within the meaning of the section? We think not. It is clear that selling country produce on the market of the city is not specially mentioned in the section, and the authority to impose a license tax for the privilege of conducting such a business must be derived, if at all, from the powers conferred in general terms.

Laws imposing a license or a tax are strictly construed, and whenever there is doubt as to the meaning or scope of such laws they are construed more strongly against the government and in favor of the citizen. Board v. Tallant, 96 Va. 723, 32 S. E. 479.

Section 70 of the general ordinances of the city of Roanoke, like the statute of the state, imposes upon the merchant doing business in the city a tax graduated according to the purchases he makes in the conduct of his business, the tax imposed being the same as that prescribed in the statute, and concludes: "Dealers in dry goods, lumber, furniture, groceries, merchant tailors, or persons engaged in any other mercantile business whatsoever, and whether they be of like kind or class with those enumerated or not, except where otherwise herein specified, shall be embraced in this section."

Section 472 of the city's ordinances, pursuant to the authority expressly conferred in the city's charter, specifically imposes a curbage tax upon the sale of country produce at the city market, making no distinction between persons selling such produce of their own raising and persons who acquired such produce in other ways; and by section 474 the sale of such produce is confined to the city market.

Here, then, the city has confined the sale of country produce to the market square, specifically imposing a curbage tax for the privilege of selling it there; and in the case at bar, after this curbage tax had been paid by plaintiff in error, demand is made upon him for the payment of a license tax as a merchant in the city, on the ground, as counsel for the city contends, that when plaintiff in error came to the city, and paid his curbage tax, he acquired a place to do business in the city as a merchant, as fully and completely as any merchant in the city doing business in any of the houses in the city, etc. This position is wholly untenable. When occupying a space in the market, after paying the curbage tax, plaintiff in error was not there to buy and sell as is the business of a merchant, but merely to sell, from his wagon, his load of country produce, raised in part on his farm, and the residue bartered for or purchased in the course of his business in Franklin county, as he had the right to do; and when this was done, or the market hours closed, he abandoned the space in the market occupied by him, and had no further right to occupy it. In no sense, therefore, was he doing business as a merchant in the city of Roanoke.

We are of opinion that the charter of the city does not authorize the imposition of a merchant's license tax in such a case, and that the common council of the city has not, by the ordinance relied on, attempted to impose the tax.

The judgment of the hustings court complained of will be reversed and annulled, and this court will enter such judgment as that court should have entered, dismissing the warrants against plaintiff in error, with costs to him as against the city of Roanoke.

RIELY, J., absent.

JACKSON v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. June 21, 1900.)

HOMICIDE—QUARRELSOME CHARACTER OF THE DECEASED—EVIDENCE—ADMISSIBILITY—SELF-DEFENSE—INSTRUCTIONS.

1. To render an assignment of error for the improper exclusion of evidence available, record must show what the party offering the witness expected to prove by him.

2. Where the defendant and the deceased were engaged in a fight, and the defendant struck the fatal blow with a rock while the deceased was running away from him, the quarrelsome and vindictive character of deceased cannot be shown.

3. An instruction that the law of self-defense is the law of necessity, and the necessity relied on to justify the killing must not arise out of the prisoner's own conduct, and that if the prisoner assaulted the deceased, and thereby brought about the necessity of killing him, then the prisoner could not justify the killing by a plea of necessity unless he were without fault in bringing that necessity on himself, was proper.

4. Where there was evidence that the prisoner grossly insulted the deceased, and made an assault on him, in which he struck the deceased a fatal blow with a rock as the latter was running away from him, an instruction that, if the first assault was made on the deceased with a preconceived design to kill or to inflict great bodily harm, then the malice of the first assault, notwithstanding the violence with which it was returned, communicates itself to the last act of the prisoner, and the killing is murder, was supported by the evidence.

5. Where the prisoner and the deceased were engaged in a mutual combat, and the prisoner struck the deceased a fatal blow with a rock as the latter was running away from him, instructions on the law of self-defense were properly refused.

Error to Pulaski county court.

Charles Jackson was convicted of murder, and he brings error. Affirmed.

J. C. Wysor and T. L. Massie, for plaintiff in error. A. J. Montague, Atty. Gen., for the Commonwealth.

BUCHANAN, J. The plaintiff in error was found guilty of murder in the second degree, and sentenced to the penitentiary for a term of five years.

The first error assigned to the rulings of the trial court was its refusal to allow the character of the deceased as a dangerous man to be shown. Two witnesses were asked if they knew the reputation of the deceased as a dangerous man. They stated that they did, but, when asked what that reputation was, the court, upon the motion of the attorney for the commonwealth, refused to allow the questions to be answered. What the witnesses were expected to testify as to the reputation of the deceased is not shown by the bills of exception.

In order that this court can pass upon the action of the trial court rejecting or excluding evidence, its materiality must be shown. Where a question is asked, and the witness is not permitted to answer it, the bill of exceptions should show what the party offering the witness expected to prove by him. If the witness is permitted to answer, and the answer is excluded, the bill of exceptions should show what the answer was; otherwise, this court cannot say that any injury resulted to the party complaining from the action of the trial court. Insurance Co. v. Pollard, 94 Va. 146, 157, 26 S. E. 421, 36 L. R. A. 271, and cases cited; Driver v. Hartman, 96 Va. 518, 31 S. E. 899.

But if the bill of exceptions had shown that the defendant expected to prove that the deceased had the general reputation of being a quarrelsome, vindictive, and brutal man, we do not think that such evidence was admissible. Placing the most favorable construction upon the evidence of the accused, he and the deceased were engaged in a mutual combat, commenced with their hands, and afterwards continued with rocks, both parties reaching for rocks at the same time. From this combat the accused made no effort to retire, but pursued the deceased, and threw the rock which killed him while he was moving away from him. The accused had not only not made out a prima facie case of self-defense, as was thought necessary in Harrison's Case, 79 Va. 374, as a condition precedent to the right to introduce evidence of the dangerous character of the deceased, but the evidence did not tend to show that the defendant did the killing in self-defense. This being so, under all the authorities the evidence was clearly inadmissible. Whart. Cr. Ev. § 84; 2 Bish. Cr. Proc. §§ 625, 626, 629.

The next error assigned is the giving of instruction No. 9 asked for by the commonwealth. That instruction is as follows:

"That on a trial for murder the law of self-defense is the law of necessity, and the necessity relied on to justify the killing must not arise out of the prisoner's own misconduct; and if the jury shall believe from the evidence that the prisoner, Charles Jackson, assaulted the deceased, and thereby brought about the necessity of killing the deceased, should they believe there was any such necessity, then the prisoner cannot justify the killing of the deceased by a plea of necessity, unless he was without fault in bringing that necessity upon himself."

The objection urged to this instruction is that it "virtually told the jury they must find the accused guilty of murder if he began the affray merely to inflict a battery, and without any felonious intent, and that he could not reduce his crime to any lower grade than murder by the plea of self-defense and by proof sustaining such a plea." We do not so understand the instruction. Its object was to tell the jury that the accused could not justify the killing of the deceased upon the ground of self-defense, and therefore be acquitted, if they believed that he had assaulted the deceased, and by such misconduct brought about the necessity for the killing, if there was such necessity, in order to save his own life. That instruction did not instruct the jury, nor was it intended to instruct them, upon the degree of the prisoner's guilt, whether it was murder or manslaughter, but it was merely intended to tell them that upon the facts hypothetically stated in the instruction the prisoner was not entitled to an acquittal.

This is clearly the law. It was so held in Vaiden's Case, 12 Grat. 717, 729, 730. Judge Lee, who delivered the opinion of the court in that case, said: "With regard to the necessity that will justify the slaying of another in self-defense, it should seem that the party should not have wrongfully occasioned the necessity; for a man shall not in any case justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself."

This decision has been followed and the language of Judge Lee quoted approvingly by this court in subsequent cases (Lewis' Case, 78 Va. 732; Honesty's Case, 81 Va. 298, 299; Clark's Case, 90 Va. 369, 18 S. E. 440), and is fully sustained by the later as well as the older text writers (1 Minor, Cr. Law, 43; 1 Bish. New Cr. Law, § 865; 1 Whart. Cr. Law [9th Ed.] § 485; Kerr, Hom. § 179; 1 Hale, P. C. 482).

In Hash's Case, 88 Va. 172, 13 S. E. 398, a somewhat different doctrine was laid down.

but it has been much questioned by the profession, and not only not been followed since, but in Clark's Case, 90 Va. 369, 18 S. E. 440, Judge Lewis, in delivering the unanimous opinion of the court, composed of the same judges who decided Hash's Case, quotes with approval the language of the court in Valden's Case, and refers to Lewis' Case and Honesty's Case, supra, in support of it, without referring to Hash's Case. So far as Hash's Case is in conflict with the doctrine laid down in Valden's Case and our decision in the case before us, we feel constrained to overrule it.

The giving of instruction No. 8 asked for by the commonwealth is assigned as error.

This assignment of error was practically abandoned in the oral argument of the case, and properly so, as the instruction complained of was a correct statement of law, and applicable to the case. 1 Minor, Cr. Law, 46, and cases cited; 2 Bish. Cr. Law, § 697.

The giving of instruction No. 10 for the commonwealth is assigned as error. It is as follows:

"The court instructs the jury that if they believe from the evidence that the prisoner, Charles Jackson, assailed the deceased, and a combat ensued, and in such combat the prisoner killed the deceased, and if they shall further believe that the first assault was made by the prisoner upon the deceased with a preconceived design to kill or to inflict great bodily harm, then the malice of the first assault, notwithstanding the violence with which it was returned, communicates itself to the last act of the prisoner, and the killing is murder."

The objection urged to this instruction is that there was no evidence upon which to base it. In this view we cannot concur. There was evidence tending to show that the accused had grossly insulted the deceased, and made an assault upon him; that during the affray the accused kicked the deceased in the stomach or privates, and doubled him up, whereupon the deceased broke loose from the accused and ran; that the defendant pursued him, although he was trying to escape; that while the deceased was running, and the accused was following, the latter threw two rocks with all the power he could, one of which struck the deceased in the back and the other on the head, causing his death. From this and other evidence in the cause the jury might have believed that the accused insulted and assaulted the deceased for the purpose of doing what he did do, for a man is presumed to have intended to do what he did, unless the contrary appears.

The court refused to give instructions numbered 4, 5, and 6 offered by the accused, and this is assigned as error.

These instructions are all based upon the theory that the accused when he killed the deceased was resisting an attack made upon him by the deceased, and killed him in self-defense. The most favorable construction that can be put upon the prisoner's own evidence, as before stated, does not show that the deceased made an attack upon him, but, at most, the affray commenced as a mere fight or mutual combat, first with the hands, and afterwards with rocks, and that at no time did the accused attempt to quit the combat.

In such cases the right of either party to justify or excuse himself on the ground of self-defense, if he killed the other, is stated by Mr. Bishop as follows: "If a mere fight or an assault, not murderously meant, is followed up till the conflict is for blood, neither party can avail himself of the perfect defense by killing the other until he has endeavored to extricate himself by 'retreating to the wall,' as the old phrase is. * * *

"Cases of mutual combat are those in which this duty of retreating to the wall oftenest appears. Two men being in the wrong, neither can right himself except by retreating to the wall. So that, when one unexpectedly finds himself so hotly pursued by the other that he can save himself only by taking the other's life, if he does it he is guilty of felonious homicide, unless he first withdraws from the place." 1 Bish. New Cr. Law, §§ 869–871; 1 Whart. Cr. Law (9th Ed.) § 486a; 1 Minor, Cr. Law, 42, 43.

In Clark's Case, 90 Va. 360, 368, 18 S. E. 440, it was held that it was a principle of the criminal law that where death ensues on a sudden provocation or sudden quarrel, without malice prepense, the killing is manslaughter, and, in order to reduce the offense to killing in self-defense, the accused must prove two things, viz.: (1) That before the mortal blow was given he declined further combat, and retreated as far as he could with safety; and (2) that he killed the deceased through the necessity of preserving his own life, or that there was reasonable ground to believe that the killing was necessary to preserve his own life, or save himself from great bodily harm. Tested by these principles, it is clear that the instructions refused ought not to have been given. The accused not only did not decline further combat and retreat, but pursued and killed his adversary.

The remaining assignment of error is to the action of the court in refusing to set aside the verdict of the jury because it was contrary to the law and the evidence.

Sufficient reference has already been made to the evidence to show that the verdict of the jury was not contrary to the evidence, and, as we have seen, the court committed no error of law in the trial of the case.

The judgment complained of must be affirmed.

RIELY, J., absent.

MAX MEADOWS LAND & IMPROVEMENT CO. v. McGAVOCK et al.

(Supreme Court of Appeals of Virginia. June 28, 1900.)

VENDOR AND PURCHASER — TRUST DEED — JUDGMENT CREDITORS—LIENS—SATISFACTION—PRIORITY.

1. Certain heirs sold land to C., retaining a lien for the purchase price; and J. C. and J. R., two of the heirs, executed to M. a trust deed conveying, in the alternative, the property conveyed to C., in case the sale should not be specifically enforced, and otherwise their interest in the purchase money due from C. The sale was specifically enforced, and the lien against the property foreclosed, and at the sale the original vendors became purchasers. The land was partitioned among them, and the portions assigned to J. C. and J. R. were sold to satisfy the trust in favor of M. and certain judgment-lien creditors, in the order of their priority, and for payment of their share of the purchase money. Plaintiff, a judgment-lien creditor, contends that M. is not entitled to be satisfied out of the proceeds of this sale, but is precluded from demanding any share of such proceeds by her conduct in allowing the court to confirm the sale to the heirs, and treat the purchase price as if paid by them, without objection. *Held* that, while in some of the decrees of the court the purchase price was treated as paid, yet, since in all of them it is declared that the land is liable for the liens theretofore reported, in order of their priority, M. is not precluded from claiming satisfaction out of these funds, but is entitled to be so satisfied, since under the trust deed the interest of J. C. and J. R. in the land was expressly conveyed in trust for her security.

2. The holder of the oldest unpaid judgment lien is entitled to be paid first out of the property of the debtor, where his lien is a general one.

Appeal from circuit court, Wythe county.

Action by the Max Meadows Land & Improvement Company against McGavock and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

W. B. Kegley, for appellant. J. H. Fulton, for appellees.

BUCHANAN, J. It appears that prior to May 3, 1893, the heirs of Randall McGavock sold to C. M. Clark and associates a tract of about 262 acres of land and conveyed it by their direction to one Denniston, securing the unpaid purchase money by a lien on the land. On May 3, 1893, J. C. and J. R. McGavock, two of the heirs of Randall McGavock, executed a deed of trust to W. E. Fulton, trustee, to secure the payment of a bond for $8,000 executed by them to Margaret McGavock, and to save harmless James H. McGavock, their surety on the bond. Among the property embraced in the trust was the interest of the grantors in the purchase money due from Clark and associates. The language of the deed by which that interest was conveyed or assigned in trust is as follows:

"And the parties of the first part do further grant, transfer, and assign to the party of the second part all their right and interest in and to the unpaid purchase money of a portion of said land sold to said C. M. Clark and his associates, and, to have payment of which, suit is now pending in the circuit court of Wythe county, to which reference is here made; and, if said contract is not specifically enforced by the court, then the parties of the first part do hereby convey their interest in said land to the party of the second part."

The sale made to Clark and associates was specifically enforced in the suit referred to, which is one of the seven causes heard together, in which the decree complained of was entered. In that suit the 262-acre tract of land was sold for the unpaid purchase money, and the heirs of Randall McGavock, the vendors of Clark and associates, became the purchasers at the price of $5,000. They did not pay the cash costs, but executed their bonds for the deferred payments. The commissioner reported the sale, and the court was of opinion that the sale, "notwithstanding the failure of the purchasers to pay the cash payment, should be confirmed, as it appears it will be necessary hereafter again to sell this land to satisfy the liens reported in these causes, when a decree for costs and cash payment alluded to can be entered if the same is not sooner paid," and in the same decree ordered that the lien reserved in the deed to Denniston be credited with the amount for which the land sold, less the costs of suit and sale.

Afterwards the court directed that the land be partitioned between the heirs of Randall McGavock, and that the shares of J. R. McGavock, J. C. McGavock, H. E. McGavock, and Mrs. Lucy Kent be laid off contiguous to each other, which was done. By its decree confirming that partition, the court, being of opinion that it was necessary to sell the interest of the four last named parties in the land to satisfy the trust and judgment-lien creditors of said parties in the order of the priority theretofore reported, ordered its commissioner, unless the said parties within 30 days paid their share of the cash costs of the former sale, their share of the money advanced by James H. McGavock to prevent a forfeiture of the 262-acre tract of land for the nonpayment of taxes thereon, and the unpaid liens reported against them, to sell the lands allotted them in the partition of the 262-acre tract. J. C., J. R., and H. E. McGavock did not pay the debts named, and Commissioner Fulton offered their interest or shares in the land for sale, and James H. McGavock became the purchaser at the price of $4,000. The sale was reported to and confirmed by the court.

By decree of February term, 1899, the court directed its commissioner to collect the two unpaid bonds executed by James H. McGavock to the commissioner for the deferred purchase price of the land sold him, and to apply the interest of J. C. McGavock and J. R. McGavock in the fund so collected to the payment—First, of any balance due on the judgment of W. B. Graham, reported in class 2 in Commissioner Kegley's report; and, sec-

ondly, to the debt of Miss Margaret McGavock, reported in class 3.

This action of the court is assigned as error by the Max Meadows Land & Improvement Company, the appellant here,—a judgment-lien creditor of J. C. and J. R. McGavock. The objection made to the distribution by the court is that the sale of the 262-acre tract of land to Clark and associates having been specifically executed, the deed of trust executed to J. C. and J. R. McGavock to secure Miss Margaret McGavock created no lien on the land for the payment of her debt, but her lien was upon their interest in the purchase-money bonds given for the land, and that she had the right, when that land was sold, to have applied to the payment of her debt the interest of J. C. and J. R. McGavock in the proceeds of that sale, but that, instead of having this done, she allowed the court to confirm the sale to them, and treat the purchase money, except the costs of the suit and sale, as paid by them, and that inasmuch as those proceedings were had in causes to which Miss Margaret McGavock and James H. McGavock were parties, and without any objection on their part, they were precluded by those decrees treating the purchase money due from the McGavock heirs as paid, and had lost their right to have the interest of J. C. and J. R. McGavock therein applied to the payment of the debt due Miss Margaret McGavock.

It is true that in some of the decrees of the court the purchase price which the heirs of Randall McGavock agreed to give for the land seems to be treated as paid, except as to the costs of the suit and sale; but, while this is done, the same decrees declare that the 262-acre tract of land is liable for the liens theretofore reported, in the order of their priority, and its decree for distribution ordered the interest of J. C. and J. R. McGavock in the proceeds of the sale of their shares of the 262-acre tract of land to be paid upon the liens against them according to the priority as fixed by the reports of liens. What ought to have been done, since there seems to have been no surety on the bonds given by the heirs of Randall McGavock for the purchase money of the 262-acre tract of land, was to have ordered the sale of the interest of J. C. and J. R. McGavock in the land for the purchase money due from them, as nothing could have been recovered from them on their bonds by actions at law within any reasonable time, if at all, as appears from the record, and so much of the proceeds of that sale as was equal to the purchase money due from them appropriated to the payment of the debt of Miss Margaret McGavock. The court erred in its mode of procedure. But the appellant, so far as the record shows, has not been prejudiced by the error. It had no right to subject J. C. and J. R. McGavock's interest in the 262-acre tract of land to the payment of its lien until the purchase money due from them, and which was a prior lien upon it, had been paid. The court, by its decree for distribution, has applied the interest of J. C. and J. R. McGavock in the proceeds of the sale of the land to the payment of Miss Margaret McGavock's debt, which was payable out of the purchase money which J. C. and J. R. McGavock owed for it. This being so, the court, by its irregular proceedings, has only done what it ought to and would have done if its proceedings had been regular; and, as no injustice has been done the appellant by such irregularity, the decree complained of will not be reversed on that account. Beery v. Homan's Committee, 8 Grat. 48-53, 54; Wilson v. Spencer, 11 Leigh, 271, 280.

The action of the court in directing the unpaid balance on W. B. Graham's judgment to be paid before the appellant's debt is also assigned as error.

Graham's was the oldest unpaid judgment lien, and was general; extending to all the funds in the hands of the court upon which the appellant had a lien. Graham had the right to be paid first, and the court properly so decreed.

It follows from what has been said that the decree complained of must be affirmed.

RIELY and HARRISON, JJ., absent.

KELLY et al. v. HAMBLEN et al.

(Supreme Court of Appeals of Virginia. June 28, 1900.)

RES JUDICATA—CREDITORS' SUIT—SATISFACTION—ANSWER—EXCEPTIONS.

1. Plaintiff, as assignee of a judgment, sued to subject certain lands to the judgment. Defendants interposed a plea of res judicata, based on a decision, in an action by another plaintiff, holding certain other lands not subject to the lien. *Held*, that since one of the defendants in the present suit was not a party to the former, and since the liability of the land sought to be subjected in the present suit was not considered in the former, the plea was not available.

2. The vitality of a judgment is not exhausted by one action thereon, but the judgment creditor is entitled to pursue successive actions until satisfaction is obtained.

3. Where the defendant in a suit to subject his land to the satisfaction of certain judgment liens answers, showing that there is other property of the principal debtor, or his alienees subsequent to defendant, still liable to the demands sought to be enforced against him, it is error to sustain an exception to such answer, since, if true, it constitutes a good defense.

Appeal from circuit court, Wise county.

Action by C. L. Hamblen and others against William J. Kelly and others to subject certain property to the satisfaction of a judgment lien. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

R. T. Irvine, for appellants. Bullitt & Kelly, for appellees.

KEITH, P. In the year 1893 Logan & Brewer recovered a judgment in Lee county against J. J. Kelly, Sr., for the sum of $5,000, with interest from January 1, 1891. At the same time Kirkpatrick recovered a judgment against the same defendant for $5,000, with interest from the same date. About the same time the Asheville Shoe Company, a judgment creditor, brought suit in the circuit court of Lee county against Kelly and Coldiron and others, alienees of Kelly, for the purpose of subjecting certain lands in Lee county, which were then in possession of said alienees; claiming that the lands really belonged to Kelly, and that he had conveyed them to his co-defendants with the intent to defraud, hinder, and delay his creditors. Plaintiff sought, also, to subject any other land owned by Kelly to the satisfaction of its judgment. The cause was referred to a commissioner, with directions to ascertain and report the liens against Kelly, and their priorities, and what lands, if any, were subject thereto. The judgment creditors were made parties, and their several judgments were duly reported by the commissioner, who also reported that the lands claimed by Coldiron and others were subject to liens of the said judgments; and a decree was entered holding the lands in Lee county to be liable, and directing that they should be sold. Coldiron and others appealed from this decree, and it was reversed, and the bill dismissed. Thereafter, in 1898, Logan & Brewer and Kirkpatrick instituted a chancery suit in the circuit court of Wise county against J. J. Kelly, Sr., and J. J. Kelly, Jr., the object of which was to enforce the judgment obtained by them against two tracts of land lying in Wise county, claimed by J. J. Kelly, Jr. One of these tracts contained 535 acres, worth about $20,000, and the other about 800 acres, worth about $16,000. J. J. Kelly, Jr., and J. J. Kelly, Sr., answered, stating that these several tracts belonged to J. J. Kelly, Jr., and were not liable to the judgments of the plaintiffs. Proofs were taken, but before a final hearing a compromise between the parties was made, by which J. J. Kelly, Jr., agreed to pay 33⅓ per cent. of the judgments of Logan & Brewer and Kirkpatrick; and thereupon, at the next term of the circuit court, this suit was, in pursuance of this compromise, dismissed.

At August rules, 1898, C. S. Hamblen, who in the meantime had become an assignee of the Logan & Brewer judgments, brought suit in Lee county against William J. Kelly and J. J. Kelly, Sr.; making all other judgment creditors of J. J. Kelly, Sr., parties. The object of the suit was to enforce the lien of the judgments against a certain tract of land, containing 700 acres, more or less, the surface of and timber on which were owned and claimed by William J. Kelly; complainants in the bill averring that J. J. Kelly, Sr., had parted with the title to the said land to William J. Kelly after the liens of the judgments had attached thereto. To this bill J. J. Kelly filed a plea in which he sets forth the proceedings in the case of the Asheville Shoe Company against himself and others, and relies thereon as res judicata.

William J. Kelly filed an answer, in which he likewise relies upon said proceedings, and also upon the suit of Logan & Brewer and others against J. J. Kelly, Jr., and J. J. Kelly, Sr., as res judicata, and also as a bar to any further proceedings against his lands, because, as he alleges, the lands of J. J. Kelly, Jr., were liable to the said judgments, and were worth a great deal more than the total amount thereof, to wit, at least $36,000, and that notwithstanding this fact the parties had compromised and dismissed the proceedings against those lands.

Plaintiffs demurred to the plea of res judicata filed by J. J. Kelly, Sr., and filed exceptions to the answer of William J. Kelly on the ground that the same did not constitute any defense. At the April term, 1899, the circuit court of Wise county entered a decree sustaining the demurrers to the plea and the exceptions to the answer, and thereupon J. J. Kelly declined to further plead or answer, and William J. Kelly declined to amend his answer; and the court entered a decree holding that none of the judgments against J. J. Kelly, Sr., constituted liens upon the 700-acre tract, except the judgments of Logan & Brewer and Kirkpatrick, but maintained the liens of those judgments, and directed that unless they should be paid within a certain time the surface of the 700-acre tract and the timber thereof should be sold.

The facts with respect to the 700-acre tract appear to be as follows: In 1882 it belonged to J. J. Kelly, Sr., who in that year sold and conveyed to one Kemmerer the coal and minerals in it. In the year 1884 J. J. Kelly conveyed the surface and timber upon this tract to his son David Kelly, but this deed was never put to record. Subsequently, by an arrangement among the parties, David Kelly was given an interest in certain lands in Lee county; and in consideration thereof he assigned and conveyed to William J. Kelly all his right, title, and interest in the 700-acre tract, who, finding that there was no deed on the record from J. J. Kelly, Sr., to David Kelly, procured from J. J. Kelly, Sr., a deed direct to himself, dated October 5, 1890, which was not recorded in Wise county until March 13, 1894, after the judgments of Logan & Brewer and Kirkpatrick had been docketed in that county, but before the judgments of any of the other creditors had been so docketed.

From the decree of the April term, 1899, the appeal now before us was taken; and the petitioners, J. J. Kelly, Sr., and William

J. Kelly admit that the judgments of Logan & Brewer, assigned to Hamblen as aforesaid, and the judgment of Kirkpatrick, constitute liens on the surface and timber of the 700-acre tract, unless the rights of Hamblen and Kirkpatrick have been lost by reason of the proceedings in Lee county in the suits brought by the Asheville Company, or by reason of the proceedings in Wise county in the suit of Logan & Brewer against J. J. Kelly, Jr., and others, but the petitioners insist that the proceedings in each of those causes do constitute bars to the right of recovery in this suit.

They assign as error, in the decree complained of, first, that the court erred in sustaining the demurrer to the plea of res judicata filed by J. J. Kelly, Sr.

We shall not inquire or decide whether a demurrer applies to an answer or plea in a chancery case. It would seem that it can only be interposed to a bill. However this may be, the appellant made no objection to it in the circuit court, and has not assigned it as error in this court; and we therefore neither approve nor condemn the practice, but reserve it for future consideration.

From an inspection of the record of Asheville Shoe Co. v. Coldiron et al., which, as we have seen, resulted in a reversal of the decree of the circuit court of Lee county, and a dismissal of the bill filed by the judgment creditors of J. J. Kelly, Sr., it appears, first, that William J. Kelly, one of the petitioners in the case before us, was not a party to that proceeding. It further appears, from the opinion of the court (see Coldiron v. Shoe Co., 93 Va. 364, 25 S. E. 238), that the liability of the 700-acre tract in Wise county to the lien of the judgments against J. J. Kelly, Sr., was never considered by the court. Creditors appear to have made strenuous efforts to discover land out of which their judgments might be satisfied. The records were examined, interrogatories were filed, and no effort seems to have been spared to accomplish that result; and, after a careful investigation of the record, we cannot discover that the liability of the 700-acre tract to the lien now asserted against it was in that case heard and determined, nor do we think that the principle invoked by counsel for petitioners applies to a case such as this. It is true, as he contends, that the doctrine of res judicata embraces, not only what was in point of fact adjudicated, but the judgment or decree is conclusive as to all questions in issue, whether formally litigated or not. "It is not necessary to the conclusiveness of the former judgment or decree that the issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment. Every point which has been specifically decided, and by necessary implication, every issue which must have been decided in order to support the judgment or decree, is concluded." Diehl v. Marchant, 87 Va. 447, 12 S. E. 808; Wells, Res Adj. p. 187; Diamond State Iron Co. v. Alex. K. Rarig Co., 93 Va. 595, 25 S. E. 894.

It is not necessary, however, to enlarge upon the familiar doctrine of res judicata, or to multiply authorities upon the subject. We are of opinion that William J. Kelly, being in possession of lands confessedly liable to the lien of the judgments asserted in this cause, cannot escape that liability by vouching the record of a suit in which no effort was made to subject the land in question to those judgments, and in which they could not have been enforced, as he was not a party to the proceeding. As we have said, diligent effort was made in that litigation to ascertain a subject upon which the lien of the judgments therein reported could be enforced. None such was discovered, and the bill was dismissed; and we know of no authority and of no principle which forbids a judgment creditor, under such circumstances, to seek satisfaction out of property which he afterwards ascertains to be liable to his lien. We will not say that the judgment debtors in that case successfully concealed from their creditors the property out of which their demand might have been satisfied, but we do say that the failure of an effort, made in good faith, to subject property in that suit, which was held not to be liable, cannot be interposed as a bar to the enforcement of a lien upon other property confessedly liable but for the unavailing effort.

Another error assigned rests upon the idea that the suits theretofore instituted by the judgment creditors to enforce their liens exhausted the vitality of those judgments, and that they are no longer subsisting causes of action. The precise principle invoked is that a judgment is an indivisible cause of action, and that when once an action is instituted upon it, and prosecuted to a final judgment or decree, no other suit or action can be brought upon it. It is true that a judgment is an indivisible cause of action, in the sense that it may not be divided or split up into several causes of action. Subject to the discretion of courts in the imposition of costs, as many successive actions may be brought upon a judgment as may be needful in the opinion of the plaintiff; but there can, of course, be but one satisfaction. If it be true that but one bill to enforce a judgment can be maintained; if it be true that, by reason of the indivisibility of a judgment as a cause of action, a decree upon a bill filed to enforce it may be pleaded as an adjudication of all rights growing out of it,—a creditor who has proceeded against his judgment debtor, and made an unavailing attempt to obtain satisfaction, would be precluded from asserting his lien, though his debtor might thereafter acquire property sufficient to satisfy his demand. This, we

know, is not and cannot be true; but, if the principle contended for exists, it must operate in all cases. To establish an exception is to deny and refute its existence.

We are of opinion that a suit brought to enforce the lien of a judgment, and prosecuted in good faith, though ineffectual, is not a bar to a subsequent suit by the same plaintiff against the same debtor to enforce satisfaction of the same judgment. In all such cases it will be the duty of the court to see that the creditor does not exercise his right capriciously or oppressively, and make such orders and decrees with reference to the imposition of costs as will protect litigants against unnecessary and vexatious suits.

The remaining error assigned is that the court erred in sustaining the exception of Hamblen and Kirkpatrick to the answer of William J. Kelly.

From that answer it appears that Logan & Brewer and Kirkpatrick had liens upon two tracts of land owned by J. J. Kelly, Jr., the title to which remained in J. J. Kelly, Sr., until 1897, which were worth more than the sum of the judgments sought to be enforced in this suit, and that Logan & Brewer, assignors of Hamblen and Kirkpatrick, entered into a compromise with J. J. Kelly, Jr., who agreed to pay and did pay them one-third of their demands, whereupon a consent decree was entered, reciting the compromise and dismissing the bill. This, we think, was error. If the facts stated in the answer be true, the lands of J. J. Kelly, Jr., title to which remained in J. J. Kelly, Sr., until 1897, should have been subjected to the lien of the judgments, to the exoneration of the lands of William J. Kelly, title to which J. J. Kelly, Sr., parted with as far back as 1894. See Jones v. Myrick's Ex'rs, 8 Grat. 179; Loan Co. v. Fellers, 96 Va. 337, 31 S. E. 505.

The answer also avers that J. J. Kelly, Sr., was the owner of a tract of land in Wise county, containing 396 acres, upon which the judgments in suit constituted liens, which should be subjected to the exoneration of the lands in the hands of his alienees. When a plaintiff excepts to an answer for insufficiency, he plants himself upon the proposition that, if the averments of the answer are sustained by proof, they constitute no defense to the plaintiff's demand. It seems manifest to us that if the defendant can show that other property of the principal debtor, or property of an alienee from the principal debtor subsequent to himself, is liable to the demands sought to be enforced against him, he should be permitted to do so.

We are of opinion that the circuit court erred in sustaining exceptions to the answer of William J. Kelly, and for this cause its decree is reversed.

Reversed.

RIELY, J., absent.

BIRD v. SULLIVAN.

(Supreme Court of South Carolina. Ju 1900.)

MAGISTRATE — JURISDICTION — ATTACH —NONRESIDENT—APPEARANCE.

1. Under Code, § 71, subd. 4, conferr magistrates jurisdiction in "an action menced by attachment of property as no vided by statute, if the debt or damages ed do not exceed $100," such court has ju tion, in an action by attachment against resident, to at least render a judgment i

2. A nonresident defendant, by appear the day of trial, and contesting the case merits by denying the allegations of th plaint, gives the magistrate jurisdiction der a judgment in personam.

Appeal from common pleas circuit c Cherokee county; O. W. Buchanan, Ju

Action by D. R. Bird against W. H. van. Judgment of a magistrate for pl was reversed by the circuit court, and tiff appeals. Reversed.

N. W. Hardin, for appellant. J. F. & Hart, for respondent.

GARY, A. J. The following statem facts appears in record, to wit: "Thi an action commenced by D. R. Bird, pl against W. H. Sullivan, defendant, 17th day of December, 1898, in the c A. M. Bridges, magistrate, on money d of $48.86, in the county of Cherokee. day the summons was issued, an attac was issued and served on the South C & Georgia Extension Railroad Company in county and state, the plaintiff alleg his attachment affidavit that the def was a nonresident of the state, and th South Carolina & Georgia Extension R Company had property in the state bel to the absent defendant. On the 6th January, 1899, the defendant, Sullivan served with a copy of the warrant of ment and the summons in the count state, in which the day set for trial of tion was the 28th of January, 1899. 21st of January, 1899, the defendant notice of a motion to vacate the attac on the following grounds: (1) Becaus pears from affidavit of the plaintiff th defendant is a resident of the state of Carolina, and no grounds are stated to an attachment. (2) Because, if not a r of this state and of Cherokee count magistrate's court in Cherokee county jurisdiction over the defendant or the s matter of the action." The magistrate as a fact that the defendant was a n dent of this state, and refused the mot the 25th of January, 1899. The recor tains the following minutes of the tr fore the magistrate on the 28th of Ja 1899: "This cause came on for trial me on the 28th day of January, 1899 fendant appeared by his attorneys, Hart & Hart, and denies each and ev legation of plaintiff's complaint. Plaint mitted the defendant Will Sullivan li

Marion, N. C. Defendant's attorneys asked that the action be dismissed because the magistrate, under the constitution, has no jurisdiction, plaintiff having proved that defendant was a resident of Marion, N. C. Motion overruled, because I am of the opinion that magistrate had jurisdiction of nonresidents in attachment cases, and especially so in this case, as the defendant was served with the summons, etc., in this county and state. * * *" The defendant appealed, and the circuit court sustained the appeal on the ground that the magistrate did not have jurisdiction, by reason of the fact that the defendant was a nonresident of this state. The plaintiff has appealed to this court from said rule.

Section 71, subd. 4, of the Code confers upon magistrates jurisdiction in "an action commenced by attachment of property as now provided by statute, if the debt or damages claimed do not exceed one hundred dollars." One of the grounds provided by statute for issuing an attachment is that the defendant is not a resident of this state. The jurisdiction of magistrates to issue writs of attachment against the property of a nonresident was not affected by the constitution of 1895. The magistrate, therefore, had jurisdiction to render a judgment in rem, even if he did not have jurisdiction to render a judgment in personam. The record, however, shows that the defendant appeared on the day of trial, and contested the case upon its merits by denying each and every allegation of the complaint. This gave the magistrate jurisdiction to render a judgment in personam. Ex parte Perry Stove Co., 43 S. C. 176, 20 S. E. 980; Smith v. Walke, 43 S. C. 381, 21 S. E. 249; Rosamond v. Earle, 46 S. C. 9, 24 S. E. 44. It is the judgment of this court that the order of the circuit court be reversed.

BURCKHALTER v. JONES.

(Supreme Court of South Carolina. June 28, 1900.)

MAGISTRATES—JURISDICTION—NONRESIDENTS—ATTACHMENT—SUMMONS.

1. Const. 1895, art. 5, § 23, providing, "Every civil action cognizable by magistrates shall be brought before a magistrate in the county where the defendant resides," does not prevent an action by attachment against a nonresident and a judgment in rem, as theretofore.

2. Omission of a magistrate to sign his name to the original summons is not a jurisdictional defect, where the order of publication is signed by the magistrate, the words, "Magistrate's Summons for Debt," and "By W. [magistrate] to J. [defendant]," appear on the face of the summons, and a copy of the summons is served on defendant personally.

Appeal from common pleas circuit court of Aiken county; James Aldrich, Judge.

Action by T. D. Burckhalter against J. B. Jones. Judgment of a magistrate for plaintiff was set aside by the circuit court, and plaintiff appeals. Reversed.

G. W. Croft & Son, for appellant. Henderson Bros., for respondent.

GARY, A. J. This action was commenced before a magistrate in Aiken county on the 16th of August, 1898. The defendant is not a resident of this state, but resides in Augusta, Ga. The magistrate granted an order that service of the summons and complaint be made upon the defendant by publication.

The following statement of facts appears in the record: "Thereupon the plaintiff filed with the magistrate an affidavit to obtain an attachment. Said affidavit was in due form and according to law. Upon said affidavit the magistrate, on August the 17th, 1898, issued a warrant of attachment in favor of the plaintiff against the defendant. The sheriff, acting under said warrant of attachment, levied upon the personal property of the defendant found in this state and county, and on the 24th day of August, 1898, he served copies of the summons and complaint in the city of Augusta, Ga., that being the place of his residence." It is admitted that the copy of the summons served on the defendant had the name of the magistrate signed to it by the attorney for the plaintiff, but that neither upon the original nor upon the copy summons does the handwriting of the magistrate appear, but that both are entirely in the handwriting of the plaintiff's attorney. The defendant made default. The plaintiff appeared before the magistrate in person, and proved his cause, whereupon Magistrate Weeks entered the following judgment by default: "Case called. Defendant not appearing, and plaintiff proving his case, judgment given against him in favor of the plaintiff for $10.61 and $6.60 costs. This 23d day of September, 1898. L. R. Weeks, M. A. C. At this stage the defendant filed his petition for certiorari, as follows: "* * * The petition of John B. Jones respectfully showeth: That as set forth in the annexed affidavit of the petitioner and of E. P. Henderson, the judgment was rendered against your petitioner on the 24th day of August, 1898, at the suit of T. D. Burckhalter in the court of L. R. Weeks, Esq., magistrate for Aiken county, by default. The petitioner did not know of the rendering of said judgment until after the expiration of the five days allowed him by law to appeal from such judgment or to ask a new trial in said action before said magistrate. That the summons upon which said action is based was not legally issued, and that said magistrate did not have jurisdiction of the person of petitioner as such defendant on the day the said judgment was rendered. That said judgment is void in law, and defendant's and petitioner's only remedy in the premises is to be had by a writ of certiorari, so that, when all the proceedings of the said magistrate's court upon which said judgment is based is certified to your honor, you may act thereon as of right and according to law ought to be done.'" The circuit judge granted the petition, and, upon hearing the return, set aside the judgment without assigning the grounds for so doing. The

plaintiff appealed upon exceptions, the first of which is as follows: "(1) That it is submitted that the magistrate had jurisdiction to issue an attachment against the property of a nonresident defendant; and that his honor, the circuit judge, erred in not so deciding."

Sections 10, 11, art. 17, of the constitution contain the following provisions:

Section 10: "All laws now in force in this state and not repugnant to the constitution shall remain and be enforced until altered or repealed by the general assembly or shall expire by their own limitations."

Section 11: "That no inconvenience may arise from the change in the constitution of this state and in order to carry this constitution into complete operation, it is hereby declared: First. That all laws in force in this state at the time of the adoption of this constitution, not inconsistent therewith and constitutional when enacted, shall remain in full force until altered or repealed by the general assembly or expire by their own limitations. * * * Second. All writs, actions, causes of action, proceedings, prosecutions, and rights of individuals, of bodies corporate, and of the state, when not inconsistent with this constitution, shall continue as valid. * * *"

At the time the constitution of 1895 was adopted, trial justices (now magistrates) did not have jurisdiction in a civil action cognizable by them, except in cases brought in the county where the defendant resided. Section 23, art. 5, of the constitution, providing that "every civil action cognizable by magistrates shall be brought before a magistrate in the county where the defendant resides," did not change the law then of force, but only made it permanent by incorporating it in the organic law of the land. While a judgment in personam could not, prior to the constitution of 1895, be rendered against the defendant unless the action was brought in the county where he resided, nevertheless his property, when he was a nonresident, was subject to attachment. Bird v. Sullivan (S. C.) 36 S. E. 494. The provisions of law as to judgments in personam and in rem were not inconsistent. Therefore, the right to attach property of a nonresident was not changed by the new constitution, and the magistrate had jurisdiction of the case.

The second exception is as follows: "(2) It is respectfully submitted that the omission of the magistrate to sign his name to the original summons was only an irregularity, which could have been cured by an amendment of the judgment, and his honor, the circuit judge, erred in holding that he had no power to do so." The omission to sign the summons was a mere clerical error apparent upon the face thereof. The order of publication was signed by the magistrate. The words, "Magistrate's Summons for Debt," and "By L. R. Weeks, Esq., to J. B. Jones," appear upon the face of the summons. A copy of the summons was served upon the defendant personally. Under these circumstances the defect was not jurisdictional. It is the judgment of this court that the judgment of the circuit court be reversed.

STATE v. CHILES.

(Supreme Court of South Carolina. June 25, 1900.)

JUSTIFIABLE SHOOTING—CHARGE—ILLUSTRATION—SELF-DEFENSE.

1. One who goes in search of another, believing him guilty of criminal intimacy with his wife, has no right to shoot him, though finding him holding his wife in his guilty embrace.
2. There is no error in giving as an illustration in the charge, on a trial for assault and battery with intent to kill, a case, from the reports of the state, where one was found guilty of murder, who, in shooting a pistol on a highway to frighten a horse, shot a person beside the road.
3. Failure to charge as to self-defense is not error, in the absence of a request therefor.

Appeal from general sessions circuit court of Abbeville county; Ernest Gary, Judge.

Judge Chiles was convicted of aggravated assault and battery, and appeals. Affirmed.

Wm. N. Graydon, for appellant. Solicitor Ansel, for the State.

POPE, J. The defendant, Judge Chiles, was tried in September, 1899, for an assault and battery, with intent to kill, committed upon his wife, Adeline Chiles. He was convicted by the jury of an assault and battery of a high and aggravated nature, but recommended to the mercy of the court. After sentence he appealed to this court. The grounds of appeal are as follows: "(1) Because his honor erred in charging the jury as follows: 'If he went there hunting for Maurice Boyd, even though he found him in sexual embrace with his wife, he would not have had the right to shoot him,'—said charge not being in conformity to the facts of the case; the defendant having testified that he went to the house for the purpose of seeing his sick child, and there being no evidence showing that he went there looking for Maurice Boyd; and said charge being a comment upon the facts of the case, the judge, by said charge, having intimated to the jury that he thought the defendant went to the house, hunting for Boyd, when said charge should have left all the facts for the jury to determine. (2) Because his honor erred in charging the jury as follows, viz.: 'There is a case in the books in this state where a party was riding along the highway, down in Darlington or Marion, from a public speaking; and two parties were riding along, and one of them shot his pistol off to scare his horse, and a little negro was sitting on the fence, and was killed by the shot. The party who fired the shot was tried for murder, and found guilty, and he was hung, because he had no right

to shoot his pistol on the public highway to scare his horse. He and the other man were quarreling, and he shot off his pistol to scare the horse,'—said charge not being responsive to the facts of the case on trial, being calculated to inflame the minds of the jury against the defendant, and being equivalent to telling the jury that, if the party in that case was guilty, how much more so in this one! (3) Because his honor erred in failing to charge the jury on the law of self-defense; the defendant having testified that he had not shot at the said Maurice Boyd until Boyd had fired his pistol at the defendant."

We cannot sustain the first exception, for the simple reason that the defendant admitted under oath that on the night he shot his wife he went to the house of his wife's sister to see his little girl, who was there sick, and also said, "And I went there * * * and I intended to shoot him [Maurice] if I caught him there." The judge, in his charge, was declaring the law, so that the jury might see how far, in its mercy, a husband could go, in safety, in dealing out punishment to that man who destroyed his family peace. The judge thus declared that the law held a husband guilty of manslaughter who killed the man while holding his wife in his guilty embrace, but that the law would not hold a husband guiltless who went in search of the man (Maurice) to kill him, believing he was guilty of criminal intimacy with his wife. The judge was correct in his statement of the law, and this exception is overruled.

So, too, we find that the second exception must be overruled. Certainly no better illustration of the law can be given than when it is taken from a case decided in our own state courts,—both circuit and supreme courts. The judge intended to give the jury an object lesson of criminal conduct flowing from an illegal act whose ultimate result was not intended.

The third exception must be overruled. No request was made by the defendant for the judge to declare the principles of law governing self-defense. The recent case of State v. Smith, 57 S. C. 489, 34 S. E. 657, 35 S. E. 727, concurred in by a majority of this court, is authority for the doctrine that, if a party wishes a specific charge as to the law, he must ask for it. While I thought such doctrine was error in the case cited, because the law required, in such a case, that specific directions should be given by the circuit judge in his charge to the jury, without any request therefor, yet in cases like the present it may be that the failure of the circuit judge to declare the law is not reversible error. This court has so held in the Smith Case. I bow to the inevitable, and declare it now sound law. The exception is overruled. The judgment of this court is that the judgment of the circuit court be affirmed.

RUSH et al. v. AIKEN MFG. CO. et al.

(Supreme Court of South Carolina. July 7, 1900.)

LANDLORD AND TENANT—RE-ENTRY—TRESPASS.

A landlord who forcibly re-entered after the expiration of a tenancy, and, without notice to the tenant, caused him and his household goods to be put into the street, is not liable therefor as a trespasser on real estate ab initio.

McIver, C. J., dissenting.

Appeal from common pleas circuit court of Aiken county; D. A. Townsend, Judge.

Action by Mary Rush and others against the Aiken Manufacturing Company and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

The following are defendants' exceptions:

"(1) That his honor erred, it is respectfully submitted, in charging the jury that, even if they found that the tenancy of the plaintiffs had ended, and they had left the premises and gone away, and left it locked, yet, if they had the key of the premises, the defendant, as owner and landlord, would have no right to enter the premises by using force to do so, or could not enter at all, in that it is submitted that the law of South Carolina plainly is that a landlord, after the termination of a tenancy, cannot be made liable as a trespasser on the real estate because of the use of force in making the entry, or because he makes entry.

"(2) That his honor erred, it is respectfully submitted, in charging upon the facts, and in invading the province of the jury, in the illustrations that he made to the jury, such as when he supposed that the plaintiff Mrs. Rush had the key when she left, and that the house was locked and fastened; for one of the main contentions in the case was that the back door was unlocked and the house unfastened.

"(3) That his honor erred, it is respectfully submitted, in charging upon the facts, and in invading the province of the jury, in conveying to them his opinion as to the defendant acting hastily and improperly, when he charged the jury: 'The law can't be enforced by electricity; the law can't be enforced by motive power; * * * he can't act by electricity.'

"(4) That his honor erred, it is respectfully submitted, in charging, in substance, that if a tenancy has terminated, and a tenant has left the premises, the landlord must wait a reasonable time before entering, and that, if there is any right asserted against the landlord, he must not enter, but must apply to the law to adjudicate the same; in other words, 'if there is any right asserted, he must stop; if there is any right asserted, the law says, "Stop; I must adjudicate that right," '—whereas, it is submitted that the law is that the landlord has the right to enter, even if he has to use force in doing so.

"(5) That his honor erred, it is respectfully submitted, in charging the jury that it is the law that where a tenancy is vacated, and the tenant gone, and the landlord has entered upon his own premises, and has not seized the personal effects of tenant found upon the premises for rent or any charge against such personal property, that still the relationship of bailor and bailee arises as to such personal property, and that such landlord assumed liabilities as bailee of such personal property; whereas, it is respectfully submitted that under such circumstances no relation of bailor and bailee arises between such tenant and landlord as to such personal property found upon the landlord's premises.

"(6) That his honor erred, it is respectfully submitted, in refusing to charge the defendant's first request, as follows: 'It is alleged in the complaint that at the time in question the plaintiffs were in the lawful possession of the tenant house in question; and that the defendant, by force, unlawfully entered the same, and removed therefrom certain goods. The jury is charged that the law in South Carolina is that, if a "tenancy" has terminated (and that is a question in this case for the jury to ascertain from the evidence), the landlord cannot be made liable in damages as a trespasser for entry upon his land or in his houses, because of the use of force in making such entry, or because of removing goods therefrom. He may be held liable criminally for committing a breach of the peace, but he cannot be held liable civilly for entering upon his own premises and taking possession, if the "tenancy" of his tenant had ceased; and the jury is charged, if they find that the agent of the Aiken Manufacturing Company entered into the house in question, and removed the goods, and that at that time the "tenancy" of the tenant had terminated, then the Aiken Manufacturing Company had the right to enter, and they are not liable for removing the goods,'—in that, it is submitted, said request to charge contained proper propositions of law, and should have been charged.

"(7) That his honor erred, it is respectfully submitted, in charging the plaintiffs' first request to charge, and what he added thereto, as follows: 'The plaintiffs ask me to charge this: "That if the jury find that the plaintiff Mary Rush went into possession of the house of the defendant company as tenant lawfully,—that is, by and with the consent of the defendant company or its authorized agents,—and without process or notice to the plaintiff the defendant company, by the authorized agents or servants, went to said house, and forcibly or otherwise entered it, and removed the household goods and chattels of the plaintiff therefrom into the street, then the defendant company violated the law and the rights of the plaintiff, and is liable to the plaintiff in damages, if nothing else is shown, for such unlawful acts." I charge you that,—have charged you that. There must be reasonable notice; what is reasonable notice,—I mean reasonable inquiry; something to ascertain whether a right is asserted or not. And, if there is a right asserted, then the law must determine. Process of law must be taken out,'—in that it is submitted that said request to charge is contrary to what is the law, and especially is what his honor added thereto contrary to the law, for process of law need not be taken out if the tenancy has terminated."

Hendersons, for appellants. John R. Cloy and M. B. Woodward, for respondents.

GARY, A. J. The first paragraph of the complaint herein alleges the corporate existence of the defendant; its ownership, control, and operation of a large cotton factory in the town of Bath; also its ownership of other real estate in said town, consisting of a large number of tenement houses, which are rented to the operatives who work in said cotton mill. The second paragraph alleges that Mary Rush was the owner of the personal property hereinafter mentioned, and that she and her husband were in lawful possession of one of the tenement houses, occupying the same as a dwelling. The other allegations of the complaint necessary to understand the questions raised by the exceptions are as follows: "(3) That on the 30th day of November, A. D. 1898, while the said plaintiff was in the lawful possession of the said house as aforesaid, and occupied the same as a dwelling, and where the said household goods and furniture were kept, and while plaintiff was temporarily absent from home, the said defendant, the Aiken Manufacturing Company, willfully, wrongfully, unlawfully, maliciously, and in a high-handed manner, caused plaintiff's said dwelling house to be broken open by its co-defendant and agent, William Birmingham, and unlawfully and recklessly seized the said household goods of the plaintiff Mary Rush, and then and there, without authority or any notice whatever to either of the plaintiffs, wantonly, recklessly, wrongfully, maliciously, and in a high-handed manner, caused the said household goods and furniture to be put out and into the public street of the said town of Bath, and, in the face of the gaze, ridicule, and gibes of the public, placed them down in a wet and muddy place, and there left them unprotected. (4) That by reason of the facts above set forth the plaintiff was left without a home, and was greatly delayed in the effort to get her said household goods removed to a safe place; that the said goods were by the acts of the defendants badly injured, by being saturated with kerosene oil, broken, and thrown in the mud. (5) That the acts of the defendants were high-handed, unlawful, and malicious, and greatly outraged plaintiff's feelings and laudable pride,

and exposed her to the gibes, taunts, and ridicule of the public; for all of which acts and grievances aforesaid plaintiff Mary Rush has been damaged in her property, injured in her person and feelings, to her damages in the sum of three thousand dollars."

His honor, the presiding judge, in his charge to the jury used the following language: "You will understand this complaint contains two causes of action,—one for breaking her house, and the other for damaging her property; and really there is another, for damage to her feelings; those two are not separated." The jury rendered a verdict in favor of the plaintiff for $500. The defendants appealed upon exceptions, which will be set out in the report of the case.

The practical question raised by the first, fourth, sixth, and seventh exceptions is whether there was error on the part of the circuit judge in charging the jury that, even if the tenancy had terminated, the defendants did not have the right to use violence in making a re-entry until a reasonable time had expired, or due diligence had been used to ascertain if the plaintiffs asserted a right to the premises after the expiration of the tenancy, and, if they asserted such a right, that the defendants could only eject them by process of law. In the case of Willoughby v. Railroad Co., 32 S. C. 410, 11 S. E. 339, Mr. Chief Justice McIver uses this language: "The question now presented is analogous to the question which has frequently arisen, both in this country and in England, and this analogy has been recognized in many of the cases; and that is, how far a landlord who regains by force the possession of the demised premises after the possessory right of the tenant therein has determined can be held subject therefor to any other liabilities than those which the statutes of forcible entry and detainer have expressly annexed to his act. This question has been very fully considered in 4 Am. Law Rev. 420, and the authorities down to that time (April, 1870) elaborately reviewed. It is there shown that the idea that one who has authority to enter, and abuses that authority, either by unnecessary force in making the entry, or by some illegal act done after the entry has been effected, thereby becomes a trespasser ab initio, so as to make even his entry a trespass, is based largely upon two English cases, Hillary v. Gay, 6 Car. & P. 284, and Newton v. Harland, 1 Man. & G. 644, the former of which was a nisi prius decision, and the latter has been distinctly repudiated; and the rule in England now is that, though the landlord may be liable to an indictment for using force in making the entry, or to a civil action for damages for committing any trespass upon the person of the tenant, either in making the entry or after he has entered, provided a proper case to that end is made, yet he cannot be made liable as a trespasser ab initio on the real estate because of the use of force in making the entry, or because of the trespass upon the person of the tenant." He reviews the cases in this state, and shows that his conclusion is not only sustained by them, but by the overwhelming weight of authorities elsewhere. The article in 4 Am. Law Rev., to which the court referred, throws much light upon the question under consideration. There are expressions in the cases of Johnson v. Hannahan, 1 Strob. 313, and Sharp v. Kinsman, 18 S. C. 108, which are not in accord with the views herein announced, but we are satisfied that the true doctrine is stated in Willoughby v. Railroad Co. See, also, Smith v. Association (Mich.) 73 N. W. 395, 39 L. R. A. 410.

We will next consider the fifth exception. As every act of the defendant in connection with the personal property was alleged to be unlawful, and it did not retain the possession thereof, we fail to see how the question of bailor and bailee has any application to this case.

The conclusion which we have reached in considering the foregoing exceptions renders speculative the other questions in the case. It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded for a new trial.

McIVER, C. J. (dissenting). As I understand it, the rule in this state is that, where the tenancy has terminated, the landlord may enter upon and retake possession of the premises, and he commits no trespass upon the real estate in so doing, even if force is used in making such entry, and therefore, in such a case, he is not liable to a civil action for trespass. If, however, the landlord, in making such entry, commits a trespass upon the person of the outgoing tenant, or upon his personal property, he may be liable to a civil action for such trespass. But the simple removal of the tenant's personal property from the premises which had been rented does not constitute a trespass, unless it is effected by the use of unnecessary force, whereby such property is destroyed or injured.

STATE v. WEAVER et al.

(Supreme Court of South Carolina. June 30, 1900.)

CRIMINAL LAW — JURY — CHALLENGES — PAYMENT OF POLL TAX—BURDEN OF PROOF —APPEAL AND ERROR.

1. The burden of proof is on one who challenges a juror on the ground of legal disqualification to show that such disqualification exists.

2. The statement of a juror on his preliminary examination that he could not state positively that his poll tax had been paid, but that he had arranged for his father to pay it for him, and had never asked him for the receipt, together with the testimony of the county treasurer that the poll tax of such juror had not been paid according to his books, but that his books were not absolutely correct, is not sufficient to support a challenge to the juror for cause on account of the nonpayment of his poll tax.

3. A judgment will not be reversed because a ruling of the trial court was based upon grounds that are erroneous, if the ruling was proper upon other grounds.

4. After defendants had exhausted their peremptory challenges, and the panel of jurors was exhausted, defendants consented to the recall of a number of the jurors they had objected to upon no other grounds than "their intention to exhaust the panel," but reserved the right to object to any of such jurors for cause. The cause was tried to a jury to none of whom any objection was made. *Held*, that defendants could not complain of their challenges for cause being overruled, since they did not exhaust their peremptory challenges.

5. Defendants offered the registration book in evidence on the preliminary examination of the jury, but the court refused to receive it at that time, saying that it might be offered "later on." *Held*, that defendants could not complain, where the offer was not renewed.

Appeal from general sessions circuit court of Edgefield county; R. C. Watts, Judge.

Ed Weaver, Abner Harris, and Allen Jones were convicted of housebreaking and larceny, and appeal, and present the following exceptions: "Defendants, for the purpose of their appeal, hereby make and serve the following exceptions to the rulings of the presiding judge: (1) Excepts because the presiding judge erred in ruling 'that any man under sixty-five and over twenty-one who has a registration certificate is a qualified and competent juror, and it does not make any difference whether he has paid his poll tax or not.' (2) That his honor erred in ruling that 'if he has got his registration certificate that is prima facie and satisfactory evidence to me that he is entitled to it; even if you could show that he procured it prior to the adoption of the constitution of 1895, I would still hold that he was a qualified elector and a competent juror.' (3) That his honor, the presiding judge, erred in ruling: 'I will give you a chance to get a direct ruling from the supreme court. I rule any man that is twenty-one and under sixty-five, of good moral character, and selected by the board of commissioners to serve as a juror, is a qualified elector, and qualified in such sense he can be a juryman, whether he has paid his poll tax and has a registration certificate or not, or whether his name is on the tax books at all.' (4) That his honor erred in refusing to allow defendants' counsel to introduce evidence (that is, the registration book, to show that the registration certificate of juror was issued prior to the adoption of the constitution of 1895) to show the disqualification of the juror at the time that the juror was sworn on his voir dire." Affirmed.

M. P. Wells and S. M. Smith, Jr., for appellants. J. Wm. Thurmond, for the State.

McIVER, C. J. These defendants were indicted for and convicted of "housebreaking and larceny," and from the judgment entered they appeal to this court, upon the several exceptions set out in the record, which should be incorporated by the reporter in his report of the case.

The first, second, and third exceptions impute error to the circuit judge in certain rulings made by him as to the qualification of certain jurors presented to the prisoners while the jury was being impaneled, while the fourth exception imputes error in ruling out certain testimony which we shall hereinafter see was taken under a misconception of the ruling really made by the circuit judge.

We would first remark that it seems to us that all of these exceptions, except the fourth, which will be presently considered, raise speculative, rather than practical, questions. It does not appear that a single one of the jurors who sat upon the trial was objected to either peremptorily or for cause. On the contrary, it does appear that the defendants were tried by a jury of 12 good and lawful men, to whom no objection was interposed by the defendants or either of them.

The rulings excepted to were made by the circuit judge in reference to challenges for cause to certain of the jurors when presented, based upon the allegation that such jurors had not paid their poll taxes, and were therefore disqualified from serving as jurors. When, however, this cause of challenge was investigated, as well by the examination of the persons presented as jurors on the voir dire as by the testimony of the county treasurer, it was made to appear satisfactorily that all of them except one R. G. Parks had paid their poll taxes, and even as to Parks it was left somewhat doubtful whether he had or had not paid his poll tax; for while the county treasurer, speaking from his books, did say that Parks had not paid his poll tax, yet that officer admitted that his books were not absolutely correct, and mentioned instances in which his books showed that the taxes of certain persons named had not been paid, yet he had become satisfied from other sources that such taxes had in fact been paid, in one instance a receipt for the taxes having been produced when it appeared from the books that such taxes had not been paid. Now, when it is remembered that a board of jury commissioners—public officers—are charged with the duty of placing upon the jury list the names of such persons as are "not absolutely exempt as they may think well qualified to serve as jurors, being persons of good moral character, of sound judgment, and free from all legal exceptions," the presumption is, in the absence of evidence to the contrary, that these public officers have done their duty; and hence, when a juror whose name is on the jury list is challenged for cause, upon the ground that he is not legally qualified to serve as a juror, the burden of proof is upon him who charges that such juror is disqualified to show such disqualification. It does not seem to us that it has been satisfactorily shown that the juror Parks had not paid his poll tax. On the contrary, on his examination upon his voir dire, when he was asked if he had paid his poll tax, he replied, very candidly, "I could not state positively,"

but went on to say that he had arranged with his father to pay it for him, and, as he had never asked him for the receipt, he, of course, could not testify of his own knowledge whether the tax was actually paid or not. But it is manifest that he intended to pay it, and, no doubt, supposed it had been paid; and, as we have said, the testimony of the county treasurer did not satisfactorily show that the tax had not been paid. We do not think there was any error in overruling the challenge for cause to the juror Parks, and requiring him to be presented; for, even though the circuit judge may have been in error in the reason he assigned for overruling the challenge for cause, still, if the ruling was right, there is no reversible error; for, as has been frequently held, this court does not concern itself with the reasons given for rendering a judgment or making a ruling, but confines itself to the inquiry whether such judgment or ruling is right, and will affirm the same, even though the reasons given for such judgment or ruling may not be such as command the approval of this court. The appellants complain that they were thereby compelled to exhaust one of their peremptory challenges, but in view of the well-settled doctrine that the right of peremptory challenge is not a right to select the jury, but only a right to reject a certain number of jurors (State v. Wise, 7 Rich. Law, 412; Same v. Gill, 14 S. C. 411; Same v. Prater, 26 S. C. 202, 2 S. E. 108), and in view of the further fact that, so far as appears from the record before us, there was not a single person on the jury which tried the case to whom any objection was interposed, we do not see that the appellants have any legal ground of complaint; for it appears from the record before us that after the appellants had exhausted their peremptory challenges, and the clerk had reported that the panel of jurors was exhausted, the court directed the clerk to issue a venire for 12 jurors, whereupon one of the counsel for appellants made the following statement: "In order not to detain the court, we consent to recall a number of the jurors we have objected to, and to whom we objected upon no other grounds except our intention to exhaust the panel. Of course, our objections for cause we don't include in this proposition. We consent to this without, of course, waiving any of our rights. These men will be technically considered as new men drawn as a new panel,"—to which the court responded as follows: "That will do, then, with the understanding that it is done without prejudice to the rights of the defendants." This voluntary action on the part of the appellants practically amounted to a withdrawal of their peremptory challenges to such of the jurors as had been previously challenged, not because of any objection to them, but solely for the purpose of exhausting the panel, doubtless meaning their peremptory challenges; and therefore it cannot be properly said that the defendants had, in fact, exhausted their peremptory challenges. If so, then, under the case of State v. McQuaige, 5 S. C. 429, Same v. Price, 10 Rich. Law, 356, and Same v. Dodson, 16 S. C. 460, appellants could not avail themselves of any error in overruling their challenges for cause.

It only remains to consider the fourth exception, which complains of error in refusing to allow defendants' counsel to introduce in evidence the registration book. This exception, as we have intimated above, was taken under a misconception of the ruling of the circuit judge; for he did not refuse to allow the book to be offered in evidence. Defendants' counsel proposed to offer the book in evidence during the progress of the examination of the jurors upon their voir dire, and his ruling was that the book could not be introduced then, but the judge expressly stated that the book might be offered in evidence "later on," but the book was never afterwards offered in evidence. The fact, as stated by counsel, that they were deterred from afterwards offering it in evidence by reason of certain views expressed by the circuit judge, cannot affect the question. If they desired a specific ruling as to the admissibility of the book as evidence, they should have offered it at the time indicated by the judge, and then had a distinct ruling as to its admissibility; but this they did not do. However, under the views hereinbefore announced, the question whether this exception is well founded becomes immaterial, and renders further discussion useless. The judgment of this court is that the judgment of the circuit is affirmed.

STATE v. BAKER.

(Supreme Court of South Carolina. June 30, 1900.)

CRIMINAL LAW — CONFESSIONS — EVIDENCE — WAIVER OF ARGUMENT TO JURY—INSTRUCTIONS TO JURY—ILLEGAL SENTENCE—NEW TRIAL.

1. A confession made by a defendant, charged with grand larceny, upon his preliminary examination, voluntarily, and which is supported by a subsequent confession made by defendant in a letter, wherein he sought to relieve one of his alleged companions from the same charge, is competent evidence, though the confession may have been made without warning to defendant that it might be used against him.

2. Although the argument to the jury was waived, it was not error to permit the solicitor for the state to read to the jury, after the case was closed, certain papers that had been offered in evidence, and which contained confessions made by defendant.

3. An instruction that a confession made "freely and fairly, without the flattery of hope or the fear of force or violence," is evidence against the person uttering it, if found worthy of belief, is not erroneous.

4. A court has not the power to impose the sentence of perpetual banishment from the state upon a defendant convicted of grand larceny.

5. The reversal of a criminal cause because of the imposition of an illegal sentence will not entitle defendant to a new trial.

Appeal from general sessions circuit court of Newberry county; O.W. Buchanan, Judge.

De Villius B. Baker was indicted for the crime of grand larceny, and from a judgment of conviction he appeals. Reversed.

C. L. Blease, for appellant. T. S. Lease, for the State.

POPE, J. The defendant was tried and convicted of the crime of grand larceny in February, 1900, and after sentence appealed to this court. His grounds of appeal are four in number: "(1) Because the presiding judge erred in allowing the paper marked as an exhibit, and purporting to be a confession made by the defendant, Baker, at the preliminary trial held in this case, introduced and used as evidence in this case. (2) Because the presiding judge erred in allowing the solicitor to read the letter and said statement, or so-called confession, to the jury after the state had closed its case, and defendant's attorney had stated that the defense would offer no testimony, and that he did not desire to make any argument, and the solicitor stated, 'Neither do I, except to read the papers that have been introduced;' the papers not having been read when introduced, and the reading of them not having been asked for by the court or the jury. (3) Because the presiding judge erred in charging the jury: 'Well, the rule is this: Where it is done freely and fairly, without the flattery of hope or the fear of force or violence, it is admitted as evidence, as the truth, if you find it worthy of belief, against the person who utters it.' (4) Because the sentence imposed upon the defendant, Baker, is contrary to the statute law and constitution of this state."

In disposing of the question raised as to the admission of a confession of guilt by the defendant when reduced to writing, we may remark that the written confession in this case was made without solicitation, importunity, promise, or threat being used to induce the same. Confessions are admitted if made voluntarily. The jury is not required by law to believe a confession. The jury may accept a part and reject the balance. All the safeguards thrown around confessions by the law are to insure truth. Once is it ascertained that the confession is true, no great attention is paid to technical rules. For instance, it was at one time held that a person charged with crime must be admonished that, if he made any statement against himself, it would prejudice his case; but in State v. Workman, 15 S. C. 544, this court held that "no previous warning was necessary." In that case, quoting from 1 Greenl. Ev. § 299, it was said: "Neither is it necessary to the admissibility of any confession, to whomsoever it may have been made, that it should appear that the prisoner was warned that what he said would be used against him. On the contrary, if the confession was voluntary, it is sufficient, though it should appear he was not warned." The confession in question in the case at bar was fortified by a second confession in writing, against which no objection was urged. This second confession or admission was made in a letter written by the defendant, whereby, while inculpating himself, he sought to relieve from the charge of grand larceny one of his alleged companions in crime. This exception is overruled.

We overrule the second exception. Both the confession made by the defendant at his preliminary trial before J. W. Werts, Esq., as a magistrate, and also the letter written by the defendant, as it appears upon the record for appeal, were introduced as testimony. It was perfectly competent for the solicitor to read them to the jury.

The third exception relates to an alleged error of the circuit judge in expressing to the jury what was necessary to be shown in order to render a confession admissible in testimony. The judge said, in substance, that it must appear not to have been induced by promises nor extorted by force, and even then it must be believed by the jury. We see no reversible error here. The exception is overruled.

When we come to the fourth exception, we are bound to sustain it. After the prisoner was convicted of grand larceny, the circuit judge imposed the following sentence upon him: "The sentence of the court is that you, De Villius Baker, be confined in the state penitentiary, at hard labor, for the term of seven years. After you have served five years, you will be released, with the understanding that you leave the state, and never set foot in it again. If you do return, after notice on you by the state and a cause shown, you will be called back to serve out the full term (additional two years), so as to make seven years; otherwise, you will be discharged after service of five years." We do not recognize the circuit judge as possessing any right to impose such a sentence as is involved in the perpetual banishment of the defendant from the state set out in the sentence. But this infirmity does not extend beyond the mere sentence itself. There is no invalidity in the trial. This court held in the case of State v. Trezevant, 20 S. C. 364, when speaking of a defective or illegal sentence: "We do not see why it should affect the whole proceeding, and therefore render a new trial necessary. The error occurred after trial and conviction, and applied to the subsequent proceeding, to wit, the sentence only, and in reason the remedy should extend only so far as the error extended. The weight of authorities sustains this view. 1 Bish. Cr. Proc. § 1293; McCue v. Com., 78 Pa. St. 191, 21 Am. Rep. 7; State v. Johnson, 67 N. C. 59." The case of State v. Trezevant, supra, was reaffirmed in Same v. Jefcoat, 20 S. C. 383. We feel bound, therefore, to overrule all the other exceptions except the fourth, which last we sustain. It is the judgment of this court that the judgment of the circuit court, as to

pronouncing sentence, be reversed, and that the case be remanded to the circuit court for resentence.

BLECKLEY et al. v. SHIRLEY.

(Supreme Court of South Carolina. June 27, 1900.)

HOMESTEAD — EXECUTION — REPORT OF APPRAISERS — EXCEPTIONS — TRIAL DE NOVO — EXEMPTION OF PERSONAL PROPERTY.

1. Under Acts 1896, p. 191, providing that, if exceptions be filed to the return of commissioners appointed to appraise the homestead of a judgment debtor within 30 days after the filing of said report, the same shall be tried de novo upon testimony taken in open court, it is error to refuse a trial de novo to a judgment defendant, where exceptions to the report of the commissioners have been duly filed.

2. Where exceptions to the report of commissioners, appointed under Acts 1896, p. 191, to appraise the homestead of a judgment debtor, have been filed and placed on the calendar 14 days before the commencement of the term, no further notice is necessary to entitle the excepting party to a trial de novo.

3. An exception to the report of commissioners, appointed to appraise the homestead of a judgment debtor, that they failed to perform their duty as required by statute in laying off the homestead, should set out the facts on which the exception is based.

4. Under Acts 1896, p. 191, making it the duty of a sheriff, before selling the real estate of the head of a family, to cause the debtor's homestead to be set off and appraised, and for that purpose three appraisers shall be appointed, one by the sheriff, another by the creditor, and a third by the debtor, where the debtor refuses to make an appointment a valid return may be made by the two appraisers appointed by the sheriff and creditor.

5. An exception to the report of commissioners appointed to appraise the homestead of a judgment debtor, that the commissioners should have called a surveyor, and exhausted all legal means for giving the debtor his homestead, before recommending a sale, will not be considered on appeal, in the absence of facts in the record in support of the exception.

6. Under Acts 1896, No. 77, § 3, making the personal property of the head of a family exempt to the extent of $500, commissioners appointed to appraise the homestead of a judgment debtor, in making their report, should set apart the personal property of the debtor that is exempt from execution.

Appeal from common pleas circuit court of Anderson county; Ernest Gary, Judge.

Action by Bleckley & Fretwell and others against W. H. Shirley for the appraisement of a debtor's homestead and to enforce an execution. From a judgment refusing defendant a trial de novo on exceptions to the report of the commissioners appointed to appraise the homestead, defendant appeals. Reversed.

J. E. Breazeale and J. N. Brown, for appellant. Bonham & Watkins and Tribble & Prince, for respondents.

GARY, A. J. The record contains the following statement of facts: The contest in this case grows out of the laying off a homestead for the defendant (appellant, W. H. Shirley) in real estate; and whether he was entitled to have his personal property set apart as exempted under the laws; and if two appraisers, under appointment of the sheriff of three, defendant having refused to name an appraiser, could make a valid return; and especially if appellant's homestead could be divided so as to retain his home and sell the excess, whereas the two appraisers returned that the same could not be laid off without injury to the remainder, and therefore placed a valuation of $1,750, to which exceptions were filed and at the hearing; and the court refused appellant an order of reference or the right of trial de novo in open court on said exceptions, for want of affidavit and notice, when the appellant had his witnesses in court ready for trial, and the case had been placed upon the calendar more than 14 days previous to the sitting of the court; whereupon the appellant gave notice of intention to appeal within 10 days after the date of said order of the court. The appellant's exceptions allege error as follows: "(1) Because his honor erred in refusing to hear and pass upon defendant's exceptions to the return of the commissioners by trial de novo in open court upon the testimony of the witnesses produced by the defendant (appellant). (2) Because his honor erred in holding want of notice of trial to plaintiffs by affidavit or notice, when it is submitted that in placing the case on the calendar fourteen days before the sitting of the court was sufficient notice of trial. (3) Because docketing the exceptions by appellant was sufficient notice of trial without affidavits or other notice of trial. (4) Because the return of commissioners shows that they did not perform their duty as required by the statute in laying off the homestead in kind and setting apart personalty exempt. (5) Because two appraisers appointed by the sheriff cannot legally act so as to deprive the appellant of his homestead in kind. (6) Because, said tract of land containing 116 acres, the commissioners should have called a surveyor, and exhausted all legal means for giving appellant his homestead in kind, before recommending a sale. (7) Because, the sheriff having levied on personal property, it was the duty of the commissioners to set apart appellant's personalty exempt from levy and sale under execution."

We will consider the exceptions in their regular order:

First exception: It seems that Act 1896, p. 191, was overlooked when the case was tried in the circuit court. That act provides: "If exceptions to said return be filed by either creditor or debtor within thirty days after the filing thereof the same shall be tried de novo upon testimony taken in open court." This exception is sustained.

Second and third exceptions: The case of Ex parte Ellis, 20 S. C. 344, cited with approval in Ex parte Ransey, 54 S. C. 517, 32 S. E. 522, decides that no further notice is required after filing exceptions to the return

of the commissioners. These exceptions are sustained.

Fourth exception: There are no facts set out in the record tending to show that the commissioners did not perform their duty as required by the statute in laying off the homestead in kind. The question as to the personal property will be hereinafter considered in connection with the seventh exception.

Fifth exception: The case of Bank v. Evans (S. C.) 6 S. E. 321, discusses this question at length, and shows that the exception cannot be sustained.

Sixth exception: The record does not contain any facts enabling us to consider this exception.

Seventh exception: The law allows an exemption in personal as well as real property, and the commissioners in making their return should have taken into consideration the claim of homestead in the personalty. This exception is sustained.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to the court for such further proceedings as may be necessary to carry out the views herein announced.

SOUTHERN RY. CO. v. SARRATT et al.

(Supreme Court of South Carolina. June 30, 1900.)

CLAIM AND DELIVERY—LIABILITY OF PUBLIC OFFICER—WHO MAY MAINTAIN—APPEAL—JUSTICES OF THE PEACE—JURISDICTION.

1. An action of claim and delivery may be maintained against a public officer who has taken into his possession property under a warrant to enforce a lien for rent, where the party from whom the property was taken was rightfully in possession, and the property was not subject to the lien.

2. Where no notice has been given by a party that the supreme court would be asked to sustain the judgment on a ground other than that on which the circuit judge rested his judgment, such ground cannot be considered.

3. Code, § 255a, provides that if the person in whose possession the property shall be attached shall appear at the return of the writ and file his answer thereto, and deny possession or control of any property belonging to defendant, or claim the property as creditor in possession or in his own right or in that of another, or if any part of such property be claimed by another, then, if plaintiff be satisfied therewith, the proceedings may be dismissed at his costs; but, if he shall contest such return, an issue shall be made, and the party that shall prevail shall recover the costs, etc. Rev. St. 1893, § 2519, requires that the affidavits and statements to be used to obtain a warrant to enforce an agricultural lien shall conform as nearly as may be to the practice regulating the issuing of warrants of attachment under the Code procedure. *Held*, that Code, § 255a, applies only to proceedings by attachment, and not to proceedings for the enforcement of an agricultural lien, or a landlord's lien for rent, except in so far as relates to the affidavits and statements.

4. Under Rev. St. 1893, § 2522, authorizing a person whose crop has been seized under a lien warrant, on entering into bond in accordance with the law now in force in regard to action for claim and delivery of personal property, to recover immediate possession of the crop so seized, a third person in whose hands personal property is seized, which it is claimed is subject to a lien for rent, may, on executing the required bond, recover the same in an action of claim and delivery.

5. Under Act 1884 (18 St. at Large, p. 751) § 1, providing that a trial justice (now a magistrate) shall have jurisdiction to issue a warrant to enforce a lien for advances made for agricultural purposes, where the amount does not exceed $100, and section 2 (the provisions of which are substantially incorporated in Rev. St. 1893, § 2512), providing that every landlord leasing land for agricultural purposes shall have the right to enforce his liens for rent in the same manner, on the same conditions, and subject to the same restrictions as provided for persons making advances for agricultural purposes, a magistrate is authorized to issue a warrant to enforce a lien for rent, where the amount claimed does not exceed $100.

Appeal from common pleas circuit court of Cherokee county; O. W. Buchanan, Judge.

Action of claim and delivery by the Southern Railway Company against I. G. Sarratt and Robert F. Gibson. There was a judgment for defendants, and plaintiff appeals. Reversed.

Duncan & Sanders, for appellant. J. C. Jefferies, for respondents.

McIVER, C. J. This was an action of claim and delivery for the purpose of recovering the possession of two bales of cotton, or, in lieu thereof, their value, alleged to have been taken from the possession of the plaintiff by the defendant Gibson. There was testimony tending to show that the cotton in question was grown upon the lands of Mrs. M. E. Huskey, which she had rented to one Wyatt, who seems to have transferred his lease to W. C. Lipscomb, who sublet the place to one Walker. The cotton seems to have been delivered (by whom does not appear) to Mrs. Huskey in payment of the rent due her, and was afterwards bought by one J. D. Jones on the 26th of October, 1898, who on that day sent it to the depot of the plaintiff company for shipment to Clifton, and on the morning of the next day, the 27th of October, received a bill of lading for the same from the plaintiff. On the afternoon of the 27th of October the cotton was seized by the defendant Gibson under a warrant issued by the defendant Sarratt, who was a magistrate, at the instance of the said W. C. Lipscomb, directed to the said Gibson as a special constable, requiring him to seize and sell the crop of one Walker, or so much thereof as may be necessary to pay the rent alleged to be due said Lipscomb by the said Walker. Thereupon the present action was commenced by the plaintiff. The case came on for trial before his honor, Judge Buchanan, and a jury. At the close of the testimony for the defense, counsel for defendants demurred to the evidence, which the court held to be practically a motion for the nonsuit, which not being sustained, defendants then demurred to the complaint on the

ground that the facts stated therein are not sufficient to constitute a cause of action, in that an action of "claim and delivery is not a proper proceeding to be brought for the recovery of possession of property which has been seized by an officer under a warrant to enforce a lien, whether it be a rent lien or for supplies"; but as the complaint did not show on its face that the defendants were officers, or that the cotton was seized under a warrant to enforce a lien for rent, the demurrer could not be sustained. The plaintiff then proceeded to examine Mrs. Huskey in reply, for the purpose of showing when and from whom she received the cotton in question for the rent due her, when, upon objection to some of the questions propounded to this witness, a colloquy between the court and counsel resulted in a ruling by the circuit judge expressed in the following language: "It is utterly immaterial who this cotton belongs to or didn't belong. If that was the same cotton that was grabbed by the trial justice, it is utterly immaterial who the cotton belonged to. My idea is this: If this jury comes up here with a verdict for the plaintiff, I would have to set it aside for this reason: Here is a magistrate, and here is a constable. They don't claim any interest at all; they don't say they have any interest at all; but they justify the proceeding, which is regular on its face, or which purports to be regular,—a warrant. Nobody sets up any claim for them at all. It turns out they have taken two bales of cotton rightfully or wrongfully in possession of the railway company under a lien warrant. The railway brings an action for claim and delivery. There was a summons attached, showing an action had been commenced against somebody. [If by this his honor means that there was a summons attached to the affidavit and lien warrant he is manifestly mistaken, for no such summons appears in the record before us, and we are unable to see any place for it, as a summons is never attached, so far as we are informed, to the papers issued to enforce a lien either for rent or for agricultural supplies.] Well, now, that is taken under the proceedings. Now, suppose it was absolutely void; are magistrates to be kicked and cuffed about that sort of way, and should they be made to guaranty the title of any property they may grab or seize under warrant? I don't think so. Now, my idea is that there ought to be a verdict directed by the court." Accordingly, the circuit judge directed a verdict in favor of the defendants, which was accordingly rendered, and, judgment having been entered thereon, the plaintiff appeals upon the several exceptions set out in the record, which need not be stated in detail here.

In the first place, it seems to us clear that the circuit judge erred in directing a verdict in this case, for the testimony certainly raised material issues of fact which it was necessary for the jury to pass upon. Indeed, this seems to have been the view of the circuit judge, as indicated by what he said in refusing to sustain the motion for a nonsuit. We need not, however, pursue this inquiry further, as the circuit judge seems finally to have based his ruling that this was a proper case to direct a verdict upon the grounds that an action of this kind, no matter what the facts may be, could not be maintained against a public officer who has seized and taken into his possession property under a warrant to enforce a lien for rent, even though the party from whom the property is taken was rightfully in possession of such property, and even though the proceedings to enforce the lien were absolutely void. We cannot subscribe to any such novel, and, as it seems to us, dangerous, doctrine. The circuit judge gives no definite reason for such a ruling, but he seems to think that because the officer has and claims no personal interest in the matter, and is simply executing the process of the law, he should not be liable to an action, as he could not be required to guaranty the title of any property which he may seize under the legal process. It never was doubted, so far as we are informed, that if a sheriff, one of the highest executive officers of the state, should, under a perfectly valid execution against A., seize the property of B., he would be liable, as a trespasser, to an action at the instance of B. Indeed, our reports prior to the war between the states are full of cases in which actions of this kind were maintained. If, therefore, it should be made to appear, upon investigation, that the cotton seized and taken from the possession of the plaintiff did not belong to Walker, or constituted no part of the crop raised by him on the rented premises, or for any other reason was not subject to the lien in favor of Lipscomb for rent, then the lien warrant would afford no justification whatever for such seizure, for the warrant only directed the seizure of "the crop of Rob Walker covered by the rent lien of W. C. Lipscomb."

It is contended, however, by counsel for respondents, that the ruling of the circuit judge should be sustained upon another ground, which, so far as appears, does not seem to have been taken in the circuit court, and therefore is not properly before us, inasmuch as no notice, as required by the proper practice, seems to have been given that respondents would ask this court to sustain the judgment upon a ground other than that upon which the circuit judge rested his judgment. But as no objection has been raised by counsel for appellant we will waive any objection on the part of the court, and consider the question presented by this additional ground. The contention on the part of the counsel for respondents is that this action cannot be maintained because, by statute, another remedy, exclusive in its nature, has been provided for a case like this. Waiving any new

inquiry whether such remedy, even if applicable in a case like this, is exclusive, for the reason that we do not think it applicable, we shall proceed to show that it is not applicable to this case. The statutory provisions referred to are found in section 255a of the Code, which reads as follows: "If the person in whose possession such property shall be attached shall appear at the return of the writ and file his answer thereto, and deny the possession or control of any property belonging to the defendant, or claim the money, lands, goods and chattels, debts and books of account as creditor in possession, or in his own right or in the right of some third person, or if any part of the said property be claimed by any other person than such defendant, then, if the plaintiff be satisfied therewith, the party in possession shall be dismissed and the plaintiff pay the costs of the action. But if the plaintiff shall contest the said return or the claim of said third person an issue shall be made under the direction of the judge to try the question, and the party that shall prevail in said issue shall recover the costs of such proceedings of the opposite party, and judgment shall be given accordingly." And it is contended that by virtue of the provisions of section 2519 of the Revised Statutes of 1893, requiring that the affidavits and statements to be used to obtain a warrant to enforce an agricultural lien "shall conform as nearly as may be to the practice regulating the issuing of warrants of attachment under the Code of Procedure," the only mode of proceeding which a third person, in whose possession personal property is seized under a warrant to enforce an agricultural lien or a lien for rent of land, can adopt to assert his right to the property so seized, is that provided for in section 255a of the Code, and therefore that an action of claim and delivery for such property cannot be maintained. In the first place, that section is found in the chapter of the Code intended to provide for and regulate proceedings by attachment, which was a distinct and well-recognized remedy prior to the adoption of the Code, and prior to any statute providing for agricultural liens and the means of enforcing the same, or for liens for rent of land, except by distress warrant. In the next place, the phraseology used in section 255a of the Code manifestly shows that the provisions of that section apply only to proceedings by attachment, and not to proceedings for the enforcement of an agricultural lien or a landlord's lien for rent, except in so far as relates to the affidavits and statement upon which the application for a warrant to enforce such liens are based. This has been expressly held in Sharp v. Palmer, 31 S. C. 444, 10 S. E. 98, where, at pages 452, 453, 31 S. C., and page 101, 10 S. E., it is said by the court: "It will be observed that the act of 1885 (which is the act from which section 2519 of the Revised Statutes is taken) does not, as seems to be supposed by counsel for appellant, require that the practice in enforcing a lien shall conform to the practice under the attachment law; but the requirement is 'that the affidavit and statements to be used to obtain such warrants of seizure shall conform as nearly as may be to the practice regulating the issuing of warrants of attachment.' The only conformity required is in the affidavit and statements; not in the subsequent proceedings." Indeed, the two proceedings are so wholly different in their nature and effects that it would be practically impossible to make the one conform to the other, except in the nature and character of the affidavit, which is the initial act in each proceeding; and that is all that the act from which section 2519 of the Revised Statutes is taken undertakes to require. This view is recognized in Baum v. Bell, 28 S. C., at page 209, 5 S. E., at page 486, and in Monday v. Elmore, 27 S. C. 126, 3 S. E. 65. We do not think, therefore, that the contention on the part of counsel for respondents can be sustained. Besides, what seems to us to be conclusive of this matter, by section 2522 of the Revised Statutes of 1893 even a person whose crops have been seized under a lien warrant is expressly authorized, "upon entering into bond in accordance with the provisions of law now of force, in regard to action for claim and delivery of personal property, to recover immediate possession of the crop or crops so seized;" and, if so, surely a third person in whose hands personal property is found and seized, which it is claimed is subject to the lien, may also, upon executing the required bond, as seems to have been done by the plaintiff in this case, likewise bring an action to recover the immediate possession of the same.

The appellant, by the twelfth exception, which is insisted on in the argument here, has raised another question, which, though not necessary to the decision of the present appeal, may become important upon the new trial, which we feel bound to order, and therefore may as well be decided now. That exception is that a magistrate has no jurisdiction to issue a warrant to enforce a lien for rent. When the agricultural lien law was originally passed, a magistrate had no jurisdiction to issue a warrant for the enforcement of an agricultural lien; but by the act of 1884 (18 St. at Large, p. 751) it was provided in the first section that a trial justice (now a magistrate) shall have jurisdiction to issue a warrant to enforce a lien for advances made for agricultural purposes, in cases where the amount of such advances do not exceed the sum of $100; and in the second section of that act it is provided as follows: "That every landlord, leasing land for agricultural purposes, shall have the right to enforce his liens for rent in the same manner, upon the same conditions, and subject to the restrictions as are herein provided for persons making advances for agricultural purposes." Now, while it is true that the pro-

visions of section 2 of the act of 1884, just quoted, are not incorporated in section 2518 of the Revised Statutes of 1893, which substantially embodies the provisions of sections 1 and 3 of the act of 1884, yet the provisions of section 2 of that act are substantially incorporated in section 2512 of the Revised Statutes; and hence we think that a magistrate is authorized to issue a warrant for the enforcement of a lien for rent as well as for advances for agricultural purposes, provided the amount for rent claimed shall not exceed the sum of $100.

Whether the defendant Sarratt, the magistrate who issued the warrant for the seizure of the property in question, can be held liable in this action, depends upon circumstances not now before us, and that question will not now be decided. The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to that court for a new trial.

McCARTER et al. v. CALDWELL et al.

(Supreme Court of South Carolina. June 27, 1900.)

PARTITION—COSTS—PARAMOUNT TITLE—PREVAILING PARTY—EQUITY—DISCRETION.

Though paramount title was an issue in partition proceedings, yet, where no separate judgment could have been entered on determination thereof, and all the rights of defendants who prevailed on such issue were not determined until final judgment because of the plaintiff's right to partition, and such issue was submitted for trial to the court, on the equity side of which final judgment was necessarily taken, it was within the discretion of the court to adjudge the costs against such defendants.

Appeal from common pleas circuit court of York county; Ernest Gary, Judge.

Action by Fannie McCarter and others against J. M. Caldwell and others. From a judgment for costs in favor of the plaintiffs, J. M. Caldwell and another defendant appeal. Affirmed.

W. B. McCaw, for appellants. Hart & Hart, for respondents.

GARY, A. J. This is an action for partition of a tract of land, arising out of the following facts set forth in the decree of his honor, Judge Gage, to wit: "There were four brothers and a sister, to wit, Andrew, John, Mary, Samuel, and Nelson McCarter, and they died in the order named,—the first in 1868 and the last in about 1882. Andrew alone died testate. The plaintiffs are widow and children and devisees of Andrew. The defendants Sallie and Jackson are children of Mary. John and Samuel died childless. Nelson had children, but it is admitted any interest which they may have had was bought by Mrs. Lacey Caldwell in 1897, at a judicial sale for the partition of Nelson's lands, at which the clerk undertook to sell 'a parcel of land situated on the waters of Clark's Ford, * * * containing, by estimation, twenty-one acres, more or less.' It is admitted that Andrew owned an undivided one-half interest in the eighty-four acres, and that the plaintiffs now own the same. The other undivided half is the thing in dispute. The plaintiffs contend it was in Samuel, and, at his death, descended, one-third to children of Andrew, the one-third to children of Mary, the one-third to Lacey Caldwell, as purchaser of the interest of the children of Nelson. Stated differently, the plaintiffs claim: They together own an undivided four-sixths of the whole eighty-four acres; Mrs. Caldwell owns an undivided one-sixth of the whole eighty-four acres; Jackson and Sallie own an undivided one-sixth of the whole eighty-four acres. The defendants Jackson and Sallie do not answer, nor did they testify, so I am not informed about their position. The Caldwell defendants answer that Nelson owned twenty-one acres on Clark's Ford, acquired by adverse possession, and not as heir at law of Samuel or anybody else, and that Mrs. Caldwell purchased that land at judicial sale hereinbefore referred to; that Mr. Caldwell is seised by purchase of all and every interest in the land which Samuel ever owned. They contend for the one-half in dispute. The cause was submitted, and witnesses examined in open court, without a reference. * * * Plaintiffs ask for partition. Defendants Caldwell ask for a writ of possession for one-half of the whole eighty-four acres. There has never been a partition of the whole tract. The parties have so treated their interest at times, but the title has never been severed. It is therefore ordered and adjudged that the plaintiffs are seised of an undivided one-half of the whole, which they are to hold under the limitations of the will of Andrew McCarter; that the defendants J. M. Caldwell and Lacey Caldwell are seised of the other undivided half therein; that it be referred to the clerk to take testimony upon the question whether a partition in kind betwixt the parties is practicable, or whether the interest of the parties will best be subserved by a sale of the whole, and a division of the proceeds. Upon the coming in of the report the plaintiffs will be entitled to a writ of partition or an order of sale; but, if the parties file with the clerk a waiver of the reference, then let the writ in partition issue forthwith."

The following admission is set out in the record: "On the issue of paramount title raised by the amended answers of J. M. and Lacey Caldwell, a jury trial was waived, and the entire cause, in all its phases, was submitted to Judge Gage for trial." The decree of Judge Gage is silent as to the payment of costs. The case was afterwards heard by his honor, Judge Gary, on the question left open by the decree of his honor, Judge Gage. Judge Gary, in his decree,

says: "Upon the question of confirming the report of the commissioners in partition (the parties having waived the reference), the only issue upon which the parties differed was as to who should pay the cost of the action; the plaintiffs contending that the defendants should pay the costs, and the defendants contending just the reverse,—that the plaintiffs were liable for the costs." He adjudged that the defendants were liable for the costs of the action.

The exceptions assign error as follows: "First. For that his honor, Judge Ernest Gary, erred, as matter of law, in reaching the conclusion that the plaintiffs were the prevailing parties in the suit, the plaintiffs having been entirely cast in their claim to an undivided one-third interest in the moiety of the land described in their complaint, formerly owned by Samuel McCarter, which moiety Judge Gage held was the only thing in dispute. Second. Judge Gage, in his decree, having adjudged that the defendants J. M. and Lacey Caldwell are seised in fee of the undivided one-half of the tract of land formerly owned by Samuel McCarter, which he further adjudged was the only thing in dispute, his honor, Judge Gary, misconceived Judge Gage's decree, and erred, as matter of law, in not finding (1) that the defendants J. M. and Lacey Caldwell were the prevailing parties in the suit; (2) that the said defendants were at least prevailing parties on the issue of paramount title to the only thing in dispute in the cause. Third. For that his honor erred in not adjudging that the said defendants were entitled to the costs of the action, as prevailing parties in the suit. Fourth. For that his honor erred in not at least adjudging that the said defendants were entitled to all costs up to the date of the recording of Judge Gage's decree, as the prevailing parties on the issue of paramount title to the only thing in dispute. Fifth. For that his honor erred in making any order as to costs in advance of a motion to tax costs, and taxation of same being made by the clerk of the court of common pleas of York county."

The only practical question raised by the exceptions is whether there was error on the part of the circuit judge in adjudging that the defendants should pay the costs. That was the only contested question presented for his determination. When the court, in the exercise of its chancery jurisdiction, renders a judgment, it has the discretionary power to adjudge by whom the costs shall be paid. When, however, it renders judgment in an action at law, the costs follow, by operation of law, the result of the action, and go to the prevailing party. It becomes important, therefore, to determine whether the judgment is rendered by Judge Gage while exercising jurisdiction in a chancery case or in an action at law. Prior to the adoption of the Code, if a suit in equity had been brought for partition, and an issue was raised as to title, the court of equity had the right either to order an action to be instituted in the court of law, or to frame an issue as to title to be decided by that court, and returned to the court of equity. Knox v. Campbell, 52 S. C. 461, 30 S. E. 485; Railroad Co. v. Toomer, 9 Rich. Eq. 276. Under the former practice, if the defendant waived the right to have the issue as to title tried in the law court, the chancellor could determine, by a decree in equity, all the rights of the parties in interest. As hereinbefore stated, a jury trial was waived, and the entire cause, in all its phases, was submitted to Judge Gage for trial. The issue as to title was merely incidental to the action for partition, and a separate judgment could not have been entered on the determination of that issue. The final judgment had, of necessity, to be taken on the equity side of the court. When Judge Gage decided that appellants were the owners of one-half of the land, this did not determine all the rights of the parties, because the one-half interest of the appellants was undivided, and the plaintiffs were entitled to partition of all the lands according to the rights of the respective parties; thus showing the necessity for retaining the appellants as parties to the action until the final judgment in the case. As Judge Gage's decree did not determine who should pay the costs, there was no error on the part of Judge Gary in adjudging this question. It is the judgment of this court that the judgment of the circuit court be affirmed.

SKIPPER v. CLIFTON MFG. CO.

(Supreme Court of South Carolina. July 7, 1900.)

MASTER AND SERVANT—SERVANT'S NEGLIGENCE—MASTER'S LIABILITY.

An action will lie for injuries caused by defendant's employé, who, while in charge of its engine, wantonly and maliciously blew the whistle, resulting in plaintiff's mule running away and plaintiff being violently thrown to the ground, since the servant was acting within the scope of his authority, and negligently.

Appeal from common pleas circuit court of Spartanburg county; O. W. Buchanan, Judge.

Action by Nancy Skipper against the Clifton Manufacturing Company. From a judgment in favor of defendant, sustaining a demurrer, plaintiff appeals. Reversed.

Nash & Lease, for appellant. Simpson & Bomar, for respondent.

GARY, A. J. The appeal herein is from an order sustaining a demurrer. The record contains the following description of the complaint, to wit: "The portion of the complaint necessary for the consideration of the question raised is as follows: The first three sections of the complaint allege the incorporation of the defendant, and that it was operating the railroad in question. They in no way involve the question raised. 'Sec. 4. That on said 22d day of August, 1898, the plaintiff was riding along the public highway, in close proximity to the said railroad of the defendant, in company with two friends, being drawn by a mule hitched to a buggy; that, while driving along the highway at said time and place, the plaintiff met the engine of the *defendant*, commonly called a "dummy," running along the said road, *in charge of and managed by the agents and employes of the defendant*. Sec. 5. That, after the said mule had almost passed the said engine or dummy, *the engineer or agent of the defendant, while in the exercise of his duties in running said engine* or dummy, maliciously, unnecessarily, willfully, negligently, mischievously, and wantonly, with utter disregard to the rights of this plaintiff, sounded the whistle of said dummy or engine, making a great and frightful noise, in close proximity to said mule. Sec. 6. That because of such malicious, unnecessary, willful, negligent, mischievous, and wanton conduct of the *agent* and *employe of the defendant*, the said mule was greatly frightened, became unmanageable, and caused to run; that the buggy was overturned, and plaintiff thrown violently to the ground; that she was severely shocked thereby, receiving severe blows on her head and side, because of which she has ever since been in a weak and injured physical condition. Sec. 7. That from said injuries, so inflicted, the plaintiff has suffered great physical and mental pain and anguish, has been compelled to expend money for medical and other attention, and is injured in her body for life, being in such condition that she is unable to perform her accustomed duties, to her damage three thousand dollars.'" (Italics ours.)

The issue before the court is thus stated in the argument of the respondent's attorneys: "Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, in that the acts of which the plaintiff complained were the acts of a servant of the defendant company, and not of the company itself, and that from such facts no liability could arise, as against the defendant." In the case of Rucker v. Smoke, 37 S. C. 377, 16 S. E. 40, the court uses the following language: "When one person invests another with authority to act as his agent for a specified purpose, all the acts done by the agent in pursuance or within the scope of his agency are, and should be, regarded as really the acts of the principal. If, therefore, the agent, in doing the act which he is deputed to do, does it in such a manner as would render him liable for exemplary damages, his principal is likewise liable, for the act is really done by him." Mr. Justice Pope, in Cobb v. Railroad Co., 37 S. C. 194, 15 S. E. 878, says: "If, while in defendant's employ, and in the exercise of the duties of the position for which he is employed, he maliciously, willfully, wantonly, etc., performed those duties, either with an intention to injure the plaintiff, or with reckless disregard of the safety of the plaintiff's property, the employer is liable." Those allegations of the complaint which we have italicized show clearly that it comes within the principle stated in the foregoing cases, and that his honor, the presiding judge, erred in sustaining the demurrer. It is the judgment of this court that the judgment of the circuit court be reversed.

TIEDMAN et al. v. MAYER et al.

(Supreme Court of South Carolina. July 5, 1900.)

MAGISTRATE'S COURT—JURISDICTION—APPEAL—BOND—AFFIRMANCE—QUESTIONS CONCLUDED.

Plaintiffs obtained judgment against defendants in a magistrate's court, and defendants appealed to the court of common pleas. The judgment in the magistrate's court was affirmed, and, not having been paid, plaintiffs sued on the bond. *Held*, that an answer alleging that the several judgments obtained in the magistrate's court were taken by default without sufficient notice, and attacking the jurisdiction of that court, states no defense, since the judgment of the court of common pleas, not having been appealed from, is conclusive of these questions.

Appeal from common pleas circuit court of Barnwell county; Townsend, Judge.

Action on an appeal bond by George W. Tiedman and Irvin B. Tiedman, co-partners as George W. Tiedman & Bro., against J. C.

Mayer and J. L. Lightsey, co-partners as Mayer & Lightsey, and J. W. Deer. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

I. L. Tobin, for appellants. R. C. Hardwick and John R. Bellinger, for respondents.

POPE, J. The plaintiffs sued the defendants in the court of common pleas for Barnwell county to recover from such defendants the sum of $324.46, with interest thereon from the 24th day of November in the year 1898, and costs. The complaint set out four causes of action,—one for $67.79, and $7 as costs, with interest thereon from the 24th November, 1898; one for $84.79, and $7 as costs, with interest thereon from the 24th November, 1898; one for $99.35, and $7 as costs, with interest thereon from the 24th November, 1898; and one for $44.35, and $7 as costs, with interest thereon from the 24th November, 1898. In order the readier to apprehend the issues here to be considered, it will be better that one cause of action in its entirety be reproduced, as all the other causes of action are identical with the first cause of action except in the amount: "(1) That, at the time hereinafter mentioned, they, the said George W. Tiedman and Irvin B. Tiedman, were, and still are, partners in trade, under the firm name of George W. Tiedman & Bro., and that at the same time the defendants J. C. Mayer and J. L. Lightsey were partners under the name of Mayer & Lightsey. (2) That on the 2d day of April, 1898, the plaintiffs, as partners as aforesaid, recovered a judgment in the court of Magistrate A. P. Woodward, at Blackville, in the county and state aforesaid, against the defendants J. C. Mayer and J. L. Lightsey, co-partners as Mayer & Lightsey, for sixty-seven and $^{79}/_{100}$ dollars, and five dollars costs. (3) That on the 5th day of April, 1898, the said defendants J. C. Mayer and J. L. Lightsey, having appealed from said judgment to the circuit court of said county, and the defendant J. W. Deer, as their surety, entered into their joint undertaking, by which, after reciting the said judgment so recovered as aforesaid, and the intention to appeal therefrom, they undertook that the said appellants would pay all costs and damages which might be awarded against appellants on said appeal, not exceeding five hundred dollars; and also, if the said judgment so appealed from, or any part thereof, should be affirmed, or the appeal be dismissed, the said appellants would pay the amount directed to be paid by the said judgment, or such part of the amount if it be affirmed only in part, and all damages and costs which should be awarded against said appellants on the said appeal; and the enforcement of said judgment was thereupon stayed as the consideration for such undertaking. (4) That afterwards, to wit, at the November, 1898, term of the circuit court of common pleas for said county, the said appeal was dismissed, and the judgment of the magistrate's court was affirmed, with costs; and that thereupon a judgment of the said court of common pleas was entered against the appellants in favor of plaintiffs for the said sum of sixty-seven and $^{79}/_{100}$ dollars, with interest thereon from the 24th day of November, 1898, and seven dollars costs, and execution issued to enforce the same, which has been returned nulla bona; and that no part of said judgment has been paid, and the plaintiffs are still the owners and holders thereof." To the complaint the defendants interposed the following joint answer: "The defendants above named, answering the complaint herein, allege that the several judgments mentioned in the complaint were taken by default against the defendants Mayer & Lightsey upon insufficient notice; that the magistrate had no jurisdiction to enter said judgments against said defendants; that said judgments, and the undertaking on appeal upon which this action is brought, are null and void." After argument, the presiding judge directed a verdict for the plaintiffs on the ground that there was no defense set up in the answer; it admitted the facts set out in the complaint. The defendants now appeal as follows: "That the circuit judge committed error in directing a verdict against the defendants upon the pleadings in this case, and refusing to allow defendants to show, as alleged in their answer, that the magistrate who rendered the judgment in this case was without jurisdiction, and that the bond upon which this action was brought is null and void."

It should be recalled that the defendant J. W. Deer, by the stipulations of the bond he signed with his co-defendants, Mayer & Lightsey, bound himself to pay whatever sum, under $500, which the circuit court (the court of common pleas for Barnwell county) should adjudge his co-defendants Mayer & Lightsey due in the appeals from the magistrate's judgment against said Mayer & Lightsey. This action—giving the appeal bond by all the defendants—bound them to litigate their liability under said magistrate's judgments in the court of common pleas, to which forum said judgments were transferred for settlement by their joint act. So, when the appeals came on to be heard in the court of common pleas for Barnwell county, inasmuch as that court is a court of general jurisdiction, and as such was clothed by law with the full power to hear and determine any and all appeals from a judgment or judgments rendered in the magistrate's court, the judgment of such court of common pleas must be presumed to conclude all questions of law and fact connected with such judgments of the magistrate's court. No appeal was taken from the judgment of such court of common pleas. All these facts and matters of law are set out

in plaintiffs' complaint herein. They are not denied by the defendants. The answer sets up that the judgments rendered in the magistrate's court which they appealed from were taken by default without sufficient notice. Clearly, this attempted issue was included in those decided by the court of common pleas when it heard the appeals. Then the answer says the magistrate was without jurisdiction "to enter said judgments." When the defendants entered no appeal from the judgments of the court of common pleas dismissing their appeals from the magistrate's judgments, all questions which arose, or might have arisen, in the court of common pleas, were settled conclusively against them. Hence, when all these matters in the case at bar came up before the circuit judge, and he held that the answer of defendants set up no issuable defense, he committed no error. It is the judgment of this court that the judgment of the circuit court be affirmed.

KELLY v. LEHIGH MIN. & MFG. CO.

(Supreme Court of Appeals of Virginia. June 28, 1900.)

EQUITY — JURISDICTION — VENDOR AND PURCHASER—RIGHTS OF PARTIES—TITLE PAPERS — RECOVERY — PLEADING — ANSWER — SUFFICIENCY.

1. Code, c. 138, which makes more effective the common-law remedy of detinue, does not affect the jurisdiction of courts of equity to decree specific delivery of title papers wrongfully detained from persons entitled to their custody and possession.

2. Where registry laws are in force requiring conveyances of land to be recorded, a vendee of lands is not, as a matter of law, entitled to his vendor's muniments of title as at common law.

3. Where plaintiff in a suit in equity based its rights to recover title papers affecting lands conveyed to it by defendant on the ground that whoever is entitled to land has the right to all title papers, and that defendant agreed to deliver all title papers he had, an answer which put in issue the agreement was sufficient.

Appeal from circuit court, Wise county.

Bill by the Lehigh Mining & Manufacturing Company against one Kelly. From a decree for complainant, defendant appeals. Reversed.

W. S. Mathews and O. M. Vickars, for appellant. R. A. Ayers and Bullitt & Kelly, for appellee.

BUCHANAN, J. A court of equity has jurisdiction to decree the specific delivery of title papers to heirs at law, devisees, and other persons properly entitled to the custody and possession of the title deeds of their respective estates, where they are wrongfully detained or withheld from them. This is an old and well-settled head of equity jurisdiction. 1 Story, Eq. Jur. § 703; 1 Pom. Eq. Jur. § 185; Snoddy v. Finch, 9 Rich. Eq. 355, 70 Am. Dec. 216.

Chapter 138 of the Code, which makes more effective the common-law remedy of detinue, does not affect that jurisdiction, for, where courts of equity have once acquired jurisdiction, a subsequent statute which gives to or enlarges the jurisdiction of the common-law courts over the same subject does not deprive the equity courts of their jurisdiction, although the statute may furnish a complete and adequate remedy at law unless the statute conferring such jurisdiction uses prohibitory or restrictive words. Filler v. Tyler, 91 Va. 458, 22 S. E. 235.

The appellee, the complainant in the court below, based its right to recover the title bonds, agreements, deeds, and tax receipts pertaining to the lands conveyed to it by the appellant upon two grounds: First, that it is an established principle of law that whoever is entitled to the land has the right to all the title papers affecting it; and, secondly, that the appellant expressly agreed, in entering into the contract for the sale of the land, that he would turn over to the appellee all the title papers which he had, under and by virtue of which he claimed title to the land.

It was conceded that it is an established principle of the common law in England that the party entitled to land had also a right to all title deeds affecting it, and that they passed with the land by the conveyance without being named in it. Harrington v. Price, 3 Barn. & Adol. 170, 23 E. C. L. 83, 84; 2 Sugd. Vend. c. 11, § 4; Williams, Real Prop. 434. But it is denied that any such rule exists in this country.

In England there was no general system of registering conveyances of real estate. Possession of the title deeds was an evidence of ownership, and they, or abstracts of them, were shown to the intended purchaser for his examination in negotiations for a sale. When the sale was made they were delivered to the grantee almost as a matter of course in all conveyances of the fee. No transfer of land could be safely made without them, and no one was supposed to have a right to their possession unless he had some claim upon or interest in the land. Whenever a supposed owner offered his estate for sale or mortgage, it was necessary for him to produce his title papers, and their absence from his possession, when demanded, cast a suspicion upon his title, and put the other party upon inquiry. 8 Pom. Eq. Jur. § 1264, note 1; 2 Minor, Inst. (4th Ed.) 353, 354. But in this state there is a general system of registering title papers to land, and persons desiring to purchase or secure loans by deeds of trust or mortgages look to the records to ascertain the condition of the supposed owner's title, and seldom, if at all, look to the original title papers or make inquiry as to the owner's possession of them.

In this state the records furnish evidence

of his title, as a general rule, and copies therefrom, equally with the originals, are admissible in evidence. Code, § 3334.

Under our registry laws and statute of conveyances the deposit of title deeds creates no lien as against a subsequent bona fide purchaser or incumbrancer, as it did in England. McClanachan v. Siter, 2 Grat. 314; 2 Minor, Inst. (4th Ed.) 353, 354.

The reasons for the common-law rule no longer exist here. In this state, and generally in the United States it is believed, it is the general practice for the grantor to retain his own title papers instead of delivering them to his grantee. 1 Cruise, Dig. tit. 2, c. 1, § 39 (Greenleaf's note); 1 Greenl. Ev. § 571, note 3; 3 Washb. Real Prop. p. 375, § 65; Eaton v. Campbell, 7 Pick. 10, 12; White v. Hutchings, 40 Ala. 258, 88 Am. Dec. 766.

We are of opinion, therefore, that the common-law rule in question is not in force in this state, and that the grantee is not, as a matter of law, entitled to demand of his grantor the original muniments of title, as he was in England. Where the reason for a rule of law has ceased, the law itself ought to and does cease. Broom, Leg. Max. (7th Ed.) 159.

Upon the calling of the cause at the December term of the court (the first term after the case had been matured at rules), the appellant appeared and filed his answer, in which he denied the existence of the agreement set up in the bill. His answer was excepted to upon the ground that it stated no defense to the case made by the bill. At the same time the appellant moved the court to continue the case upon the ground that the appellee had not closed its depositions until Monday, the 28th day of November, 1898, and that he was not notified of that fact until the 29th of that month; that at that time he was engaged, as chairman of the board of supervisors of Wise county, in the business of said board, and was so engaged until Friday, the 2d of December following, and that he did not have time to prepare his defense by taking his depositions, which he was advised were material to his defense. The court overruled his motion to continue, and sustained the exception to his answer, and, the appellant not desiring to file any other or further answer, the court was of opinion that the appellee was entitled to the relief sought by the bill, and so decreed. The action of the court in overruling the motion to continue the cause, and in sustaining the exception to the answer, is also assigned as error.

From what has been said in discussing the demurrer to the bill, it is clear that the court erred in sustaining the exception to the answer. It put in issue the agreement set up in the bill, and the exception to it ought to, and doubtless would, have been overruled, if the court had not been of the opinion that the appellee was entitled to the possession of the papers sued for as a matter of law, in accordance with the English rule. In no other way can the court's action in sustaining the exception be understood. Having this view, the court, of course, overruled the motion to continue, for there was no issue of fact upon which to take proof, and a continuance of the case could have been no benefit to the appellant.

The appellee insists that as the action of the court in refusing to continue the case was not plainly erroneous, and the decree complained of granted only such relief to the appellee as he was entitled to upon the record as it then stood, treating the exception to the answer as overruled and the answer properly in the case, the decree complained of ought not to be reversed.

It is well settled that every motion for a continuance is addressed to the sound judicial discretion of the court, under all the circumstances of the case, and that an appellate court will not reverse it upon the ground that a continuance was improperly granted or denied unless its action is plainly erroneous. Hite's Case, 96 Va. 489, 493, 31 S. E. 895, and authorities cited. If the circuit court had held that the answer was sufficient, and then overruled the motion to continue, it would have exercised that judicial discretion contemplated in such cases, and we are not prepared to say that its action ought to be reversed, although, under the circumstances of the case, the better practice would have been to have continued the case in order that the appellant might have taken proof to meet the appellee's depositions, taken and closed so recently before the term of court as not to give the appellant time to take his proof before the term commenced.

Without, therefore, intending to infringe in any manner upon the rule which governs this court in considering the action of a trial court upon a motion to continue, where it was necessary, in the view the court took of the case, to consider and decide the sufficiency of the grounds upon which the motion was based, we are of opinion that the decree appealed from should be reversed in so far as it sustained the exception to the appellant's answer, and the cause be remanded to the circuit court for further proceedings to be had therein, not in conflict with the views expressed in this opinion.

RIELY, J., absent.

NATIONAL MUT. BUILDING & LOAN ASS'N v. BLAIR.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

TRUST DEED—PRIORITY—RELEASE—ACTION TO SET ASIDE—LACHES.

1. In a suit to set aside a release of a trust deed securing purchase-money notes on the ground that it was obtained by fraud, where plaintiff's assignor of the note had knowledge of the alleged fraud, and permitted defendant to sell the property under its deed of trust acquired subsequent to the release, and to purchase and hold the property four years, plaintiff is estopped, by reason of the laches of her assignor, to impeach the validity of the release.

2. Where a purchaser of land took a trust deed, when he sold it, to secure the payment of purchase-money notes which he had assumed, and his grantor afterwards released the trust deed held by him, and acknowledged satisfaction of the notes secured by the deeds, it operates as a release of the trust deed held by his vendee.

3. The fact that a trust deed securing purchase money may not have been properly acknowledged and recorded will not affect the priority as between it and another trust deed, where the owner of the latter deed had actual knowledge of the existence of the former.

Appeal from circuit court of city of Roanoke; J. A. Dupuy, Judge.

Suit by Gertrude Blair against the National Mutual Building & Loan Association to set aside a release of a trust deed. Decree for plaintiff, and defendant appeals. Reversed.

Cocke & Glasgow, for appellant. A. A. Phlegar and Scott & Staples, for appellee.

HARRISON, J. Without expressing an opinion upon the question raised by the demurrer, but conceding, for the purposes of this case, that the appellee has a right to be heard, we are of opinion that, upon the merits of the case presented by this record, she cannot prevail.

By deed of August 20, 1890, J. M. Watts sold and conveyed to Mary O. Willmeth a lot in the city of Roanoke, and took from the grantee a deed of trust securing to himself the payment of two interest-bearing purchase-money notes, each for $2,333.33. On the margin of this deed of trust the following release is recorded:

"I hereby release the lien of the deed of trust on the property herein conveyed, the amount secured therein having been satisfied. Given under my hand, this 20th June, 1891. J. M. Watts. Attest: W. F. Bryant, Deputy Clerk."

On October 23, 1890, Mary O. Willmeth sold and conveyed this lot to Junius B. Fishburne, who assumed the payment of the two notes secured thereon to J. M. Watts.

On March 25, 1891, Junius B. Fishburne sold and conveyed part of the same lot to Mary M. Simmons, who assumed, as part of her purchase money, the payment of the two notes secured thereon to J. M. Watts. Contemporaneously with this deed, the grantee executed a deed of trust to secure the grantor, as appears from the following clause of the deed:

"In trust to secure Junius B. Fishburne the payment of the sum of $7,666.66, and interest, unpaid purchase money on above property, said sum being evidenced by one note of Mary M. Simmons, bearing even date herewith, and payable, with interest, to said Fishburne, 30 days from date, in the sum of $3,000.00; and also two notes drawn by Mary O. Willmeth, dated August 20, 1890, and payable one and two years from date to James M. Watts, each in the sum of $2,333.33, with interest, the payment of which two notes the said Mary M. Simmons has assumed."

On the margin of this deed of trust the following release is recorded: "The note herein described, for the sum of $3,000.00, payable to me thirty days after its date, has been fully paid, and I hereby acknowledge the receipt of same. Given under my hand this 28th day of May, 1891. Junius B. Fishburne. Attest: W. F. Bryant, D. C."

On the 16th day of May, 1891, Mary M. Simmons conveyed this lot to George J. Peet in trust to secure the appellant association a loan made by it of $5,000.

On June 16, 1891, May M. Simmons gave a deed of trust on this same lot to secure James M. Watts one of the notes for $2,333.33, executed to him by Mary O. Willmeth, August 20, 1890, the other of said notes having been paid off and discharged; the deed of trust stating on its face that the note secured had been "made by Mary O. Willmeth, and assumed by May M. Simmons."

On July 20, 1893, Rush U. Derr, who had been substituted as trustee in the deed securing the appellant, sold the lot in question, and conveyed the same to appellant.

After this sale and conveyance, nothing appears touching these transactions until the 19th day of August, 1897, when the bill in this cause was filed, claiming that the second note executed by Mary O. Willmeth to J. M. Watts was due and unpaid, and that the same was assigned by Watts on the 10th day of December, 1896, without recourse, to C. C. Ellis, who had on the 21st day of December, 1896, assigned the same without recourse to the complainant, Gertrude Blair, who is the appellee here.

The substantial allegations of the bill are: First, that the release of J. M. Watts, dated June 20, 1891, indorsed on the margin of the deed of trust, dated August 20, 1890, from Mary O. Willmeth to secure J. M. Watts the two notes of $2,333.33 each, had been secured by fraudulent representations made to Watts by Rush U. Derr, agent and attorney for the appellant building association.

Second, that the Fishburne deed of trust, dated March 25, 1891, also secured the note asserted by appellee, and that the lien of that deed had not been released as to said note, and was still a valid security therefor; and,

Third, that the deed of trust given to se-

cure the appellant association was acknowledged by the grantor before Rush U. Derr, who was alleged to be the attorney for the association, and was therefore void as to the debt set up by the appellee.

The prayer of the bill is that the release made by Watts, June 20, 1891, on the margin of the deed of trust of August 20, 1890, be set aside and annulled as having been obtained by fraudulent misrepresentations and concealment on the part of the appellant association, through its agent and attorney, Rush U. Derr; that the note asserted by appellee be declared to be a valid subsisting lien upon the property in question, superior to the appellant association or any other person; and that said property may be sold to satisfy the same.

J. M. Watts, the original beneficiary of the claim here asserted, is the only witness to prove the alleged fraud. The case as presented by his testimony is that he held the deed of trust of August 20, 1890, upon the property; that Rush U. Derr, the attorney for appellant, came to his house several times to urge and persuade him to release his lien; that he finally yielded, and made the release, and took a new deed of trust to secure the bond here set up; that Derr told him that the transaction did not alter his position, and that he would still have the first lien. From the record, Watts appears to be an intelligent business man, and it is difficult to understand what was, in his view, to be accomplished by the apparently useless performance of releasing one first lien to immediately put upon record another of the same dignity; and this, when he knew that appellant was lending money on the property, and had, as he says, always understood that a building and loan association would not lend money unless they had a clear title. This opinion, however, need not be prolonged to consider whether or not Watts was induced by false representations to execute the release; for, if he was, his subsequent conduct would preclude a recovery.

It is well settled that, where a party desires to repudiate a transaction upon the ground of mistake or fraud, he must, upon the discovery of the fraud, or upon the discovery of facts and circumstances from which such knowledge would be imputed to him, assert his remedial rights with diligence and without delay. To delay instituting judicial proceedings, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, regarded as an acquiescence, and this may be, and generally will be, a bar to any equitable remedy. Great punctuality and promptness of action by the deceived party, upon his discovery of the fraud, is required. Unnecessary delay after such knowledge will defeat the equitable relief. 2 Pom. Eq. Jur. §§ 817, 897, 917.

"Acquiescence or delay for a length of time after a man is in a situation to enforce a right, and with a full knowledge of the facts, is, in equity, cogent evidence of a waiver and abandonment of the right. * * * But as soon as a man with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material circumstances of the case, freely and advisedly does anything which amounts to the recognition of a transaction, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly and deliberately permits another to deal with the property, or incur expense, under the belief that the transaction has been recognized, or fully and advisedly abstains for a considerable lapse of time from impeaching it, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Nor will the mere notice or assertion of a claim, unaccompanied by any act to give it effect, keep alive a right which would be otherwise barred." Kerr, Fraud & M. pp. 299, 301, 311.

In accordance with many previous decisions by this court, it is said in the recent case of Hurt v. Miller, 95 Va. 32, 27 S. E. 831: "A party who intends to repudiate a contract on the ground of fraud should do so as soon as he discovers the fraud; for if, after the discovery of the fraud, he treats the contract as a subsisting contract, or if, in the interval while he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, he will be deemed to have waived his right of repudiation. And, whenever a party to a contract has a right to elect whether he will avoid it, his election may be manifested by acts as well as words, and, when once made, is final, and cannot be retracted."

In the case at bar it appears that in June, 1892, about one year after the release in question was made, J. M. Watts knew that appellant had the first lien, and that he held a second lien. He knew that Mrs. Simmons had bought the property, and given appellant a deed of trust upon it. He kept himself informed as to the manner in which the dues to the association were being paid. He knew that default had been made in the payment of the dues, and that the association had advertised the property under its deed of trust to be sold in June, 1893. He practically admits that he requested a postponement of the sale, and knew that it would take place on the 20th of July, 1893. He contemplated buying the property to save himself, but finally abandoned the idea, because, with a second mortgage, he thought he would lose. He permitted the association to become the purchaser of the property, and to receive a deed therefor, and to hold title for more than four years, without a suggestion, so far as the record shows, of the claim now set up. Nor is J. M. Watts now seeking to enforce said claim. On the contrary, he sold the bond in question, amounting, with interest, to more than $3,-

000, without recourse, to C. C. Ellis, for the paltry sum of $27, who sold it in a few days thereafter to the appellee. It is inconceivable that Watts would have parted with a bond for that amount, for such a consideration, if he had believed that there was any valid ground for making the claim now asserted by his assignee. His whole course in the matter shows an acquiescence in the superior right of appellee, and a purpose not to assail or attempt to impeach that right.

It further appears that the situation and circumstances of the parties to the alleged fraudulent release have materially changed during the long period of inaction and acquiescence by Watts. May M. Simmons and Rush U. Derr, the only two persons who could meet and explain the charge of fraud now made, are dead. The property has depreciated to less than one-third of its former value, and Mrs. Simmons, the debtor of appellee, died insolvent. The rule is general that where there has been a change of circumstances or relations which would render either an execution or rescission of a contract a hardship to the defendant, and this change grows out of an unexcused delay on the part of the plaintiff, the change and delay together will constitute a sufficient ground for denying equitable relief. Darling v. Cumming's Ex'r, 92 Va. 521, 23 S. E. 880; Hurt v. Miller, 95 Va. 32, 27 S. E. 831.

The appellee can occupy no better position than her assignor. Inasmuch, therefore, as J. M. Watts is estopped by reason of his laches and acquiescence to impeach the validity of the release of June 20, 1891, made by him, his assignee is also denied the right to call that transaction in question.

The contention that J. M. Watts is entitled to the benefit of the Fishburne deed of trust dated March 25, 1891, is not tenable. The clause relied on for this position has been already quoted. It is clear that the parties to that deed were not securing Watts. He already had a deed of trust upon the same property. In his purchase, Fishburne had assumed the Watts debt, and the reference to it in the trust deed of March, 1891, was merely to recognize the assumption of the same debt by Mrs. Simmons, and to protect Fishburne in the event that he should be called upon to discharge the Watts lien before Mrs. Simmons had fulfilled her obligation to pay the same. In releasing the lien of his own deed of trust, Watts stated of record that the amount secured thereby was satisfied. The debt was at that time owned by Watts, and was in his possession, and when he marked it "Satisfied" it was also discharged as to Fishburne, and the deed of trust taken for his protection was satisfied as to such debt as effectually as if the indorsement of satisfaction had been made thereon.

It is further contended that the deed of trust in favor of the appellant association was acknowledged before Rush U. Derr, the attorney for the association, and was therefore not properly recorded; that, not being properly recorded, the deed of trust securing appellee, though subsequent in time and subsequent in recordation, had become by operation of law a first lien upon the premises. It is not necessary to express an opinion as to the validity of this acknowledgment. One object of recordation is to give notice. Under the statute, only purchasers without notice can take advantage of a failure to record. In this case, it abundantly appears that Watts had notice of the deed of trust in favor of the appellant, and hence, if the acknowledgment were invalid, it could not affect the right of priority between the parties to this suit.

For these reasons, the decree appealed from must be reversed and annulled, and this court will enter such decree as the lower court should have entered, dismissing appellee's bill, with costs.

NEWBERRY v. BANK OF PRINCETON.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE OF FRAUDULENT INTENT OF GRANTOR—EVIDENCE.

A grantee knew that the grantor was indorser of a note, but did not know that the makers were insolvent. An action on the note was pending at the time of the purchase, but there was no evidence that the grantee knew of it. One-half the purchase price was made payable to the grantor's wife, but the grantee knew that money belonging to her had been used in paying incumbrances on the land, and that she claimed a half interest therein. The deed to the grantee recited the payment of the consideration in full where only half had been paid. The grantee acted without advice, was somewhat illiterate, and did not notice the discrepancy in the deed. *Held* not sufficient to charge the grantee with notice that the conveyance was made by the grantor with intent to defraud his creditors.

Appeal from hustings court of Radford.

Suit by the Bank of Princeton against Henry Newberry to set aside conveyance of land. From a decree in favor of plaintiff, defendant appeals. Reversed.

Henson & Mason, for appellant. S. W. Williams and J. H. Fulton, for appellee.

BUCHANAN, J. One of the objects of this suit was to set aside a conveyance of land made by James H. Mustard and wife to Henry Newberry, the appellant, upon the ground that it was executed to hinder, delay, and defraud the creditors of the male grantor. Upon the hearing of the cause, the court was of opinion that the deed was executed by the grantor, James H. Mustard, with the fraudulent intent charged, and that the grantee, Newberry, "had knowledge of the existence of such facts as would have put him on inquiry as to such fraudulent intent, and therefore warrants the court in holding him responsible for the fraudulent intent with which the deed was executed," and so decreed.

From that decree this appeal was taken.

The finding of the court as to the fraudulent purpose of the grantor in making the conveyance is conclusively shown by the record, and is not controverted here.

The trial court further found, as is evident from its decree, and in that view we concur, that the record does not show that the grantee had actual knowledge of the grantor's unlawful intent. Although the grantee did not have such knowledge, he may have made his purchase under such circumstances as will prevent him from being deemed a bona fide purchaser. If he had knowledge of facts and circumstances which were naturally and justly calculated to excite suspicion in the mind of a person of ordinary care and prudence, and which would naturally prompt him to pause and inquire before consummating the transaction, and such inquiry would have necessarily led to a discovery of the fact with notice of which he is sought to be charged, he will be considered to be affected with such notice, whether he made inquiry or not. But, while the fact of notice may be inferred from circumstances as well as proved by direct evidence, yet the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of mala fides. Ferguson v. Daughtrey, 94 Va. 308, 312, 26 S. E. 822; Fischer v. Lee, 98 Va. —, 35 S. E. 441, and cases cited.

It appears that some time prior to November 5, 1886, the date of the conveyance in question, James H. Mustard became the first indorser on a negotiable note for Compton and Shannon for about $2,700, which was not paid at maturity, and suit was brought upon it against the makers and indorsers to the November term of the circuit court for Bland county. Compton and Shannon were heavily indebted at that time, and, although the owners of a large amount of valuable property, it was not sufficient to pay their debts when subjected. Mustard, the grantor, was the owner of the farm conveyed, and, being apprehensive of the solvency of Compton and Shannon, was endeavoring to prevent his farm from being subjected to the payment of the appellee's debt, either by conveying it to some one who would hold it for his benefit, or by selling it, and putting the purchase price in his pocket or beyond the reach of the appellee. Having failed in his efforts to find any one who was willing to hold the property for his benefit, he determined, it seems, to find some one who would purchase the land, and pay all or a large part of the consideration down. Prior to his becoming involved in the affairs of Compton and Shannon, as far as the record shows, and during the preceding two or three years, he had been endeavoring to sell his land to the grantee and others. A short time before the conveyance in question was made he renewed his offer to sell it to the grantee, who became the purchaser at the price of $4,000, —all that it was worth. He paid one-half of the consideration down, and executed his two bonds, for $1,000 each, payable, respectively, on or before November 6, 1887, and November 6, 1888, to the wife of the grantor, and a conveyance was made to him which acknowledged the receipt of the whole purchase price.

A number of facts and circumstances are relied on to show that the grantee, if he had made such inquiry as it was his duty to make, would have discovered the fraudulent intent of the grantor in making the conveyance to him.

In considering what effect those facts and circumstances ought to have had upon the action of the grantee, it must be borne in mind that his grantor, aside from his indorsement for Compton and Shannon, was perfectly solvent, and that the record does not show that the grantee had notice of their failing condition, or that they were unable to pay their debts. On the contrary, he testified that he thought they were solvent, and could pay all their indebtedness, and there is no sufficient ground for doubting the truthfulness of his statement. It is true that there are some discrepancies in his evidence as to some of the details attending his purchase, yet they are not such as to seriously affect his testimony. When he was examined as a witness he was 70 years of age, and was testifying as to a transaction which took place 12 years before. His testimony shows that he was an illiterate man, yet it bears upon its face the impress of truth, and not only his own but witnesses for the appellee also prove that his reputation for truth and veracity was unquestioned.

Among the material facts and circumstances relied on to show that the grantee would have discovered the fraudulent purpose of the grantor if he had made such inquiry as it was his duty to make, was the pendency of the appellee's action at law upon the $2,700 note. This action was pending, and judgment was rendered on the note within a few days after the grantee purchased the land, but the record does not show that he knew of its pendency, and he testified that he had no such knowledge.

Another circumstance was making his bonds for the deferred purchase price payable to the grantor's wife. It appears from the record that a large portion of the money used some years before in removing incumbrances upon the land conveyed came from the wife's father during his lifetime, and from his estate after his death; that it was charged to her in the distribution of her father's estate; that she claimed, by reason of such payments, a half interest in the land; and that the grantee knew of this claim, and executed his bonds for the deferred purchase money to the wife instead of to the husband by their direction. While the wife had no interest in the proceeds of

the sale of the land on account of the money received from her father and his estate used in removing incumbrances upon the land, which she could enforce against the husband or his creditors, still there was nothing so unreasonable in her demand that half of the proceeds of sale should be paid to her as to render the grantee guilty of culpable negligence in not making further inquiry.

Another circumstance is the recital in the deed that the whole purchase price had been paid, when only half of it had been. The grantee testifies that in making the purchase he had no counsel; that the deed was drawn by the attorney of the grantor, who, he thought, knew how to draw it; that the grantee had never drawn a deed; and that, so far as he recollects, he did not know that it was so drawn until the day he testified, when his attention was called to it. He was a man of means, fully able to purchase the land, had given his bonds for the deferred purchase price, and knew that they would be paid. Under such circumstances, even if he had noticed the recital in the deed, drawn by a lawyer whom he thought knew his business, it is not likely that it would have made much impression upon him. Certainly not such an impression as would fix upon him the imputation of bad faith if he did not inquire why the recital was made, under the facts of this case.

Without discussing in detail the other suspicious circumstances connected with the grantee's purchase, it is sufficient to say that when all the circumstances relied on to show that the grantee was guilty of bad faith in making his purchase without making further inquiry are considered in the light of all the facts disclosed by the record, and especially of the facts that the grantee paid and bound himself to pay a full price for the property, and did not know that the makers of the note upon which his grantor was indorser were insolvent, but thought them fully able to pay their debts, the imputation of bad faith has not been fixed upon the grantee with that degree of strength and clearness which is required in making out a case of fraud.

We are therefore of opinion that the court erred in holding that the grantee was affected by the fraudulent intent of the grantor, and decreeing against him on that ground; but as it appears from the record that, before the grantee had paid the purchase-money bonds made payable to the grantor's wife, he had notice of the appellee's claim, and in a garnishee proceeding sued out by the appellee answered that he still owed said bonds, and was willing to pay them to whomsoever the court might order, and it further appearing that no judgment was rendered against him in that case, and that all the parties in interest were before the court, it ought to have entered a decree against the grantee in favor of appellee for the amount of those bonds, with interest thereon from the time they became due and payable, and thus put an end to the controversy.

This court will reverse the decree complained of so far as it held that the appellant was affected by the fraud of the grantor, and decree against him on that ground for the amount of the appellee's judgment, and will enter such decree as the trial court ought to have entered, with costs to the appellant as the party substantially prevailing.

CASH v. HUMPHREYS.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY.

Where a judgment creditor seeks to subject lands in the hands of a third party to the payment of his judgment, the pecuniary demand asserted is the matter in controversy, and not the title of land; and, where the defendant is appellant, the test of the jurisdiction of the appellate court is the sum decreed against him.

Appeal from circuit court, Bedford county.

Bill by one Cash against one Humphreys to subject certain land to the payment of a judgment. From a decree in favor of plaintiff, defendant appeals. Dismissed.

Caskie & Coleman and Campbell & Tucker, for appellant. G. W. Crumpecker and William Eubank, for appellee.

BUCHANAN, J. This is a suit by a judgment creditor to subject certain land in the bill and proceedings mentioned to the payment of his judgment, which, with its interest and costs at law, is less than $500.

The decree appealed from held that the land was liable in the hands of the appellant, the present owner of the land, although he is not the judgment debtor.

The appellant's contention is that the matter in controversy is not the amount or validity of the judgment, but the right to subject the land to its payment, and therefore the real controversy is as to the ownership or the title to the property. Whatever may be the merits of this contention as an original proposition, it is unnecessary to consider, as this court has held, by repeated decisions, that the pecuniary demand asserted is, in such a case, the matter in controversy, and not the "title or boundary of land," and where the defendant is appellant, as in this case, the test of jurisdiction is the sum decreed against him or declared to be a lien upon the land. Fink v. Denny, 75 Va. 663; Hawkins v. Gresham, 85 Va. 34, 6 S. E. 472; Cook v. Bondurant, 85 Va. 47, 6 S. E. 618; Smith v. Rosenheim, 79 Va. 540; Patteson v. McKinney, 88 Va. 748, 14 S. E. 379.

It follows from what has been said that the appeal must be dismissed, as improvidently awarded.

WILLARD v. WILLARD.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

DIVORCE—ABANDONMENT—SETTING ASIDE DIVORCE — PETITION FOR REHEARING — CORRECTION OF INJUSTICE—CROSS BILL—RIGHT TO AMEND—CONTINUANCE—LACHES.

1. Where it was shown that, less than three years before entry of a decree divorcing a husband from the bonds of matrimony on the ground of abandonment, such husband had lived and cohabited with his wife for a period of several months, it was not error to set aside such decree.

2. Under Code, § 3233, authorizing any party to a case who was not served with process, and did not appear therein before judgment, to petition for rehearing, and have any injustice in the proceedings corrected, a wife against whom a decree of divorce from the bonds of matrimony had been entered without appearance or service of process was entitled to petition for rehearing, and to plead or answer.

3. Where a divorce was granted a husband on grounds of cruelty and abandonment, without appearance by or service of process on the wife, who 11 months thereafter (as soon as she knew of its existence) petitioned for a rehearing, and filed a cross bill alleging desertion and adultery (it being then shown that no effort was made by the husband to sustain the charge of cruelty, and that he in fact abandoned his wife in a foreign state without support), such wife was not precluded from the right when the cause came on for hearing, 7 months thereafter, to file an amended cross bill, alleging further adultery, and to have a continuance to enable her to take proof thereof, on the ground of lack of diligence in bringing forward the matters alleged therein, and proof to sustain them.

Appeal from corporation court of Roanoke city.

Bill by one Willard against his wife for divorce. There was a decree for plaintiff, and defendant, on petition for review, filed a cross bill. Decree was entered dismissing defendant's cross bill, denying leave to file an amended cross bill, setting aside the divorce decree, and dismissing the cause, and defendant appeals; plaintiff assigning cross error in setting aside the divorce decree. Reversed in part.

Smith & King, for appellant. William Gordon Robertson and G. W. Crumpecker, for appellee.

CARDWELL, J. This is an appeal from a decree of the corporation court of the city of Roanoke, and the case is as follows:

Appellant and appellee intermarried in the state of New York on June 6, 1888, and lived together as man and wife at various places in different states until March 16, 1896. For several years previous to February, 1895, they resided in the city of Roanoke, Va. In February, 1895, appellant went on a visit to New York, to see her sick father, who died before her arrival. She remained in the North with her people until the following September, when appellee joined her, and they lived together as man and wife in Hartford, Conn., from October 1, 1895, until March 16, 1896. On the last-named date appellee left appellant in Hartford, and returned to Roanoke, Va., where he owned a residence and some other property; saying to appellant that he expected to be absent about six weeks. He did not return to Hartford, Conn., but in May, 1898, filed his bill against appellant in the hustings court of the city of Roanoke for a divorce from her on the grounds of cruelty and abandonment. On June 9, 1898, he proceeded to take the depositions of witnesses in Roanoke, and on June 24, 1898, the cause was heard on his bill and the said depositions; and the court entered a decree divorcing him from appellant, a vinculo matrimonii, and dismissing the case from the docket. May 8, 1899, appellant filed her petition in the hustings court of Roanoke, alleging that she had never been served with process to answer the bill filed against her by appellee, and had not had any notice whatever of the pendency of his suit prior to the decree therein of June 24, 1898, nor until a very short while before filing her petition, and asked that the decree of June 24, 1898, be set aside; that she be permitted to file her answer to the bill filed by appellee; and that her answer be treated as a cross bill. She was permitted to file her answer, to be treated as her cross bill; the decree then entered reciting that it appeared from the record in the case that she was not served with process, and did not appear in the case, prior to the decree of June 24, 1898. The cross bill charges appellee with adultery in the city of Middletown, Conn., between July 1 and December 3, 1897, and with desertion and abandonment of appellant on the 16th day of May, 1896, and prays for a divorce from him, alimony, etc. Appellee answered the cross bill, and exhibited therewith a certificate of the clerk of the supreme court of Middlesex county, Conn., setting forth that appellant had instituted a suit against appellee for a divorce in said county and state in December, 1898. Depositions were taken on behalf of appellant, and also the depositions of appellee on his own behalf; the depositions for appellant clearly showing that she and appellee lived together as man and wife in Hartford, Conn., from October 1, 1895, to March 16, 1896, when he left her and came back to Roanoke, Va., and had not since then contributed to her support and maintenance. The cause coming on to be heard on the 6th of December, 1899, on the pleadings, the depositions of witnesses, and the exception of appellant to the deposition of appellee taken on his own behalf, appellant asked leave to file her amended cross bill, charging appellee with adultery in the city of Roanoke, Va., during the months of March and April, 1898, and moved the court to continue the cause for the purpose of permitting her to take proof to sustain this charge; but the court overruled her motion for a continuance, refused to permit her to file her amended cross bill, and heard the case upon the record as it stood, entering the decree appealed from.

which, in so far as it is now material, is as follows:

"* * * The court being of opinion that the defendant has no right to set up by cross bill in this suit any facts entitling her to a divorce from the plaintiff, because the court is satisfied from the evidence that prior to the time she entered an appearance in this suit, but subsequent to the institution of this suit, she had instituted a suit for divorce from the plaintiff in a court where she resides, in the city of Middletown, Conn., which is yet pending, and that hence this court is without jurisdiction to entertain her cross bill."

The decree then denies appellant's motion to permit her to file her amended cross bill, dismisses her original cross bill, and, reciting that the evidence showed that appellant and appellee last resided together as man and wife in the city of Hartford, Conn., as late as March 16, 1896, and that the decree of divorce granted the plaintiff (appellee) from the defendant (appellant) on June 24, 1898, was improperly granted, as three years had not elapsed at that time since the alleged abandonment, set aside said decree and dismissed the cause.

Appellee assigns as cross error so much of the decree as sets aside the decree of June 24, 1898, awarding appellee a divorce from appellant. There is no error in this ruling of the court below. As we have seen (and the decree so recites), the evidence in the cause shows the fact that appellant and appellee had lived together as man and wife as late as March 16, 1896, and three years had not since elapsed when the decree of June 24, 1898, was rendered. Moreover, a decree entered in the cause prior to the decree appealed from rightly held that it appeared from the record in the cause that appellant was not served with process to answer the bill filed by appellee, and did not appear in the cause, prior to the decree of June 24, 1898. She was, therefore, clearly entitled to file her petition to have the case reheard, and to plead or answer, in order to have any injustice done her in the proceedings corrected. Section 3233 of the Code.

Counsel for appellee frankly concede in the argument here, that the reason given in the decree for denying appellant's right to file her amended cross bill is erroneous, but contend that she should have been denied this right, because of the lack of diligence in bringing forward the matters alleged in the amended cross bill, and the proof to sustain them.

The authorities cited in support of this contention are not applicable, as the court in those cases was passing upon the question whether or not the pleader should have been allowed to file a petition for a rehearing or a bill of review on the ground of newly-discovered evidence touching the matters already decided, and not on the right to file a cross bill or an amended cross bill setting up newly-discovered facts pertinent to the issues undetermined in the cause, and to take proof in substantiation of these facts.

Mr. Bishop, in his work on Marriage and Divorce (volume 2, § 673), says: "In proper circumstances, where justice requires, the courts, in divorce causes, are liberal in allowing continuances and suspensions of the hearing to supply defects in the evidence or pleadings. The public is not interested to interpose technical obstructions. Of all causes, there are none wherein, more than these, the exact and real truth should, on every account, be made to appear."

The doctrine stated by this learned author, and supported by ample authority cited, is peculiarly applicable to the case at bar.

No effort is made by appellee to sustain the charge of cruelty made in his bill, and, instead of the evidence in the record sustaining his charge of abandonment by appellant in February, 1895, it clearly shows, as we have seen, that he in fact abandoned her in March, 1896, after living with her as his wife for months next preceding,—leaving her in a foreign state, without sufficient means of support,—and remained away from her continuously until the institution of this suit by him, and since. Under these circumstances, and in view of the further fact that appellant made her appearance in the case as soon as she ascertained that it was in existence, it cannot be reasonably said that there was such a lack of diligence on her part in bringing forward the matters alleged in her amended cross bill as to justify a denial of her right to file it, and to take proof to sustain its allegations.

We are of opinion that the decree appealed from is erroneous in so far as it denied appellant the right to file her amended cross bill in the cause and to take proof of its allegations, dismissed her original cross bill, and removed the case from the docket, and to this extent it will be reversed and annulled, but in all other respects affirmed; and the cause is remanded, to be further proceeded in according to the views expressed in this opinion.

NEWBERRY et al. v. FRENCH.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

LANDS — CONTRACT TO CONVEY — SPECIFIC PERFORMANCE—DEFECTIVE TITLE—LACHES —DEPRECIATION IN VALUE.

1. Where complainant contracted to convey to defendant certain land by "good and sufficient deed," and it appears that he had no title to the property, but only an equitable right, against which there were a large number of judgment liens, specific performance of the contract will not be granted, since defendant cannot be compelled to accept such a title.

2. Where complainant contracted to convey land to defendant, and delayed performance for 30 months, during which time the value of the property depreciated about one-half, he cannot have specific performance of the contract, since defendant will not be compelled to take the land in its depreciated condition.

Appeal from hustings court of Radford.

Bill by William A. French against one Newberry and others for specific performance of a contract to purchase real estate, and for a decree for the balance of the purchase price due under the contract. From a decree for complainant, defendants appeal. Reversed.

J. H. Fulton and Chapman & Gillespie, for appellants. S. W. Williams and May & May, for appellee.

HARRISON, J. This suit was instituted in March, 1893, on the part of the complainant, suing for the benefit of his assignees, asking for the specific performance of so much of a certain contract in writing for the sale of land as he was interested in, and to have a decree against the appellants for the balance of purchase money due under said contract.

The contract sought to be enforced was made August 27, 1890, and involved the sale of two adjoining tracts of wild unimproved mountain land, one containing 4,648½ acres, and the other 847½ acres. The purchase price of the smaller tract, which is here involved, was $7,710.28, one-fourth to be paid in cash upon the delivery of a good and sufficient deed, and the balance in three equal payments, at 12, 24, and 36 months, with interest from date at 6 per cent., the vendor's lien being retained to secure the deferred payments. The larger tract mentioned in the contract is not involved in this controversy, and need not be again referred to.

The purchasers, who are the appellants here, filed an answer and cross bill, demurring to complainant's bill, resisting the enforcement of the contract, and asking for its rescission, and a decree over for the cash payment which they had paid, and that such decree be made a charge upon the land in question, upon the grounds (1) that no such deed as the contract required had ever been executed or tendered by the vendor; (2) that the laches of the vendor in tendering a good and sufficient deed had been attended by such a change of circumstances, and depreciation in the value of the property, as to render the enforcement of the contract inequitable and a great hardship; (3) that the title of the vendor was so defective, doubtful, and uncertain that the purchasers ought not to be required to accept it; (4) that the incumbrances upon the land are far in excess of the price agreed to be paid therefor, and the vendor has since the sale become insolvent, so that his warranty would afford no protection.

It appears that, within a day or two after the contract in question was made, the vendor, D. A. French, and his wife, executed a deed, purporting to convey this land to the purchasers, and placed the same in the hands of his agent, William A. French. The appellants deposited the cash payment to the credit of the vendor in the Bank of Tazewell, and at their request William A. French deposited the deed there also. It further appears that, for the convenience of the purchasers, who were widely separated, some of them living in distant parts of the state, the deferred purchase-money bonds were executed and left with the Bank of Tazewell, with the understanding that they were not to be delivered to the vendor until the attorneys had passed upon the sufficiency of the title and the deed. It further appears that the land sold was unimproved wild mountain land, valuable chiefly for its timber and mineral deposits, and that no actual possession thereof was taken by the purchasers, though they did do some prospecting upon it for iron ore, both before and after the purchase.

It also satisfactorily appears that the deed left with the bank was not accepted, at any time, as a compliance with the contract, but was deposited with the bank subject to inspection by the attorneys, and an investigation by them of the title. It further appears that the original contract was retained by W. A. French, and never recorded; that after considerable delay in getting the contract, which was necessary before the deed could be examined, the attorneys examined the deed, and at once informed their clients that it was not drawn in accordance with the contract; that it conveyed the land in gross, whereas the contract called for the conveyance of a specific number of acres, the acreage controlling the price. W. A. French was informed that the deed would not be accepted in that form, and the cashier of the bank was told that the deed was not satisfactory, and that he must not deliver the bonds.

Nothing further appears to have been done in the premises until February, 1893, nearly 30 months after the date of the contract, when D. A. French and wife executed and tendered another deed to the attorneys of appellants, which they declined to accept, because it did not conform to the contract, and for the further reason that no abstract was furnished with the deed showing a good title to the land conveyed. Thereupon this suit was instituted, complainants filing with their bill an abstract of title.

There were a number of proceedings not necessary to be here recited, until January, 1895, when an order was entered in the cause referring the same to a commissioner for a report upon the character and condition of the title to the land in question. After due notice to the parties, the commissioner filed his report, covering about 46 pages of the printed record, returning therewith a great mass of depositions and documentary evidence, which had been produced upon the hearing before him. After pointing out a number of defects in the title, well calculated to cause a purchaser doubt and uncertainty, the commissioner concludes his elaborate report by finding that on the 28th of August, 1890, D. A. French had only an equitable title to the land in question, with judgments amounting to $4,708.54 resting thereon, and that, therefore, the purchasers should not be required to accept the deed tendered August 28, 1890.

He further finds that at the date of his report the title to the land was in a worse condition than in 1890, saying: "There are now over $50,000 existing liens upon this land, and it is in evidence that D. A. French is insolvent." The commissioner then arrives at the following conclusion: "The links that your commissioner has failed to find of record in the chain of title, together with the unsatisfactory doubtful evidence of possession, but especially in view of the enormous amount of judgment liens, leaves no doubt in your commissioner's mind but that the title is such that the defendants should not be required to accept it."

It is well settled that a purchaser of land, at a private sale, will not be required to pay his purchase money, and take in exchange therefor a defective, or even doubtful, title; and especially is this true where, as in the case at bar, he has contracted for a good and sufficient deed, which undertaking is not confined to the form of the deed, but includes a good title. Garnett v. Macon, 6 Call, 309, 367, Fed. Cas. No. 5,245; Jackson v. Ligon, 3 Leigh, 174; Christian v. Cabell, 22 Grat. 82; Hendricks v. Gillespie, 25 Grat. 181; Clark v. Hutzler, 96 Va. 73, 30 S. E. 469; Matney v. Ratliff, 96 Va. 231, 31 S. E. 512.

In Garnett v. Macon, supra, Chief Justice Marshall says: "Both on principle and authority, I think it is very clear that a specific performance will not be decreed on the application of the vendor, unless his ability to make such a title as he agreed to make be unquestionable."

In Jackson v. Ligon, supra, Judge Carr says: "It is a principle laid down in many cases in equity that an unwilling purchaser shall not be compelled to take a title with a cloud upon it, and that principle is assuredly strengthened here, where the party has contracted for a good and lawful right."

In Hendricks v. Gillespie, supra, Judge Anderson says: "A court of equity is anxious to protect a purchaser, and give to him reasonable security for his title, not compelling him to take a title not knowing whether it was good or bad; * * * for it would be an extraordinary proceeding for a court of equity to compel a purchaser to take an estate which it cannot warrant to him. It has therefore become a settled and invariable rule that a purchaser shall not be compelled to accept a doubtful title. Nor will he be forced to take an equitable title."

We need not quote further from the numerous authorities announcing and maintaining this doctrine. It is too well settled and understood to call for more than a brief statement of the proposition.

After a careful consideration of the evidence underlying the commissioner's report, no doubt remains of the correctness of his conclusions. It is shown by the record that at the time of the sale the vendor did not have the legal title to the land in question, and that a large number of unsatisfied judgments were then docketed against him. It further appears that notwithstanding the deed tendered in August, 1890, was for good reasons rejected, and notwithstanding the first and second purchase-money bonds had in the meantime become due and payable, the vendor made no effort to furnish the purchasers with a good and sufficient deed, and made no demand for the purchase money due, until March, 1893, when this suit was brought, in which they file for the first time an abstract which shows on its face that the vendor could not then make a good and sufficient deed. It further appears that at the time of this suit there were, in addition to other serious doubts as to the title, more than $50,000 of liens outstanding against the vendor, and he insolvent; the liens amounting to more than six times the entire purchase money agreed to be paid. It is clear that no purchaser could be required to take such a title as the vendor was able to make when this suit was brought.

After the commissioner's report was filed, the appellees, with a view to perfecting the title, filed an amended bill, making, as defendants thereto, a great number of new parties, both known and unknown. In this new suit various proceedings were had. The propriety of such proceedings in a suit for specific performance may well be doubted, but we are not called upon to express any opinion upon that question, or to determine whether or not the title was thereby perfected; for it is an established fact in the case that at the time the suit was brought the land in question had depreciated in value 50 per cent.

The rule may be laid down as general, applying to either the vendor or vendee, that where there has been a change of circumstances or relations, which renders the execution of the contract a hardship to the defendant, and this change grows out of, or is accompanied by, an unexcused delay on the part of the plaintiff, the change and delay together will constitute a sufficient ground for denying a specific performance, when sought by one thus in default. Darling v. Cumming's Ex'r, 92 Va. 521, 23 S. E. 880; Garnett v. Macon, supra; Christian v. Cabell, supra; Hendricks v. Gillespie, supra.

In Garnett v. Macon, Chief Justice Marshall says: "As, before such decree was attainable, the value of the article has greatly changed, that circumstance creates a strong objection to specific performance;" and, adverting to the change of circumstances in that case, the learned jurist says: "The same property which, if sold in time, would probably have enabled him to pay for Mantapike, would not, on any reasonable estimate, now enable him to do so."

In Christian v. Cabell, Judge Staples says that it is the result of all the cases "that any loss occurring to the property, before the vendor was in a condition to convey a clear, unincumbered title, must fall on him, and not on the purchaser."

In Hendricks v. Gillespie, Judge Anderson says: "But if the vendor has been long in default, and in the meantime a change

of circumstances has taken place, unfavorable to the party resisting the demand, a court of equity will not compel specific performance;" and, in speaking of the change of circumstances in that case, says: "That there has been a general decline in the value of lands is a fact of public notoriety."

In the case at bar it is established by the evidence that there had been, at the time suit was brought, a great decline in the value of the class of property here involved, and that the particular land in question, as already stated, was not worth more than 50 cents on the dollar of the price appellees had agreed to pay. Under such circumstances, a court of equity could not decree specific performance, and therefore the proceedings on the amended bill, even if permissible, were without avail.

It is further contended by appellees that, after the contract of sale was completed, W. A. French was no longer the agent of his brother, the vendor, and that it was thereafter the duty of appellants to notify the vendor in person of their objections to the title, it being insisted that he was not informed of such objections. The contract shows on its face that William A. French was the agent of the vendor. It is further shown that the vendor delivered his deed of August, 1890, to William A. French; that the vendor never at any time appeared or had any connection with the transaction in person; and that W. A. French was treated and regarded by all concerned as his agent. But can the vendor be heard to deny knowledge of the condition of his own title, and to complain of appellants for not informing him of their objections thereto? He knew that he had made a contract in which he had agreed to deliver his vendees a good and sufficient deed before anything was paid by them. He is chargeable with knowledge that the deed tendered by him in August, 1890, was not in accordance with the contract, and that he did not furnish an abstract of title. He is chargeable with knowledge of the fact that he had no legal title to the land until about the time this suit was brought, nearly 30 months after he had made the sale. He is chargeable with knowledge of the fact that the land was bound by numerous judgment liens against himself, and that he was insolvent. All these things were quite sufficient to suggest the importance, if he expected to carry out his part of the contract, of getting his title in such condition as to be free from reasonable objection.

For these reasons, we are of opinion that the appellees are not entitled to a specific performance of the contract in their bill mentioned, and that the decree appealed from is erroneous. And we are further of opinion that the appellants are entitled to have the said contract rescinded, and to have a decree against the appellee D. A. French for the amount paid by them in cash under said contract; but inasmuch as said contract was never recorded, and liens have since been acquired, said decree will not be made a charge upon the land in question.

The decree, therefore, will be reversed, and such decree will be entered here as the lower court should have made, carrying out the views herein expressed.

The decree is as follows:

The court is of opinion, for reasons stated in writing and filed with the record, that the appellees are not entitled to a specific performance of the contract in their bill mentioned, and that the decree appealed from, dated September 11, 1899, is erroneous.

The court is further of opinion that the appellants are entitled to have the said contract rescinded, and to have a decree against the appellee D. A. French for $1,927.57, the amount of the cash payment made by them under said contract to D. A. French, with interest thereon from October 10, 1890, the date of its payment.

It is therefore ordered and decreed that said decree be reversed and annulled, and that appellees do pay to the appellants their costs by them expended about the prosecution of their appeal aforesaid here. And this court, proceeding to render such decree as should have been rendered by the hustings court of the city of Radford, doth order and decree that the contract in the bill and proceedings mentioned, dated August 27, 1890, be, and the same is hereby, rescinded; and it is further ordered and decreed that the appellee D. A. French do pay to the appellants Harman Newberry, J. G. Watts, Henry Bowen, Joseph S. Gillespie, and A. P. Gillespie $1,927.57, with interest thereon from October 10, 1890, and that the appellees do pay to the appellants their costs by them about their defense of this suit in said hustings court expended; and, nothing further appearing to be done in this cause, it is ordered that the same be stricken from the docket.

All which is ordered to be certified to the hustings court for the city of Radford.

SMITH'S EX'R v. POWELL.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

ESTOPPEL — NOTES — ACCEPTANCE — APPEAL —ASSIGNMENT OF ERROR—MOTION IN TRIAL COURT—NECESSITY—SUBSEQUENT DECREE—APPEAL—ERRORS IN ORIGINAL DECREE.

1. Plaintiff obtained a decree against several defendants, and a note was tendered to his attorney in satisfaction of it, which he received on the representation of defendants that plaintiff had agreed to its acceptance, but plaintiff had never made such agreement, and repudiated the act of the attorney as soon as it came to his knowledge, and before the time to appeal had expired. *Held*, that plaintiff was not estopped from enforcing payment of the decree on the ground that defendants, by the attorney's acceptance, were prevented from taking an appeal.

2. Under Code, § 3451, providing that a judgment by default may be vacated by the trial court on motion; and section 3452, declaring that no appeal shall be allowed by the appellate court or judge for any matter for which the judgment may be reversed on motion in the trial court,—where defendants, who were held as joint obligors in a decree taken by default, made no motion in the trial court to vacate it, error in holding them so liable will not be considered on appeal.

3. Where, several years after a decree in favor of plaintiff, the respective attorneys consented to the appointment of a commission by the trial court to determine whether a note given in satisfaction of such decree had been accepted or not, and an appeal was taken from a decree that it had been accepted, errors in the rendition of the original decree will not be considered on such appeal.

Appeal from hustings court of Roanoke.

Action by Smith's executor against L. L. Powell, trustee. From a decree in favor of defendant, plaintiff appeals. Reversed.

Scott & Staples, for appellant. Thomas W. Miller, for appellee.

KEITH, P. Smith's executor filed his bill in the hustings court of the city of Roanoke in June, 1890, stating that one Edmund Didier, the owner of three lots of land in said city, had entered into an agreement to sell the same to L. L. Powell, trustee for a number of beneficiaries, who were named, who were to take unequal interests in the said lot, ranging from 1/8 to 8/80 of the whole, as shown by the deed from Didier. The purchase price was $6,000, of which sum $2,833.33 was paid in cash, and for $2,566.66 Powell, trustee, executed his two negotiable notes, each for the sum of $1,283.33, payable at one and two years from date, and as to the residue he assumed two other negotiable notes drawn by Didier, payable to the order of Webb and others. A vendor's lien was reserved to secure the two notes of $1,283.33, and before the maturity thereof the first of these notes to fall due was, for value received, transferred to the plaintiff's intestate. This note not having been paid at maturity, Smith's executor filed his bill praying that the lots upon which it constituted a lien might be sold for its satisfaction, and that, if the fund thus produced proved insufficient to pay off the said note in full, the beneficiaries in the deed from Didier who are named parties defendant in the bill may be required to make good any deficiency. Powell, trustee, and all those interested in the trust, were made parties defendant, and as to all of them the bill was taken for confessed. In January, 1892, this cause was referred to a commissioner to report an account of the liens upon the property. The commissioner reported, and, there being no exception filed, his report was confirmed, and a decree of sale was entered. A sale was made and confirmed, which proved inadequate to satisfy the liens, and the court thereupon disposed of the purchase money to satisfy charges superior to the lien of Smith's executor, and applied the residue to his debt, which left due to him as of the 1st of April, 1893, the sum of $867.23, and to Edmund Didier the sum of $1,833.33, with interest from June 24, 1890, until paid, and for these sums a decree was entered against the defendants jointly. This decree disposed of the whole subject. It sold the land; it distributed the proceeds; it ascertained the balance due; it gave a decree against those who were, in the opinion of the court, liable for the sums ascertained to be due.

The only controversy in the suit thus far had been as to the measure of liability upon the defendants, their contention being that a personal decree should have gone against them only for their ratable proportion of the sum to be raised, to be ascertained by reference to their interests under the deed to them from Didier.

Upon the part of the plaintiff, it was claimed that they were jointly and severally liable for the whole amount, and this view was sustained by the court. There was some talk about an appeal from this decree, and thereupon Didier, who was anxious to get the money coming to him, undertook to bring about a settlement, as a result of which a Mr. Preston, who had purchased some of the interests in the suit, approached Mr. Scott, who was counsel of record for Smith's executor, and told him that he would pay upon the decree in the case to Smith's executor $608.15. This proposition was communicated by Mr. Scott to Didier in a note of April 24, 1893, the day upon which the decree under consideration was entered. On the following day, April 25, 1893, Didier and Preston went to Scott with a note drawn by Preston, payable to Booth's executor at the First National Bank of Roanoke, for $608. This note was indorsed by M. T. C. Jordan. Scott declined to receive this note because, as he said, he had no authority from Booth to take anything in payment of the judgment but money, but Mr. Preston stated that he had seen Booth, who was willing to accept the note in question. Mr. Scott replied that "if this is true I have nothing further to say," and upon this express assurance that Booth had agreed to take the note in part payment of the decree the receipt was given by Scott which is filed in the record. A very short time thereafter it was discovered that Mr. Preston was mistaken in representing Booth as willing to accept his note as a payment upon the decree, and the parties interested were notified of the fact.

That Scott's action in agreeing to accept the note was predicated upon the statement that it met with the approval of his client is proved by himself and Didier, while Preston's account of the interview is far less clear and definite. He says that he does not recollect what conversation he had with Mr. Scott upon the subject. In this condition of the proof, we must accept the positive statements of Didier and Scott. There is no evidence whatever that Booth knew of the transaction on or before the 24th of

April. On the contrary, he himself says in his deposition that he was wholly ignorant of it at the time, and repudiated it as soon as it came to his knowledge, and that the note was never at any time in his possession.

There is a check in the record drawn by L. C. Buckner to the order of R. E. Scott for $121.64. Buckner, who was one of the defendants against whom the decree had gone of which we have spoken, had always earnestly insisted that he should only be bound for his ratable proportion, which he would pay after crediting the decree by the Preston note. The Preston note, however, was not paid. On the 4th of June, 1894, an order was entered in the case of Smith's executor against Powell, trustee, directing a commissioner to report "whether or not the amount remaining due to the complainants, after applying the proceeds of sale of the land in the bill mentioned, has been paid to the complainants or to the parties named in the decree, or what parties have been paid, and by whom, and upon what agreement, if any, the sum was so paid."

The decree of April, 1893, having been a final decree, no other decree could regularly have been entered in the cause. Battaile v. Hospital, 76 Va. 63. No such objection to the proceeding, however, is made, because, as was stated at the bar, it was done by agreement among counsel. In execution of this decree, the commissioner took the evidence from which we have gathered the facts hereinbefore stated, and he reports that the note of $608 was received by Mr. Scott as a payment "under a mistake and misapprehension of the facts as they existed, and that, therefore, it should not be regarded as a payment. The commissioner is further of opinion that, had there been no mistake or misapprehension in regard to the facts, said attorney had no right to receive anything other than money in payment of said decree, unless expressly authorized so to do by the complainants in this cause, and that no such authority is shown by the evidence produced before him. The commissioner is further of the opinion that no act or words of said complainants after the execution of the said note amount to a ratification of the act of the said attorney in receiving said note." He then credits the decree with $48.17, which he considers as having been proved to be a proper credit, and reports that, subject to this credit, the amount of the decree of April 24, 1893, was still due and unpaid.

To this report exceptions were filed, and, the cause coming on to be heard before the hustings court, a decree was entered, from which this appeal is taken, in which it is declared "that the note of M. P. Preston was so dealt with by complainants, after they had full knowledge of all the facts relating to its delivery, as to preclude them from refusing to allow it as a credit upon the decree entered on the 24th of April, 1893, and that defendants made payments to complainants upon the understanding that such payments exonerated them from any further liability, and that L. C. Buckner gave his check for $121.64 upon a like understanding. It is adjudged, ordered, and decreed that, upon the payment of the amount of said check," it should operate as a full satisfaction of the former decree.

That Scott had no authority as attorney to receive anything other than money in satisfaction of his client's demands is not controverted, and, that being the case, we do not perceive how Scott's conduct, assuming that the evidence established all for which defendants contend, could operate by way of estoppel to the prejudice of his client. It is plain from the evidence that he gave Scott no previous authority to act otherwise than as his attorney at law. It is equally plain from the evidence that he never, by word or deed, consented to or ratified the acceptance of Preston's note as a part satisfaction of the decree in his favor. But there can be no estoppel here in any view, or against any one. It is of the essence of estoppel that the act relied upon as such should have been injurious, and to the prejudice of him who relies upon it as estoppel. The defendants have not been injured by anything said or done by the plaintiff or his testator. The note which was received was not due for a year, and within that period every one interested was informed of the truth of the matter; that it had been taken under a misapprehension of facts; and that Booth, and Scott, his attorney, had declared that the Preston note would not be accepted, while they would be glad if he would pay the money which it was intended to represent. The Buckner check injured nobody. It was not collected, and, if it had been, it represented only the amount for which Buckner was in any event liable.

But it is said that the defendants were prevented from taking an appeal. Both, we reiterate, did nothing that estops him. He was not in any way responsible for the failure to appeal, and, after appellees were informed of his position, there was yet ample time to move in the hustings court to have the decree corrected, and, failing in this, to apply to the court of appeals for such relief as they might have shown themselves entitled to.

We are of opinion that the hustings court erred in crediting the decree of April 23, 1893, by the amount of the Preston note.

Appellees seek, under rule 9, to assign as error the ruling of the court against them in that decree, by which they were held liable as partners or obligors. The decree, as we have seen, was taken against them by default; and, by virtue of section 3452 of the Code, this court had no jurisdiction to entertain a petition for appeal until relief had been sought, under section 3451, by a motion to the court in which the decree was rendered. That motion was never made. The time within which it could be made has expired, and the decree has long since become final and irreversible.

It is to be observed that the proceeding upon which the controversy is now in this court does not involve any question at issue in the litigation which resulted in the final decree of April, 1893. It is wholly with respect to what has occurred since the rendition of that decree, so that no relief could, in any aspect of the case, be afforded under the rule which appellees invoke. This consideration is also a sufficient answer to the objection presented by counsel in his oral argument to the bill, which is copied into the record. There is no dispute before us which involves the pleadings in the original case, and whether the bill, as accepted by the court as a copy of the original bill, be a true copy or not, is a matter of no moment.

Upon the whole case, we are of opinion that the decree complained of should be reversed.

BROWNING'S EX'R v. BROWNING.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

APPEAL AND ERROR—UNSATISFACTORY RECORD—COMMISSIONER'S REPORT—DECREE—SUBSTANTIAL JUSTICE.

Where a record on appeal is unsatisfactory, and the evidence not clearly stated, a decree which was based on the report of a commissioner who had the witnesses before him and knew the particular items to which their evidence was directed, and which appears to do substantial justice, will be affirmed, though the conclusions reached are not absolutely accurate.

On rehearing. Affirmed.

For former opinion, see 36 S. E. 108.

HARRISON, J. This case is before us upon a petition to rehear a decree of this court rendered at a former term.

The controversy grows out of a brief and unhappy marriage existing between appellant's testatrix and the appellee, which ended with this suit by the wife, praying for a divorce a mensa et thoro, and for protection in the possession and enjoyment of her separate estate, consisting of real and personal property owned by her at the time of her marriage. The defendant answered the bill, and the cause was referred to a commissioner for a report upon the matters of dispute between the parties.

It seems that at the time of the marriage Mrs. Browning was the owner of valuable real estate, choses in action, and a small amount of personal property. Her real estate was all under lease, and she owned no live stock, except a pair of carriage horses, a riding horse, and a pony; nor did she own any corn, wheat, or hay. It further appears that immediately after the marriage Mrs. Browning went to the home of her husband, where she remained with his family, consisting of himself and a number of children, for several months, when, as claimed by appellee, she induced him to move with his family to her home, upon the promise that he should have the use of her lands after the lease thereon had expired, and that the profits arising therefrom, both as to crops and stock, should belong to him. Appellee further claims that, acting upon this promise, he broke up his own home and moved with his family to the home of his wife. It appears that appellee took with him to his wife's home a large amount of live stock, to which he subsequently added, by purchase, a still larger number. It further appears that appellee put out and cultivated large crops upon his wife's lands during the year, and that he hauled more than 1,200 bushels of corn from his own place to the home of his wife to feed to the stock there, and took a large number of cattle from his wife's land to his own home, and fed and wintered them upon his own grain and roughness. This stock, the cost of feeding the same, the crops, and many other items not necessary to enumerate, constitute the subject of the present controversy. By a decree entered in July, 1891, Mrs. Browning was allowed to retain possession of all the disputed property, to save the expense of a receiver, upon entering into bond, with good security, in the penalty of $20,000, conditioned to pay her husband all damages resulting from an injunction restraining him from all control over said property. Mrs. Browning died pending the litigation, and the property in question passed into the hands of her executor, and has since been sold by him.

The commissioner to whom the cause was referred says, "there is a good deal of proof tending to show that M. J. Browning had turned over to her husband, A. P. Browning, her farms, to make out of them all he could for himself individually and his family, and this idea is borne out in the evidence." Notwithstanding this view of the evidence, the commissioner declines to allow appellee anything on account of the profits arising from his wife's lands, and disallows many other items, reducing appellee's claim, amounting to more than $4,000, to an indebtedness in his favor against the estate of Mrs. Browning of $1,794.94. The circuit court modified this report, and entered a decree in favor of appellee for $1,861.33.

The record in this case is very unsatisfactory, and in many particulars difficult to comprehend. The evidence of the witnesses is not clear or succinctly stated. After, however, giving the case the best consideration possible, we are unable to say that any injustice has been done the appellant by the decree appealed from. Appellee, with quite as much reason, apparently, as appellant, complains that he is greatly damaged by the action of the circuit court. The commissioner had all of the witnesses before him. He knew at the time they were testifying to what particular item of property the evidence of each was directed, and was therefore in an advantageous position to

determine better the value of the evidence. Under such circumstances, special weight should be accorded the commissioner's findings.

While not satisfied that the conclusions reached are absolutely accurate, we think the circuit court has, as nearly as the case presented will admit, reached substantial justice between the parties to this controversy, and its decree is therefore affirmed.

CARPER v. MARSHALL.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

VENDOR AND PURCHASER—PURCHASE MONEY—BOND—COLLATERAL SECURITY—SET-OFF—EVIDENCE.

1. Where an agreement between a vendor and purchaser provided against the assignment of the last purchase-money note by the vendor until judgments against the vendor constituting a lien on the land were satisfied, and the decree foreclosing the vendor's purchase-money lien, which was largely in excess of the judgment liens against the land, provided for the payment of such judgments after payment of costs and expenses of sale, defendant cannot complain of an assignment of the note in violation of the contract, since he is amply protected against the judgment liens.

2. Where plaintiff, holding a bond of $2,333.33 for purchase money due on land, surrendered it to defendant, the maker, and received from him a purchase-money bond for $2,500 due from third parties, and plaintiff testified positively that he surrendered the bond with the express understanding that the debt due from the maker, and the lien securing it, should not be extinguished, but defendants' testimony thereto was of a negative character, and the commissioner found in favor of plaintiff, the supreme court will not disturb the finding.

3. In an action for the purchase price of land, where defendant had assigned to plaintiff a purchase-money bond due from third persons, to be collected and the proceeds applied on defendant's purchase-money debt due plaintiff, but plaintiff delayed and failed to collect the bond, defendant was entitled to have damages sustained by the delay set off against his liability for the purchase price.

Appeal from circuit court, Craig county.

Bill by one Marshall against one Carper. Decree for plaintiff, and defendant appeals. Reversed.

Benjamin Haden, for appellant. Marshall & Marshall, Paris & Jones, and S. W. Williams, for appellee.

KEITH, P. The bill in this case was filed by Marshall to recover the balance of the purchase money due upon a tract of land sold by him to Carper in 1890. The purchase price was $7,000, of which sum Carper paid in cash $2,333.33 and executed his two notes, payable on the 1st of March and September, 1891. Carper had a short time before this sold a tract of land to J. H. Hoge and A. B. Humphreys, receiving for it $3,000 in cash, and two notes, of $2 500 each,—the first falling due on the 1st of March, 1891, and the other September 1, 1891,—with interest from date. When the bond for $2,500 fell due, Carper placed it in the hands of Marshall, a practicing lawyer, to collect, and out of the proceeds Marshall was to pay Carper's note to him falling due on the 1st of March. Before this note became due, Humphreys and Hoge conveyed the tract they had purchased to the West Salem Land Company. Marshall, as attorney for Carper, brought a chancery suit to March rules, 1891, against Humphreys and Hoge, to enforce the vendor's lien reserved by Carper, but did not make the West Salem Land Company a party. The West Salem Land Company desired to have this suit dismissed, and, with that end in view, through its vice president it entered into a negotiation with Carper and Marshall which resulted in its paying to Carper a sum upon the $2,500 bond which reduced it to $2,333.33; and thereupon Marshall delivered Carper's bond to him, falling due March 1, 1891,—the first deferred payment upon the land sold by Marshall to Carper,—and Carper transferred to Marshall the amount remaining due on the bond to Humphreys and Hoge, falling due upon the same date. The suit brought to enforce this bond was thereupon dismissed.

Marshall, in his bill, avers that, when he delivered Carper's bond to him, it was with the express understanding that the lien reserved to secure the balance due from Carper, as well upon the first as upon the second bond, was to remain unimpaired by that transaction. He sets out in full all the credits to which, as he claims, Carper is entitled, and prays that the lien which he reserved for the land sold by him to Carper may be enforced for his benefit, and an account be stated by a commissioner to ascertain the balance due to him.

Carper answered this bill. His principal contention is that the transaction between himself and Marshall by which he transferred to Marshall the bond of Hoge and Humphreys, amounting originally to $2,500, and Marshall delivered to him his bond for $2,333, which he had given for the first deferred payment on the land purchased by Marshall, was a satisfaction and extinguishment of the bond, the debt evidenced by it, and of all liens by which it was secured. He avers that the indulgence extended in the collection of the bond transferred by him to Marshall was given by Marshall, and that it would be unjust to visit upon him any loss resulting from it, as it was without his knowledge or direction.

An order was entered directing the commissioner to state an account, who returned a report from which it appears that there is due from Carper to Marshall, secured by a vendor's lien, the sum of $2,211.23. To this report exceptions were filed by Carper, which were overruled, and a decree entered, from which this appeal is taken.

The first error assigned is that by the terms of the contract of sale between Carper and Marshall the last purchase-money note of $2,333.33 was not to be assigned by Mar-

shall until certain judgment liens against him binding the first purchase by Carper had been satisfied.

We think there is no merit in this contention. The decree complained of provides that out of the cash payment received on the sale of the land the commissioners shall first pay and discharge the costs of suit and expenses of sale; and, secondly, such judgment liens against James W. Marshall as bound the land at the time it was alienated by him to Carper, and which remained unpaid at the day of sale. As the sum ascertained to be due from Carper to Marshall is largely in excess of the sum represented by the judgments against Marshall, Carper is amply protected.

The second assignment of error proceeds upon the idea that when Marshall surrender to Carper the first bond for $2,333.33, due upon his sale of land to Carper, and received from him the $2,500 bond due by Humphreys and Hoge, Carper's bond and the lien securing it were extinguished. That such is the usual effect of a transaction which results in placing a bond in the hands of the obligor is true; but Marshall avers that in this case he expressly declined to extinguish the debt from Carper to him, or the lien by which it was secured. He sets up in his bill a somewhat unusual transaction, but, while unusual, it is not on that account less binding, if established by proof. There was nothing illegal or contrary to public policy in making a bargain such as he describes. The rights of third parties do not intervene; it was a transaction wholly between Carper and himself; and, if established by proof, there is no reason why it should not be enforced. Marshall was examined as a witness in his own behalf. He testified explicitly, directly, and frankly in support of the statement which he makes in his bill, while the evidence of Carper upon the same subject is negative in its character. The commissioner to whom the matter was referred, and who heard the witnesses, found in favor of the appellee,—if not in direct terms, by necessary implication. This finding was approved by the circuit court, and we do not feel that the evidence warrants us in reaching a different conclusion.

The third assignment of error involves a consideration of Marshall's duty with respect to the bond of Humphreys and Hoge transferred to him by Carper, as before stated. That bond constituted a lien upon the land sold by Carper to Humphreys and Hoge. It was the first purchase-money bond, and Marshall was entitled to exhaust all the security for its payment, as between himself and Carper. In addition to the lien securing its payment, Marshall could look to both of the obligors and to Humphreys, who signed it as guarantor. By accepting it of Carper, he assumed control and dominion over it, and it became his duty to exercise due diligence to make it out of those primarily bound for its payment.

A bond which is transferred as collateral security is put under the dominion of the creditor, to make his claim out of it. His duties in respect to it are active. He is to employ reasonable diligence in collecting the money on the security and applying it to the principal debt. Muirhead v. Kirkpatrick, 21 Pa. St. 237. He alone is empowered to receive the money to be paid upon it, and to control it in order to protect his right under the assignment. Where the collateral is lost by the insolvency of the debtor in the collateral instrument, through the supine negligence of the creditor, he must account for the loss to his own debtor. Hanna v. Holton, 78 Pa. St. 334.

Carper having parted with all his right of control over the bond which he transferred, Marshall was bound to employ reasonable diligence in its collection. Colebrooke, Collat. Sec. (2d Ed.) § 114; Lead. Cas. Eq. pt. 2, p. 312; Williams v. Price, 1 Sim. & S. p. 581.

The doctrine is fully stated in Wilson's Adm'r v. Barclay's Ex'r, 22 Grat., at page 541, by Judge Staples, as follows: "It is clear, as a general rule, the assignee must sue the maker or obligor before he can resort to the assignor. This rule is varied where it is perfectly manifest a suit would be wholly unavailing. It is equally clear that, where the debt which has been assigned is secured by a specific lien, it is the duty of the assignee diligently to enforce such lien, before he can have any recourse against the assignor. If he fails to pursue this course, it is incumbent upon him clearly to show that the security was worthless, and that no loss or damage has resulted from his lack of diligence."

It appears that this bond was assigned by Carper to Marshall April, 1891. Suit was not instituted upon it until the latter part of October of that year,—a term of the circuit court having intervened,—and judgment was not obtained upon it until October, 1893. Carper testified that, if suit had been brought promptly on that bond, the whole of it would have been made out of the obligors. It may be that no loss was sustained, and that no injury was occasioned by this delay. It may be that the obligors had no other property than that which was subjected in the proceedings instituted against them. But these facts do not appear in this record, and we are of opinion that a decree should not go against Carper, the assignor or transferror of the bond to Marshall, until an inquiry has been made upon this subject.

Upon the whole case, we are of opinion that the assignment from Carper to Marshall was received by the latter, not as a payment, but as a means of payment, and that there was no error in the appropriation of payments made by the circuit court, except in so far as it may be affected by the result of an inquiry to ascertain whether any loss was sustained by Carper by reason of Marshall's failure to use due diligence to collect the debt assigned to him.

The decree complained of must be reversed, and the cause remanded to the circuit court, with instructions to direct the commissioner to inquire and report what loss, if any, Carper sustained by reason of Marshall's failure to proceed promptly against those liable upon the bond assigned to him. Any loss which Carper may have sustained by reason of Marshall's dealing with this collateral is to be set off against the bond of $2,333.33 due March 1, 1891; and, as to any balance due Marshall, the payments are to be applied as in the reports heretofore made in this cause.

MITCHELL et al. v. WITT, Judge.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

ELECTIONS—CONTESTS—COMMON COUNCIL—JURISDICTION.

Under Code, § 160, providing that the returns of election of county, corporation, and district officers shall be subject to the inquiry, determination, and judgment of the court of the county or corporation wherein the election was held on complaint of an undue election or false return, the corporation court has no jurisdiction to try and determine contests over the election of members of the common council of the city, but only such officers of the city as correspond to the officers of the respective counties and districts of the state.

Application by Thomas W. Mitchell and others for a writ of mandamus commanding S. B. Witt, as judge of the hustings court for the city of Richmond, to set aside his order dismissing petitioner's complaint, and to hear and determine an election contest on its merits. Denied.

William L. Royall, for petitioners. L. O. Wendenburg, H. M. Smith, and Geo. D. Wise, for respondent.

CARDWELL, J. Thomas W. Mitchell and others filed their petition in the hustings court for the city of Richmond, alleging that they were qualified voters of Jackson ward, in the city of Richmond; that on the 24th day of May, 1900, there was an election held in the city for general city officers, and for members of the board of aldermen and common council; that the election for aldermen and common council from Jackson ward was an undue and fraudulent election, and resulted in certain parties being certified as elected to the board of aldermen and common council from that ward who were not duly elected. After reciting that a large number of votes which had been cast for certain candidates were fraudulently and falsely counted for the parties to whom the certificates of election were given, the petitioners prayed that the court make inquiry into the matter, and award certificates to the parties to whom they rightly belonged.

The candidates to whom the certificates were awarded by the commissioners of election appeared in court in answer to the petition, and, each for himself, filed a plea to the jurisdiction of the court to hear and pass upon the complaint of the petitioners, and, the case coming on to be heard upon the plea, the judge of the hustings court sustained the plea, and dismissed the complaint.

The case is before us upon the application of the said petitioners for a writ of mandamus, directed to the judge of the court below, commanding him to set aside his said order and judgment dismissing petitioners' complaint, and that he proceed to hear and determine the contest on its merits.

It is contended for petitioners that they have the right, under section 160 of the Code, to make their complaint to the judge of the court below, and to have it adjudicated by him upon its merits; and their learned counsel argues here that, if the members of the common council of the city of Richmond are officers, it is conclusive that it was the duty of the judge below to hear and decide their complaint upon its merits.

The inquiry does not stop there, for it may be conceded that members of the common council are in a certain sense officers, and still the question is, are they such officers as are referred to and embraced within the provisions of section 160 of the Code? This question is to be determined by a construction of that section, read in connection with, and in the light of, all other statutes in force which are in pari materia, viz. sections 106 and 1030 of the Code.

Statutes which are not inconsistent with one another, and which relate to the same subject-matter, are in pari materia, and should be construed together, and effect be given to them all, although they contain no reference to one another, and were passed at different times. Especially should effect be given, if possible, to statutes in pari materia enacted at the same session of the legislature. 25 Am. & Eng. Enc. Law, 311, and the numerous authorities there cited.

There is no exception to the universality of this rule. Id., note on page 313.

Sections 106, 160, and 1030 were adopted into the Code of 1887, and are to be construed by the rule stated.

Section 160 provides that the returns of election of county, corporation, and district officers shall be subject to the inquiry, determination, and judgment of the court of the county or corporation wherein the election was held, upon the complaint of 15 or more qualified voters of such county, corporation, or district of an undue election or false return. It then provides as to how the pleadings are to be made up, how proof may be taken, how and when the case may be heard, and that, in judging of such election or return, the court shall proceed on the merits thereof, and decide the same according to the constitution and laws. The section then concludes as follows: "When the contest is decided, a certificate of election shall be granted to the successful party, unless he shall have already received one. If, however, the court shall be of the opinion that there has

been no valid election of any person, the proceedings shall be in conformity with section one hundred and six."

Section 106 provides that, when a vacancy occurs in any county, corporation, or district office, the same shall be filled by the court of the county or corporation in which it occurs, or the judge thereof in vacation; when in the office of clerk of the circuit court, by such circuit court or judge thereof in vacation; when in the office of the chancery court of the city of Richmond, by the said court, etc.; when in the office of sheriff of said city, by the circuit court thereof; when in the office of a corporation or hustings court clerk or attorney for the commonwealth, by the corporation or hustings court of such city, etc. The term of office of any officer appointed under this section shall commence as soon as he shall qualify, and continue for the unexpired term of such office; provided, further, when a vacancy occurs in a corporation office, and the charter of such corporation prescribes the mode of filling such vacancy, the vacancy shall be filled in the mode so prescribed.

It is needless to cite authority for holding that no court can be said to have jurisdiction to hear and determine a matter in controversy when the power to execute its judgment is wanting.

Spelling, in his work on Extraordinary Relief (volume 2, § 1377), says: "It is well settled, as a fundamental principle of the law of mandamus, that courts will not grant this extraordinary remedy where to do so would be fruitless and unavailing. If it appear that the writ would be ineffectual to accomplish the object in view, either from the want of power on the part of the respondent to perform the act required, or on the part of the court granting the writ to compel its performance, the court will refuse to interfere." High, Extr. Rem. § 252.

From any point of view that may be taken of section 160 of the Code, when read in connection with section 106, the respondent in this cause is without jurisdiction to hear and determine the matters complained of by the petitioners; for to do so would be fruitless and unavailing. It is true that section 160 provides that, when the contest is decided, a certificate of election shall be granted to the successful party, etc.; but, where such certificate awarded in this case, would be wholly ineffectual, as the holder of it, upon presenting it to the board of aldermen or common council of the city, as the case might be, would be met with the response that the council was by express authority, under section 1030, the judge of the election, qualification, and returns of its members; and, if the judgment should be that there had been no valid election in Jackson ward of any person to the common council, it would likewise be fruitless and unavailing, as section 106 of the Code makes no provision for filling the vacancy.

It will not be claimed that authority anywhere exists for respondent to fill by appointment a vacancy in the common council of the city adjudged by him to exist. On the contrary, the statute, as we shall presently see, confers this power expressly upon the common council. It is obvious, therefore, that it was not the legislative intent to include within the provisions of section 160 members of the common council of a city, but only such officers of the city as corresponded to the officers of the respective counties and districts of the state, viz. sheriff, treasurer, clerks, attorney for the commonwealth, etc. When the legislature came to legislate generally upon the government of cities and towns, it provided by section 1030 that "the council shall judge of the election, qualification and returns of its members; may fine them for disorderly behavior, and with the concurrence of two-thirds of its members, expel a member; and if any member returned be disqualified or expelled a new election to fill the vacancy shall be held at the same place, on such day as the council may prescribe."

These sections do not conflict, nor are they inconsistent with each other. One (section 160) gives the court jurisdiction, upon a proper petition, of all contests over corporation officers, and the other (section 1030) empowers and authorizes the council itself to adjudicate all questions as to election of its members.

Whether the allegation of petitioners that the candidates for the common council in Jackson ward, at the election of May 24th last, cannot obtain their rights by a contest before the council be true or not, section 1030 specifically prescribes this as their remedy, and, if it be ineffectual, it is not the fault of the statute; and this court is without authority to issue its writ of mandamus to compel the honorable judge of the hustings court, the respondent here, to take jurisdiction and decide upon the complaint, as he rightly held that he was without power to do so. King William Justices v. Munday, 2 Leigh, 165; Page v. Clopton, 30 Grat. 415.

The mandamus prayed for must therefore be denied.

EUBANK et al. v. BOUGHTON.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

MANDAMUS—SCHOOL TRUSTEES — DETERMINING COLOR OF SCHOOL CHILDREN—JUDICIAL DISCRETION—DECISION OF BOARD—APPEAL TO COUNTY SUPERINTENDENT.

1. Under Code, §§ 1466, 1492, providing that white and colored persons shall be taught in separate schools, and making it the duty of school trustees to enforce the school laws and regulations, it is the duty of the board to assign white children to schools for white children, and, when any question arises as to the color of a particular applicant, they are to determine it, and courts will not interfere by mandamus to control their determination.

2. Mandamus will not lie to compel a board of school trustees to receive into a school for

white children one whom they have decided is a negro, within Code, § 49, declaring every person having one-fourth of negro blood to be a colored person, since petitioner has a right of appeal from the decision of the board, under Code, § 1439, subd. 8, giving the county superintendent of schools jurisdiction to decide finally all complaints concerning the acts of any persons connected with the school system within his bounds.

Error to circuit court, King and Queen county.

Application by George Boughton for a writ of mandamus to compel Eubank, Latane, and Deshazo, district school trustees, to receive his son into a school set apart for white children. From an order directing the issuance of the writ, the trustees bring error. Reversed.

Claggett B. Jones, for plaintiffs in error. Isaac Diggs, for defendant in error.

KEITH, P. George Boughton filed his petition in the circuit court of King and Queen county praying for a mandamus upon Eubank, Latane, and Deshazo, district school trustees for Stevensville district, in said county, in which he states that he is a voter, a taxpayer, and head of a family, with two children between the ages of 5 and 20 years, who reside with him in the district and county aforesaid; that he and his wife and children are white, and his children are entitled to attend the public free school for white children, but that they have been refused admission by the trustees; and he therefore prays for a mandamus directed to the trustees above named to compel them to receive his son into the school set apart for white children. The trustees answered, saying that in the exercise of their discretion they had refused to grant the request of petitioner, because they were informed and believed that the child of petitioner is a negro, and to permit him to attend the school for white children would not only materially interfere with its prosperity and efficiency, but, in their judgment, would destroy it.

Upon the issue thus made testimony was taken, and the circuit court being of opinion that it established the fact that petitioner's son "has not one-fourth of negro blood in him," and is therefore a white person, awarded the writ of mandamus. This judgment is before us upon a writ of error.

The writ of mandamus is the appropriate means of compelling the performance by a public officer of a duty which is either imposed upon him by some express enactment or necessarily results from the office which he holds. It does not lie in any matter requiring official judgment, or resting in sound discretion; for in such a case the court can do no more than compel the officer to exercise his function according to some discretion when he has refused or neglected to act at all. By it an inferior court may be directed to hear a case, but the decision to be rendered cannot be affected. Spell. Extr. Relief, §§ 1432, 1433; Thurston v. Hudgins, 93 Va. 784, 20 S. E. 966.

Section 1492 of the Code provides, among other things, "that white and colored persons shall not be taught in the same schools but in separate schools under the same general regulations as to management, usefulness and efficiency."

Section 1466 makes it one of the duties of the boards of school trustees "to explain and enforce the school laws and regulations." When, therefore, application was made to the board to admit to a white school the son of petitioner, it became at once the duty of the board to ascertain, before granting or refusing the request, whether the child of petitioner was a white person or a negro,—that is to say, whether he had more than one-fourth of negro blood; for that is the test established by section 49 of the Code, which declares that "every person having one-fourth or more of negro blood shall be deemed a colored person."

It is the duty of the board to assign white children to schools for white children, and it is none the less their duty to assign colored children to the schools for colored children. When the question arises as to the color of a particular applicant, the board must take evidence, and make such disposition of the matter as shall seem right. Here, then, is a duty which calls for the exercise of judicial discretion. It is true that when the fact is ascertained the duty is plain. When the status of the applicant is fixed by the judgment upon the evidence, the law itself assigns him to the proper school. The law has seen fit to confide the determination of the question to a board of school trustees, and the discharge of the duty thus imposed upon the board involves, as we have seen, the exercise of a judicial discretion, and the court cannot control its exercise. But the decision of the board is not final. If petitioner felt himself aggrieved by its action, he had, under subdivision 8 of section 1439 of the Code, a right of appeal to the county superintendent of schools, who is given jurisdiction to "decide finally all appeals or complaints concerning the acts of any persons connected with the school system within his bounds, unless the matters in question are properly referable to other authorities." So there are two grounds upon which the judgment complained of must be reversed. It undertakes to control the official judgment of the board of trustees in the exercise of a discretionary power specially confided to them by the statute, and because the petitioner is given a remedy by appeal to the county superintendent.

"Where a party aggrieved by the action of a board of school directors has an adequate remedy by appeal to the county superintendent, he is not entitled to a writ of mandamus." Spell. Extr. Relief, § 1445; Marshall v. Sloan, 35 Iowa, 445; Barnett v. Directors, 73 Iowa, 134, 34 N. W. 780; Mitchell v. Witt (Va.) 36 S. E. 528.

For the foregoing reasons, we are of opinion that the judgment of the circuit court must be reversed, with costs.

ANDREWS v. ROANOKE BLDG. ASS'N & INV. CO.

(Supreme Court of Appeals of Virginia. July 5, 1900.)

BUILDING AND LOAN ASSOCIATIONS — WITHDRAWING MEMBER — RIGHTS — ACTION — ACCRUAL — LIMITATIONS — RECEIVERS — DISSOLUTION.

1. Since a suit by a withdrawing member of a building and loan association to recover the withdrawal value of his stock does not accrue until there is a sufficient fund in the hands of the association applicable for that purpose, a suit by such member to have a receiver appointed, and to wind up the affairs of the association, is not barred by limitations, where no fund ever existed, since his withdrawal, out of which his claim could have been recovered by suit.

2. Where, after notice of withdrawal was given by a member of a building association, but before such notice became effective, the association changed its by-laws, by which one-fourth of the amount paid in by holders of installment stock was set apart for the purpose of paying withdrawals, so that the installment stock was converted into paid-up stock, leaving no stock from which a fund could be raised for the payment of withdrawals, such withdrawing member was entitled to the appointment of a receiver for the association, and, if necessary, to wind up its affairs.

Appeal from corporation court of Roanoke; John W. Woods, Judge.

Suit by W. K. Andrews against the Roanoke Building Association & Investment Company for a receiver and to wind up its affairs. From an order sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

S. Hamilton Graves, for appellant. Cocke & Glasgow, for appellee.

KEITH, P. Appellant instituted his suit in the hustings court of the city of Roanoke, on behalf of himself and all other creditors of the appellee on the 30th of September, 1898, in which he states that he is the owner of 10 shares of the stock of the company, upon which he had paid $500 in monthly installments of $10 each; that on the 20th of April, 1893, he gave notice of withdrawal to the company in due form; that under the by-laws, as they then existed, his notice did not become effective until the 20th of the ensuing May; that on the 15th day of April, 1893, at a meeting of the stockholders, a change was made in the by-laws, the effect of which was to create a specific sum out of which withdrawals could be paid, which was limited to one-quarter of the amount paid into the association by the holders of installment stock; that as of May 15, 1893, there were in existence 1,643 shares of installment stock, monthly payments upon which would have produced something more than $400; that a number of said shares have been paid for and discharged, and the residue have all been converted into paid-up stock under the amendments of the by-laws of May 15, 1893, with the exception of 22 shares, for which notice of withdrawal had been filed prior to May 15, 1893, and of which the shares of appellant constitute a part; that at a regular annual meeting of the stockholders, held on the 15th of April, 1898, further amendments to the charter and changes in the by-laws were proposed, and to that end a petition was presented to the judge of the hustings court, who entered an order as of the 19th of July, 1898, making the amendments asked for, by virtue of which, whenever there happens to be as much as $500 in the treasury, the company notifies its stockholders, and invites bids from them, the member offering the largest number of shares of stock to be canceled for the least amount of money being accepted. It appears that there is not, and never has been, in the treasury of the company, a fund applicable to the demands of the appellant; nor can there be in the future, since there are no longer any contributing members.

There are other averments of fact in the bill, the tendency of which are to strengthen the position of the appellant, but enough has been said to enable us properly to present our conclusions with respect to the law of the case.

The defendant demurred, and also filed a plea of the statute of limitations, setting forth that the cause of action did not arise within three or five years before the institution of the suit.

The position occupied by a withdrawing member of a building association is not very clearly defined by the authorities. It is said that he is not in all respects a creditor, for, if that were so, he might get judgment, issue an execution, acquire a lien upon real estate, and subject the personalty of the association, to the prejudice of other creditors. He is no longer a member of the association, so far as his right to participate in its management and control is concerned. He has no right of action against the company until a fund accrues out of which, in accordance with the charter and by-laws of the company, his debt should be paid; and, as it appears from the averments of this bill that no such fund existed at any time in this case, it would seem that the right of action has never accrued to him as a creditor. If this be true, then it follows that his right to sue is not affected by the statute of limitations; but, if he is to be regarded only as a creditor, he is still out of court, because there was no right of action which entitled him to be in court. A member of such an association must, upon withdrawal, retain some relation to the company, growing out of his membership, other than that of creditor. It seems to us that by so much as he falls short of being clothed with the rights of a creditor, by so much there must remain in him the residuum of his rights as a member; otherwise, as in the case at bar, he could not sue as a creditor, because there was

no fund out of which his debt could be paid, and the company, by its dereliction of duty, would deny all redress if he is not permitted to seek a remedy in his capacity as stockholder. These propositions seem to be supported by authority.

In Heinbokel v. Association, 58 Minn. 340, 59 N. W. 1050, 25 L. R. A. 216, the supreme court of Minnesota held that a member of an association who has brought himself within the rules by notice of withdrawal cannot bring an action, and take judgment against the association, when there is no money in the treasury legally applicable to the payment of his claim. To the same effect, see Engelhardt v. Association, 148 N. Y. 281, 42 N. E. 710, 35 L. R. A. 289.

In support of the position that a withdrawing member has not lost all of his right or interest as such in the association, there are numerous decisions and the authority of respectable text writers.

"The right of members to presently withdraw deposits is practically limited to funds on hand, and the withdrawing member must show that there are funds for that purpose before he can enforce his demand; but it is an abuse of discretion for the directors to invest the entire funds in real estate, so as to leave none applicable to the payment of withdrawing members, and thus defeat their rights. When notice of withdrawal is given the association, it should arrange the disposition of its receipts so as to meet its payments when due. While the right to withdraw is only grantable out of funds designated for that purpose, it is not intended that rightful lack of funds shall defeat the right as against the members. So, if the association is solvent, and a member gives notice of withdrawal, and the notice had matured before the association is being wound up, he is entitled to be paid out of the assets, after outside creditors, in priority to those members who had not given notice, notwithstanding the fact that, after he had given the notice, there were no funds for payment. The intention of the rule is to prevent the application of the funds to withdrawals to such an extent that its operations will be crippled; and, when it winds up, the reason of the rule does not apply, which readily defeats the application of the rule itself." Thomp. Bldg. Ass'ns, c. 8, § 13.

It is said in End. Bldg. Ass'ns (2d Ed.) § 514, where the demands of all the members of such a corporation cannot be paid in full, there are ordinarily several classes advancing contradictory claims, "to wit, members who have given notice of withdrawal, and the period of whose required notice may have expired before the proceedings to wind up were instituted, and members who have given no such notice. * * * The tendency of the English courts, whilst recognizing that a withdrawing member is not a 'creditor' of the association in the ordinary sense of the word, has been to allow them a preference supposed to be based in the rules of the society over those who have given no withdrawal notice."

In Sibun v. Pearce, 44 Ch. Div. 354, Lindley, L. J., says, of the position of one who has given notice of withdrawal, but has not received payment: "That he is not an ordinary creditor is plain. He cannot come into competition with outside creditors. On the other hand, as between himself and the continuing members, he is entitled to be paid the amount due to him before they can divide the assets. In that sense he is a creditor, though he cannot take part in the affairs of the society."

We have seen that a withdrawing member cannot sue until a sufficient fund is accumulated by the society to meet his demand, for until that event has happened he has no right of action, and it is well established that the statute of limitations does not begin to run until the right of action accrues. We have seen that it is the duty of the association to set apart a fund to meet its obligation to withdrawing members, and it conclusively appears from the bill under consideration that this duty in this instance has not been performed, and that the course taken by the stockholders precludes the possibility that appellant can obtain relief from that source.

The prayer for relief asks the appointment of a receiver, and, if need be, the winding up of the affairs of the company. This prayer, upon the facts presented by the bill, is sufficient to entitle the appellant to the relief which he seeks, if, upon a hearing on the merits, he is able to establish by proof the case which he has made in the pleadings.

The decree of the hustings court must be reversed, and the cause remanded to be further proceeded in in accordance with the views expressed in this opinion.

DE LOACH et al. v. SARRATT.

(Supreme Court of South Carolina. July 3, 1900.)

EXECUTORS AND ADMINISTRATORS — MALADMINISTRATION—COSTS—CLAIMS—ORDER OF PAYMENT—COMPENSATION.

1. Where administrators voluntarily place a fund belonging to their decedent's estate out of their hands and beyond their control, they will be held liable for the costs of proceedings supplementary to execution instituted by a judgment creditor of the decedent to subject such fund to the payment of his judgment,—such proceeding being rendered necessary by reason of the failure of the administrators to properly administer the estate; and, in case such costs cannot be collected from the administrators, the judgment creditor may recover his costs from the fund before it is applied to the payment of his judgment.

2. Under Rev. St. 1893, § 2048, providing that the funeral expenses and expenses of the last illness of a deceased person shall be first paid, in the administration of his estate, it is proper for the court, in proceedings supplementary to an execution, brought to subject a fund belonging to the estate of a deceased person to the payment of a judgment against the decedent, on which an execution was returned unsatisfied during the lifetime of the judgment

debtor, to provide that the funeral expenses and expenses of the last illness shall be paid before the fund is applied to the payment of the judgment.

3. Administrators indorsed a check given in payment of life insurance on the life of their decedent to one who collected the check and deposited the proceeds in his own name, as trustee. *Held*, that the administrators never received or paid out the money, so as to entitle them to commissions thereon.

Appeal from common pleas circuit court of Cherokee county; George W. Gage, Judge.

Action by Elizabeth De Loach and another against A. A. Sarratt. There was a judgment in favor of plaintiffs, and on the return of an execution unsatisfied, and after the death of the judgment debtor, plaintiffs applied for an order in proceedings supplementary to execution for the purpose of subjecting a fund belonging to the estate of the deceased judgment debtor, in the hands of F. G. Stacey and others, administrators, to the payment of the judgment. From an order made in such proceedings, the judgment creditors appeal. Modified.

The following is a copy of the order complained of:

"On 7th August, 1899, I made an order designating Arthur L. Gaston, Esq., to examine one F. G. Stacey, of Gaffney, concerning certain property belonging to the estate of A. A. Sarratt, deceased, and alleged to be in his possession. The order was made pursuant to section 314 of the Code of Civil Procedure. The examination was had, and a report made to me. On the coming in thereof, the plaintiffs applied for an ex parte order directing the payment of the funds in Stacey's hands over to them on their judgment. I did not make the order then, but gave notice to the attorneys of S. G. and W. J. Sarratt, administrators of defendant, and to the attorney of Stacey, that I would hear the plaintiff's motion, at Chester, on 25th August, 1899. On that day the motion was heard, and it was resisted by the attorneys for Stacey and the Sarratts. Pending the hearing of that motion, and before the attorneys resisting the same had notice of it, they gave notice that they would move before me, at Spartanburg, on 5th September, to set aside the order of 7th August, and the proceedings had before Arthur L. Gaston thereunder. The grounds of that motion were argued on 25th August, and have been considered. The order of 7th August was directed to be served on the parties in interest, and it was served on S. G. Sarratt and W. J. Sarratt, administrators, and on F. G. Stacey; and they all appeared before the referee and before us by counsel. The facts are fully stated in the report of A. L. Gaston, Esq., referee, and I shall not repeat them here, but only affirm his findings, except where modified. It was admitted at the hearing that the plaintiffs' judgment for some $10,000 against A. A. Sarratt was the oldest against the estate, and that there was only one other, junior thereto, for some $260, belonging to Beauregard Goings. It was also conceded that A. A. Sarratt left a family of some ten children, of whom six are minors, and that they all reside in Cherokee.

"At the hearing before me on 25th August, the witness F. G. Stacey asked leave, by formal notice, to commence an action, making all claimants parties, to settle the right to have the fund in his hand. I see no warrant in the statute for this demand, and this is a statutory proceeding. Stacey does not deny the possession, nor does he claim any interest in the property. See section 319, Code. Besides, the administrators are practically parties to this proceeding. The order was served on them. They have appeared along with Stacey, and have been heard.

"The most serious difficulty I have had is this: Ought the fund in Stacey's hands to be paid by him to the administrators, to be administered according to section 2048, Rev. St. 1893, or ought the provisions of section 314 of the Code be complied with and enforced? The administrators once had this money, for they indorsed the check. The money was deposited with Stacey, not for the trusts of A. A. Sarratt's estate, but in trust for S. G. Sarratt and W. J. Sarratt. This money is liable for the payment of plaintiffs' judgment. It would be liable if the administrators had it. But the administrators demand it for administration according to the statute; that is, to receive their commissions, and to pay funeral expenses and expenses of last illness, etc., and then to pay plaintiffs' judgment. Section 317 of the Code empowers me to order any property of the judgment debtor in the hands of either himself or any other person to be applied to the satisfaction of the judgment. Manifestly, I ought not to give force to the provisions of the Code, and ignore the provisions of section 2048, Rev. St. The plaintiffs are entitled to have the fund in Stacey's hands applied to their judgment, but let $500 be reserved thereout, to be applied to a homestead for A. A. Sarratt's children, if they establish the same before the proper tribunal. Out of the balance let the fees of the witnesses be paid, including a fee for the referee of twenty-five dollars and his disbursements. Then let so much be reserved as is necessary for the payment of the funeral and other expenses of last sickness of A. A. Sarratt, deceased. Then let the defendant administrators have their lawful commissions for receiving the fund, but not for paying it out. Then, plaintiffs' judgment. And, to secure the proper and orderly execution of this order, let the fund be paid forthwith by F. C. Stacey to the clerk of this court, and let him disburse the same, taking such commissions therefor as is allowed by law. Let a copy of this order be served on F. G. Stacey and S. G. and W. J. Sarratt, and let the original be

manifested to them. In the event either party (the plaintiff, Stacey, or the Sarratts) appeals from this order, they may apply before me to have its execution deferred until the judgment of the supreme court is had thereon, meantime continuing the injunction heretofore granted."

From this decree plaintiffs gave due notice of their intention to appeal, and, pursuant to said notice, do now appeal from said decree, and ask that it be modified by this court, upon the following grounds:

"First. For that his honor erred in not ordering the entire fund of $5,000 in the hands of F. G. Stacey to be paid directly on the judgment of plaintiffs, in whose favor execution had been issued on their judgment against A. A. Sarratt in the sum of $11,201.24, and tested in the lifetime of the said judgment debtor. Second. For that his honor erred in not, at least, ordering the whole of the fund in the hands of F. G. Stacey to be paid on the judgment of the plaintiffs, less the sum of $500 to be held and applied to a personal exemption in favor of the heirs of A. A. Sarratt, should they establish their claim thereto before the proper tribunal; the plaintiffs being the owners of an execution issued on their judgment recovered against A. A. Sarratt, and tested in his lifetime. Third. For that his honor erred in not holding, as was urged, that where execution had been issued and tested against the judgment debtor, A. A. Sarratt, in his lifetime, his administrators personally cannot be affected, and scire facias against them would be both unnecessary and unwarranted. Fourth. For that his honor erred in allowing commissions out of the fund to the administrators of A. A. Sarratt. Fifth. For that his honor erred in not giving full force and effect to sections 317 and 314 of the Code of Procedure of South Carolina, and in allowing, in proceedings supplementary to execution, the provisions of section 2048, Rev. St. 1893, to in any manner override same. Sixth. For that his honor erred in ordering the fees of witnesses and the fee of Arthur L. Gaston, Esq., referee, to be paid out of the fund, and in not requiring the fees of said witnesses and referee to be paid by F. G. Stacey."

W. B. De Loach and Wm. B. McCaw, for appellants. Munro & Munro, Duncan & Sanders, and J. C. Jefferies, for appellee.

McIVER, C. J. This is an appeal from an order granted by his honor, Judge Gage, made in a proceeding supplementary to an execution, issued to enforce a judgment obtained by the said James E. De Loach and Elizabeth De Loach against the said A. A. Sarratt in his lifetime. This execution having been returned nulla bona in the lifetime of the judgment debtor, and the judgment creditors, who are the appellants herein, having learned that the estate of their judgment debtor had become entitled to a large sum of money, the proceeds of a policy issued by the New York Life Insurance Company upon the life of said A. A. Sarratt, which had passed into the hands of the respondent, F. G. Stacey, they applied for and obtained an order from his honor, Judge Gage, requiring the said Stacey to appear before Arthur L. Gaston, Esq., who was apointed referee for that purpose, and be examined touching the same. Copies of this order were duly served upon the said F. G. Stacey, and also upon the other respondents herein, S. G. Sarratt and W. J. Sarratt, who claimed to be administrators of the deceased judgment debtor, A. A. Sarratt. This examination, together with the testimony of other witnesses, was taken and reported to the court, all of which is set out in the "case." Thereupon the order bearing date 16th of September, 1899, was granted by Judge Gage, from which the judgment creditors alone appeal; asking certain modifications thereof, as set out in their exceptions. For a more full understanding of the questions presented, let this order and the exceptions thereto be embraced by the reporter in his report of the case. Inasmuch as it was agreed at the hearing of this appeal that the question as to the right of homestead set up in behalf of the children of the deceased judgment debtor, whereby the sum of $500 should be reserved out of the fund in question, should be reserved, we pass by the exception raising that question, and will not consider or decide that question, but will confine our attention to the other points in which error is imputed to the circuit judge. These points are (1) the allowance of the witness fees out of the fund; (2) the allowance of the fee of the referee and his disbursements; (3) the allowance of the funeral expenses and other expenses of the last illness of the judgment debtor; (4) the allowance of commissions to the administrators.

As to the first and second of these points, which may be considered together, inasmuch as they both practically relate to the costs of the proceedings, it seems to us clear that this proceeding was rendered necessary by the illegal and improper action of the administrators, and therefore they should be held primarily liable for all the costs and expenses incident to the proceeding. The testimony in the case leaves no doubt upon our minds that these administrators, instead of pursuing the usual and proper course in administering the assets of their intestate's estate, saw fit, for some reason (as to which the court is not at liberty to speculate, though it would not be difficult to form a conjecture as to what was their real motive), voluntarily to place this fund beyond their control, and that this alone rendered this litigation necessary, to enable the judgment creditors to obtain their just rights. But, if these costs cannot be made out of the administrators personally, then the fees of such witnesses as they may have summoned, as well as the fee and disbursements of the referee, whose services they doubtless obtained, should be paid by the judgment

creditors, or (what is the same thing, practically) should be deducted from the fund before applying the same to their judgment.

As to the third point, we agree with the circuit judge that the funeral expenses and the expenses of the last illness of the judgment debtor should be provided for out of the fund before applying the same to the judgment. Section 2048, Rev St., gives a preference to claims of that character over judgments, where such judgments have no lien upon the fund to be administered (and here it does not appear that these judgment creditors had ever acquired a lien upon the fund in question); and, when the court takes possession of the assets of an intestate, it should, as far as practicable, conform to the law prescribed for the administrator in the administration of such assets. In this way the provisions of section 2048 can be harmonized with the provisions of the Code in reference to proceedings supplemental to an exception.

As to the fourth and last point, however, we cannot agree with the circuit judge, as we do not think that the administrators are entitled to any commissions on this fund, either for receiving or paying out the same, for the reason that they cannot be said to have ever either received or paid out the same. It is true that the circuit judge says in his order that "the administrators once had this money, for they indorsed the check." But this is a mistaken inference from the testimony. This fund was originally represented by a check drawn by the New York Life Insurance Company on the New York Security & Trust Company, payable "to the order of S. G. Sarratt and W. J. Sarratt, administrators"; and this check they, by their indorsement thereon, transferred and delivered to F. G. Stacey, trustee, who collected the money and deposited the same in bank, not to the credit of the estate of A. A. Sarratt, or to the credit of S. G. Sarratt and W. J. Sarratt, as administrators of said estate, but to his own credit, as trustee. For, as the circuit judge finds (and his finding is not only supported by the testimony, but has not been excepted to or appealed from), "the money was deposited with Stacey, not for the trusts of the estate of A. A. Sarratt's estate, but in trust for S. G. Sarratt and W. J. Sarratt." Now, if these administrators had indorsed this check to Stacey for collection, with instructions to deposit the proceeds in bank when collected, to the credit of the estate of A. A. Sarratt, or to their own credit, as administrators of that estate, then it might with some propriety be claimed that they had, at least, constructively, received the proceeds of the check, and were therefore entitled to commissions for receiving the same. But that is not the case here. On the contrary, it is more like the case of an administrator, holding a note payable to his order as such, who by indorsement transfers the same to a third person, who collects the money due on the note, and deposits the same in bank to his own credit; and in such case it could not with any sort or propriety be claimed that such administrator had received the amount of money mentioned in the note. It seems to us, therefore, that the circuit judge erred in holding that the administrators were entitled to commissions for receiving the fund in question, and that in this respect, also, his order must be modified. The judgment of this court is that the order appealed from must be modified as hereinabove indicated, and, when so modified, that the order be affirmed.

EBAUGH v. EASTERN BUILDING & LOAN ASS'N OF SYRACUSE, N. Y.

(Supreme Court of South Carolina. June 28, 1900.)

FOREIGN BUILDING AND LOAN ASSOCIATION—STOCK—CONTRACT TO MATURE SHARES—VALIDITY UNDER LAWS OF NEW YORK—NEW YORK LAW—REFEREE'S FINDINGS—REVIEW ON APPEAL.

Plaintiff's stock certificates in defendant building and loan association provided that in consideration of certain membership fees and monthly dues, payable for 6½ years, amounting to $595 for each $1,000 worth of stock, the stock should be redeemed at its par value at the end of that period. Plaintiff, having performed his part of the contract, sued to enforce it; and his action was referred to a referee, who found as a fact that the statutes of New York, where defendant resided and the stock was issued, which were in force at the time of contract, did not forbid the making of such contract, and also that by New York law a corporation entering into a contract, suffering the other party to perform, and receiving and retaining the benefits thereof, is bound by the contract, though in excess of its charter powers. This report was confirmed by the circuit judge. *Held*, that the findings as to the statutes and law of New York were findings of fact, and not subject to review on appeal, and hence that plaintiff's contract was enforceable against defendant.

Appeal from common pleas circuit court of Greenville county; Ernest Gary, Judge.

Action by David W. Ebaugh against the Eastern Building & Loan Association of Syracuse, N. Y., to recover the par value of certain shares of stock. From a judgment in favor of plaintiff on a referee's report, defendant appeals. Affirmed.

The cause was tried before a referee, who made the following findings:

"All issues of law and fact arising on the pleadings having been referred to me, I proceeded to hold a reference, and took the testimony which is herewith reported.

"The defendant is a corporation chartered in 1890 under the laws of the state of New York. In the spring of 1892 an agent of the defendant approached the plaintiff, in Greenville, S. C., where he resides, and solicited him to become a stockholder in the defendant company. The agent exhibited to the plaintiff certain printed circulars or literature, and a specimen of the certificate of stock issued by defendant. The agent also made certain verbal statements to the effect that the company would pay to the plaintiff

par value for the stock after seventy-eight monthly payments, and this agreement would be valid. But, as I am in doubt as to the admissibility of these statements, I have not considered them in the discussion of the questions at issue. Practically the same statements, put in a clearer and more tangible form, were contained in the circulars issued by the defendant company, and used by its agent in soliciting the plaintiff's subscription. These statements represented the company as promising unconditionally and absolutely that it would pay to the stockholder one hundred dollars for each share of stock at the end of seventy-eight months, alleging that it was 'the only association making a contract definite in every particular'; that its 'shares mature in exactly six and one-half years'; and that, 'on a basis of ten shares (one thousand dollars' maturity value), he will have paid in five hundred and ninety-five dollars, and receives one thousand dollars.' The certificate itself contained the following promise: 'The said Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder, or his heirs, executors, administrators, or assigns, the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof.' This promise is clear, unconditional, and absolute. The circulars issued by the defendant show that this was its construction of this promise. I do not think that this promise can be limited or controlled by any indefinite or vague provisions contained in the by-laws. A similar certificate, together with the charter and by-laws of the defendant company, were before the supreme court in the case of Williamson v. Association, 54 S. C. 582, 32 S. E. 765. The court in that case held that the promise was absolute and unconditional, and bound the defendant to pay one hundred dollars for each share at the end of seventy-eight months. The decision in that case is conclusive of this. The evidence shows, and I so hold, that the plaintiff paid his entrance fees and all monthly dues. The Williamson Case was an appeal from an order of the circuit judge dissolving the attachment and dismissing the action. This order of the circuit judge proceeded upon two grounds: (1) That the notes and bonds attached were not the subject of attachment; (2) that the changes made in the charter in 1894 and in the by-laws of 1896 provided that not more than one-half of the amount received each month from dues and stock payments should be used in paying withdrawing and maturing stock, and that withdrawals should be paid in the order of the applications therefor. On this ground the circuit judge held that the plaintiff had no present cause of action, and dismissed the proceedings. In the present case there is absolutely no evidence that there were any changes made either in the charter or by-laws, so that the questions at issue are to be decided as though no such changes had been made. The supreme court reversed the order of the circuit judge, and held that, under the contract of the defendant, it was bound to pay to the plaintiff the par value of its stock after seventy-eight months. The question as to whether this promise was in excess of the charter powers was not expressly decided by the supreme court, but that court did decide that, even though it were in excess of its charter powers (in the language of Railroad Co. v. McDonald [Ind. App.] 46 N. E. 1022, 60 Am. St. Rep. 172), 'the general rule is that where a private corporation has entered into a contract not immoral in itself, and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of ultra vires.' This proposition is fully sustained by the decisions of New York. The plaintiff introduced in evidence the following decisions of that court: Arms Co. v. Barlow, 63 N. Y. 62; De Groff v. Thread Co., 21 N. Y. 124; Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419. This constituted the only evidence before me as to what was the law of New York touching this point. I find as a matter of fact that the law of New York is that, where a corporation enters into a contract that is in excess of its charter powers or is unauthorized by law, it will nevertheless be bound to perform its agreement as contained in the contract, if it suffers the other party to perform his agreement, and receives the benefits and retains them. This being the law of New York, it is conclusive of the case at issue. I find, as a matter of fact, that the defendant promised to pay to the plaintiff one hundred dollars for each share of the stock taken by him, at the end of seventy-eight months, and that it represented to him that in issuing this stock it would be bound to perform this agreement according to its terms. I further find that the plaintiff was induced by this promise and this representation to take the stock, and that, believing the promise to be valid and that the defendant intended to perform it, he paid the entrance fee and the monthly dues. I further find that the defendant, knowing that the plaintiff relied upon the validity of this promise, allowed him to pay his money, and that defendant has continued to hold onto this money, and has never offered to return it. I therefore hold that, even if the contract made by the defendant was in excess of its charter powers, it would not be heard to plead ultra vires, but would be bound, under the law of New York, to perform its promise as expressed in the certificate. The defendant introduced in evidence chapter 122, Laws N. Y. 1851, and chapter 564, Laws N. Y. 1875, under which defendant's charter was issued, and he urged upon me to hold that these acts forbid the defendant to make a contract such as that contained in the certificate. There is no provision in these statutes which forbids such a contract. The most that can be said is that the statutes do not confer the powers, or authorize a corporation chartered under them

to make such an agreement; in other words, that such an agreement is in excess of its charter powers. But I am by no means convinced that these acts do not confer upon building and loan associations the power to make an agreement of the kind set forth in the certificate of stock. The objection urged against this agreement is that it provides for the maturity of the stock at a definite time. Chapter 122, § 2, authorizes building and loan associations to provide 'the manner of redemption of shares by advances made thereon.' 'And the ultimate amount to be paid to the owners of unredeemed shares.' This chapter, as well as chapter 564, evidently contemplates that a building and loan association may issue paid-up stock; and they do not impose any limitation upon the price at which such stock is to be issued, or as to the terms of its redemption. It is clear that under these statutes the association could issue ten shares of paid-up stock for five hundred and eighty-five dollars in cash, to be redeemed at the end of seventy-eight months. For the same reason, I do not see why such an association may not issue stock to be fully paid up by seventy-eight monthly payments, and to be redeemed at par at the end of that time. The latter promise may be unwise, but this is not the question at issue. It is whether such a contract is forbidden by the statutes. I am clearly of the opinion that it is not forbidden by the statutes, and I so hold. The most that can be said is that such a promise is not authorized by the statute. I therefore conclude that the promise made by the defendant to pay the plaintiff one hundred dollars for each share of stock at the end of seventy-eight months is not immoral in itself, and is not forbidden by statute either in New York or in this state.

"The defendant introduced in evidence the decision in the case of O'Malley v. Association, 92 Hun, 572, 36 N. Y. Supp. 1016, for the purpose of showing that an agreement like that contained in Ebaugh's certificate is not enforceable under the laws of New York. The plaintiff objected to the introduction of this decision as evidence on the ground that it was irrelevant to the issues in this case, to wit: (1) That the decision was rendered in 1895, whereas the contract sued on was made in 1892; and (2) in that the decision was made by the supreme court of the state of New York, which is not a court of last resort. While I have admitted the decision, I do not think it has any force in determining the issues between the plaintiff and the defendant. The decisions of the supreme court of New York do not settle the law of that state. They tend to this result no more than do circuit court decisions in South Carolina. I repeat that in my opinion this contract is neither immoral, nor is it forbidden by the laws of New York or of this state.

"It is possible that this contract might not be enforceable by a stockholder as against creditors. But there is no such question in this case. There is no allegation that the defendant owes any debts. On the contrary, it was stated in argument that the defendant association was abundantly solvent. The question is merely between the association itself and one of its stockholders,—between him who promises and him to whom the promise is made. It is urged that to allow plaintiff to recover judgment on his contract will work a preference to him over other stockholders. This argument might meet with some consideration if insolvency proceedings had been commenced, and a receiver appointed. But no such proceedings have been started, and there is no evidence that to allow the plaintiff judgment will work a preference in his favor. But, even if it did work a preference, this would be no defense to an action at law brought upon the defendant's agreement. Again, it is said that, if the courts hold the defendant to be bound by its promise as contained in its certificate, this would operate to bankrupt the defendant. But this argument cannot prevail. It is the business of the court to enforce contracts as made, and its hands will not be stayed by reason of the debtor's plea that the enforcement of his obligations will reduce him to bankruptcy. It may be that the defendant's agreement with its stockholders was unwise, but, if so, this court has nothing to do with that question. This is an action at law brought upon a contract made by the defendant. This contract is to be enforced according to its terms.

"To summarize my conclusions, I hold as follows: (1) That the defendant bound itself in express terms to pay to the plaintiff one hundred dollars for each share of stock subscribed by him, at the end of seventy-eight months, provided he paid his monthly installments during that time, and that the plaintiff did pay all his monthly dues. (2) That this promise was not immoral in itself, and was not forbidden by the statutes or law of New York, as established at the time of the contract. (3) That even if this contract was in excess of its chartered powers, and was unauthorized by the laws of New York, yet, under the principle of law as established in that state and in this state, the defendant would be bound to discharge its promise, where it had received and where it retains the benefit of the transaction. I find that it did receive and does retain the benefit of the transaction, and that it suffered the plaintiff to perform his part of the agreement under the belief that its promise was valid, and that it would discharge such promise according to its terms. I therefore hold that the plaintiff is entitled to judgment against the defendant for the sum of one thousand dollars, with interest from October 15, 1898, at the rate of seven per cent. per annum, and for the costs of this action. All of which is respectfully reported."

The following is the decree of the circuit judge:

"The defendant is a corporation organized under the laws of New York, with its prin-

cipal place of business in the city of Syracuse. In the early part of the year 1892 it began business in the state of South Carolina, and organized in the city of Greenville a local branch of said association. The plaintiff is a resident of the city of Greenville, in said state. The defendant's agent approached the plaintiff for the purpose of inducing him to become a stockholder in the defendant company. The agent exhibited to the plaintiff a form of the certificate of stock, which contained, among other things, this promise: 'Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder, or his heirs, executors, administrators, or assigns, the sum of one hundred dollars for each of said shares, at the end of seventy-eight months.' At the same time the agent exhibited to him certain printed circulars, or literature, of the defendant company. One of these circulars was entitled 'The Definite Contract Plan.' This circular stated:

"'Q. What amount is deposited monthly? A. Seventy-five cents per share. * * * Q. When will the shares reach their par value? A. Shares mature in exactly six and one-half years. Q. How much will a member have to pay in altogether? A. On a basis of ten shares (one thousand dollars maturity value), he will have paid in five hundred and ninety-five dollars ($595), and receives one thousand dollars. * * * All shares on which payments are made are regularly matured at the expiration of seventy-eight months (six and one-half years) from date of certificate. * * * Illustration showing costs and profits to the investor of ten shares, of $1,000, six and a half years, at time of maturity:

He pays a membership fee of $1.00 per share	$ 10 00
He pays monthly installments of $7.50 per month for 78 months ($7.50×78)	585 00
Total amount invested	$ 595 00
He receives in cash at maturity	1,000 00

"' * * * The only association making a contract definite in every particular. * * * Stock matures in seventy-eight months.'

"On reading the circulars, and after listening to the persuasive talk of the agent, the plaintiff was induced to become a subscriber for ten shares of stock. Thereupon the certificate sued upon was issued to him. This certificate is dated on April 1, 1892. It certifies that: 'D. W. Ebaugh, of Greenville, county of Greenville, and state of South Carolina, is hereby constituted a shareholder of the Eastern Building and Loan Association of Syracuse, New York, incorporated under the laws of New York, and holds ten shares therein, of one hundred dollars each, and in consideration of the membership fee, together with agreements and statements contained in the application for membership in the association, and full compliance with the terms, conditions, and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract; and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay to said shareholder, or his heirs, executors, administrators, or assigns, the sum of one hundred dollars for each of said shares, at the end of seventy-eight months from the date hereof.' Ebaugh paid the entrance fees, and continued to pay the monthly installments until seventy-eight months had elapsed. The last payment was made on October 1, 1898. In subscribing to this stock and in making these payments, Ebaugh trusted to the statements contained in the circular, and to the promise made in the certificate. About one month before the last payment was made, the association wrote to Ebaugh, stating that they could not carry out the contract, and stating that they could not pay him one hundred dollars upon the end of seventy-eight months, but that he would have to continue making payments. In reply to this, Ebaugh wrote that he had made a definite contract with the association, and expected them to comply with its terms. A short time after making the last remittance, he signed a blank receipt upon the back of the certificate, and sent the same to the association, with the request that they forward him a check for the money due him. The association refused to make payment, and on January 17, 1899, this action was commenced to recover from the association the sum of one thousand dollars, with interest thereon from October 1, 1898. Certain property of the defendant company in this state was attached in said action. The defendant made answer, alleging that there was no contract to mature the stock at a definite period, but that it was only estimated that the stock would be matured in seventy-eight months. It also claims that any promise to mature the stock within a definite time would be contrary to their by-laws and charter, and contrary to the laws of New York.

"By agreement of counsel, all issues of law and fact were referred to Oscar Hodges, a member of the bar at Greenville, as special referee. Mr. Hodges took testimony, and heard argument, and filed his report, wherein he concludes 'that the plaintiff is entitled to recover judgment against the defendant for the sum of one thousand dollars, with interest from October 15, 1898, at the rate of seven per cent. per annum, and for the costs of this action.' To this report the defendant filed certain exceptions. After hearing argument, I am satisfied that the report of the referee is correct in every particular, and the exceptions are hereby overruled. The defendant certainly made definite assurances in those circulars, and a definite promise as to the maturity of stock, —that if the plaintiff would pay the entrance fees, and his monthly dues for seventy-eight months, at the end of that time it would

pay to him one hundred dollars for each share of stock taken by him. These assurances and this promise were made for the purpose of procuring the plaintiff as a stockholder. This promise was definite. The plaintiff relied upon it, and made the payment of his entrance fees and his monthly dues. The association knew that the plaintiff was relying upon its promise, and allowed him to make all these payments and to incur the liability of a stockholder. It received the full benefit of this transaction, and it cannot now be heard to say that the contract was contrary to its by-laws or its charter. Even if this contract were in excess of its charter powers, the association would nevertheless be bound by it, inasmuch as it received the full benefit thereof. In the cases of Williamson v. Association (S. C.) 32 S. E. 765, and Welling v. Same (S. C.) 34 S. E. 409, these same questions were raised. The supreme court had before it the same circulars, the same certificate, the same by-laws, and the same matters of law as were introduced in evidence in this case, and its judgment was that the defendant association was bound to the full extent of its promise. These cases conclude all the issues here, and render unnecessary a further discussion of the principles involved.

"This is a law case, and it will be necessary to have judgment entered regularly upon this order. It is therefore ordered and adjudged that the plaintiff, David W. Ebaugh, do recover of the defendant, Eastern Building & Loan Association of Syracuse, New York, the sum of one thousand dollars, with interest from October 15, 1898, at the rate of seven per cent. per annum, now amounting to one thousand and eighty dollars, together with costs of this action, and that the plaintiff be, and he is hereby, permitted to enter judgment for said sum and costs."

T. H. Spain, for appellant. Haynsworth, Parker & Patterson, for respondent.

GARY, A. J. The facts of this case are fully set forth in the report of the master and the decree of the circuit judge, which will be incorporated in the report of the case. Contracts similar to that which gave rise to the action herein have recently been construed by this court in the case of Williamson v. Association, 54 S. C. 582, 32 S. E. 765, and Welling v. Same, 56 S. C. 280, 34 S. E. 409. See, also, cases cited in the notes to Williamson v. Association (S. C.) 32 S. E. 765, 71 Am. St. Rep. 822. The appellant contends that the contracts must be construed with reference to the laws of New York, and attempts to differentiate this case from those just mentioned on the ground that the answer alleges, and the testimony establishes the fact, that under the laws of that state the by-laws of the association, and not its express agreement, must prevail in the interpretation of the contract between the parties. Both the master and circuit judge found, as matter of fact, that the laws of New York did not forbid the defendant from entering into an agreement by which the shares of stock would mature in a definite time. In his report the master says: "The question as to whether this promise was in excess of the charter powers was not expressly decided by the supreme court, but that court did decide that, even though it were in excess of its charter powers (in the language of Railway Co. v. McDonald [Ind. App.] 46 N. E. 1022, 60 Am. St. Rep. 172), 'the general rule is that where a private corporation has entered into a contract not immoral in itself, and not forbidden by any statute, and it has been in good faith performed by the other party, the corporation will not be heard on a plea of ultra vires.' This proposition is fully sustained by the decisions of New York. The plaintiff introduced in evidence the following decisions of that court: Arms Co. v. Barlow, 63 N. Y. 62; De Groff v. Thread Co., 21 N. Y. 124; Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419. This constituted the only evidence before me as to what was the law of New York touching this point. I find as a matter of fact that the law of New York is that, where a corporation enters into a contract that is in excess of its charter powers or is unauthorized by law, it will nevertheless be bound to perform its agreement as contained in the contract, if it suffers the other party to perform his agreement, and receives the benefits and retains them. This being the law of New York, it is conclusive of the case at issue." The report of the master was confirmed in all respects by the circuit judge. As this is an action at law, the foregoing findings of fact are not subject to review, but are conclusive on this court. As the laws of New York are not in conflict with the construction which this court has placed upon contracts similar to that upon which the action herein is founded, we fail to discover any facts causing us to differentiate this case from those hereinbefore mentioned. It is the judgment of this court that the judgment of the circuit court be affirmed.

DARWIN et al. v. MOORE.

(Supreme Court of South Carolina. July 11, 1900.)

DESCENT AND DISTRIBUTION—CHOSES IN ACTION—TITLE OF HEIRS AND DISTRIBUTEES—HARMLESS ERROR—MARRIED WOMEN—SEPARATE ESTATE—CONTRACTS.

1. Heirs and distributees of a deceased person cannot acquire title to his choses in action, without administration proceedings, merely by taking possession, so as to authorize the maintenance of an action thereon in their own names.

2. On appeal, a judgment for plaintiff will not be reversed where it appears that the trial court erred in holding that defendant's answer was not verified, where it appears that plaintiff was entitled to recover on the merits, and thought it was verified.

3. In an action on a note executed by a married woman in 1890, it is not necessary for

plaintiff, to charge her separate estate, to show that the proceeds of the note were used for its benefit, since all that the law required at the time of the execution of the note to charge the defendant's separate estate was that she should have contracted with reference to her separate estate.

Appeal from common pleas circuit court, Cherokee county; O. W. Buchanan, Judge.

Action by John T. Darwin and another against Mary M. Moore. There was a judgment in favor of plaintiffs, and defendant appeals. Affirmed.

N. W. Hardin, for appellant. W. B. De Loach, for respondents.

POPE, J. R. R. Darwin departed this life intestate, on the 10th day of November, 1893, survived by the plaintiffs as his only heirs at law and distributees. At his death he held, as the owner thereof, a mortgage on 112 acres of land, situate in Cherokee county, in this state, executed by the defendant Mary M. Moore while she was the wife of H. M. Moore, now deceased, to secure a sealed note dated 29th August, 1890, and maturing 29th day of August, 1895, for the sum of $112.93, with 8 per cent. interest. After the death of R. R. Darwin, his two children, the plaintiffs, took possession, as the owners thereof, of said sealed note and mortgage, and now hold the same as such. On the 9th day of January, 1899, these two children of the said R. R. Darwin brought an action against the said Mary M. Moore as defendant to obtain judgment on said note and mortgage. The defendant appeared and answered. All the issues were referred to a special referee, by whose report a judgment for $1,095.11 in favor of the plaintiffs against the defendant, as well as for foreclosure of the mortgage on the 112 acres of land executed to secure the debt, was recommended. That cause came on to be heard before his honor, O. W. Buchanan, as presiding judge, upon exceptions to the report, the pleading, and testimony. He decreed in favor of plaintiffs. The defendant now appeals, as follows: (1) For error in holding that the answer of the defendant was not verified. (2) For error in holding that "the testimony fully establishes the fact that the debt secured by the mortgage was created with reference to the separate estate of the defendant, who was at the time of the execution of the note and mortgage a married woman"; whereas, he should have held, it appearing that the defendant was a married woman, and her separate estate charged with the payment of a debt secured by a mortgage, that it developed upon the plaintiffs to show, by the preponderance of the testimony, that the debt represented by the note and mortgage was used for the benefit of her separate estate, and, this not being established by the above-stated rule of law, judgment should have been in favor of the defendant. (3) For error in not holding from the testimony that the action was prematurely brought. (4) For error in not holding that plaintiffs could not maintain this action. (5) For error in holding that the "plaintiffs herein are entitled to the relief asked for in the complaint," for the reasons hereinabove stated, and adjudging that the lands of the defendant be sold to pay said debt. At the hearing before us, the appellant abandoned exceptions numbered 3 and 4; hence they are not for our consideration.

This court deems it a duty it owes, in upholding the law in relation to intestate estates, to state that the practice of the plaintiffs in avoiding any administration of the estate of their father by suing in their own names as his heirs at law and distributees, as holders of his personal property, cannot be sanctioned. It is true Mr. John T. Darwin, as one of the plaintiffs, in his testimony states: "There was no necessity for administration, in my opinion;" but we would state that the opinions of an individual claimant of property cannot outweigh the law. Strictly speaking, there is no ownership of personal property of an intestate by his children. They are only entitled to receive what is left after paying his indebtedness and the expenses of administration. The legal title to such personal property of an intestate vests in his administrator. But in the case at bar the defendant declines to raise this question, and we fear, therefore, that, as between the plaintiffs and defendant, we must decide alone upon the questions here presented.

As to the first question, we agree with the circuit judge that the plaintiffs would be entitled to judgment even if the answer of the defendant was verified. But in justice to N. W. Hardin, Esq., who prepared the answer as the attorney of the defendant, it should be stated that this court is perfectly satisfied that his client, Mrs. Mary M. Moore, signed the answer which was verified by her oath before M. Hardin, as a notary public. Her testimony to the contrary was but the utterances of a feeble old woman, who did not apparently understand what she was saying in this connection. She admitted that Mr. Hardin came to her house as her attorney, and that she laid the facts of her defense before him. This, however, as before intimated, is an abstraction, and we overrule this exception.

As to the second exception, we may remark that all that the law required at the date of this transaction between Dr. Darwin and Mrs. Moore was that it should appear that the contract was made with reference to her separate estate. When this was made to appear, no attention need be paid to the question whether such contract was beneficial to the married woman's estate. When Mrs. Moore was testifying, she certainly in her cross-examination admitted that she "contracted this debt," and at that time she "intended to pay it. * * * I never contracted any debts except for myself." "I owned all the lands, and what debts I contracted I contracted for in the

interest of my estate." The good lady evidently was impressed with the idea that she would not be required to pay this debt as long as she lived, and the long credit (five years) given to her by Dr. Darwin evidences the fact that something about a long credit was talked about between them. But the old lady fixed by her contract as the time for which she was to have credit five years. That time has passed, and five years additional have passed. She knew what she was doing when she contracted this debt. It was for her separate estate. The debt is now due, and she must pay it.

As to the fifth exception, it must be overruled for the reasons just given. It is the judgment of this court that the judgment of the circuit court be affirmed.

SHUTE v. MANCHESTER FIRE ASSUR. CO. et al.

(Supreme Court of South Carolina. July 11, 1900.)

INSURANCE — PROPERTY — TITLE — DEED — PRODUCTION — PAROL TESTIMONY — DELIVERY OF DEED—QUESTION FOR JURY.

Where, in an action on a fire insurance policy providing that it should be void if the building was on ground not owned by the insured in fee simple, the plaintiff testified on cross-examination that several years prior to the issuance of the policy he had executed a deed to the property to his son, but it had never been delivered, and the deed was not produced, or any testimony introduced on behalf of defendant, a judgment of nonsuit was erroneous.

Appeal from common pleas circuit court of Lancaster county; O. W. Buchanan, Judge.

Action by H. H. Shute against the Manchester Fire Assurance Company and another. From a judgment in favor of defendants, plaintiff appeals. Reversed.

R. E. & R. B. Allicon, for appellant. Ernest Moore, for respondents.

POPE, J. The trial of this action was had before Judge Buchanan at the October term, 1899, of the court of common pleas for Lancaster county. After plaintiff closed his testimony, upon the motion of defendant the Manchester Fire Assurance Company Judge Buchanan ordered the nonsuit of plaintiff. After entry of judgment thereon, plaintiff appealed.

It seems to us that the error of the circuit judge, if error there be, lies in a very narrow compass,—so narrow that we may lay our finger on it, if it exists. The grounds of the motion for nonsuit were: "That the proof does not correspond with the allegation of the complaint; the testimony of the plaintiff showing that he did not have the estate in the property in question which the complaint alleged; objection having been made to all evidence showing any estate or insurable interest in the plaintiff other than alleged in the complaint. The insurable interest represented by the plaintiff and his wife in the property mentioned in the policy was not insured. That where the plaintiff alleges himself to be the owner of the property, and bases his complaint thereon, alleging that such insurable interest was insured under the policy, therefore he cannot recover thereon by proving another insurable interest, not contemplated by the parties or mentioned in the policy. That the plaintiff alleges one contract, and offers proof as to another. Also, that the very policy annexed as an exhibit to the complaint contained a promissory warranty on the part of the plaintiff that he was the sole and unconditional owner of the property, and that the building was on ground owned by the insured in fee simple, and in his complaint the fulfillment of this condition is alleged, whereas there is no proof either of the contract alleged, or the fulfillment of the terms and conditions thereof." The foregoing grounds of motion for a nonsuit were substantially taken down by a stenographer. The plaintiff (appellant), in argument, contended that the execution of the alleged deed of conveyance had not been proved, and the deed had not been offered in evidence, and that the title of the property was still in the plaintiff; and, when the judge indicated an adverse view, plaintiff's counsel remarked, "If your honor has any doubt about the delivery of the deed, we would like to put the subscribing witnesses on the stand, as to the execution and delivery of the alleged deed." The judge refused to do this; remarking that the plaintiff had rested, and this was a motion for a nonsuit. The circuit judge then made his ruling on the motion, as follows, viz.: "My idea about the case is this: Here is a man comes to an insurance company, by his agent, and says: 'Look here. You have been carrying my insurance about 3 or 4 years. I want to renew my insurance.' Practically says that, because, when he says that by an agent, he says that himself. No questions were asked, at all. The company says: 'All right. Here it is.' Well, it turns out now that at a time heretofore that property upon which this policy was written had been conveyed to somebody else. The agent of the company says: 'Well, I insured you' such a time and such a time. 'I will insure you in pursuance of the contract.' Well, now, not one syllable is given him of any change at all in the condition. Here is a man who has conveyed away the property, knows the insurance has been carried as his property, and does not give the insurance company a word of notice. Is that putting these men on notice? The company did not know it. Was it his negligence, his lack of care? I don't think, from whatever standpoint you view it, there is any evidence of waiver. There is certainly not any evidence here to show any fee-simple title, nor can the complaint be sustained here upon the ground of a lesser estate. Now, if plaintiff's statement be true, he not only has no lesser estate, but no estate at all, except an estate hung up in the skies, depending

upon the affection the children have for their —for the plaintiff? I don't think so. He does not sue as agent,—as trustee. He sues in his own name. He does not say he was acting for A., B., and C.,—acting as agent,—but the allegation is that he is owner in fee simple. Well, now, it might be said in reply that the matter of forfeiture is a matter of specific defense; but it is also true, when a plaintiff undertakes to anticipate the defense, and to prove that, and to prove himself in court and out of court at the same time, he goes out of court, because he could have gone and proved his loss alone. Now, by the same thing he attempts to prove his status in court he proves himself out of court. I think the nonsuit ought to go. That is my judgment." The judge then signed the following order of nonsuit: "The plaintiff having concluded his evidence, and a motion for a nonsuit having been made by the defendant, after hearing argument, ordered that said motion for nonsuit be, and the same is hereby, granted, upon the grounds made and reasons expressed, taken down by the stenographer. October 24, 1899. O. W. Buchanan, Judge."

Notice of appeal from the judgment and order of nonsuit, and from the ruling of the circuit judge at the trial, within 10 days from the rising of the court, to the supreme court, for reversal and correction of the same, was given; and the following are the exceptions and grounds of appeal: "(1) Because the forfeiture of an insurance policy is a matter of defense, and the policy of this insurance was duly admitted and produced in court, and it was incumbent upon the insurance company to show by competent evidence wherein the forfeiture lay, and the circuit judge erred in withholding the issues from the jury. (2) Because the introduction of the policy raised the presumption that its terms had been complied with, and it was then a question for the jury to determine, and the judge erred in granting the motion for nonsuit. (3) Because the circuit judge erred in assuming that there was a conveyance by the plaintiff to his sons, changing the title to the house insured and the surrounding lands, when the alleged deed was not proven and not offered in evidence at all. (4) Because he erred in assuming that there was a change of title in the property, when all the witnesses that made any reference to the alleged deed testified that the same had been signed by the plaintiff, but not delivered as a deed, and was never intended by either party to operate as a conveyance in the lifetime of plaintiff. (5) Because the alleged deed was set up in the answer as a defense, and it was incumbent on the defendant company to prove the same, and the judge erred in assuming the alleged change in the title without such proof. (6) Because the mere admission that the alleged deed was signed in 1892, but never delivered, is not legal proof of the conveyance of the property. The testimony of the Shute family, drawn out on the cross-examination, that the plaintiff had some years ago signed a paper, to take effect after his death, but which was not delivered, and was never intended to be delivered, in plaintiff's lifetime, was no evidence to pass the title out of plaintiff. And the circuit judge erred therein. (7) Because the plaintiff's attorneys, when they discovered the inclination of the judge, proposed to go further than their duty, and swear the subscribing witnesses to the alleged deed, to show that the same was not delivered, and was never intended to be delivered, as a conveyance, but the court refused this request. (8) Because the alleged deed was signed in 1892, but not delivered, and the house was first insured in 1894, again in 1895, and now again in 1896, by the defendant company; and the presiding judge erred in assuming that the title to the property insured changed hands after the first policy was delivered, contrary to the facts, not considering that this would raise the question of waiver of the defense. (9) Because, when E. K. Palmer applied for the policy in 1894, 1895, and in 1896, it was proof that no concealment and no misrepresentations were made, and that no questions whatever were asked by the insurer, and that Palmer had no knowledge of any change whatever in the title, and that Shute, the plaintiff, had no knowledge of the contents of the policy, and that he had no communication at any time with any agent of the insurance company; and the circuit judge misconceived this testimony, and erred in assuming that there was no waiver by the defendant company, and no negligence on its part. These were questions of fact for the jury. (10) Because it was in proof that the defendant, immediately after the house was burned down, was the first to raise the question of forfeiture set up in its answer, and before the said E. K. Palmer, agent, had had knowledge of the alleged change in the title, and before the plaintiff had any knowledge of the contents of the policy of insurance; and the inquiry when and how this information was acquired by the defendant company should have been left to the jury, to determine whether or not there was a waiver of this defense. (11) If the insurer, before issuing the policy, asks for no information, and the insured makes no representations, it must be presumed that the insurer has, in person or by agent, in such a case, obtained all the information desired as to the premises insured, or that he ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him. Such were the facts in this instance, and the nonsuit was erroneously granted. (12) Insurance companies or their agents are presumed to know what facts and circumstances are material to the risk much better than persons applying for the insurance, and if they, as in this instance, choose to accept the risk without

inquiry, and when a loss occurs it appears that some fact, which the insurance company may regard as material to the risk was not communicated by the insured, common honesty and fair dealing forbid that this shall operate as a forfeiture of the policy. (13) Because the proof did not vary from or contradict the allegations of the complaint, and, even if it were so, it was no ground for a nonsuit. (14) Because the policy of insurance did not contain a promissory warranty to bind plaintiff. (15) Because, even if any of the material specifications in the policy were not proven, the conduct of the defendant company was such as to raise the presumption of a waiver, and was a question of fact for the jury to determine."

There is no doubt but that the circuit judge was impressed with the idea that the plaintiff sued for one thing, and, in his dilemma, wanted to recover for another thing. In discussing the matter of a nonsuit, this court, in the case of Willis v. Hammond, 41 S. C. 158, 19 S. E. 312, said: "It is settled law in this state that the circuit judge ought not to grant a motion for a nonsuit if there is any competent testimony before the jury in support of plaintiff's tender of issues; but, on the other side, it is equally true, if no such testimony is offered, such motion should be granted. The solution of this question therefore involves a consideration of the pleadings, and the fact whether any testimony was offered by plaintiff to support the issues there tendered." When the plaintiff in this action at bar complains upon the policy of insurance made for him by his agent, E. K. Palmer, with the defendant insurance company, and makes such policy a part of his complaint, there can be no doubt but that such policy evidences the contract betwixt the parties. The contract was in writing, and it became the duty of the circuit judge to expound such writing. This contract contained these provisions: "This entire policy shall be void * * * if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple." So, as we said, it was the duty of the judge to construe these provisions of the policy. Again, the deed itself, which was testified to by the plaintiff and his two sons, was not brought before the court, except in this testimony. Therefore the circuit judge had no right to say what the testimony of these witnesses proved (he said that such testimony showed that the plaintiff had no fee-simple title to the land on which the building insured was located), especially when the deed itself was not produced, and reliance was had upon the testimony of the plaintiff, which declared that the deed was "signed." He never declared in his testimony that the deed was "delivered." It is the duty of the jury to take care of the testimony. In addition to all these matters, it was in testimony that E. K. Palmer never told the insurance company of this deed, for he did not know of it, and that the plaintiff never told the insurance company of this deed, and yet this insurance company, as soon as it became liable to pay this policy, suddenly, through its adjuster, disclosed to the plaintiff that it knew of this deed. Now, with such testimony before the court, and with no explanation of when or how the insurance company had this knowledge, the circuit judge had no right to take such testimony from the consideration of the jury. If the insurance company knew that this land had been conveyed to the three sons, and yet, after such knowledge, granted a policy thereon to the plaintiff, it may be (we will not assert it as a fact) that the insurance company waived the requirement of its policy that the plaintiff should be the sole and unconditional owner of the land, or that the building it insured should be located on land owned by the plaintiff in fee simple. Without expending any further time, we prefer to have the new trial without any hampering restrictions thereon from us. It is the judgment of this court that the judgment of the circuit court be reversed, and that the action be remanded to that court for a new trial.

RIVERS v. PRIESTER. PRIESTER v. WHALEY et al. PRIESTER et al. v. SAME.

(Supreme Court of South Carolina. July 11, 1900.)

TRIAL—WAIVER OF IRREGULARITY—DOCKETING OF CAUSE ON CALENDAR—EXTRA TERM.

Where a party, without objection, participates at an extra term of the circuit court in the trial of a cause not docketed at the preceding regular term, he will be deemed to have waived his objection that the cause was not docketed on the calendar of the preceding regular term, and the court has jurisdiction, notwithstanding Code, § 28, providing that no cause shall be tried at any extra term of the circuit court unless previously docketed on some one of the calendars of the last preceding regular term of said court.

Appeal from common pleas circuit court of Barnwell county; R. C. Watts, Judge.

Action of trespass to try title by J. M. Rivers against T. E. Priester, consolidated with a motion by J. P. Priester against Whaley & Rivers to vacate a judgment in foreclosure. There was a judgment in favor of plaintiff in the action of trespass to try title, and defendant appeals. Judgment affirmed, as is also the denial of the motion to vacate the judgment in foreclosure.

J. O. Patterson, for appellants. Bates & Simms, for respondents.

GARY, A. J. The facts of this case are thus set forth by Judge Townsend in that portion of his decree which we have copied, as follows: "The first above mentioned case is for trespass to try title, in the usual form,

and was, by consent, referred to the master to take testimony and to report to this court, and said report is in. The remaining two matters were motions to vacate and set aside a judgment in foreclosure heretofore entered in this court, and all of these matters, being closely connected and dependent upon the same state of facts, were, by consent, heard by me together, upon the pleadings and testimony in the first case, and upon the papers in the motions above stated. The following are facts found by me after hearing the whole matter, and, for convenience, are arranged in narrative form: Upon the 27th day of February, 1891, and the 7th day of September, 1891, the above-mentioned J. P. Priester executed and delivered to Whaley & Rivers two mortgages upon the real estate in the complaint set forth and described, in the sum of three thousand dollars each, and these two mortgages were duly recorded in the office of R. M. C. for said county upon the 27th day of February and the 7th day of September, 1891, respectively, in Book 54, p. 99, and Book 54, p. 135. The said Priester having defaulted in the payment of said mortgages, an effort was made by the said Whaley & Rivers to foreclose the same under the power contained in said mortgage, by an advertisement in one of the newspapers in said county. The said defendant J. P. Priester, through his attorneys, Messrs. Patterson & Holman, filed an action, entitled 'J. P. Priester v. Whaley & Rivers,' for an accounting, and injunction pending same; and the said sale was enjoined, and a rule to show cause why the injunction should not be continued pending the trial of the case was granted by his honor, Judge Witherspoon, and at the November, 1894, term of said court the matter was argued, the injunction continued, and an order of reference to take the accounting demanded by the mortgagor was signed by his honor, Judge Witherspoon, all at the said term of court. The order of reference to the master, however, required the reference to be held by a given day, and the same was not held within the time limited by said order; and when the same was held the mortgagor's attorneys aforesaid appeared before the master, and objected to the reference on the ground that the said order was functus officio, and had expired by its own limitation, and at the same time gave notice that at the succeeding term of the court said attorneys would apply for an order of discontinuance of said action filed on behalf of said Priester, mortgagor. Nothing was done by the master at this reference, beyond taking proof of the mortgages admitted by the complaint of the plaintiff; and the defendant mortgagees, Whaley & Rivers, who in said action had filed an affirmative answer praying foreclosure of said mortgages, gave due notice to plaintiff's attorneys that upon a given day they would take the testimony of J. M. Rivers, one of the defendants, before a notary public in Charleston, de bene esse. At the hearing no one appeared for the plaintiff, the testimony of Rivers was taken, and the whole accounting gone into and testified to in detail; and this testimony so taken was duly sent to the clerk of this court, to be used in the trial of the cause, and the whole matter (that is to say, the application for a discontinuance, the report of the master, and the testimony de bene esse) was all ready for a hearing at the regular term, in July, 1895. This court was not held, however, at that term, owing to the illness of Judge Watts, but his honor, Chief Justice McIver, appointed a special term, to be held in August of said year, and at this special term Judge Watts presided. The case was called up, and Messrs. Patterson & Holman moved to discontinue the action, and defendant's attorney moved for a trial and a judgment of foreclosure. His honor, Judge Watts, granted a judgment of foreclosure, and in said decree it appears that the plaintiff's attorneys had announced that they had obtained all the relief demanded by them. Upon the filing of this decree the attorneys for Priester, the mortgagor, gave notice of appeal to the supreme court from the judgment of foreclosure, and prepared their case, with exceptions, etc.; but the said appeal was dismissed for want of prosecution, and the lands described in the complaint and answer were sold by the master for said county upon sales day in November in 1895, under said decree of foreclosure, and were purchased by J. M. Rivers, who complied with the terms of sale and received master's title to the same upon the same day,—sales day. After the sale by the master the said lands were sold by the sheriff of said county under certain and sundry judgments recovered against the said mortgagor, J. P. Priester, subsequent to the date and record of said mortgages foreclosed as above stated; and at this sale the said J. P. Priester and his said attorneys, Messrs. Patterson & Holman, purchased said land, and instructed the said sheriff to make titles to Mrs. T. E. Priester, the wife of the said J. P. Priester, which titles were executed and delivered in March, the year following. At the March term, 1896, the said master's report of sale came in, and was duly confirmed by his honor, Judge Aldrich, without objection, and thereafter certain efforts were made to obtain possession of said premises, in the nature of writs of assistance, on the part of the purchaser at said master's sale, J. M. Rivers, but proved ineffectual, owing to Mrs. T. E. Priester and J. P. Priester setting up independent title in Mrs. Priester; and the judge held that she not having been a party to the record, and no lis pendens having been filed, she could not be ejected in a summary way, as desired, but that she should have her day in court, whereupon the above first entitled action was brought by the said J. M. Rivers to recover possession of the premises, and for damages for its holding by said Mrs. Priester. Mrs. Priester's answer sets

up, practically, in defense, that the judgment of foreclosure above alluded to was a nullity, having been recovered at a special term of the court, and that the case was not formerly upon the calendar, and hence the master's title conveyed nothing to the plaintiff J. M. Rivers. These issues being made up, the case, by consent, as above stated, was referred to the master to take testimony. At these references (there were several) it was admitted that both plaintiff and defendant claimed from a common source, in the person of J. P. Priester; and it was shown that the plaintiff claimed under the foreclosure proceedings in re J. P. Priester v. Whaley & Rivers, upon the mortgages above set forth, whilst the defendant claimed under the judgments against J. P. Priester, and sheriff's sale thereunder. The question thus presented is, which has the paramount title? Damages were also proved at said reference in favor of plaintiff, and not contradicted, of one hundred dollars per planting year. Plaintiff's counsel gave notice at the reference that if it was deemed by the court that an allegation of damages should be specifically made, and that there should be such allegation in the prayer for judgment, they would ask for an amendment of the complaint so as to conform to the undisputed testimony as to the damages. At the close of these references the defendants' attorneys, Messrs Patterson & Holman, and also on behalf of J. P. Priester, had served upon Whaley & Rivers, the judgment creditors in foreclosure, as above stated, two motions to vacate said judgment of foreclosure, which are the two motions set forth at the head of this decree. These motions base the relief desired upon the same ground as set up in the answer of Mrs. T. E. Priester, to wit, because of the alleged lack of jurisdiction in the court at said special term to try a case not at that time on the calendar. These are the facts constituting a history of this case. Having, therefore, fully considered the facts of the case, I am of the opinion, and I so conclude, that the foreclosure case, as above stated, having been commenced in November, 1894, and having had orders granted therein, and the same having been in all respects fully ready for trial at the regular term of the court preceding the special term, and at the special term was heard without objection on the part of the mortgagor, J. P. Priester, on account of the alleged nondocketing, but the hearing having been fully acquiesced in by the said attorneys for Priester, his honor's decree in foreclosure was rightly granted. And the case of Simms v. Phillips, cited by Messrs. Patterson & Holman, does not apply to the case in foreclosure heard by his honor, Judge Watts, in that the said case was heard without objection on the ground of nondocketing, and that this was a right that could be waived by consent or acquiescence in same, whereas in the case of Simms v. Phillips the case was not ready for trial at the regular term preceding the extra term, and was heard over the objections specially raised by the defendant's attorneys on the ground that the case had not been ready for trial at the said regular term, and had not been docketed by defendant's consent," etc.

The record contains the following statement: "Only so much of the testimony is printed as shows the damages for the possession of the land, and the notice of proposed amendment of the complaint which was given at the reference before the master,—all other questions of fact, as found by Judge Townsend, being admitted to be correct,—and the only questions raised by this appeal being: First, whether Judge Townsend is right in holding that Judge Watts had jurisdiction, at a special term of court, to hear and determine the case of foreclosure in the original suit of J. P. Priester v. Whaley & Rivers, and that that question is, as to J. P. Priester and his wife, Mrs. T. E. Priester, res adjudicata, and that Mrs. Priester is estopped by the facts to defeat plaintiff's recovery; and, second, whether the judge abused his discretion in allowing the amendment to the complaint. It is admitted that the judgment in the case of J. P. Priester v. Whaley & Rivers, under which the plaintiff J. M. Rivers purchased, was in all respects regular, and properly entered up in the clerk's office,—the only objection now urged against it being that it was obtained at a special term of court, and, in appellants' view of the testimony, was not docketed the requisite length of time before the said hearing, although it is admitted that no objection of this nature was made by defendants' attorneys in said suit at said trial, and that they took an appeal to the supreme court for the decree of foreclosure, served exceptions, etc.; but no exception of this character was taken, and finally said appeal was duly dismissed for want of prosecution, and the master's report of sale thereafter duly confirmed, without objection."

The circuit judge refused the two motions to vacate the judgment hereinbefore mentioned, and adjudged the plaintiff's title to be paramount to that of Mrs. T. E. Priester, and that the plaintiff was entitled to the possession of the land, and to enter up judgment for $400 damages for the unlawful withholding of said possession. He also ordered that the complaint be amended so as to conform to the testimony, by adding a specific allegation of damages.

We will first consider the question of jurisdiction. The only ground upon which it was contended that Judge Watts did not have jurisdiction to try the case was that it had not been docketed the requisite length of time before it was heard. The circuit judge, in his decree, points out the distinction between this case and that of Simms v. Phillips, 46 S. C. 149, 24 S. E. 97. The court of common pleas for Barnwell county had acquired jurisdiction of the cause before the special term of court commenced.

If the court did not have jurisdiction of the subject-matter of the action, it could neither have been tried at the general nor at the special term thereof. The statutory provision as to what cases could be heard at the special term of the court related merely to the time of hearing, and not to the subject-matter of the action. The parties to the action had the right to waive compliance with the statutory requirements as to the docketing, which the circuit judge finds was done in this case. In the case of Overstreet v. Brown, 4 McCord, 79, the court uses this language: "* * * Although a person cannot by consent give jurisdiction to a court where it had no jurisdiction before, yet, where the court has jurisdiction of the matter, and the party has some privilege which exempts him from the jurisdiction, he may waive that privilege if he chooses to do so." If judgments could be declared null and void by reason of the fact that the cases had not been docketed the requisite length of time before the court convened, even when this objection was waived, it would unsettle titles throughout the entire state. As to the order of amendment, we fail to discover any abuse of discretion on the part of the circuit judge, or any other error, in granting it. Judgment affirmed.

LAVENDER v. DANIEL et al. SAME v. LAVENDER et al. SAME v. HUMPHRIES.

(Supreme Court of South Carolina. July 8, 1900.)

DOWER—RELEASE—EVIDENCE—BURDEN OF PROOF—CONDITIONAL DEED.

1. Where a wife indorsed her renunciation of dower on a deed executed by her husband to their son for land subject to a mortgage, subsequent purchasers of the land on foreclosure of the mortgage, to which the son was a party, took the title to the land free from plaintiff's claim of dower, since her claim of dower was barred as against the son, and was consequently barred as against the purchasers at the judicial sale.

2. A deed by a husband, absolute on its face, and purporting to have been given for a money consideration, on which the wife indorsed her release of dower, cannot be changed to a conditional deed by testimony that the real consideration for it was the promise of the grantee to assume a mortgage indebtedness against the land, and to support the grantor and his wife during the remainder of their lives, so as to entitle the wife to recover dower in the land on failure of the grantee to pay off the indebtedness, and support the grantor and his wife, as against purchasers without notice of the condition at foreclosure sale under the mortgage, to which the grantee was a party.

3. Under Rev. St. 1893, § 1902, declaring that "when a husband dies intestate, and his wife accepts her distributive share of his estate, she shall be barred of dower in the lands of which he died seised and all he had aliened," where a widow received and receipted for her distributive share of her husband's estate, and afterwards sought to revoke her election, the burden is on her to show that she was misled as to the condition of the estate before making the election, and her right to retract is not established by her testimony that she receipted for her distributive share in consequence of certain information which she received, the nature of which or from whom she received it she failed to disclose.

Appeals from common pleas circuit court of Cherokee county; Buchanan, Judge.

Actions by Polly Lavender against C. J. Daniel and another, against D. R. Lavender and another, and against W. T. Humphries, and to establish her dower right to certain lands, and have the same set off to her. From a judgment of the circuit court reversing a judgment of the probate court in favor of defendants, they appeal. Reversed.

Simpson & Bomar, for appellants. J. C. Jefferies and Carlisle & Carlisle, for respondent.

McIVER, C. J. These three cases, all growing out of the same state of facts, and involving the same principles of law, were heard, and will be considered, together. Some time in February, 1899, Polly Lavender, the respondent herein, filed a petition, in each of the three cases above stated, against the defendants therein, as parties in possession of different parcels of the land, in the court of probate, for her dower in said land, alleging that she was the widow of one George Lavender, who died on the 8th of April, 1897, having been seised during coverture of said land. The defendants answered, claiming that the petitioner was barred of her dower (1) by the fact that she had renounced her dower on a deed executed by said George Lavender on the 21st March, 1888, conveying the same to his son P. C. Lavender; and (2) because the petitioner had accepted her distributive share of her deceased husband's estate. At the trial it appeared that the said George Lavender, on the 15th of February, 1888, had executed a mortgage on the said lands to one Lewis Clary prior to the date of the deed to his son, above referred to. Subsequently, but at what time does not appear, an action was commenced by one Thomas McCraw, as administrator of said Lewis Clary, against the said George Lavender, for the foreclosure of said mortgage, to which action the said P. C. Lavender, and D. R. Lavender, also a son of the said George, were also made parties defendant, as persons claiming some interest in the said land. That action culminated in a judgment in favor of the plaintiff, and by an order of the late Judge Norton bearing date the 14th April, 1890, the land was directed to be sold; and on sale day in November, 1890, the land was sold, and bought by the defendants C. J. Daniel, D. R. Lavender, and W. T. Humphries (the other defendants in the two cases first named being, as we suppose, parties in possession, as tenants or otherwise), who divided the land among them. The proceeds of this sale were applied, first, to the costs of the action of Marsh, as the administrator of Clary, against George Lavender and others,

and next to the mortgage in favor of Clary, leaving a balance in the hands of the master. The master made his report on the sale, which was confirmed, and the deeds from the master to the defendants C. J. Daniel, D. R. Lavender, and W. T. Humphries, conveying to them the premises out of which dower is claimed, were offered in evidence. It further appeared in evidence that P. C. Lavender, after his father had conveyed to him the land in question, had executed a mortgage on the same to one R. S. Lipscomb, bearing date the 15th April, 1889, to secure the payment of a note for $800. It also appears that one M. Bonner had set up a claim, as judgment creditor of George Lavender, to the balance in the hands of the master; whereupon it seems that both Lipscomb and Bonner were made parties to the case of McCraw, as administrator of Clary, against George Lavender and others, and an order was passed referring it to the master to inquire and report to whom the balance in the hands of the master should be paid. The master made his report, to which all parties consented, and recommended that "the costs of this action—that is, costs of officers, and $25 for Bonner's attorneys—be first paid out of the fund in hand, and that the sum of $500 be next paid to M. Bonner or his attorneys, and that the sum of $299 be paid to R. S. Lipscomb or his attorneys, and that the balance be paid to George Lavender or his attorneys." Subsequently, it appears from the evidence, a compromise agreement between P. C. Lavender and George Lavender was made, by the terms of which "all moneys left after the payment of the sum agreed to pay M. Bonner and the mortgage of R. S. Lipscomb should be equally divided between George and P. C. Lavender," and the evidence shows that this arrangement was carried out.

To sustain the second ground upon which the defendants claim that the dower was barred, the papers of the estate of George Lavender were offered in evidence, "which showed that D. R. Lavender was administrator of the estate, and made settlement thereof in the probate court of Cherokee county on the 28th of December, 1898; that on the same day, in accordance with the decree of the probate judge, he paid to Polly Lavender the sum of twenty-seven and $^{42}/_{100}$ dollars in full of her one-third interest in the estate"; to which statement copied from the "case" is appended the final decree, setting forth in detail the amounts due to each of the distributees, and adjudging that the administrator shall pay the same. The defendants also offered in evidence the deed from George Lavender to P. C. Lavender, above referred to, covering all the land out of which dower is claimed, upon which is indorsed a former renunciation of her dower by the petitioner, Polly Lavender. This deed, upon its face, is an absolute conveyance, and purports to have been executed in "consideration of the sum of sixteen hundred dollars to me paid by P. C. Lavender," and appears to have been duly recorded on the 15th April, 1889. They also introduced in evidence the mortgage of P. C. Lavender to R. S. Lipscomb, covering all the land described in the deed from George Lavender to P. C. Lavender, being the mortgage hereinabove referred to.

The plaintiff, Polly Lavender, was examined in reply, and, after saying that D. R. Lavender, the administrator of the estate of George Lavender, was her son, her testimony proceeded as follows: "Q. When you received any money from D. R. Lavender, did you have any notice, or did you think or know, that it would knock you out of your dower interest in this matter? (Defendants object. The competency of this question to be reserved until final argument.) A. No, sir; I did not. Q. Before signing any receipt for this money, did you ask for any information? (Defendants object. Ruling reserved.) A. Yes, sir. Q. In consequence of information you received, did you sign receipt? (Objected to by defendants. Ruling reserved.) A. I did. Q. Did you intend by signing this receipt to release your dower in this matter? (Defendants object. Ruling reserved.) A. No, sir; I did not. Q. What was the consideration of the deed from George Lavender to P. C. Lavender upon which you renounce your dower? (Objected to by defendants. Ruling reserved.) A. P. C. Lavender was to take the land, pay the debts, and keep us up, as I understood. It was why I signed dower in said deed. Would not have done it otherwise. (All this objected to. Ruling reserved.) Have never renounced dower in that property to any one else. Q. Did P. C. Lavender pay off the debts and support you and husband on the place, as he agreed to do? (Objected to. Ruling reserved.) A. No, sir; he stayed there one year, and the land was sold for the debts." Cross-examination: "Witness was present in the probate judge's office for Cherokee county some time ago, and D. R. Lavender paid me some twenty odd dollars, part of my husband's estate."

Upon this testimony the judge of probate heard these cases, and in his decree he sustained both of the grounds upon which the defendants claimed that the right of dower had been barred, and he rendered judgment dismissing petitions in each of the three cases. From this judgment the plaintiff appealed to the circuit court upon the several grounds set out in the "case," and the same came on for hearing before his honor, Judge Buchanan, who reversed the judgment of the probate court, and remanded the cases to that court for such proceedings as are necessary to admeasure to the petitioner her dower in each of the three cases. From this judgment of the circuit court the defendants appealed upon the several grounds set out in the record, which we do not deem it necessary to state in detail, as we propose to consider the several questions made thereby.

The exceptions raise two general questions: (1) Whether the renunciation of dower indorsed upon the deed from George Lavender to P. C. Lavender bars the plaintiff's claim of dower in the land covered by that deed; (2) whether the plaintiff, by receiving her distributive share of her deceased husband's estate, has barred her claim of dower.

As to the first question, it seems to us clear that it must be answered in the affirmative. When the plaintiff executed her renunciation of dower, indorsed upon the deed from her husband to her son P. C. Lavender, she undoubtedly barred herself of any claim of dower in the land embraced in that deed as against P. C. Lavender and all persons claiming under or through him; and when the land was sold under the proceedings in the action brought by Thomas McCraw, as administrator of Lewis Clary, to which the said P. C. Lavender was a party, there can be no doubt that the purchasers at that sale took their title freed from the plaintiff's claim of dower. As we understand it, the rule is well settled that a purchaser at a judicial sale acquires the title and interest of all the parties to the action under which such sale is made; and, if P. C. Lavender took his title freed from the plaintiff's claim of dower, then the purchasers at such sale acquired all his right, title, and interest, and they also held the title free from the plaintiff's claim of dower.

But it is contended that the deed from George Lavender to P. C. Lavender, though absolute on its face, was in fact conditional merely, and that P. C. Lavender, having failed to perform the condition upon which he was to take the title under that deed, lost all right to, or interest in, the land, as well as all right to any interest that he might otherwise have acquired under the renunciation of dower indorsed upon said deed by the plaintiff, before the land was sold under the proceedings in the action of McCraw, as administrator of Clary, against George Lavender and P. C. Lavender, and therefore the purchasers at such sale (who are the defendants in these actions) took their titles subject to the plaintiff's claim of dower. Even if this could be conceded, while it might have the effect of protecting the plaintiff from the effect of her renunciation of dower indorsed upon the deed from George Lavender to P. C. Lavender, if she were asserting her claim of dower against the said P. C. Lavender, we do not see how it is possible that it should affect the rights of third persons, purchasers at a judicial sale of land to which the records showed that one of the parties held the absolute legal title, free from any claim of dower on the part of the plaintiff, especially when there is not a shadow of testimony even tending to show that these purchasers had any notice whatever of this hidden equity, which now for the first time she seeks to set up in order to avoid the effect of her renunciation of dower which was spread upon the records. Such a doctrine would operate a fraud upon such purchasers, and would tend to destroy all confidence in titles acquired at judicial sales.

Besides, it appears from the record that the proceeds of the sale of this land were applied, not only to the satisfaction of the mortgage to Clary, upon which the plaintiff had not renounced her dower, but also to a judgment obtained by one Bonner against George Lavender (incorrectly states was a judgment against P. C. Lavender), as well as the judgment of the balance due upon the mortgage executed by P. C. Lavender to one R. S. Lipscomb after he acquired the title from his father, and that the balance of the proceeds of the sale was equally divided between George Lavender and P. C. Lavender by agreement between them, the said Bonner and Lipscomb having subsequently been made parties to the action under which the sale was made. So that, practically, the defendants claim as purchasers at a judicial sale made for the purpose not only of satisfying liens on the land imposed thereon by George Lavender, the original owner, but also for the satisfaction of a mortgage placed thereon by P. C. Lavender in favor of Lipscomb, while he held the legal title to the land under a deed absolute in its terms, with a renunciation of dower indorsed thereon, which was spread upon the records. Now, if the land had been sold under proceedings directly instituted for the foreclosure of the mortgage in favor of Lipscomb, it cannot be doubted that the purchaser at such sale would take his title free from any dower incumbrance, in the absence of any evidence (and there is none here) of notice to Lipscomb and the purchaser at such sale of the hidden equity now sought to be set up by the plaintiff. In such a case, the plaintiff would have been remitted for her claim of dower to the surplus of the proceeds of the sale after satisfying the Lipscomb mortgage. So here it seems to us that, if the plaintiff had any claim at all, it should be upon the proceeds of the sale improperly applied to the satisfaction of liens in favor of which she had not renounced her dower, and that she cannot make any claim on the land in the hands of purchasers, or those claiming under them, as the proceeds of the sale under which they bought have, in part at least, been applied to the satisfaction of a lien placed upon the land of the holder of the deed therefor, upon which she has renounced her dower.

But, in addition to this, we do not think it can be conceded that it has been shown by any competent evidence that the deed from George Lavender to P. C. Lavender, which upon its face was certainly an absolute deed, was in fact a mere conditional deed, and that upon the failure of the grantee to perform the conditions the title never vested in him, and hence that the renunci-

ation of dower indorsed thereon amounted to nothing. While it is quite true that the authorities cited by respondent's counsel do show that it is competent to introduce parol evidence tending to show that the consideration mentioned in a deed is greater or less than that therein stated, as well as how such consideration is to be paid or satisfied, yet we are not aware of any case in which it has been held that it is competent by parol evidence to change the nature and effect of a deed, as, for example, to convert a deed absolute on its face into a mere conditional deed, as it was proposed to do in this case. This can only be done where fraud is alleged and proved, and in this case there is neither allegation nor proof of fraud. See Latimer v. Latimer, 53 S. C. 483, 31 S. E. 304, where it was held that, except where fraud is alleged and proved, it is not competent to show by parol that a deed purporting to be based upon good consideration, executed for a specific purpose, was based upon valuable consideration, and executed for an entirely different purpose. It seems to us, therefore, that the parol testimony of the plaintiff, introduced for the avowed purpose of showing that the deed from George Lavender to P. C. Lavender, though absolute on its face, was intended to be a conditional deed, and that as the condition was not performed the deed became nugatory, was clearly incompetent for any such purpose. But, even if that testimony was competent, we do not think it shows what is claimed for it. The circuit judge in his decree says: "The testimony is that the said P. C. Lavender was to pay the mortgage debt of George Lavender, and support George Lavender and his wife, the petitioner herein, during their lives, upon the property, and after their death the property was to be his absolutely." Now, the only testimony we find in the record before us is that of Polly Lavender, which we have copied in full in our statement of the case. By reference to that testimony, the marked difference between what the witness testified to and what the circuit judge represents the testimony to have been may readily be perceived. But, waiving this, we may remark that, if the testimony be as the circuit judge represents, then it is clear beyond dispute that such testimony was incompetent; for if the testimony tended to show that the conveyance was to P. C. Lavender, with a reservation of a life estate in the grantor and his wife, only to become absolute in the grantee upon the death of his mother and father, then clearly parol evidence was wholly incompetent to effect an entire revolution in the character and effect of a deed absolute upon its face.

But the real contention on the part of the respondent seems to be that the parol evidence was to show that the true consideration of the deed was not the sum of $1,600, mentioned in the deed, but was in fact an agreement on the part of the grantee to pay the debts of his father, and to furnish a support to him and his wife during their lives, for which purpose the parol evidence in question may have been competent. We must, therefore, consider the question under that aspect, and in connection with the further fact, testified to by the plaintiff, that this agreement was not complied with by P. C. Lavender. Granting this to be so, the question still remains as to what is the effect of such testimony. The respondent contends that the effect was to convert the deed from an absolute into a conditional deed, and that, upon the failure of the grantee to perform the conditions, his estate became forfeited, and hence the renunciation of dower indorsed upon the deed at once became nugatory. We are not prepared to assent to such a view. If the real consideration of the deed was the agreement of the grantee to pay his father's debts, and provide a support for his father and mother during their lives, how does such an agreement differ in principle from an agreement to pay the specified sum of money as a consideration of the deed? If a person buys land on a credit, and enters into an agreement, whether by note, bond, or otherwise, to pay a stipulated sum as the purchase money thereof, at a specified time, and fails to perform such an agreement, it never was supposed that he thereby forfeited his title to the land, or even that the land, in the absence of any mortgage, became impressed with any lien; for it is settled by at least three cases in this state that the doctrine of the vendor's lien for the purchase money which prevails in England never was recognized in this state. Wragg v. Comptroller General, 2 Desaus. 509; McCorkle v. Montgomery, 11 Rich. Eq. 114; Morse v. Adams, 2 S. C. 56. Upon the same principle, we do not see how the failure to perform any other agreement entered into as a consideration for a conveyance should operate as a forfeiture of the estate conveyed, in the absence of any provision of the deed to that effect.

But even assuming, for the purposes of this discussion only, that this was a conditional deed, as it is called, the next inquiry is whether the estate conveyed was upon a condition precedent, or upon a condition subsequent. The very terms of the condition show that it was the latter, and not the former, as the obligations which it claimed the grantee assumed necessarily implied that he must first be invested with an estate in the land, as he could not otherwise comply with such conditions.

If, then, the estate was conveyed to P. C. Lavender upon a condition subsequent, then the mere failure to perform such condition did not ipso facto devest his estate, which could only be affected by the grantor taking the necessary steps to revest the estate in him; and it is not pretended this was ever done. See Hammond v. Railroad Co.,

15 S. C., at pages 33, 34, recognized and followed in the subsequent case of Kibler v. Luther, 18 S. C. 606. It seems to us, therefore, that, under any view that may be taken of the first general question stated above, the circuit judge was in error in holding that the plaintiff was not barred of her dower by her renunciation indorsed upon the deed from George Lavender to P. C. Lavender, which was duly spread upon the records.

While this would be conclusive of this appeal, yet, as the second general question has been raised and argued, we will proceed to consider it also, which involves the inquiry as to the effect of the receipt by the plaintiff of her distributive share of her deceased husband's estate. In section 1902 of the Revised Statutes of 1893, it is expressly declared that "when a husband dies intestate, and his widow accepts her distributive share in his estate, she shall be barred of her dower in the lands of which [he] died seised, and all of such as he had aliened." Now, as the undisputed facts are that the husband of plaintiff died intestate, and that she on the 28th September, 1898, received her distributive share of his estate, the case is brought directly under the provisions of the statute, and she is barred of her dower in the lands.

It is contended, however, and the circuit judge seems to hold, that the election which the plaintiff made to take her distributive share of her husband's was not made upon full information, and therefore she has the right now to retract such election, and assert her claim for dower; citing the case of Hill v. Gray, 45 S. C. 91, 22 S. E. 802. That case, however, differs widely from the present case. There it appeared that there never had been any administration upon the estate of the wife's deceased husband, and hence, as was said in that case, it was "difficult to understand how the widow's distributive share of the estate could have been ascertained, without which she could not properly be said to have made any election; for it is well settled that the widow is entitled to have full information of her interest before she can be held to any election." Indeed, in that case there was no evidence that the widow had ever received a single dollar out of her deceased husband's estate; certainly not that she had ever received a part of her distributive share of her deceased husband's estate. Here, however, the undisputed facts are that there was administration upon the estate of plaintiff's deceased husband; that such estate had been finally settled in the office of the judge of probate, and the rights and interests of the several distributees were finally ascertained and determined by the decree of that officer; and that she then and there received and receipted for the amount thus ascertained of her distributive share of the estate. And neither the plaintiff, nor any one of the distributees, so far as appears, has ever even intimated any dissatisfaction with that settlement, until the institution of these proceedings for dower were commenced, about two months afterwards. While, therefore, it is quite true that a widow is entitled to full information as to the condition of her deceased husband's estate before she shall be put to her election whether she will claim her dower or her distributive share, yet when she has made her election, and has actually received the amount of her distributive share, as ascertained by the decree of the judge of probate, and she now comes and asks the court to allow her to retract the election which she has made, the burden of proof is certainly upon her to satisfy this court that she was deceived, or, at least, misled, by incorrect or insufficient information as to the condition of the estate, into making such election. Now, the testimony on the part of the plaintiff not only fails to meet this burden, but rather tends to show the contrary. The only testimony which we find in the "case" as to this matter is that of the plaintiff herself and the records of the court of probate. She does say that she signed the receipt for her distributive share in consequence of certain information which she received, but what that information was, or from whom it was received, she was not asked, and she does not say. Indeed, there is not the slightest intimation in her testimony that she was in any way misled or deceived by any one as to the condition of the estate; and as the transaction took place in the office of the judge of probate, where all the papers of the estate were, it is difficult, if not impossible, to conceive how she could have been misled, even if any one were disposed to do so, without imputing to the judge of probate the grossest fraud and dereliction of duty, of which there is not a semblance of testimony. It is true that the plaintiff does say that she did not so intend, by signing the receipt; but, as was held in Buist v. Dawes, 3 Rich. Eq. 281, the rights to dower and "thirds," using that word in the sense of the wife's distributive share, are both legal rights, and the acceptance of the one (whether intended as a waiver of the other or not), is a bar, at law and in equity, to the claim of the other. Of course, this proposition is subject to the qualification that where it appears to the satisfaction of the court that where the widow has been induced to accept either of these alternative rights by fraudulent or incorrect representations the bar will not arise. But that case also shows that where the widow has actually accepted a sum of money in lieu of her dower, or has accepted the amount of her distributive share of her deceased husband, and comes before the court asking to be allowed to retract the election which she has made upon the ground that she was induced to make

such election by false or incorrect information, she must, before she can be heard, return or tender back the money which she had received; for equity will not allow her, while still holding the fruits of the one alternative, to claim the other inconsistent alternative, and there is no pretense that the plaintiff has done this in these cases.

In view of the testimony in relation to this matter, all of which is set out above, it is very difficult, if not impossible, to conceive what warrant there is in the testimony for the conclusion reached by the circuit judge that the plaintiff endeavored to find out whether she would bar herself of her claim of dower, and from the information which she received she accepted her distributive share, not intending thereby to waive her claim of dower. In the first place, there is no evidence whatever as to the nature of the information which she received; for she was not asked, and she did not say, what it was, or from whom it was received. The conclusion of the circuit judge that the plaintiff tried to find out whether, by accepting her distributive share, she would bar her claim of dower, is absolutely without any evidence to support it. Besides, the plaintiff, like every one else, is presumed to know the law, and she must be presumed to know what is plainly written in the statute. So, also, the following language found in the circuit decree is without a shadow of testimony to sustain it, and must be based purely upon conjecture: "I do not know who it was advised the petitioner, and cannot say how she was advised, but certain it is that her son D. R. Lavender was the administrator of the estate of her husband, and he is one of the defendants in this action, and it would have been of interest at least to him to have advised his mother in a manner contrary to her interest, and thus influence her to accept a distributive share of the estate, and thus try to prevent her from recovering dower in the property of which he is an owner." This intimation that a son has practiced a fraud upon his mother is not only without testimony to support it, but is based solely upon the assumption that a son would be willing to practice fraud upon his mother simply because it was to his interest to do so. Even if human nature be as bad as some seem to suppose it to be, this court is not willing to make any such assumption, as the well-settled doctrine is that fraud cannot be presumed, but must be proved by such testimony as is competent in a court of justice.

The judgment of this court is that the judgment of the circuit court be reversed, and that the judgment of the court of probate of Cherokee county be affirmed: to which last-named court these cases are remanded for the purpose of having final decrees in each of these three cases entered dismissing the petitions in each of said cases.

STATE v. FOOTE.

(Supreme Court of South Carolina. July 16, 1900.)

HOMICIDE—EVIDENCE—INSTRUCTION—NEW TRIAL—APPEAL AND ERROR.

1. In a prosecution for murder, a physician who attended deceased from the time he was shot until he died, several days thereafter, may base his opinion as to the cause of death on his personal observation and examination; a hypothetical statement of facts not being essential.

2. The court charged that "if a party is shot, and while getting well pneumonia sets in, and caused his death, the gunshot wound would be the primary cause probably of his death, and he would be liable," and that if the death of the deceased was produced by a cause independent of the gunshot wound defendant could not be convicted. *Held*, that the instruction was correct.

3. Where the court charged that the jury should ascertain whether defendant caused the deceased's death or whether he died from disease, and, if caused by defendant, whether it was in self-defense, or under such circumstances as justified defendant in the belief that it was necessary to save his own life, or save himself from serious bodily harm, and there was testimony that the deceased died from a disease brought on by the wound inflicted by defendant, the charge was not erroneous.

4. Where a motion for a new trial because the verdict is not sustained by the evidence has been overruled, the supreme court will not disturb the ruling if the verdict was supported by some evidence.

5. That the court, in a prosecution for murder, stated, in its refusal of a new trial on the insufficiency of the evidence, that if the doctor who testified as an expert had stated that the death was not caused by the wound the jury had the right to discredit the testimony, and find that the wound caused the death, does not constitute error, since the court is not bound to set aside a verdict if the jury has disregarded the opinion of an expert witness.

Appeal from general sessions circuit court of Abbeville county; Ernest Gary, Judge.

Prosecution against Thomas Foote for murder. Conviction, and defendant appeals. Affirmed.

Graydon & Graydon and Frank B. Gary, for appellant. Solicitor Ansel, for the State.

JONES, J. The appellant, under an indictment for the murder of James Walker, was convicted of manslaughter, and now seeks to reverse the judgment imposed, upon exceptions to the admission of certain testimony, to the charge of the jury, and to the refusal of the motion for a new trial.

The first three exceptions relate to the admission of the testimony of Dr. B. M. Carlton, who gave his opinion as a medical expert as to the cause of the deceased's death. It appears that in an altercation between the parties on Sunday, May 29, 1898, the defendant shot Walker, wounding him in the fleshy part of the thigh, and that Walker died on the Friday following. There was an issue whether the wound inflicted caused the death. The witness testified that he was a practicing physician; that he attended Walker on the day he was shot, and ex-

tracted the ball; that he saw the patient the next day, and again on Friday, June 3, 1898, when he was in a dying condition. Then the following questions and answers were made, upon which the exceptions were taken: "What caused his death? He died from peritonitis. Peritonitis caused his death? Yes, sir; I presume he died from peritonitis caused from this wound. (Mr. Graydon objects.) What is your medical opinion as to what caused that peritonitis? Well— (Mr. Graydon objects.) By the Court: Peritonitis cannot be caused by drinking water, can it? Witness: No, sir; and in this case I don't know as a fact what caused it, but I presume that it was that wound." The specific objection made in the exceptions to this testimony is that the witness failed to state any fact upon which he based his opinion, but in the argument before this court the position is taken that the witness should have stated facts, or, if he desired to express an opinion, it should have been upon a hypothetical state of facts. We think the testimony was competent. In 12 Am. & Eng. Enc. Law, 444, the general rule is correctly stated thus: "Physicians may give their opinions of the cause of death, such opinions being based upon knowledge derived as attending physician, or from examination, or from hypothetical statements." It is very common practice to allow a medical expert to state his opinion as to the cause of death, based upon his own personal observation. While it is quite proper that the jury, as far as practicable, should be informed as to the facts or circumstances upon which the opinion is based, it is not error to permit such expert opinion when it appears to be based upon the witness' personal observation. If the objecting party desires, he may, on cross-examination, develop all the circumstances inducing the opinion which are capable of reproduction to the jury, and thus test the value of the opinion. A hypothetical statement of facts as the basis for the opinion of a medical expert as to the cause of death is not necessary when the opinion is based upon the personal observation or examination of the witness.

The fourth exception assigns error in charging the jury as follows: "It matters not whether the death is attributable to the gunshot, but if it hastened his death, but for a minute, he would be responsible for the death." The specific error complained of is not pointed out in this exception, and it was not argued. It was not disputed that the wound was given by the defendant, and there is no doubt that one is responsible if by his unlawful agency he hastens the death of another.

The fifth exception imputes error as follows: "In charging the jury as follows: 'If a party is shot, and while getting well pneumonia sets in, and caused his death, the gunshot wound would be the primary cause probably of his death, and he would be liable,'—the said charge being erroneous and misleading, and having a tendency to prejudice the jury against the defendant, and to injure his case, for the following reasons: (1) Because it is contrary to the rule of law that the state must prove in such a case beyond a reasonable doubt that the sickness which caused the death was brought about by the wound; (2) because the reasonable presumption in the case stated by his honor would be directly contrary to what he stated to the jury it would be, namely, that the wound in such a case did not produce the pneumonia which was the immediate cause of the death; (3) because his honor in making said statement too clearly intimated to the jury his opinion that the wound inflicted in this case caused the peritonitis from which the deceased died." That portion of the charge containing the sentence complained of is as follows: "Now, if your inquiry leads you to the belief that the death of the deceased was produced by some other cause than by the gunshot wound, he could not be convicted. But I charge you that, if he died from some disease brought on by that gunshot wound, he should be held liable for it. It matters not whether death is attributable to the gunshot, but if it hastened his death, but for a minute, he would be responsible for the death. If a party is shot, and while getting well pneumonia sets in and caused his death, the gunshot wound would be the primary cause probably of his death, and he would be held liable. If a man receives a wound by which death is produced, the party inflicting it is liable for the consequences, although the deceased might have recovered by the exercise of more care and prudence, or with better treatment." While the sentence excepted to, when isolated from its connection, is objectionable, yet, when taken in connection with the whole charge, we cannot think there was prejudicial error. The jury was clearly instructed that, if the death of the deceased was produced by a cause independent of the gunshot wound, the defend ant could not be convicted, but that he was liable if the death was from a disease brought on by the wound. The exception is overruled.

The sixth exception imputes error as follows: "Sixth. In charging the jury as follows: 'Now, you will say what caused the man's death. Not so much that, but did the defendant here cause it, or did he die from blood poison or pyæmia or pneumonia? If so, then under what circumstances was the wound inflicted? Was it in self-defense, or was it under such circumstances as made the defendant believe that it was necessary for him to resort to his gun in order to save his own life or to save him from serious bodily harm?'—the said charge being misleading and prejudicial to the defendant in the following particulars: (1) In having no relevancy to the facts of the case, there being no testimony that the deceased died

from blood poison or pyæmia or pneumonia; (2) because it withdrew from the consideration of the jury every defense set up by the defendant except that of self-defense; (3) because it, in effect, told the jury that, if they believed that the deceased died from any of the diseases mentioned by his honor, the defendant caused his death; (4) because the said charge is in violation of the constitution of this state, in that his honor thereby intimated his opinion that the defendant was guilty, and charged on the facts." This charge was relevant to the facts. There was testimony in behalf of the state tending to show that the deceased died from a disease brought on by the wound inflicted by the defendant. The court was careful to impress upon the jury the duty of ascertaining whether the defendant had any agency in the death of the deceased,—in other words, whether death resulted from the wound inflicted by defendant, or from some independent cause; and this issue was not withdrawn from, but was fairly submitted to, the jury. Nor do we see any ground for the complaint that the circuit judge charged upon the facts.

The remaining exceptions relate to the refusal of the motion for a new trial. When there is absolutely no testimony tending to sustain the verdict, it is the duty of the court to grant a new trial, and it is error of law in such a case to refuse; but, when there is some testimony to sustain the verdict, the refusal of a new trial by the circuit court on the testimony is final. In this case we do not find such absolute want of testimony as to make it error of law to refuse a new trial. It is contended, however, that the circuit judge committed error of law in basing his refusal upon an improper and untenable ground, inasmuch as he stated as his reason therefor "that, if the doctor had stated that the death was not caused by the wound, the jury had the right to disregard the testimony, and find that the wound caused the death of the deceased." This does not constitute error of law. A circuit judge is not bound to set aside a verdict, even if the jury in reaching its conclusion may disregard the opinion of an expert. Jones v. Fitzpatrick, 47 S. C. 58, 24 S. E. 1030. The judgment of the circuit court is affirmed.

GUNTER v. ADDY et al.

(Supreme Court of South Carolina. July 11, 1900.)

MORTGAGES—ALTERATION—CONSENT OF MORTGAGOR — ABSENCE OF FRAUD — INSERTING NUMBER OF ACRES—MATERIALITY—SUBROGATION.

1. Where, three years after a mortgage was executed and recorded, it was altered, at the request of the mortgagor, by inserting the rate and payment of interest, to make it conform to the note, in the absence of fraud such alteration did not render the mortgage void.

2. Where, three years after a mortgage was executed and recorded, it was altered, at the request of the mortgagor, by inserting, after the description of the premises, "containing 165 acres, more or less," which expressed the exact number of acres in the tract, it did not render the mortgage void, since the alteration was immaterial.

3. Where a mortgage executed by defendant to plaintiff was recorded in 1883, and a junior mortgage to D. was recorded in 1884, and at the time of the execution of both a prior mortgage in favor of M. was on record and unsatisfied, the fact that a part of the proceeds of D.'s loan was used to discharge M.'s mortgage does not entitle him to be subrogated to the rights of M., since he was not a surety for defendant, and there was no equitable assignment to him of M.'s rights.

Appeal from common pleas circuit court of Lexington county; James Aldrich, Judge.

Action by U. X. Gunter against D. U. Addy and others. From a judgment in favor of plaintiff, defendant the Dundee Mortgage & Trust Investment Company appeals. Affirmed.

G. T. Graham, for appellant. Meetze & Muller, for respondent.

GARY, A. J. So much of the circuit judge's decree as is necessary to understand the questions presented by the exceptions is as follows:

"This action, instituted in 1897, and heard at the fall term, 1899, came before this court on the pleadings, the testimony taken by a special referee, and the argument of counsel. The Dundee Mortgage & Trust Investment Company, Limited, answered the complaint, and has contested the claim of the plaintiff. The other defendants have not answered. At least, no such answers were submitted to the court. The defendant D. U. Addy on January 31, 1883, made and delivered his note, whereby he promised to pay to plaintiff the sum of $919.18, with interest from date at ten per cent. per annum; interest to be paid annually, and, if not so paid, to become principal, and bear interest at ten per cent. The consideration of this note is a prior note, a small open account, and $5 or $10 paid in cash. To secure said debt, defendant D. U. Addy on the same day executed and delivered to plaintiff a mortgage upon 'a certain tract or parcel of land, known as "Gable Lands," on waters of Cut-Log Branch, county and state aforesaid, bounded on the north side by lands of Bell Crout, on the east by lands of Mrs. Betty Smith, on the south by lands of Wesley Risenger, on the west by lands of Alanzo Rose'; and the same was duly recorded on February 15, 1883. D. U. Addy on March 24, 1884, to secure a loan of $2,200 then paid to him in cash by the Dundee Mortgage & Trust Investment Company, Limited, executed and delivered to said defendant company a mortgage of real estate, covering, with other lands, the premises mortgaged to plaintiff as above stated. This mortgage was duly recorded on March 28, 1884. The condition of the note or bond given as aforesaid by the said D. U. Addy

to plaintiff, as stated in the said mortgage, when executed, delivered, and recorded, was 'for the payment of the full and just sum of nine hundred and nineteen (919) dollars and 18 cents.' Afterwards, to wit, on February 16, 1886, the following words were inserted, written upon the face of said mortgage, immediately after the words just cited, to wit, 'with interest from date at ten per cent. per annum; interest to be paid annually, and, if not so paid, to become principal, and bear interest at ten per cent.' At the same time the following words were inserted, written in said mortgage just after the description of the mortgaged premises, to wit, 'containing one hundred and sixty-five (165) acres, more or less.' It is apparent from an inspection of said mortgage that the words above stated are not in the same handwriting nor in the same ink as in the body of the mortgage. I may be mistaken as to the handwriting. The same person may have written both the original instrument and the words inserted.

"As the plaintiff submitted his said mortgage in evidence, and it appears to have been altered, it was incumbent upon plaintiff to explain this appearance. 1 Greenl. Ev. § 569; Vaughan v. Fowler, 14 S. C. 358. Plaintiff has fully and satisfactorily explained the said alterations. The said words were inserted in said mortgage on February 16, 1886, at the time when Mrs. Addy, the wife of defendant Addy, signed her renunciation of dower on said mortgage, and were put there with the consent (indeed, at the instance) of D. U. Addy himself. The rule is well settled that 'any alteration of a note in a material part, after its execution, without the assent of the maker, renders it void.' Kennedy v. Moore, 17 S. C. 466; Stagg v. Cepoon, 1 Nott & McC. 162; Miller v. Starr, 2 Bailey, 359; Vaughan v. Fowler, 14 S. C. 355. There was no fraud or suggestion of fraud on the part of any one in making the said alterations. It is reasonable to conclude that D. U. Addy only desired to make the mortgage conform to the wording of the note, which was and is correct, and to make the description of the mortgaged premises more certain. I do not think that the defendant the Dundee Mortgage & Trust Investment Company, Limited, can complain of this ruling. When it lent money to D. U. Addy, it had full constructive notice of plaintiff's mortgage as recorded. With this knowledge, it lent money to D. U. Addy, and took a junior mortgage upon the premises. The insertions or alterations in plaintiff's mortgage, made as above stated, were made nearly two years after the Dundee Company had lent money to Addy, taken his bond and mortgage therefor, and had recorded the latter. The plaintiff, however, must stand upon his mortgage as he accepted and recorded it, and can ask for foreclosure and sale and for the payment of the money as therein stated. Plaintiff is entitled to a judgment, as against D. U. Addy, upon his note, for the amount therein stated; but he is entitled to be paid upon said indebtedness, from the sale of the mortgaged premises, only so much as the said mortgage, without the insertions, purports to secure. The Dundee Company, in the answer, pleads that it is a bona fide purchaser for valuable consideration, without notice of plaintiff's mortgage, and is entitled to have the mortgage adjudged to be the first lien on the mortgaged premises. What has been said, and will hereafter be said, must, I think, dispose of this claim, and adversely to the said Dundee Company.

"On January 15, 1881, D. U. Addy and his wife, E. C. I. Addy, to pay a debt for $500 owing by them to Westly Nichols, executed and delivered to said Nichols a mortgage of the lands heretofore described as being covered by the mortgage of the plaintiff and of the Dundee Company. This mortgage was duly recorded on January 15, 1881. This mortgage was upon record, unsatisfied, when both the plaintiff and Dundee Company took their mortgages, and both had constructive notice thereof. On April 2, 1884, the Dundee Mortgage & Trust Investment Company, Limited, paid to said Westly Nichols $350, the balance then due upon said mortgage; and thereupon the said Westly Nichols marked said mortgage 'Satisfied,' and said satisfaction was duly entered of record across the face of the record of the mortgage. The Dundee Company asks that, if plaintiff's mortgage is held to be a first lien upon the mortgaged premises, it be subrogated to all the rights that the said Westly Nichols had under his said mortgage, which was first lien on said tract of land at the time of the execution of plaintiff's mortgage. Upon this subject the special referee reports: 'With reference to the Westly Nichols mortgage, which bears date the 15th January, 1881, recorded in Book D, p. 334, it is admitted that the defendant the mortgage company placed in the hands of G. T. Graham, Esq., a considerable sum of money, to wit, $2,200, to be paid to Addy when the amount due on the Nichols mortgage and the J. H. Lewie mortgage were satisfied, and that Graham paid Nichols the balance due on his mortgage, to wit, $350, out of the money paid into his hands by the mortgage company, and that after paying the Nichols mortgage, and a mortgage or two of J. H. Lewie, and attorney's fees, together with other costs of loan, the balance was turned over to Addy by Graham.' The assertion of the right of subrogation by the Dundee Company is denied. I can see no possible ground for it to rest upon. The Dundee Company was no surety for Addy. It had no interest in the debt or lands. It was a stranger to Addy and to Nichols. The Dundee Company, as the lender of the money, lent no money to Addy under the terms of the loan, and for its own protection the Dundee Company used a part of the money to pay the Nichols mortgage.

The contract or agreement was carried out, and the Nichols mortgage was paid, and formally and legally satisfied and discharged. The idea of an assignment, either as the act of the parties, or an equitable assignment by way of subrogation, did not enter into the transaction at all. There is nothing to base defendant's claim of subrogation upon, and it is dismissed."

The conclusion which this court has reached upon certain questions raised by the exceptions renders speculative the other questions therein presented. There are practically but three questions to be considered, the first of which is whether the insertion in the plaintiff's mortgage of the words, "with interest from date at ten per cent. per annum; interest to be paid annually, and, if not so paid, to become principal, and bear interest at ten per cent.," rendered it null and void. The circumstances under which the alterations were made are set forth in the circuit judge's decree, and clearly show that they were not made with a fraudulent intent. They were made three years after the execution and recording of plaintiff's mortgage, and two years after the execution and recording of the appellant's mortgage. The plaintiff was only allowed to foreclose his mortgage for the amount due him as disclosed by the record. The defendant has in no way been prejudiced, and we do not see what right it has to complain.

The second question is whether there was error in deciding that the insertion of the words, "containing one hundred and sixty-five acres, more or less," rendered the mortgage null and void. These words were not material, for the following reasons: (1) Because they expressed correctly the number of acres contained in the tract, and were not in conflict with the other description of said land; and (2) they could not, in any event, prevail against the words describing the land by boundaries, even if they had been in conflict.

The third question is whether the circuit judge erred in deciding that the appellant was not entitled to be subrogated to the rights of Westly Nichols. For the reasons stated by the circuit judge, this court concurs with him that the appellant did not have such right. Judgment affirmed.

STATE v. TENNY et al.

(Supreme Court of South Carolina. July 16, 1900.)

TRESPASS—PLEADING—EMINENT DOMAIN—STATUTES—REPEAL.

1. Where defendants were convicted under an affidavit and warrant charging trespass after notice, by going on land of another, an exception to the judgment, that there is no such offence as that charged, is not well taken, since the words used sufficiently allege the offense of entry on land of another after notice from the owner or tenant prohibiting the same.

2. Spartanburg City Charter (17 St. at Large, p. 439) gave the city power to open streets, provided they should first pay damages for land taken, and directed the appointment of five freeholders to fix damages; Act Dec. 24, 1884 (18 Stat. 781), provided the mode by which lands should be taken for streets, roads, and highways by cities, required a board of 12 freeholders to assess damages, and repealed all acts inconsistent therewith; and Act March 2, 1899 (23 St. at Large, p. 205), authorized the city of Spartanburg to condemn land for a sewer system, the land to be condemned and damages assessed in the manner provided by law for opening streets. *Held*, that the charter provision for the assessment of damages was repealed by the act of 1884 (18 St. at Large, p. 781), and that proceedings subsequently taken under it were void.

3. Where defendants in a prosecution for trespass sought to introduce evidence of condemnation proceedings of the land in question under a repealed statute, the evidence was properly excluded.

Appeal from general sessions circuit court of Spartanburg county; O. W. Buchanan, Judge.

G. O. Tenny and Earl Sanders were convicted of trespass. From a judgment of the circuit court affirming conviction before a justice, they appeal. Affirmed.

Simpson & Bomar, for appellants. Solicitor Lease, for respondent.

JONES, J. This appeal is from the judgment of the circuit court affirming the judgment of a magistrate's court, wherein the defendants were tried and sentenced under an affidavit and warrant which, after amendment, charged that defendants on March 8, 9, 10, 25, and again on April 15 and 17, 1899, "committed a trespass after notice, by going on the land of deponent [S. S. Daniel] and cutting a ditch," etc.

The first and second exceptions relating to the amendment of the affidavit, were taken under a misapprehension, and were not insisted on.

The fourth exception complains of the judgment on the ground that there is no such offense in this state as that charged. This exception is disposed of by the case of State v. Hallbach, 40 S. C. 298, 18 S. E. 919, wherein an affidavit and warrant charging that defendant committed a trespass on land after notice sufficiently alleged the offense of "entry on the inclosed or uninclosed land of another after notice from the owner or tenant prohibiting the same."

The third and fifth exceptions complain of error in excluding from the evidence a paper purporting to be a report of a board of assessors to the city council of Spartanburg, claiming to have been selected to assess the damage done to the property of Dr. S. S. Daniel, in which report the assessors found no damages to the property. The report was dated March 22, 1899, and was made pursuant to a notice by the said city council to S. S. Daniel, dated March 16, 1899, notifying him that the city council finds it necessary, in constructing a system of sewerage, to make excavations, to lay pipes, etc., across the said Daniels' lot, and requesting him to nominate two freeholders within 10 days,

who, together with two freeholders named by the city council, would select a fifth freeholder, to assess the damage that may be done to the premises. The report was signed by the five freeholders selected in accordance with said notice. This report was sought to be introduced in justification of the entry by defendants on the prosecutor's land after notice forbidding the same. The magistrate rejected the evidence, holding the proceeding void on the ground that such board of assessors was not legally constituted, and this ruling was affirmed by the circuit court. The proceedings were taken under the act of December 24, 1880 (17 St. at Large, p. 439), incorporating the city of Spartanburg, which gave the city council power to lay out and open new streets in said city, and to close up, widen, or otherwise alter streets, provided they shall first pay damages to the landowners; said damages to be fixed and determined by five freeholders of said town, two of whom shall be chosen by the said city council, two by the said landowner, and the fifth by the persons so chosen. The act of December 24, 1884 (18 St. at Large, p. 781), entitled "An act to provide a mode of procedure by which lands may be taken by cities and towns for streets, roads and highways for public use," required six freeholders to be appointed by the city authorities, and six others by the landowner to determine the damage, etc. The act of March 2, 1899 (23 St. at Large, p. 205), authorized the city council of Spartanburg to condemn private property for the establishment, etc., of a system of sewerage; "the same to be condemned and the compensation and damages therefor assessed as is now provided for by law for the opening or widening of streets." The act of 1884, supra, being a general act on the subject, and repealing expressly all acts repugnant thereto, operated to repeal so much of the act of 1880, supra, as related to the mode of assessing damages, etc. It follows that the proceedings under the act of 1880 were void, and could constitute no justification or defense even for entry on the prosecutor's land after such proceedings,—much less, for an entry previous to such proceedings. The evidence in this case was to the effect that the ditch was dug on the prosecutor's premises previous to the said proceedings to assess damages. The judgment of the circuit court is affirmed.

GOING v. MUTUAL BEN. LIFE INS. CO.

(Supreme Court of South Carolina. July 11, 1900.)

LIFE POLICY—DEATH BEFORE DELIVERY—CONDITION REQUIRING GOOD HEALTH—RIGHT TO INSPECT POLICY—TRIAL—NONSUIT—EVIDENCE—HEARSAY—PRIVATE RULES OF COMPANY—HARMLESS ERROR.

1. Plaintiff's evidence in an action against a life insurance company showed that a policy issued on her husband's life was sent to the local agent for delivery; that thereafter her husband became seriously ill, and three days before his death tender of the first premium was made to the agent, which he refused to accept,—stating, as one witness said, that the company would not allow him to deliver policies to sick men." The policy itself provided that it should not take effect "until the first premium shall have been actually paid during the lifetime of the insured." No condition in the policy required payment during good health. *Held*, that a motion to nonsuit should have been denied, since the condition requiring payment of the first premium during the lifetime of the insured was complied with by its tender, and the question whether there was any other condition would depend on the view taken of the testimony by the jury.

2. An insurance company wrote plaintiff's attorneys, regarding a contested policy, that the contract of insurance had never been completed, as the insured had never paid the premium. Undisputed evidence in the subsequent action against the company showed that tender had been made during the life of the insured. *Held*, the introduction of the attorneys' reply that such tender had been made, and that in their opinion there was a valid claim, was not objectionable, as the mere opinion of the attorneys, nor as a self-serving declaration, and should be admitted in evidence as part of the correspondence.

3. On an issue whether insured was notified that his policy was ready for delivery, a third party's testimony as to what message was given G. for the insured, and as to what G. told him the next morning with reference to the message, was hearsay evidence and inadmissible.

4. In an action on a policy, an agent's manual, forbidding agents to deliver policies unless the applicant was in good health at the time of delivery, was inadmissible, without proof that the applicant knew the rule.

5. Where an agent's manual, showing rules of the company, was excluded from evidence in an action on a life policy because it was not shown that the insured knew the rules, subsequent testimony to that effect did not invalidate the ruling, as its correctness was dependent on the state of the testimony at the time.

6. Where the agent testified, in an action on a life policy, that the company's rules forbade his delivery of policies to applicants not in good health at the time of delivery, a prior ruling excluding an agent's manual showing the same rule, if error, was harmless.

7. Where an applicant for life insurance became fatally ill after issuance, but before delivery, of his policy, the fact that he reserved the right to inspect it before paying the first premium would not defeat recovery thereon, providing he waived the right and tendered payment, since the reservation was intended solely for his benefit.

Appeal from common pleas circuit court of Union county; R. C. Watts, Judge.

Action by Emma Going against the Mutual Benefit Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Ansel, Cothran & Cothran, for appellant. R. W. Shand and James Munro, for respondent.

McIVER, C. J. This action was brought upon a policy of insurance on the life of the deceased husband of the plaintiff, alleged to have been issued by the defendant company, and payable to her if she survived her husband, as she did. The defense set up by the company was that the policy sued upon had never been delivered, and there

was never any completed contract of insurance. While some of the facts are contested, the following seem to be undisputed: On the 4th of May, 1898, J. D. Going, the husband of the plaintiff, made an application for insurance in writing, which is set out in the "case"; and this, together with the certificate of the medical examiner, was forwarded to the home office of the company, in Newark, in the state of New Jersey, where it was received and marked "Approved" the 9th of May, 1898, and the policy was prepared, bearing date the 10th of May, 1898, signed by the proper officers of the company, and sent to the local agent of the company at Union, S. C., through the office of the state agent at Raleigh, N. C. Precisely when the policy reached the office of the local agent at Union does not appear, though there is but little doubt that it was about the 15th of May, 1898, when Mr. L. S. Townsend, the local agent, was absent from home, and did not return until about the 15th or 20th of June, 1898. Nor did it distinctly appear at what time the assured, J. D. Going, learned that the policy had been returned to Union; but it must have been on or before the 29th of June, 1898, for on that day the judge of probate, accompanied by B. B. Going, brother of the assured, at his request called on Mr. Townsend, the local agent, and tendered him the amount of the first premium, which the local agent refused to accept, for the reason, as he said, that "the company would not allow him to deliver policies to sick men." On the 28th of May, 1898, the assured was taken sick with what proved to be typhoid fever, and on the 29th of June, when the tender was made, was very sick, and he subsequently died, on the 2d of July, 1898. Soon after this Messrs. Munro & Munro, attorneys at law, having been employed to collect the insurance, called on the local agent, Mr. Townsend, for blanks to make out the claim, and were referred by him to Mr. Pearson, the vice president of the company; and they thereupon wrote him a letter, under date of 28th of July, 1898, demanding payment of the policy of insurance issued by the company, which "your agent afterwards refused to deliver," and also for blanks for proofs of death, if required. To this letter the vice president of the company replied by letter under date of 1st August, 1898, saying that: "The contract of insurance to which you refer was not completed by Mr. James D. Going, as he did not pay the premium. There is, therefore, no claim against this company because of said contract." These two letters were received in evidence without objection, but, when the plaintiff offered to introduce a letter of Messrs. Munro & Munro in reply to the letter of the vice president of the company, objection was made, which objection was overruled, and the letter was read in evidence, in which Messrs. Munro & Munro, after acknowledging the receipt of the letter of the vice president, use this language: "Mr. Going, as you say, did not pay the premium; but the full amount of the premium was tendered to your agent, and demand made for the policy, in the lifetime of Mr. Going. It seems to us that there is a claim against your company because of the contract, and we trust you will reconsider the matter and pay the policy." To this letter no reply was received, and on the 14th of December, 1898, this action was commenced. At the close of the testimony for the plaintiff, the defendant moved for a nonsuit upon the ground that the plaintiff had failed to prove a completed contract, inasmuch as it was claimed that delivery of the policy was essential to complete the contract, and there was no evidence of either actual or constructive delivery of the policy. The motion was refused, and exception taken by defendant's counsel. The defendant then offered its testimony, in the course of which certain exceptions were taken as to the rulings of the circuit judge upon the admissibility of some of the testimony offered by defendant. The case went to the jury under the charge of the judge, to which certain exceptions were taken; and, a verdict having been rendered in favor of the plaintiff, a motion for a new trial on the minutes was made, which being refused, judgment was entered upon the verdict. From this judgment defendant appeals upon the several exceptions set out in the record. These exceptions impute error to the circuit judge (1) in refusing the motion for a nonsuit; (2) in his rulings as to the admissibility of testimony; (3) in his charge; and (4) in refusing the motion for a new trial.

First as to the motion for a nonsuit, which was based upon the ground "that the plaintiff has failed to prove a completed contract." Now, on a motion for a nonsuit the question is not whether the plaintiff has failed to prove his case, but the only question is whether the plaintiff has failed to produce any testimony tending to prove his case. Assuming the view most favorable to the appellant,—that the real meaning of this ground is that there was no testimony tending to show a completed contract,—we will proceed to consider the question in that aspect. While it is conceded that there was testimony tending to show that the policy which evidenced the contract sued on was sent to the local agent by the defendant company for the purpose of being delivered to the assured, yet the contention is that, while that would amount to a constructive delivery to the assured, provided it was sent for unconditional delivery, yet, as there were two conditions (one that the first premium should be paid, and the other that the policy should not be delivered if the assured was at the time sick), and while the first might be regarded as having been complied with by the tender of the amount of the first premium, yet there was no testimony that the second (that the assured was in good health at the time) was complied with, and there was therefore no

testimony that the contract had ever been completed, and that, on the contrary, the testimony on the part of the plaintiff showed that, when the first premium was tendered and the policy was demanded, the assured was very sick, and died in a few days thereafter. It is very obvious that this position of appellant rests entirely upon the assumption that the testimony on the part of the plaintiff tended to show that the policy was sent by the company to its local agent not for unconditional delivery, but that it was sent for delivery upon the compliance by the assured with the two conditions above stated. Now, while it is true that the policy does contain these words, "This policy does not take effect until the first premium shall have been actually paid during the lifetime of the insured," which necessarily imply that the policy was not to be delivered until that condition was complied with, yet there is not a single word in the policy which implies or even intimates that there was any other condition upon which the policy was to take effect or to be delivered. On the contrary, it is expressly declared in the policy itself that the defendant company "has, by its president and secretary, signed and delivered this contract" on the 10th of May, 1898, which, it will be noted, was the day after the application for insurance had been received and marked "Approved;" and counsel for respondent has cited an authority (Bliss, Ins. § 153), which is based upon the case of Xenos v. Wickham, 2 L. R. H. L. 296, in which it was held that a policy purporting to be "signed, sealed, and delivered" by the proper officers of an insurance company must be conclusively taken, as against the company, to have been not only duly signed and sealed, but also duly delivered, and that such a policy is complete and binding against the party executing it, though in fact it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it, and that it is not necessary that the assured shall formally accept or take away a policy, in order to make the delivery complete. Now, in the case before the court the only act remaining to be done by the assured after it was executed, so far as the contract on its face shows, was for the assured to pay the first premium, which was, in effect, done during the lifetime of the assured, by the tender of the amount of such premium, which, it is conceded, and properly conceded, was equivalent to payment; and so that condition was complied with, and the contract was completed. It is contended, however, by the appellants, there was another condition to the delivery of the policy, which was not, and could not have been, complied with at the time the delivery of the policy was demanded, to wit, that the assured must then have been shown to be in good health, which was not only not shown, but, on the contrary, the testimony tended to show that the assured was at the time very sick of a disease from which he died in a few days thereafter. But it is very obvious that the policy, which constitutes the contract between the parties, contained no such condition, and the attempt is to raise such a condition by the testimony as to the instructions given to the local agent by the company. Whether it would be competent to annex to a written contract any other condition than that contained in the written contract is a question which we do not propose to consider at present, as no such question seems to have been made up to the time when the motion for a nonsuit was submitted. Assuming, then, for the purposes of this particular inquiry only, that such testimony was competent, it is apparent that the only testimony which had then been offered (for, of course, in considering a motion for a nonsuit our attention must be confined to the testimony of the plaintiff offered in chief) was the simple declaration of the local agent as to the reason why he refused the tender made of the first premium, which was that "the company would not allow him to deliver policies to sick men," as testified by Mr. Greer, one of the parties who made the tender, though the other witness, B. B. Going, who went with Greer to make the tender, did not remember that the local agent gave any such reason for refusing to accept the money when tendered, but that his reply was: "He said he had the policy,—the paper; it was all right, but he would not accept of the money." And when that witness was recalled he testified as follows: "Q. When you went there to Mr. Townsend to tender the money, what did he say? (Objected to by counsel for defendant because it was incompetent to prove by this witness declarations of the agent as to what the company had done. Objection overruled, and the witness testified as follows:) A. He said he would not take the money. He said he had the policy, and he said it had been accepted,—the company had accepted it,—but he would not take the money." The only other testimony to which we deem it necessary to refer in this connection is that of the correspondence between the Messrs. Munro, as attorneys for the plaintiff, and the vice president of the defendant company, to whom they had been referred by the local agent, in which the vice president, in his letter, denies the liability of the company solely upon the ground that the contract had not been completed by the assured, "as he did not pay the premium"; making no allusion whatever to any other condition or alleged condition in the contract. These two letters were received in evidence without objection, but, when the letter of Messrs. Munro & Munro in reply to that of the vice president was offered, objection was made upon the ground that "it is simply the opinion of a distinguished lawyer"; but the objection was overruled, and the letter received in evidence, very properly, as we shall see when we come to consider the second general question in the case. This being the state

of the testimony when the motion for a nonsuit was submitted, we think it clear that there was no error in refusing the motion; for there was no doubt that the first condition upon which the policy was to take effect, as stated in the policy (the payment of the first premium), was, in law, complied with by the tender, which was undisputed; and whether there was any other condition depended entirely upon the view which should be taken of the testimony, and that was a matter to be determined by the jury.

We proceed next to the consideration of the second general question, involving the inquiry whether there was error in any of the rulings as to the admissibility of testimony specified in the second, third, fourth, and fifth exceptions. In the second exception the error complained of is the admission of the letter of Messrs. Munro & Munro in reply to the vice president of the company, hereinabove referred to. It will be observed that the objection made at the time this letter was offered was based solely upon the ground that "it is simply the opinion of a distinguished lawyer"; but in the second exception it is claimed that this letter was incompetent for a wholly different reason, to wit, because "it is in the nature of self-serving declarations." Strictly speaking, therefore, this exception could not be considered; but, waiving this, we think the letter was clearly competent, in either view. In the first place, it was a part of a correspondence, a portion of which had been received without objection. In the next place, the manifest purpose of the letter was to correct a misapprehension under which the vice president seemed to be laboring; for, as we have said, the vice president, in his letter, which was received without objection, had based his denial of responsibility entirely upon the ground that the first premium had not been paid, which, while true as matter of fact, as the money had not actually been paid, yet was not true as matter of law, as the undisputed fact was that the money had been tendered during the lifetime of the assured, which, as it was properly conceded, was equivalent to payment. The manifest object of the letter in question was simply to correct this misapprehension on the part of the vice president, by calling his attention to the fact of the tender having been made,—a fact of which he possibly may have then been ignorant. The letter was not objectionable as the opinion of a distinguished lawyer; for such was not its purpose, and the only opinion expressed in it was that, in view of the fact of the tender, to which the attention of the vice president was called, the writer thought that he might take a different view from that expressed in his letter to which this was a reply. At all events the letter could in no aspect be regarded as anything more than the expression of Mr. Munro's opinion that tender would be equivalent to payment in a case like this,—an opinion in which this court, as well as every one connected with this case, seem to concur. Nor is the letter objectionable as "in the nature of self-serving declarations"; for the only fact stated in it was a fact about which there was no dispute,—that the amount of the first premium had been tendered during the lifetime of the assured. In no view that we have been able to take was the letter in question incompetent, and to have rejected it would have worked great injustice to the plaintiff, by allowing a garbled correspondence to go before the jury. It would have been like allowing a part, only, of a conversation between parties to be offered. The second exception must therefore be overruled.

The third and fourth exceptions, being of a similar character, may be considered together. It seems that when Mrs. L. S. Townsend, the wife of the local agent, was on the stand, after testifying that she was in the habit of opening her husband's business letters in his absence, and had received the policy in this case, she was asked what message she had sent assured when she received the policy, to which objection was made; and the court ruled that this would be incompetent unless it was made to appear that such message had been received by the assured. Then the witness J. A. Brown was asked whether he heard Mrs. Townsend give a message for J. D. Going to any one, to which he replied, "Yes;" that he heard her deliver a message to Oliver Going. But, when he was asked what that message was, the court made the same ruling as above. The witness was then asked what Oliver Going had told him the next morning in reference to the message, which was ruled out as hearsay. We see no error in any of these rulings. If the defendant desired to prove that a message had been sent to J. D. Going, the assured, the proper witness to prove that fact would be the person who delivered the message to J. D. Going; and, if it was desired to prove what was the reply of J. D. Going to such message, the proper witness to prove that fact would have been the person who received the reply. The claim that Oliver Going, the person selected to carry the alleged message to J. D. Going, was the mutual agent of the parties, is not sustained by any testimony competent for that purpose; for it is well settled that agency cannot be proved by the mere declarations of the alleged agent, for there is no evidence that any message was ever received by J. D. Going. If any such message was ever sent to J. D. Going by Oliver Going, the defendant had the ready means of proving it, by putting Oliver Going on the stand as a witness; but this was not done, and surely the defendant cannot be allowed to supply that testimony by offering a third person as a witness to prove the declarations of Oliver Going, as that would be purely hearsay testimony. This view is sustained by McGee v. French, 49 S. C. 454, 27 S. E. 487. The third and fourth exceptions must therefore be overruled.

The fifth exception, imputing error to the circuit judge in refusing to receive in evidence that printed rule of the defendant company, furnished to its agents, by which an agent is forbidden to deliver a policy unless the first premium has been paid, and unless the assured is in good health at the time, cannot be sustained, for two reasons: (1) Because we think the ruling was right; (2) because, even if erroneous, it was harmless error. At the time this book, called "The Agents' Manual," containing the rules for the guidance of agents, was offered in evidence, no testimony had been offered tending to show that the assured had ever been informed of these rules or assented thereto; and therefore the testimony was clearly incompetent, under the case of Riordan v. Doty, 50 S. C., at page 547, 27 S. E., at page 943. Besides, upon principle, we think that the private instructions given by a corporation to an agent, to govern his dealings with third persons on behalf of the corporation, should not be received, unless made known to the persons with whom they deal. Especially should this be the rule in a case like this, where a policy of insurance, which contains the terms of the contract, is sought to be avoided by some private instruction to the agent, not made known to the applicant when he takes out his policy. It is true that, after the ruling excepted to was made, the local agent did testify that he did tell the assured at the time he was examined by the doctor that, if he did not then make payment of the premium, he could not deliver the policy when it was returned approved by the company, if he was seriously sick at the time; but, of course, the correctness of the ruling must be tested by the testimony as it appeared at the time the ruling was made, and the question could not be affected by any testimony offered afterwards. But, even if there was error in ruling out the printed instructions to the agents, yet such error was manifestly harmless, for the agent was afterwards permitted (whether correctly or not, we cannot undertake to decide in this case, as there was no objection, or, rather, no exception, taken to such testimony) to testify that his instructions from the company were not to deliver any policy until the first premium was paid, and not then unless the applicant was then in good health, so that the company got the same benefit from these instructions as if the book had been admitted in evidence when it was offered. The fifth exception must therefore be overruled.

The sixth exception is based upon an alleged error in the charge of the circuit judge, or, rather, in his modification of a request to charge submitted by the defendant. It seems that there was some testimony tending to show that, in the conversation between the local agent and the assured on the day of the medical examination, the assured had been told by the agent that if, when the policy was returned, there was anything in it that he did not understand, or that it was not exactly understood it was to be, he could not be obliged to take the policy, to which the assured assented; and upon that testimony the circuit judge was requested to charge the jury, "upon the effect of that agreement, if they believe the testimony of Mr. Townsend, that the contract was therefore not completed until Mr. Going had an opportunity to examine that policy, and he examined it and signified his acceptance of the policy, and that he could not, when seriously sick, take advantage of the change of affairs then, to tender the money without an examination—without an acceptance—of the policy, and demand the policy and tender the payment." In response to that request the jury were charged as follows: "If there was an understanding or agreement between the agent of the company here and Mr. Going that Mr. Going should inspect that policy before he paid the premium,—should have a chance to look at it and see whether or not he should accept it,—then I charge you, as matter of law, the contract would not be complete until he had inspected it, *or waived his right to inspect it*, and signified his willingness to accept it; but if he went there and accepted it just as it was, and tendered the premium, or if he sent anybody there for that purpose, and the company had sent the policy to their agent, with the intent to deliver it to Going if he paid the premium and accepted that policy as insurance on his life, then the plaintiff would be entitled to recover." The point of the exception lies in the insertion of the words which we have italicized,—"or waived his right to inspect it." In this there certainly was no error, for the reservation of the right to examine the terms of the policy before paying the premium for the policy was for the benefit of the assured solely; and, if he chose to waive that right, the other party surely has no reason to complain. Indeed, this exception seems designed to raise, in another form, the point on which the defense was really rested,—that there was a condition in the contract whereby the policy was not to be delivered unless the assured was in good health when the premium was tendered and the policy was demanded. Whether there was such a condition was a question of fact, depending upon the testimony, of which the jury were the sole judges; and they have solved that question in favor of the plaintiff, under instructions to which no exceptions were or could have been taken by the defendant,—that if they believed there was such a condition, and the same was not complied with, then their verdict should be for the defendant,—and this must be an end of the matter. The sixth exception must therefore be overruled.

The seventh and last exception imputes error to the circuit judge in refusing the motion for a new trial, for three reasons: (1) Because of error in excluding the printed rules of the company containing instructions

to agents as to the delivery of policies. This has been already disposed of, by what we have said in considering the fifth exception. (2) Because there was no dispute as to the facts of the case, and, under the law as given to the jury by the court, they were bound to render a verdict for the defendant. The third ground of the motion for a new trial is practically involved in the second, and they may therefore be considered together. The rule, as we understand it, is that where, as in the cases of Dent v. Bryce, 16 S. C. 1, and Thompson v. Lee, 19 S. C. 489, the judge directs a verdict, and the jury disregard such direction and find a verdict contrary to that directed, then it is the duty of the circuit judge to set aside the verdict and grant a new trial, and, if he refuses to do so, then there is such error of law as this court may correct. But where, as in this case, the jury were instructed that if, from the testimony, they believed a certain fact or series of facts, then their verdict should be for the plaintiff or defendant, as the case may be, but if, from the testimony, they did not believe such fact or series of facts, their verdict should be the other way, then a motion for a new trial presents a question for the discretion of the circuit judge, with which this court has no power to interfere. It cannot properly be said that there was no dispute as to the material facts of this case. In the first place, there was testimony tending to show that the policy, which had been approved by the company, was returned to the local agent at Union for delivery to the assured at least 10 days before the assured was taken sick; but there is no evidence that the assured received any notice to that effect until the 29th of June, 1898, when the assured, being quite sick at the time, sent his brother and a friend to the local agent to pay the premium and demand the policy. What occurred between the agent and these gentlemen when the premium was tendered was at least left in some doubt by the testimony, as one of them testified that the agent simply refused to accept the tender, without giving any reason for such refusal, while the other said that the reason he gave was that "the company would not allow him to deliver policies to sick men." Not a word was said as to his having any general or special instructions to this effect from the company,—just simply the bald declaration above quoted, which might have been a mere expression of opinion upon the part of the agent. Then, too, there is another significant circumstance which appears in the testimony, and that is, when demand was made on the company for payment of the policy, the vice president denies responsibility solely upon the ground that the first premium had not been paid, and makes no allusion to the noncompliance with any other condition; and even when he is informed by Mr. Munro's second letter that, while it was true that the premium had not in fact been paid, yet it had been tendered, which, in his view, was equivalent to payment, he makes no reply whatever. From this testimony it is possible that the jury may have inferred that there was in fact no condition that the policy was not to be delivered if the assured was not in good health at the time, and that such condition was an afterthought. Be that as it may, however, it was a question of fact for the jury, and with their finding we have neither the power nor the disposition to interfere. The judgment of this court is that the judgment of the circuit court be affirmed.

BARRON v. WILLIAMS et al.

(Supreme Court of South Carolina. July 25, 1900.)

INSURANCE—GIFT BY INSURED—EVIDENCE—FRAUD OF CREDITORS—PERSONAL PROPERTY—HOMESTEAD EXEMPTIONS.

1. Testimony of insured's son and daughter, whose character and credibility were unimpeached, that two years prior to his assignment for the benefit of creditors he delivered his life policy to his wife, saying, "This is yours," and instructed her to put it away, and keep it, was uncontradicted, and was corroborated by a letter written during his last illness, instructing her to collect the insurance, and saying it was all hers. The assignment for creditors conveyed all insured's property not exempt as homestead, but did not mention the life policy, which was not delivered to the assignee, but remained in possession of his wife, and was not mentioned in an appraisement of his personal property made shortly after the assignment. *Held*, that such testimony showed a gift of the policy by the insured to his wife prior to his assignment, and a finding that it passed to the assignee was erroneous.

2. Where the personal property of an insured, including the cash surrender value of his life policy, did not exceed his homestead exemption, a gift of such policy to his wife was not void as to creditors, since, as an insolvent debtor may convey his homestead to his wife, such gift did not affect their rights.

Appeal from common pleas circuit court of York county; O. W. Buchanan, Judge.

Action by John I. Barron, individually and as administrator of the estate of Mary L. Barron, deceased, against George W. Williams, as administrator of the estate of Walter T. Barron, deceased, and others. From a judgment in favor of George W. Williams, administrator, and other defendants, but allowing plaintiff a portion of his claim, plaintiff appeals. Reversed.

Geo. W. S. Hart, for appellant. D. E. Finley and T. Y. Williams, for respondent D. E. Finley.

JONES, J. The object of this action is to determine the ownership of a policy of insurance issued November 22, 1888, by the Equitable Life Assurance Society, on the life of Walter J. Barron, who died intestate January 21, 1899. The policy was made payable "to Walter T. Barron, his executors, administrators, or assigns." The plaintiff, as administrator of Mary L. Barron, who died intestate February 12, 1899, claims the policy under an alleged gift by Walter T. Barron to his wife, Mary L. Barron. The defendant D. E. Finley claims the policy under a deed

of assignment for the benefit of creditors executed to him as assignee June 2, 1896, by the firm of Kennedy Bros. & Barron, of which Walter T. Barron was a member, and by Walter T. Barron individually. This assignment conveys all the individual and partnership property of the assignors not exempt from levy, attachment, and sale as a homestead, but does not mention specifically the policy of insurance. In the event the transfer to Mary L. Barron is not sustained, the plaintiff and the five defendants named in the title of this cause as surviving children of Walter T. Barron and Mary L. Barron claim that the policy should go to them as part of the homestead exemption of their father. The circuit court held that there was no transfer of the policy by Walter T. Barron to Mary L. Barron; that the policy passed to the assignee, D. E. Finley, under the assignment for creditors; but that, Mary L. Barron having paid the premiums on the policy from the date of the assignment to the death of Walter T. Barron, her administrator was entitled to such a proportion of the fund as the payments she made bear to the whole number of payments.

We think the preponderance of the evidence is clearly against the conclusion of the circuit court that there was no transfer of the policy by Walter T. Barron to Mary L. Barron. Indeed, we fail to find anything in the evidence to sustain the conclusion of the decree below. The plaintiff testified positively that his father, Walter T. Barron, in 1894, delivered to his mother, Mary L. Barron, a policy in the Equitable Life Assurance Society on the life of Walter T. Barron, saying to her: "This is yours. Put it up. Keep it." This is corroborated by Elizabeth E. Barron, one of the defendants, a daughter of Walter T. Barron, who testified that more than two years previous to July, 1896, when her brother Lapsly died, her father delivered to her mother a policy in the Equitable Life Assurance Society, saying: "This is yours. Put it away in a safe place." The identity of the policy in question with the policy referred to by these witnesses is shown by the testimony of an officer of the Equitable that said company issued but one policy on the life of Walter T. Barron. There is no imputation whatever against the character and credibility of these witnesses. Their evidence was objected to as incompetent under section 400 of the Code. It does not appear that this objection was ruled upon by the circuit court, nor is such ruling, if any, questioned by any exception; but, as we are relying upon said testimony, we may say in passing that the testimony was not objectionable under section 400, because it was not in regard to any transaction or communication between such witness and the deceased person. This evidence was further corroborated by a letter addressed by Walter T. Barron to his wife, Mary L. Barron, dated November 30, 1898, during his last illness, which was found in his pocket after his death. In this letter, among other matters, not necessary to mention, Walter T. Barron wrote: "First collect the insurance. It is all yours." The policy was never delivered to the assignee under the deed of assignment for creditors, nor, as stated, was it referred to specifically in the deed of assignment; on the contrary, the policy remained in the possession of Mary L. Barron, and after her death it was found in her private desk. In the listing and valuation of the personal property of Walter T. Barron made by Joseph F. Wallace a short time after the assignment of June 2, 1898, no mention is made of this policy. In the absence of any evidence to the contrary, we are satisfied that Walter T. Barron gave this policy to his wife previous to the deed of assignment. But it is argued that such a voluntary transfer was fraudulent and void as against Walter T. Barron's existing creditors. In order to avoid a gift by the husband to the wife for fraud, it is incumbent on the creditors to show that the gift was detrimental to their rights. As stated in Bridgers v. Howell, 27 S. C. 434, 3 S. E. 790: "There can be no fraud, either actual or constructive, in a debtor putting beyond the reach of the ordinary process of law funds or property which by law are exempt from the payment of a debt, for the reason that the creditor is not thereby deprived of any right or impeded in the enforcement of it." So, in Finley v. Cartwright, 55 S. C. 198, 33 S. E. 359, it was held that an insolvent debtor who is the head of a family in this state may, as against his creditors, convey his homestead to his wife. It was incumbent, therefore, on the contestee assignee for creditors to show that at the time of this transfer or gift of the policy to his wife the homestead exemption would not protect this property from creditors. It does not appear what amount of personal property was owned by Walter T. Barron at the time of the gift to his wife, but it does appear that Mr. Barron's personal property was valued by Mr. Wallace about June, 1896, and found to be $335. This did not include $34.89 money on deposit in the Loan & Savings Bank in the name of Walter T. Barron. There was evidence to show that the cash surrender value of the policy on June 2, 1896, the date of the assignment to D. E. Finley for creditors, was only $94.15. From this evidence alone the only proper inference is that at the time of the transfer of the policy to Mrs. Barron, Mr. Barron did not own personal property exceeding his homestead exemption; hence the transfer could not be in fraud of the rights of creditors. We may add that a policy of insurance, like any other chose in action, may be transferred by parol, unless some unwaived provision in the policy forbids it. We find nothing in the policy forbidding such a transfer. The insurance company makes no question on that score, but by a consent order has paid the fund, $2,641.24, into the hands of the clerk of the

court for the person entitled to the same. Our conclusion above disposes of the case, and it is unnecessary to consider further. The administrator of Mary L. Barron is entitled to the fund in court. The judgment of the circuit court is therefore reversed, and the case remanded, with instructions to the court below to order the whole fund, $2,641.24, paid to the plaintiff, as administrator of Mary L. Barron.

Ex parte BULLOCK.

(Supreme Court of South Carolina. July 16, 1900.)

HOMESTEAD—WIDOW'S RIGHT BARRED—DEVISE.

Where petitioner's husband devised a part of his real estate to one of his sons in fee, and the balance to petitioner for life, remainder to the son, and expressly excluded his other children from any participation in his property, it was improper to set off homestead to the widow and children of deceased, since a specific devise of real estate by testator will defeat any claim of homestead therein.

Appeal from common pleas circuit court, Greenwood county; R. C. Watts, Judge.

Petition by Parmelia G. Bullock to have homestead set off to her in the real and personal estate of her husband. From an order confirming the report of commissioners setting off homestead in such estate, David M. Bullock, as executor and devisee under the will of deceased, appealed. Reversed.

Giles & Magill and Eugene W. Able, for appellant. W. K. Blake, for appellee.

GARY, A. J. The record contains the following statement of facts: "David C. Bullock died 2d day of May, 1898, seised and possessed in fee of a tract of land of 150 acres, more or less, in Cooper township, Greenwood county, whereon he lived, leaving surviving him his widow, Parmelia G. Bullock, and D. M. Bullock, Albert Bullock, Martha Parkman, and Mary Polatti, children of a former marriage, all adults, and none of whom lived on the premises. That the petitioner's mother lives with her on said premises. That said David C. Bullock left a will recorded in office of probate judge for Greenwood county, the provisions of which the petitioner refuses to accept. That no process has been lodged with any officer against the homestead. That the said Parmelia G. Bullock resides on the said premises with her mother. That D. M. Bullock was appointed under the said will executor of the same, and qualified as such on the 5th day of May, 1898." The first item of the said will provides for the payment of debts. In the second item the testator wills to the petitioner the homestead on which he resided, "so long as she may live." The third and fourth items are as follows: "(3) It is my wish and will that my son David Manly Bullock shall have free and undisturbed use of the entire balance of my real estate (except as to item 2) so long as my beloved wife, Parmelia G. Bullock, may live. (4) At the death of my beloved wife, Parmelia G. Bullock, it is my wish and will for my son David Manly Bullock to have the entire real estate I may own, and at his death to go to his children that may be living." The debts against the estate amounted to about $200. The circuit judge decided that the petitioner and the children of the testator were entitled to homestead. David M. Bullock appealed upon exceptions which will not be considered seriatim, as the practical question raised by them is whether there was error in so ruling.

It does not appear whether the debts were contracted prior or subsequent to the adoption of the constitution of 1895. If they were contracted before the constitution of 1895, the case of Beaty v. Richardson, 56 S. C. 173, 34 S. E. 73, shows that a devise by the testator would defeat the widow's right to claim homestead. If they were subsequently contracted, there are no provisions of the new constitution requiring a different construction. The present case is materially different from Ex parte Worley, 54 S. C. 208, 32 S. E. 307, as in that case the widow had an interest in the land, while in this case she has none. It is the judgment of this court that the judgment of the circuit court be reversed.

COOLEY et al. v. COOLEY et al.

(Supreme Court of South Carolina. July 11, 1900.)

WILLS—SETTING ASIDE DEVISES—LEGITIMACY—DISMISSING COMPLAINT.

1. Plaintiffs, the legitimate children of testator, sued to set aside certain devises to illegitimate children, and for an accounting by the executors. One of the plaintiffs, as administrator of his brother, had previously begun suit on a judgment against testator, and it was stipulated that the liability of the estate therefor should be determined in the present suit. The master to whom the matter was referred reported that the judgment had been paid by lapse of time. No exceptions were taken to the report. *Held* error to dismiss the complaint without granting defendants affirmative relief against this judgment.

2. Where, in an action to set aside certain devises in a will, the question turned on whether a certain child was legitimate or illegitimate, it was error for the master to whom the matter was referred to reject the direct and positive testimony of the child's mother and sisters merely because they were interested parties.

3. On the question whether a certain child was legitimate or illegitimate, four witnesses, including the child's mother and sisters, testified positively to its legitimacy, while plaintiffs produced only testimony of "rumors in the neighborhood," etc., to the contrary. *Held*, that the finding of the circuit judge that the evidence greatly preponderated in favor of the child's legitimacy was amply supported by the evidence.

Appeal from common pleas circuit court of Greenville county; Ernest Gary, Judge.

Action by Lewis J. Cooley, Chantey A. King, Mary Hall, and W. C. Cooley against

John T. Cooley, Ella Alverson, Thomas O. Cooley, Esther Cothran, Sanford Cooley, Anna Prudence Cooley, Olliday Cooley, and Stacy Cooley to set aside certain devises contained in the will of J. J. Cooley, and to have an account against the executors. From a judgment in favor of defendants, plaintiffs appeal. Modified and affirmed.

The following are the plaintiffs' exceptions and grounds of appeal:

"(1) His honor erred in reversing the report of the master upon the ground that the master erred in rejecting altogether the testimony of parties to the case and in relying upon the evidence of disinterested witnesses, and in holding in this connection that 'section 400 is express authority against rejecting a witness on account of interest, except in certain cases therein mentioned.' (a) It being respectfully submitted that no objection was raised to the competency of the testimony of said parties, and it was all admitted without objection, and 'no person offered as a witness' was 'excluded by reason of his interest in the event of the action.' Code, § 400. (b) The law does not circumscribe or restrict the master in the exercise of his judgment in determining upon what witnesses he can rely, and, therefore, in the exercise of his discretion, in coming to his conclusion, he had the right to accept or reject any evidence in the case without committing error of law. (c) The court erred in confusing the exclusion of the witness because of interest, under section 400, and the disregarding of the evidence when admitted for any reason which might appeal to the judgment and common sense of the master. (d) Because it is evident from the mere reading of the master's report that he had used the word 'rejecting' in the sense of 'disregarding.'

"(2) His honor erred in holding that, 'It seems to me that the testimony of these witnesses was competent, and the master should not have rejected it.' (a) For it is here assumed that the master held said testimony to be incompetent, when in fact he did not do so, but admitted said testimony; there being no question made as to its competency, either before the master or before his honor, the presiding judge. (b) For the further reason that the master, when he came to weigh the testimony and form his conclusions, was free to follow his own best judgment as to what testimony should be rejected as lacking credibility, or he had the right to offset the testimony of one witness of equal credibility with that of another, thereby determining the weight of the evidence.

"(3) His honor erred in concluding 'that the master has based his conclusion as to the marriage of John and Stacy Cooley and the birth of Olliday upon irrelevant testimony, the same being hearsay,' for it is respectfully submitted: (a) That it nowhere appears that the said master considered any testimony in the case which was incompetent. (b) That John J. Cooley's admissions, which the circuit judge held were clearly hearsay, upon the ground that they were declarations of a person not a party to the action, and who had no interest in the subject-matter, and was at that time dead, were competent as against those claiming through or under him. (c) The most material fact in the case being as to the time when the said John J. Cooley was married to the defendant Stacy Cooley, it is respectfully submitted that the declarations of the said John J. Cooley in his liretime with reference thereto were competent, and fell within the class of exceptions as to the admissibility of hearsay evidence recognized by the authorities. (d) That the said testimony characterized as hearsay, and especially the testimony of numerous witnesses as to the admissions of John Cooley made after 1884, when defendants claim Olliday was born, to the effect that he and Stacy were not married, was admitted without objection, and therefore became competent, even if originally incompetent. See testimony of Judson King, John T. Chapman, David Jenkins, Jas. T. Campbell, Dr. Benson Harrison, Hewlett Chapman, and others.

"(4) His honor erred in holding that the testimony of Wm. Davenport, in so far as he refers to it, was incompetent and was not testimony on a question of pedigree, and, in this connection, in holding that common repute was only admissible in cases of pedigree.

"(5) His honor erred in concluding as follows: 'In view of the fact that the said John and Stacy Cooley were legally married and had one child in lawful wedlock, I think the testimony preponderates to establish the fact that Olliday was born in legitimate wedlock;' it being respectfully submitted: (a) That the testimony shows that one child born in lawful wedlock died in infancy. (b) That the clear preponderance of the testimony showed that Olliday was illegitimate. (c) That the testimony which the circuit judge, in coming to his conclusion, disregarded as incompetent, was either—First, competent under the rule of evidence; or, second, was admitted without objection, and therefore became competent for the purposes of this case, and, with that testimony in the case, the conclusions of the master were supported by the clear preponderance of the evidence. (d) Admitting that defendants' testimony that Olliday was born in 1884 is true, not only is there some evidence, but there is a preponderance of evidence, going to show that the marriage did not take place until after that time. (e) That, even admitting that the said Olliday Cooley was not illegitimate, the devise to the other defendants admitted to be illegitimate exceeded one-fourth of the real, clear value of the property of said John J. Cooley, and entitled the plaintiffs to some recovery; and the circuit judge erred, therefore, in dismissing the complaint.

"(6) His honor erred in not holding and adjudging that the findings of fact on the

part of the master were based upon the clear preponderance of the testimony, that his conclusions of law were sound, and in therefore not sustaining the said report."

The following additional grounds of appeal were offered by defendants:

"(1) The master erred in finding that the plaintiffs are entitled to recover the entire excess over one-fourth of the real, clear value of the estate of said John J. Cooley, deceased, real and personal, devised to said Anna Prudence Cooley, Sanford Cooley, and Olliday. He having found that said John J. Cooley and Stacy Cooley were married, he erred in not finding that she was entitled to one-third of such excess, and, not seeking to avoid said will or any part thereof, the recovery of plaintiffs should have been reduced by deducting one-third of such excess therefrom, and he erred in not so doing; and this exception having been duly taken to the said report of the master, and the circuit judge having failed to pass thereon (it being unnecessary, as he dismissed the complaint), the defendants (respondents) ask the supreme court to pass thereon and sustain this ground in case it shall find itself unable to sustain the decree of the circuit judge.

"(2) The master erred in holding that the plaintiff Chantey King was entitled to recover any part of said excess under the assignment to her from Hiram Cooley. He erred in not holding that the right to avoid the devise and bequest under said will to said illegitimate children, in so far as they exceed one-fourth of the real, clear value of his estate, was personal to the lawful wife and children of said John J. Cooley, and could not be assigned; and it being admitted that said John J. Cooley has five lawful children, and that only four of them are suing in this action, their recovery should have been limited to four-fifths of said excess, after deducting therefrom the one-third to which said Stacy Cooley, his wife, is entitled, and he erred in not so doing; and this exception having been duly taken to the said report of the master, and the circuit judge having failed to pass thereon (it being unnecessary, as he dismissed the complaint), the defendants ask the supreme court to pass thereon and sustain this ground in case it shall find itself unable to sustain the decree of the circuit judge.

"(3) The master having found that the said excess and interest is $314.61, he should have first deducted therefrom one-third thereof, to wit, $104.87, the share to which Stacy Cooley, the lawful wife, is entitled, thus leaving $209.74, and he should have deducted from this latter amount one-fifth thereof, the share of said Hiram Cooley, thus reducing the recovery of plaintiffs to $167.80, and he erred in not so doing; and this exception having been duly taken to said report of the master, and the circuit judge having failed to pass thereon (it being unnecessary, as he dismissed the complaint), the defendants (respondents) ask the supreme court to pass thereon and sustain this ground in case the court shall find itself unable to sustain the decree of the circuit judge.

"(4) The master erred in not holding said excess should be distributed, under the statute of distributions of intestate property, among the lawful wife and children of said John J. Cooley, and in the proportions prescribed by said statute, and that the plaintiffs could recover no greater proportion thereof than is prescribed by said statute if said excess were intestate property; and this exception having been duly taken to the report of said master, and the circuit judge having failed to pass thereon (it being unnecessary, as he dismissed the complaint), the defendants (respondents) ask the supreme court to pass thereon and sustain this ground in case the court shall find itself unable to sustain the decree of the circuit judge."

McCollough & Martin, for appellants.
Shuman & Dean, for respondents.

POPE, J. J. J. Cooley departed this life on the 13th day of December, 1896, leaving of force his last will and testament. Mr. Cooley's first wife died a short while before the war between the states, having borne him six children, viz. James, Hiram, Lewis, William C., Chantey King, and Mary Hall, all of whom are now alive, except James, who died in the year 1879. The said J. J. Cooley, several years after his first wife's death, became infatuated with Stacy Chastain, and so intimate were their relations that she bore him seven children, namely, John T. Cooley, Ella Alverson, Thomas O. Cooley, Esther Cothran, Sanford Cooley, Anna Prudence Cooley, and Olliday Cooley. All of these children were confessedly born out of the bonds of wedlock, except Olliday Cooley. The said J. J. Cooley provided for his putative children, John T. Cooley, Ella Averson, Thomas O. Cooley, and Esther Cothran, before his death. About the fall of the year 1883, it is alleged, the said John T. Cooley married the said Stacy Chastain, and she ever after lived with him as his dutiful wife; bearing him a daughter, Olliday, in June, 1884. The said John J. Cooley conveyed to his wife a tract of land, containing 35 acres of land, which she returned for taxation in the year 1884 in her newly-wedded name of Stacy Cooley. In the last will and testament of John J. Cooley he devised "unto his beloved wife, Stacy Cooley," his homestead lot of land, containing 40½ acres; unto his putative son Sanford Cooley a lot of land containing 31½ acres; unto his putative daughter Anna Prudence Cooley a lot of land containing 30½ acres; and "unto my youngest daughter, Olliday Cooley," a tract of land of 30¼ acres. After the death of J. J. Cooley his legitimate children by his first wife (the plaintiffs here) brought an action against the putative children to take from them the lands which had been con-

veyed to them by J. J. Cooley in his lifetime, but in the action the defendants triumphed over said plaintiffs. So this action now pending was brought by the four children named as plaintiffs (the said Chantey King having purchased all the estate of her brother Hiram Cooley, by which result it was not necessary to make Hiram a party, only suggesting the reason for his absence on the record, which was duly performed), against Stacy Cooley, John T. Cooley, Thomas O. Cooley, Sanford Cooley, Ella Alverson, Esther Cothran, Anna Prudence Cooley, and Olliday Cooley, to set aside the devises in the will named, and to have an account of the property of the estate by the executors; alleging as the ground to set aside the said devises that they were a larger or greater proportion of the real, clear value of J. J. Cooley's estate, real or personal, after payment of his debts, than one-fourth part thereof, and were therefore in violation of the statute law of this state, so far as the excess over the one-fourth part is concerned. The answer denied these things. It seems that, while the son James J. Cooley was alive, he was alleged to have had assigned to him some judgment or judgments against his father, J. J. Cooley, and that after the death of the said James J. Cooley his administrator, Lewis J. Cooley, as plaintiff, had brought an action against the executors of the last will of J. J. Cooley, deceased, to revive said judgment or judgments, and that the action was pending in the court of common pleas against said executors during the year 1899. So that about July, 1899, the following agreement in writing was entered into touching said pending lawsuit: "Counsel agree that the question of the liability of the estate of J. J. Cooley, deceased, and the devisees under his will, upon the judgment sued on in the case of Lewis J. Cooley, as administrator, v. John T. Cooley et al., as executors, be determined in this action, all the necessary parties being before the court, and that the said case on Cal. 1, common pleas docket, be discontinued, and that the devisees and legatees be permitted to adopt the answer of the executors in that case, in so far as it is applicable to their interests, as of this date. Case continued." The case at bar was referred to the master of Greenville county to hear and determine all the issues involved. By his report he found as a fact that J. J. Cooley and Stacy Chastain were married, but not until after the birth of the defendant Olliday Cooley, thus making all the children borne by Stacy Chastain to J. J. Cooley born out of wedlock; also, that the net clear estate, real or personal, of J. J. Cooley, deceased, amounted to $1,993, and that one-fourth thereof was $498.25; also, that the devise to Anna Prudence Cooley was worth $213.50, that to Sanford Cooley was worth $252, and that to Olliday Cooley was worth $300, aggregating $765.50, which would be $267.25 more than the one-fourth clear value of the estate of J. J. Cooley, deceased, and that by adding interest from the 13th December, 1896, to the date of the report, the $267.25 would amount to $314.61, for which last amount plaintiffs were entitled to judgment against the three devisees, Anna, Sanford, and Olliday Cooley. The master also found that the judgment sued on in the case of Lewis J. Cooley, as administrator, against John T. Cooley et al., executors, is paid by lapse of time, and that the plaintiff is not entitled to recover anything thereon. There were no exceptions taken to the finding by the master that J. J. Cooley had married Stacy Chastain; that the net value of J. J. Cooley's estate was $1,993; that the devises to Anna, Sanford, and Olliday Cooley aggregated $765.50, of which Olliday's devise was worth $300; and that the judgment sued on in the case of Lewis J. Cooley, as administrator, against John T. Cooley et al., as executors, had been paid by lapse of time, and that plaintiff was not entitled to recover anything thereon. But exceptions were taken to the finding by the master of the illegitimacy of Olliday Cooley. When the circuit judge passed upon this exception, he found that the master was in error as to his finding touching the bastardy of Olliday Cooley; holding that the marriage of J. J. Cooley and Stacy Chastain took place in the fall of the year 1883, and that Olliday Cooley, as the issue of that marriage, was born in June, 1884. The circuit judge ordered the complaint to be dismissed. From this decree the plaintiffs have appealed. The reporter will set out in the report of the case the grounds of appeal.

We may remark at the outset that we think that the circuit judge erred in dismissing the complaint; for it seems to us that the action ought to be retained, in order that the circuit judge may formulate a decree giving affirmative relief to the defendants against the judgment sued on by Lewis Cooley as administrator, which the master found was paid, and from which finding by the master no exception was taken.

It remains for us to consider plaintiffs' exceptions touching the alleged error of the circuit judge in holding Olliday Cooley a legitimate daughter of J. J. Cooley. It is apparent that, if Olliday Cooley is held to be a legitimate daughter of J. J. Cooley, the devises to Anna Prudence and Sanford Cooley are not null and void under the statute law of our state (section 1999, Rev. St.; and cases of Bradley v. Lowery, 1 Speer, Eq. 188; Massey v. Wallace, 32 S. C. 154, 10 S. E. 937; and Gore v. Clark, 37 S. C. 537, 16 S. E. 614, 20 L. R. A. 465); for the whole net estate being only $1,993, of which $498.25 is the one-fourth part, and as the devises to Anna Prudence Cooley and Sanford Cooley amounted to $465.50, not the one-fourth part of the net estate of J. J. Cooley, deceased, was received by them.

In disposing of the questions raised by the appellants, we will not undertake to dispose

of them seriatim, but in the views we may suggest a full and complete consideration of each exception is involved. Although the master found as a fact that J. J. Cooley and Stacy Chastain were husband and wife, he does not state, as a fact, the date of their marriage. It seems to us that, if there was sufficient testimony before the master for him to determine that J. J. Cooley and Stacy Chastain were husband and wife, there ought to have been found sufficient testimony to determine when the marriage itself was solemnized. Certain it is that there were four witnesses who testified that they were present and witnessed the marriage ceremony performed by Rev. Mr. Tribble while he was pastor at Washington Church, and these witnesses say this occurred in the fall of 1883. That very intelligent witness for the plaintiffs, John T. Chapman, testified that in the fall of 1882, and up to the spring of 1883, he knew that the parties were not married, although they occupied a compromising attitude to each other. This witness threatened to report these parties, for the way in which they lived. Mrs. Stacy Cooley, as she afterwards became, was living at the time spoken of by the witness Mr. Chapman in what was known as the "Pat Henry House," and not in the homestead of J. J. Cooley. This is exactly what all the defendants testify. None of them speak of Stacy occupying the homestead, or J. J. Cooley dwelling house, until about the time the marriage occurred. Witnesses for the plaintiff, when they speak of the marriage of Stacy Chastain to J. J. Cooley, speak of "rumors in the neighborhood," "it was the understanding of the family that they were not married," or "it was the understanding of the family that Olliday Cooley was born in the Pat Henry house." Such testimony as this, when contrasted with the direct, explicit, circumstantial, and natural testimony of Stacy Cooley, John T. Cooley, G. W. Vincent, and W. T. Bruce that this marriage occurred in the fall of 1883, in the family dwelling house of John J. Cooley, will not stand for a moment. And so, too, as to the birth of Olliday Cooley. Several of the defendants' witnesses swear that she was born in the month of June, 1884. Nearly all of the witnesses who spoke of Olliday's age said she was 14 or 15 years in 1899. If she was born in 1884, in June, she would have been 15 years of age when the testimony was given. If she was only 14 years old, she must have been born in 1885. When the witnesses speak from actual knowledge, the birth is alleged to have occurred in June, 1884. When, however, "the understanding in the family" or rumor is relied upon, it is quite easy to understand how the date is made to vary. We are not sure but that the very best antidote against reliance upon these "family understandings" and "local rumors," in establishing the date of the marriage or the date of a birth, when contrasted with direct testimony, would be furnished by the testimony in the cause. We are, like the circuit judge, unable to feel a doubt in this matter so far as this testimony is concerned.

So far as the first exception is concerned, it seems to us that it makes no difference whether we ascribe error to the master in using the language that he found the clear preponderance of the testimony in favor of the contention of the plaintiffs that Olliday Cooley was born out of lawful wedlock, "rejecting altogether the testimony of disinterested witnesses"; for an examination of the testimony of the witnesses for the plaintiffs shows that it was made up of "hearsay" in part, "rumor" in part, and "family understandings" in part, while the testimony of the defendants was direct and positive. Still we must hold that the master had no right to disregard testimony simply because such testimony was given by parties to the cause. It is only in certain enumerated classes of cases that testimony of this nature becomes incompetent. In the case at bar it was competent. The appellants are in error in stating in subdivision "a," under the first ground of appeal, that no objection was offered by the defendants to the introduction of at least some of this testimony. So far as "b" is concerned, the law does not restrict the master in the exercise of his judgment in determining upon what testimony he can rely; but the law, in its wisdom, does lay its hand upon a master who confessedly rejects direct testimony to facts merely because the witnesses who detail such testimony happen to have some interest in the event of the suit. The foregoing disposes of "c" and "d."

So far as the second ground of appeal is concerned, it does appear, as found by the circuit judge, that the testimony of Mrs. Stacy Cooley, John T. Cooley, and others, was competent, and the master should not have rejected it. This testimony should have been placed in the scales when the master was determining the preponderance of the testimony. The number of the witnesses is not of the essence of belief, for one or two reliable witnesses may outweigh the doubtful testimony of a dozen witnesses. This ground of appeal is dismissed.

So far as the third ground of appeal is concerned, as we before remarked, there is no necessity to consider it, as it is rendered unavailing because of the superior weight of the direct testimony of defendants, and, even if admitted, could exercise no force,—certainly to overcome the positive and direct testimony of the defendants. This ground of appeal is dismissed.

So far as the fourth, fifth, and sixth grounds of appeal are concerned, they become mere abstractions, in the light of our holding as to the force and effect of the direct and positive testimony of the defendants. They are overruled.

It is the judgment of this court that the judgment of the circuit court should be so

modified that the action shall be retained in order that the circuit court may formulate a judgment giving the defendants affirmative relief against the judgment sued upon by Lewis J. Cooley as administrator, but that so much of said circuit judgment as denies the plaintiffs any claim against the defendants growing out of the devises in the will of J. J. Cooley, deceased, be affirmed.

Ex parte MURDAUGH.

MAYFIELD v. MURDAUGH.

(Supreme Court of South Carolina. July 20, 1900.)

EQUITY—SALE OF PROPERTY—AMENDMENT TO DECREE—PAYMENT OF PROCEEDS—LIABILITY OF MASTER.

Where petitioner was owner of one-sixth interest in land which had been ordered sold under a decree in a suit to which he was not a party, and after the order of the sale the decree was amended by ordering one-sixth of the proceeds to be paid to petitioner, but the amendment was not placed on the file books or common pleas journal in the county clerk's office, or called to the attention of the master until five months after he had paid out the proceeds of the sale to the parties entitled thereto under the original decree, the master was liable to petitioner for one-sixth of the proceeds.

Appeal from common pleas circuit court of Barnwell county; W. C. Benet, Judge.

Action by S. G. Mayfield against N. P. Murdaugh. From an order dismissing the petition of J. A. Murdaugh, petitioner appeals. Reversed.

Izlar Bros., for appellant. Robert Aldrich, for appellee Patterson.

POPE, J. In the action of Mayfield against Murdaugh, Judge Benet passed a decree on the 1st day of August, 1896, providing for the sale of a tract of land in Barnwell county, S. C., and that the master of that court, A. Howard Patterson, Esq., should make such sale, and pay out the proceeds thereof to certain parties named in the decree; but on the 5th day of August, 1896, Judge Benet, on the petition of J. A. Murdaugh, who was the owner of one-sixth part of the tract of land, and who, through some mistake, had not been made a party to the action of Mayfield against Murdaugh, amended his decree so as to allow the petitioner, J. A. Murdaugh, his one-sixth part of the proceeds of sale of the tract of land. This amended decree was marked "Filed" by the deputy clerk in the office of the clerk of common pleas for Barnwell county, and was thereafter placed in the record of the case of Mayfield against Murdaugh, but no reference thereto appears on the file book and common pleas journal in the clerk's office of the court of common pleas for Barnwell county, and was never called directly to the attention of A. Howard Patterson, Esq., as master of Barnwell county, until after the sale by him, and the payment by him of the proceeds of such sale to the parties entitled thereto under the original decree of Judge Benet of August 1, 1896. The share of the petitioner, J. A. Murdaugh, in the proceeds of sales was $140.43. Under this state of facts J. A. Murdaugh applied to Mr. Patterson as master to pay him $140.43, but to this Mr. Patterson insisted that the money had been paid away, and without any fault of his, and also that said master offered to assist J. A. Murdaugh in any way he could to recover from the parties to whom this money had been paid this $140.43. The result was that J. A. Murdaugh, by petition setting out all the facts, prayed the court to issue a rule against Mr. Patterson as master requiring him to show cause why he does not pay this $140.43 to J. A. Murdaugh. Judge Benet issued this rule, and Mr. Patterson, as master, made his return, by which, among other things, he said he did not know of the amended decree until about five months after he had paid out the money; that the payment made by him as master exhausted all the funds in his hands; that the petitioner had no right to demand payment of him, the master. Judge Benet heard the return, and after a little while he dismissed the petition, discharging the rule. The petitioner, J. A. Murdaugh, now appeals to this court.

The third exception cannot be sustained, because there is nothing in the order of Judge Benet, on the case for appeal, which suggests that Judge Benet held that proceedings by petition and order to show cause were not the proper proceedings to collect whatever funds the master ought to have had belonging to J. A. Murdaugh under his own decree.

We will next consider the first and second exceptions together. They are as follows: "(1) That his honor erred, it is respectfully submitted, in holding the return of the master and ordering the rule discharged, when the uncontradicted facts show that he paid out the money in his hands, belonging to the petitioner, in violation of the order of the court. (2) That his honor erred, it is respectfully submitted, in not holding the return of the master insufficient, and in not ordering the master to pay over to the petitioner the terms of the supplemental order. (3) That his honor erred in holding that the proceedings by petition and order to show cause were not the proper proceedings to collect the said funds from the master." It cannot be denied that, under the statements contained in the "case for appeal" in the case at bar, J. A. Murdaugh, under the decree pronounced in the case of Mayfield against N. P. Murdaugh, was entitled to $140.43 of the proceeds arising from the sale of land made in pursuance of that decree, and that by law A. Howard Patterson, Esq., as master of Barnwell county, was the legal holder of said funds until the parties entitled thereto

under said decree should receive the same from him. It is equally certain that J. A. Murdaugh has not received one cent of such portion to which he was entitled. Until that money is paid, against whom has J. A. Murdaugh a cause of action? Certainly not against persons to whom Mr. Patterson has paid J. A. Murdaugh's money. There is no ligament connecting them. No. It is against the master that the petitioner, J. A. Murdaugh, has his action. The master has his action against all the parties to whom he has accidentally paid J. A. Murdaugh's money. This being our view, we are obliged to sustain these exceptions. The motion to dismiss the appeal in this was heard along with the case, and was dismissed for the reasons orally stated at the hearing. It is the judgment of this court that the judgment, or, rather, the order, of the circuit court here appealed from be reversed, and that the action be remanded to the circuit court, and that an order may be made directing A. Howard Patterson to pay to the petitioner, J. A. Murdaugh, the sum of $140.76.

CITY NAT. BANK OF GREENVILLE v. COBB et ux.

(Supreme Court of South Carolina. July 16, 1900.)

HUSBAND AND WIFE—LAND OF WIFE—MATERIALS TO ENLARGE HOME—JUDGMENT AGAINST HUSBAND.

Husband and wife lived on land belonging to the wife, her title being of record for many years. Husband bought material to enlarge their house from the contractor for whom he worked, agreeing to pay for the same out of his wages. The evidence was conflicting as to whether the contractor had actual notice of the wife's ownership. The husband had no property when he bought the lumber, nor when the action was brought, but gave his note for the material, making payments from wages earned, and renewing from time to time. The contractor failed, the note being then in the hands of plaintiff, a bona fide purchaser, who took judgment against the husband on the note. The evidence showed that the wife knew that the lumber came from the contractor, and that it was not paid for, but had steadily refused to place a mortgage on the land, and that she did nothing to mislead the contractor into making the arrangement with her husband. *Held*, that plaintiff was not entitled to have the wife's land subjected to the payment of their judgment against the husband.

Appeal from common pleas circuit court of Greenville county; G. W. Gage, Judge.

Action by the City National Bank of Greenville against Abner Cobb and Mrs. S. H. M. Cobb, his wife, seeking to have land of Mrs. Cobb subjected to the lien of judgments in favor of the plaintiff against Abner Cobb. From a decree entered in favor of defendants on a master's report, plaintiff appeals. Affirmed.

Haynsworth, Parker & Patterson, for appellant. Shuman & Dean, for respondents.

POPE, J. Abner Cobb, while in the employ of Osborn Cagle (who was a contractor), was approached by Cagle with a proposition to advance him the material to enlarge the dwelling he occupied, being of two rooms, by adding four other rooms thereto. Cobb assented to the proposition, agreeing to pay money when he could, and pay from his wages when he could. Abner's co-defendant, Mrs. S. H. M. Cobb, is his wife, and the mother of 11 children. She owns the land on which the house in which they reside is located. Her deed was dated in the year 1875, and recorded in the office of the register of mesne conveyances in the year 1876. Her parents had lived on the land before it was conveyed to Mrs. Cobb by her mother. Abner Cobb paid, in money and work, to Osborn Cagle, the sum of $275, in part payment of the sum of $500, which was the amount of the account between Abner Cobb and Osborn Cagle for the building material. Some time in 1898, Osborn Cagle induced Abner Cobb to give him his note at 90 days for the balance still due, to wit, $278.20, interest, etc. This note was transferred, for value, before maturity, to the plaintiff, the City National Bank of Greenville. Not being paid at maturity, the plaintiff bank recovered judgment thereon against Abner Cobb; but, such judgment not having been paid, and Abner Cobb being insolvent in property, the City National Bank of Greenville has brought this action against the said Abner Cobb and his wife, Mrs. S. H. M. Cobb, as defendants, wherein, among other things, it recites the transactions of Cagle and Abner Cobb, but insists that Abner Cobb was insolvent when he made the arrangement with Osborn Cagle, who thought that he (Abner Cobb) held title to the one acre of land whereon the improved dwelling house was located, and, besides, that Mrs. Cobb knew of these things; wherefore the bank prayed that it might have judgment against Mrs. Cobb on the note, and also might have the land sold if she failed to pay the note. It should have been stated that it was alleged and proved that the property had been improved by the enlarged building at least to the sum of $400. Both the defendants answered, denying anything in the complaint which would lead to the relief plaintiff sought, alleging that Mrs. Cobb's title had been of record for 25 years before these transactions (of which fact Osborn Cagle was well acquainted), and that he had been informed by Abner Cobb at the time of the agreement that Mrs. Cobb declined to have any mortgage upon her property for this purpose, etc. The issues were referred to Master Verner and he reported squarely against the plaintiff. Upon exceptions to the master's report, and on all the testimony and pleadings, the cause came on to be heard before his honor, Judge Gage, who also decreed in favor of the defendants. This decree is so clear and convincing that it should be set out herein, and it is as follows:

"Decree: This is an action to subject the real estate of the defendant Mrs. S. H. M. Cobb to the payment of a judgment in favor

of plaintiff against the defendant Abner Cobb. The cause was referred to the master, and his report and the testimony are in. The master found for the defendants, and the plaintiff excepts thereto upon fourteen grounds. Of these, eight grounds charge error of fact, five charge error of law, and one ground charges error of law and fact. These facts are uncontested, to wit: Mrs. Cobb got the land by deed from her mother in 1875, and the deed was recorded in 1876. The husband and wife have lived on the land about twenty years, and have reared a large family there. Cagle was a contractor and builder, and Cobb was a carpenter and foreman in his employ. During the latter months of 1896 and the first months of 1897, Cagle sold and delivered to the husband building material of the value of about five hundred dollars. Mrs. Cobb 'knew that lumber was [carried to her lot] from Cagle's, and that it had not been paid for.' The lumber and material were constructed into a house on the said land, and such house stands in the front of, but is joined to, and is now parcel of, a small two-room dwelling in which the family had hitherto lived. As much as forty dollars was turned over to the husband by the wife, and was paid by the husband to Cagle, at or before the delivery of the first lumber, and thereafter the husband paid Cagle in small amounts as much as two hundred and thirty-five dollars more. That the judgment of plaintiff is upon a note executed by the husband to Cagle for the unpaid balance due for said lumber and material, transferred by Cagle to plaintiff and by plaintiff sued to judgment. Cagle told the husband 'he could use the note.' 'The lumber and material put in the house have increased the value of the premises four hundred dollars.' The husband had no property when the contract for lumber was made, and he has none now. The house is located on a small parcel or lot of land containing one acre, more or less, in or near the corporate limits of the city of Greenville, and is now the residence of the husband and wife and a large family of children. The master has made some findings of fact which are not sustained by the testimony, to wit: 'It is agreed * * * that Abner Cobb should pay for [the material] by continuing to work for said Cagle as foreman carpenter, and pay from his wages from $5 to $10 and $15 per month.' The testimony of Cobb is this: 'He said he would furnish the material, and I could pay him $5 to $10 or $15 per month.' Again, 'I pay along on the lumber every Saturday night when I worked.' Again, 'I did not continue to work and pay the amount because Cagle failed, and could not get any further.' The testimony of Cagle is this: 'He [Cobb] was to pay in work when he could and in money when he could.' It nowhere appears from Cobb's testimony that Cagle agreed to look exclusively to one source for payment, or that Cobb insisted on that. No such contract between them has been proved. On the other hand, it is not manifest that when the contract was made and the credit given to Abner, Cagle looked to and relied exclusively on Abner's ownership of the property. The categorical question was put to him: 'Had you known the title to be in any one other than himself, would you have given him this credit?' The answer is not correspondent to the question. The testimony of Abner and Cagle is somewhat conflicting. Abner testifies he told Cagle 'the land belonged to my wife.' Cagle testifies, 'Abner always spoke of the property as his place,' and 'he never did tell me that his wife owned the property.' The testimony of Abner Cobb's son, W. T. Cobb, is to the same effect as his father's. The burden is, by the pleadings, on the defendants, to prove that Cagle had knowledge of the fact. Abner Cobb returned the property in his own name, and paid the taxes on it. He was the owner of no other property. In the light of all the circumstances I am of the opinion that Cagle did not have actual knowledge of the fact of the ownership by the wife, but I think he relied primarily for payment from sources available to Abner Cobb, and it is likely he looked in the last event to the property for payment. But how does this avail him if he had constructive notice from a record of the deed? Had he loaned Abner $500, and taken a mortgage on the land from him, what would have been his plight? His present position is no better in the aspect now under consideration. The matter would be seriously changed if the testimony tended to show that Mrs. Cobb connived at what was done, but I am satisfied she is without moral wrong in the matter. She did nothing to mislead Cagle. The most serious question involved is this: If Cagle in good faith added $400 to the value of the property, for which he has not been paid, and which Mrs. Cobb permitted, and which she enjoys, ought not her property to pay therefor? On the other hand, it may be asked: Ought a creditor to be granted relief which may seriously affect the interests of a person who has taken no active steps to bring about a status, and when diligent inquiry could have protected him from loss? The small two-room house was turned around; the four-room house was built to and in front of it; the whole occupies one acre of land, and is inhabited by the family; the new cannot be severed from the old, and leave matters as they were before; and a part of the new has been paid for. It is a case where equity even is powerless to do, under the forms of the law, with a sword, what a Hebrew mother volunteered to do. My judgment is, the complaint must be dismissed, and it is so ordered. G. W. Gage, Circuit Judge."

From this decree of Judge Gage the plaintiff now appeals on six grounds, to wit: "(1) The judge erred in holding that the house built by Abner Cobb out of the lumber purchased from Cagle could not be severed from the old house; whereas the testimony shows

that they were not connected together. (2) He erred in holding that equity is powerless to grant relief to the plaintiff in the present case; whereas he should have held that the land of Mrs. S. H. M. Cobb was liable to the plaintiff's debt to the extent that it had been enhanced in value by the erection of the improvements made with the lumber purchased from Cagle. (3) He erred in holding that the plaintiff was in no better position than if Cagle had taken a note and mortgage for the lumber sold Abner Cobb. (4) He erred in not holding that the use by Abner Cobb of the material purchased from Cagle to erect a dwelling house on his wife's land was, in effect, a gift to her of property which was liable in his hands to the payment of plaintiff's debt, and that, Cobb being insolvent, the plaintiff was entitled to subject this property or building in the erection of which it was used to the payment of its debt. (5) The circuit judge should have held that, where an insolvent debtor employs property which would be liable in his own hands to the payment of his debts in the erection of buildings upon his wife's land, the creditors are entitled to relief as against the wife to the extent that the said lands have been enhanced in value by reason of said improvements, and that the court in such case should either direct the land to be sold, and out of the proceeds the debt to the extent of this enhanced value be paid, or else that the improvements should themselves be sold, and the proceeds of sale be applied to the payment of said debt. (6) He erred in not holding that the lumber which Cobb purchased of Cagle would have been liable in his hands to the payment of the debt, and that this having been used by him in erecting a building on his wife's land, and he being insolvent, the plaintiff was entitled to subject the said land to the payment of its debt to the extend that the said land had been enhanced in value."

The first exception is as to the fact found by the circuit judge that the old two-room house was now connected with the new four-room house. This depends on what effect the testimony has on the mind. It impresses us, as it has the circuit judge, but it is of no great moment, one way or the other. The exception is overruled.

The next five exceptions, in one form or the other, appeal to the conscience of the court in upholding the great principles of equity. We find as a fact that the title to this lot of land is in the defendant Mrs. Cobb alone, was placed upon the records of the county for 21 years before the agreement between Osborn Cagle and the defendant Abner Cobb was made, and, therefore, that the said Osborn Cagle was bound to take notice of this as a fact. Besides, three witnesses testify that he was told of the title being in Mrs. Cobb at the time of the agreement. We find as a fact that Mrs. Cobb was free from any fraudulent collusion with her husband, if any such thing as fraud existed in the heart of any one connected with this whole affair, which we do not admit. We find as a fact that, although her land was heightened in value, no blame or responsibility can attach to Mrs. Cobb therefor. We find as law that the husband is allowed to work honestly for his wife in the state of South Carolina without incurring any blame in the eyes of the law or in equity, and thereby make a gift to her of his labor. We cannot agree that law or equity will view with approval any endangering of the wife's estate, when she acted with perfect bona fides, as she did in these transactions, by anything the husband did, especially as the person with whom the husband dealt had perfect knowledge, in law, at least, of her title to the land and of the insolvency of the husband. All the exceptions must be overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

MILAM v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. July 16, 1900.)

CARRIERS — INJURY TO HORSES — VALUE — PROOF—WITNESS—COMPETENCY — EVIDENCE —NONSUIT—REQUEST FOR INSTRUCTION—NECESSITY—CONNECTING LINES—PRESUMPTION OF LAW—QUESTION FOR JURY—LIABILITY OF CARRIER—DUTY TO FEED STOCK.

1. A keeper of a livery and sale stable, who had examined horses before shipment, may testify as to whether he sold them for less than their value because of injuries sustained in shipment.

2. An agent of a connecting line, who had collected bills for defendant railway company for feeding plaintiff's horses during shipment, may testify as to such bills, in an action for damages for improper care and injury to them while on defendant's line.

3. Where, on plaintiff's examination, defendant was allowed to introduce a contract for a pass, signed by plaintiff, which was on the back of a waybill for shipment of plaintiff's stock, the refusal to allow defendant to offer the waybill itself in evidence before it had been proven, for the purpose of moving for a nonsuit, was proper.

4. Where, in an action for damages to horses in shipment, there was evidence that they appeared lean and gaunt on arrival, and several of them died a few days after, and defendant had fed them every 28 hours during shipment and rested them 5 hours after each feeding, a motion for a nonsuit was properly overruled, since the question of their improper care was for the jury.

5. Where there was no evidence that horses shipped by plaintiff on defendant's road were unruly, an instruction that defendant was not liable for any injury occasioned during their shipment, caused by their unruly disposition, was properly refused.

6. No error can be based on the failure of the trial court to give an instruction, where no request for such an instruction was made.

7. Where horses transported by successive carriers were injured in shipment, and the court charged that, before plaintiff can recover of the defendant line, the jury must be satisfied by the preponderance of the evidence that they were injured while in defendant's possession,

the objection that the court made the defendant an insurer beyond its own line was not well taken.

8. Where horses shipped over several connecting lines were injured in shipment, an instruction that, if they were shipped under special contract, plaintiff could not recover by proving that they were in good condition when loaded or at any intermediate point, and not in good condition when received, but must also show that such injury did not arise from their unruly disposition, or weakness from their long journey, or from the crowded condition of the car, or from concussion incident to running a freight train, was not objectionable as placing too great a liability on defendant.

9. Where horses shipped over several connecting lines were injured, an instruction that where horses were transported by successive carriers, and the proof only shows that they were in good condition when received, and damaged when they reached their destination, the law presumes that such damages were caused while they were in the hands of the last railway company, was properly refused.

10. Where horses were injured in shipment over several connecting lines of railway, an instruction that the question on which line of railway the injury occurred was for the jury, and that if shipped under special contract defendant was not liable unless they were injured while in its possession and because of its negligence, was proper.

11. Where horses were injured in shipment, an instruction that, if the shipper failed to feed and rest them during shipment according to his contract, he could not recover, was properly refused, since, if the shipper failed to feed and rest them, it was the duty of the railroad company to do so, and charge the expenses to the shipper.

Appeal from common pleas circuit court of Newberry county; R. C. Watts, Judge.

Action by Robert R. Milam against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

B. L. Abney and Duncan & Sanders, for appellant. Johnstone & Welch, for respondent.

POPE, J. The plaintiff, by his action, sought to recover $1,000 damages by reason of the injuries sustained by a lot of 24 horses which were transported by the defendant from Birmingham, Ala., to Newberry, in the state of South Carolina. Plaintiff, in his complaint, set up three causes of action: One was based upon the common-law doctrine that the defendant was an insurer of the freight received by it as a common carrier; the second charged the same facts as were set forth in the first cause of action, except that the defendant was charged with negligence by which injuries to the 24 head of horses resulted; and the third charged wanton negligence. By the answer of the defendant, it admitted that it was a common carrier, but denied all other allegations of the complaint; alleging, in addition thereto, that the plaintiff was responsible for all injuries which resulted to his car load of horses from a failure to feed, water, and rest them as was required by law; that any injuries done the said car load of horses happened upon some other line of railway, in their transportation to Clinton, S. C., than on the defendant railway. The cause came on for trial before Judge Watts and a jury. During said trial the defendant objected to certain testimony offered by plaintiff. Also, it made two motions for nonsuit, both of which were overruled. Also, it made certain requests to charge, which were declined by the circuit judge. Verdict was for plaintiff in the sum of $300. After judgment thereon, defendant appealed upon the grounds previously indicated, and also upon the ground that the circuit judge erred in some of his charges to the jury.

The first ground of appeal suggests error in the circuit judge in allowing the plaintiff to testify in answer to the questions: "From your experience as a horse dealer, and from your knowledge of the valuation of horses, did you, or did you not, sell your horses at a price less than their real value by reason of these injuries?" "Did you, by reason of these injuries, sell your horses for less than they were worth?" The testimony offered here showed that these 24 horses, when taken from the car in which they had been transported from the city of Birmingham, in the state of Alabama, to the village of Clinton, in the state of South Carolina, were scarred, bruised, gaunt, stiff in limbs, with high fever, and that two were down on the floor in the car, and had to be struck with a whip to get them up, and that the day after arrival a handsome gray died, having passed blood before death, and a little later than the next day after arrival two other of the horses died. But, soon after arrival,—in a few days,—plaintiff sold some of the horses. The plaintiff was the owner and keeper of a livery and sales stable. Hence the circuit judge allowed him to answer these questions. Before going further, it should be stated that the plaintiff had inspected the horses when he bought them. Therefore he knew how they looked at the date of shipment, how they looked on their arrival at Clinton, and how they looked several days thereafter, when he sold them. We cannot see anything speculative in the testimony in question. It was based upon facts within the knowledge of this witness. In 12 Am. & Eng. Enc. Law (2d Ed.) p. 477, the doctrine is thus stated: "Farmers, dealers in horses, and liverymen, who know the value of horses generally, may testify thereto." See, also, page 460, Id., which says: "On damages, as on other subjects of expert-opinion evidence, the opinions of witnesses must not be speculative or conjectural, but must be based on facts and conditions existing and proved." Who is there who has not been astonished at the accuracy of dealers in stock and hogs in their estimate of the weight of each one of them? It is this accuracy of judgment, derived from the experience of dealers in stock, which gives their opinions as to the value of horses, mules, etc., such great weight. This exception is overruled.

Again, appellant suggests that the circuit

judge erred when he allowed Mr. Horton, as the agent of the Newberry & Laurens Railroad, which railroad had received the car load of horses from the defendant at Newberry, to testify as to the three waybills on which he had receipted for the charges of the defendant itself for feeding the horses at Birmingham, Atlanta, Ga., and Hodges Depot, S. C. We believe the defendant withdrew this exception. But, in the abundance of caution, we pass on it; and in doing so we remark that the service of Mr. Horton in collecting these bills entered as waybills was as the quasi agent of said defendant in its collection of charges from the plaintiff, which service of Mr. Horton the defendant has ratified. This exception is overruled.

In its second exception the defendant suggests that the circuit judge erred in not allowing it to introduce in evidence, while one of the plaintiff's witnesses was being examined, and before the defendant introduced any testimony, a bill of lading, after the plaintiff had admitted that he had signed some writing on the back of said bill of lading. When Mr. Milam, the plaintiff, was on the witness stand, the defendant asked him, on cross-examination, if he had not signed such a paper, a copy of which was exhibited to him. The witness replied that he did not know whether he had signed such a paper or not, but he said he would know his signature when he saw it. It was at this point when defendant's counsel proposed to open the commission it had issued to examine some witnesses at Kansas City, state of Missouri; claiming that the original papers, which had been signed by Mr. Milam, and a copy of which he had exhibited to Mr. Milam, would be found attached to the bill of lading. After a while the court allowed the package containing the depositions of witnesses taken in Missouri to be opened, and the papers referred to taken out, while Mr. Milam, as plaintiff's witness, was on the stand; and the counsel for defendant then exhibited the paper, of which the following is a copy, signed by Mr. Milam, to wit:

"Form 45. Kansas City, Fort Scott & Memphis R. R. Live-Stock Contract. Duplicate. Station, Kansas City. Date, Oct. 28, 1896. In consideration of the free transportation granted us by Kansas City, Fort Scott & Memphis Railroad Company, to accompany the live stock described in the within contract, on its road, and to return therefrom, and of the agreements contained in said contract to be performed by said railroad company, we, the persons in charge of said live stock, agree to be bound by all the terms and conditions of said contract which refer to the persons in charge of said live stock, especially those in regard to how and where we shall ride, and the risks we assume, contained in the ninth, tenth, and eleventh paragraphs thereof; and, for the same consideration, we further agree that while attending to said live stock, as provided in the third paragraph thereof, we shall be deemed employés of the railroad company, of the rank of brakemen, for the purpose of determining its liability to us, and we assume all risks incident to such employment. R. R. Milam.

"Pass, on freight trains only, R. R. Milam. F. D. Leeds, Agent."

When the witness was shown his signature to the paper copied above, he promptly admitted that it was his signature, and that the free pass to the city of Birmingham, Ala., was given to him. But the witness said that he did not read the paper he had signed, but that he was told, "Sign this, to get your pass." This he signed at Kansas City, Mo. But he swore that he knew nothing of a contract such as the bill of lading; that he never signed it, nor did he authorize any one to sign the same in his name or as his agent. So, when the attorney for the defendant asked the court to admit it in evidence just then, the court declined to do so. This paper, known as a "bill of lading," was subsequently introduced by the defendant, after (by commission) it had examined the railroad authorities and Tough & Son, at Kansas City, Mo. The reason that defendant was so eager to have the paper introduced while plaintiff's witness was on the stand was to enable it to move for a nonsuit at the close of plaintiff's testimony. The circuit judge refused to admit the bill of lading at that time. While the paper admitted by Mr. Milam to have been signed by him was admitted, and this was on the back of the bill of lading itself, this did not entitle the bill of lading itself to be admitted. The bill of lading was not yet proved, if ever it was. So there was no error on the part of the circuit judge. Under Wallingford v. Railroad Co., 26 S. C. 258, 2 S. E. 19, the defendant would have failed to have this bill of lading considered as the basis of a nonsuit, it being admitted while plaintiff's witness was on the stand. This exception is overruled, and we see no harm to the defendant, especially as the defendant had the benefit of the admission of this bill of lading afterwards.

The appellant next alleged error in the refusal of the circuit judge to grant a nonsuit:

"Third. In not granting the motion of the defendant for a nonsuit on the grounds: (1) That as the defendant had delivered the car containing the horses of the plaintiff to the Columbia, Newberry & Laurens Railroad Company, which road had delivered them to the plaintiff at Laurens, the presumption was that any injury that may have occurred to them occurred on the line of the last-named road; (2) because there was no sufficient evidence to go to the jury of any injury done the horses of the defendant while they were in defendant's charge; (3) because there was a total failure of evidence to sustain the allegations of the complaint." (a) The rule of law granting nonsuits is too firmly established by the decisions of the court of last resort in

this state to need a restatement, and yet the question is again raised, and we must pass upon it. Whenever the plaintiff fails to introduce any competent testimony to support the material allegations of his complaint which set up his cause or causes of action against the defendant, the circuit judge is authorized to grant a nonsuit. Was it the circuit judge's duty to nonsuit on a presumption of fact, if any other facts were in testimony? We do not think so, for it is the place of the jury, and not that of the judge, to weigh testimony. (b) The testimony of all the witnesses who spoke of the appearance of the horses on their arrival at Clinton, S. C., was emphatic as to the leanness, the lankness, and the gauntness of the horses. There was testimony that the defendant had complied with the law, in having fed the horses every 28 hours, and rested them for 5 hours after they were fed and watered. But it was no part of the duty of the circuit judge to weigh this testimony. That was the province of the jury. After an examination of the testimony, we cannot agree with the appellant that there was a total lack of testimony. These exceptions are all overruled.

"Fifth. In charging: 'Now I charge you that if the defendant railroad, here, received the stock as a common carrier, then they become insurers. Whenever a railroad gets a charter and becomes a common carrier for the purpose of transporting freight and passengers, and such matter as that, when they receive any freight as a common carrier they become insurers of the freight, and they thereby agree to deliver in good condition to the parties that it is consigned to. If the railroad here received this property of Milam in Birmingham, Alabama, as common carriers, then they became insurers of that property, and it was their duty to deliver it to Milam in Clinton, South Carolina, in good order; and if it was not in good order, and it was injured while in their possession, then the road would be liable.' It being respectfully submitted that his honor overlooked the following principles or rules of law: (1) That, where a common carrier in the performance of its duties delivers freight to a connecting road for transportation to its destination, it does not insure the safe delivery by such connecting road; (2) that a common carrier does not insure the safe delivery of live stock against the injuries inflicted upon such stock by their own unruly dispositions, or by the ordinary jars or concussions incident to the usual and ordinary managing and running of a train." Not in every case does a railroad, when it delivers property to a connecting road for transportation to its destination, insure the delivery of said property at its destination to the consignee in safety, but sometimes it does, and this must depend on its contract. In Kyle v. Railroad Co., 10 Rich. Law, 382, the court of last resort in this state held that the contract of the carrier required it to bear the responsibility of safe delivery at destination, to the exoneration, as between the consignee and the common carrier, of the connecting road. There were two points of view as to the contract in the case of Milam, the plaintiff, and the Southern Railway Company. One might follow from the terms of the bill of lading signed by Tough & Son and the Kansas City, Ft. Scott & Memphis Railroad Company at Kansas City, state of Missouri; and the other was what might be construed by the waybill issued by the Southern Railway Company at Birmingham, together with the circuitous route it adopted in delivering the car load of horses, for it is an undoubted fact that the Southern Railway Company brought this car load of horses to Atlanta, Ga. At that point the nearest way to Clinton, S. C., was by the Georgia & Northern Railroad, by which in at least 12 hours the car load of horses could have been carried from Atlanta, Ga., to Clinton, S. C., whereas in fact the Southern Railway Company carried this car load of horses from Atlanta, Ga., to Greenville, S. C., and then from there to Newberry, S. C., at which latter point the car load of horses were sent to Clinton by the Columbia, Newberry & Laurens Railroad Company. There was no contract evidenced by the bill of lading issued by the Southern Railway Company, with the plaintiff. The waybill was not a contract in itself, and yet it may be taken as a circumstance, along with others, to determine what this contract between the parties actually was. All these are matters for the jury to solve. Inasmuch as the circuit judge, in his charge, left it to the jury to determine defendant's liability, limited by the requirement that the injury to the horses should have occurred while they were in the custody of the Southern Railway Company itself, we can see no harm in the charge of the judge. So, also, we may say that it was not reversible error in the circuit judge to fail to call the attention of the jury to any results from the unruly disposition of the stock, or by the ordinary jars or concussions incident to the usual and ordinary managing and running of a train; for certainly there was no testimony on either of such matters, nor was any request made to the judge for any charge on these lines. The exceptions are overruled.

We will consider the sixth, seventh, and eighth exceptions together: "(6) In instructing the jury: 'That, if the stock was received by the Southern Railroad as a common carrier, then they became and would be liable for any damage that might be done to the stock. In other words, they would be then required to deliver it to Milam at Clinton, South Carolina, in good order;' thereby overlooking the principle or rule of law which makes a common carrier an insurer only over its own line. (7) Because his honor, by his charge, erred in instructing the jury that a common carrier of freight was an insurer of freight which it had delivered to a connecting carrier to be transported to its destination,

whereas, it is respectfully submitted, a common carrier of freight is not an insurer of freight which in the performance of its duty it delivers to a connecting carrier to be transported to its destination, beyond the line of such common carrier. (8) In leading the jury to think that a common carrier, to which live stock is delivered to be transported over its own line and connecting lines to their destination, becomes an insurer of safe delivery of such stock at their destination, whereas, it is respectfully submitted, a common carrier of live stock does not insure—First, against injuries which are caused by the unruly dispositions of the animals themselves; or, second, against injuries caused by the ordinary jars or concussions in the ordinary management of a train; or, third, against injuries inflicted while in the hands of a connecting line to which the common carrier, in the performance of its duties, had delivered such stock to be transported to their destination." In justice to the circuit judge, it would be no bad idea to adopt from the argument of Mr. Welch, for the respondent, under the heads of "a" and "b," respectively, under parallel columns, what the judge said by detached portions, and what he said connectedly, in regard to defendant's liability as a common carrier.

(a)

Pages 108, 109, middle of folio 431:

"Now, I charge you that, if the defendant railroad here received the stock as a common carrier, then they became insurers. Whenever a railroad gets a charter and becomes a common carrier for the purpose of transporting freight and passengers and such matters as that, when they receive any freight as a common carrier they become insurers of that freight, and they agree thereby to deliver it in good condition to the parties whom it is consigned to. If the railroad here received this property of Milam's in Birmingham, Ala., as a common carrier, then they become insurers of that property, and it was their duty to deliver it to Milam, in Clinton, South Carolina, in good order; and if it was not in good order, and it was injured while in their possession, then the road would be liable."

Page 111, folio 440 to middle of folio 441:

"If it was received by the Southern road as a common carrier, then they become insurers, and would be liable for any damage that might be done to the stock,—in other words, would be required to deliver it to Milam, at Clinton, South Carolina, in good order."

Page 113, end of folio 448:

"If you believe that they took it as common carriers at Birmingham, Ala., they were insurers of the goods, and it was their duty to deliver it in good order at its destination at Clinton."

(b)

Page 109, folio 431:

"And if it was not in good order, and it was injured while in their possession, then the road would be liable."

Page 112, middle of folio 443 to middle of folio 445:

"Now, you will understand that, before the plaintiff can recover here, the jury must be satisfied from a preponderance of the testimony in the case that the injury, if any at all, to the stock, occurred while it was in the possession of the Southern Railway Company. If the stock were all right and in good order when they were delivered at Newberry, here, to Columbia, Newberry & Laurens road, and they were injured while in the possession of the Columbia, Newberry & Laurens road, then the plaintiff could not recover against this defendant. His remedy, if any, then, would be against the Columbia, Newberry & Laurens road. If, however, the testimony satisfies you that the defendant company was negligent; that they were guilty of negligence in not observing due care and due caution in the handling of that stock, or if they failed to feed or water it or rest it as required by law, and the stock was injured by their negligence,—then the defendant here (the railroad) would be liable."

Page 112, folio 445 to folio 448:

"If the testimony satisfies you that the Southern Railway received the stock at Birmingham, Ala., and it was not injured while in their possession, that they complied with the law, and fed and watered and rested the stock as the law requires, and then delivered it to another road here at Newberry in good order, and it afterwards got injured while in the possession of another road, then the plaintiff would not be entitled to recover. In other words, before you can give a verdict for the plaintiff in this case, you have got to be satisfied that there was negligence on the part of the railroad, if they received it under this contract, and that negligence was the cause of the stock being injured, and the injury occurred while the stock was in the possession of the Southern Railway, and it was on their account that the injury occurred. Then, if you are satisfied that the railroad was negligent, and the stock was injured while in its possession, then the plaintiff would be entitled to recover whatever damages, in your opinion, he has sustained, under the testimony in the case; that being entirely a matter for you. If this stock was injured after it left the possession of the Southern Railway, the plaintiff would not be entitled to recover. Before the plaintiff can recover here, you must be satisfied that it was injured while in the possession of the Southern Railway, and they were negligent, if you believe there was this contract."

Page 119, requests 16 and 17:

"'Even if the evidence shows that the plaintiff's horses were injured when they arrived at Clinton, this fact does not entitle him to damages against the Southern Railway Company, but, before he can recover against it, the jury must be satisfied from the evidence that such injuries were inflicted while the horses were in charge of the Southern Railway Company; and, unless the evidence does satisfy the jury of this fact, then the verdict must be for the defendant.' I charge you that. 'Even if plaintiff's horses were injured when they arrived at Clinton, and it was uncertain whether those injuries occurred on the Southern Railway Company, or Columbia, Newberry & Laurens Railway, then the verdict must be for the defendant.' I charge you that."

Page 125, middle of folio 496:

"As I told you before, before you can hold this railroad responsible, you must be satisfied by a preponderance of the testimony that the injury, if any, occurred while the stock was in their possession."

As remarked by Mr. Welch in his argument: "Can there be any doubt, therefore, after reading these two parallel sections of his honor's charge, what his meaning was? Column 'a' shows that the isolated portions of the charge may be taken, when considered alone, to hold that a common carrier is liable beyond its terminus. Column 'b' shows that his honor meant to charge nothing like that. He expressly says, again and again, both in his general charge and in charging defendant's requests, that the injury, if any, for which the defendant is held liable, must have occurred on the defendant's road and while in defendant's possession. Now, we confess we do not see how it could be made plainer."

We have thus reproduced what the circuit judge did say, and in what connection he said it. Finding, as we do, that the circuit judge exercised very great care in limiting, by easy and just terms, the liability, if any, of the defendant railroad, we are not inclined to view his remarks, in his charge as complained of, as erroneous. Now, when a circuit judge indulges in some general remarks upon the law, without any possibility of affecting thereby the issues actually on trial before him, we can see no reversible error. Somewhat akin to this is what was said by the late Chief Justice Simpson in Wallingford v. Railroad Co., 26 S. C. 264, 2 S. E. 21: "Before discussing these exceptions, it would be well to state some of the principles of law applicable to common carriers, about which there is little or no doubt. At common law there is no exemption to the liability of common carriers for goods, etc., intrusted to them, except for an act of God or of the king's enemies. They are regarded as insurers as to all else. In England, however, and in several of the states of this Union, including our own [South Carolina] the common-law doctrine was modified to the extent of allowing a common carrier to exempt himself from this broad liability by special contract as to certain specified causes of injury. See, in this state, Swindler v. Hilliard, 2 Rich. Law, 286; Baker v. Brinson, 9 Rich. Law, 202, and other cases that need not be cited. It was, however, held in all these cases: That he could not shield himself from the consequences of negligence by a contract. That his character as a common carrier could not be changed by contract. Only his liability to the extent of the specified exemptions was diminished. In all things else the general doctrine of common carriers applied, and especially as to negligence. And, further, that the onus was upon him to bring himself, by the testimony, within the exemptions mentioned in the contract. [Here follows, in the opinion, a quotation from the case of Swindler v. Hilliard, supra.] It was held in that case that common carriers could not by any special contract or agreement exempt themselves from liability for negligence, and that, when a contract was made, the onus of showing, not only that the cause of the loss was within the terms of the exemption, but also that there was no negligence, lies on the carrier." As will be seen by considering the charge, as a whole, the circuit judge was exceedingly careful to limit the liability only for injuries, if any, to the 24 hours while they were in charge of the Southern Railway Company.

The defendant insisted that the contract between the plaintiff and itself was embodied in the bill of lading signed by the Kansas City, Ft. Scott & Memphis Railway Company and Tough & Son. If so, the defendant had to agree to the thirteenth article of said contract, to wit: "* * * It is also agreed that the conditions of this contract shall inure to the benefit of all carriers transporting the live stock shipped hereunder, unless they otherwise stipulate, and that in no case shall one carrier be liable for the negligence of another." So far as the sixth exception is concerned, it must be overruled, for it is clear from an examination of the whole charge that the circuit judge limited the liability of the defendant to its own acts of commission and omission. And so as to the seventh exception; his honor was very careful in his charge. And so as to the eighth exception; his honor was, if anything, too lenient in his charge to the defendant. Hear his charge: "'(5) If the jury are satisfied that the bill of lading purporting to have been issued on October 28, 1896, by the Ft. Scott, Kansas City & Memphis Railroad Company to John S. Tough & Sons, in the contract for the transportation of the horses described in the complaint from Kansas City, Missouri, to Clinton, S. C., and that this contract was made under circumstances similar to those stated in request No. 1, then the plaintiff cannot recover for any alleged injuries to said horses by simply proving that said horses were in good order when they were first delivered to the railroad company, or that they were in good order at any intermediate point, and then by proving that they were damaged when they arrived at their destination; but he must go further, and prove that such injuries were not caused by their being weak, unruly, or exhausted from their long journey, or from the cramped and crowded condition of the horses in the car, or from the ordinary jars or concussions incident to the ordinary managing and running of a freight train.' I charge you that." For, notwithstanding all these advantages conceded to the carrier, it may be that some proviso as to negligence by the carrier should have been included in the charge; but no complaint comes to us on this matter, and we only mention it to show that appellant has not been injured by the charge. This exception is overruled.

Next we will consider the ninth ground of appeal, which complains that the judge charged the jury that "if you [the jury] believe they took it [the car load of horses] as common carriers at Birmingham, Alabama, they

are insurers of the goods, and it was their duty to deliver it in good order at its destination, in Clinton." The error in this charge is alleged by appellant to be that by this charge his honor caused the jury to believe that a common carrier of live stock is an insurer "(1) against injuries inflicted by the unruly dispositions of the animals themselves; (2) against injuries inflicted by the ordinary jars and concussions caused by the ordinary running and managing of a train; (3) against injuries inflicted by a connecting line to which, in the performance of its duty, the first carrier had delivered the stock to be transported to their destination." We have just seen that the circuit judge charges the law as to first subdivision as requested by appellant, and so, also, as to the second subdivision; and, so far as the third subdivision is concerned, the charge of the judge is its own vindication, as to the error here suggested. This exception is overruled.

We will next consider the tenth exception: "(10) In instructing the jury that defendant's fifth request, to wit: 'If the jury are satisfied that the bill of lading purporting to have been issued on October 28, 1896, by the Ft. Scott, Kansas City & Memphis Railroad Company to John S. Tough & Sons is the contract for the transportation of the horses described in the complaint from Kansas City, Missouri, to Clinton, S. C., and that this contract was made under circumstances similar to those stated in request No. 1, then the plaintiff cannot recover for any alleged injuries to said horses by simply proving that said horses were in good condition when they were first delivered to the railroad company, or that they were in good order at any intermediate point, and then proving that they were damaged when they arrived at their destination; but he must go further, and prove that such injuries were not caused by their being weak, unruly, or exhausted from their long journey, or from the cramped and crowded condition of the horses in the car, or from the ordinary jars or concussions incident to the ordinary managing and running of a freight train,'—was only applicable to this case provided the stock were shipped under the contract as expressed in the bill of lading, and that it was not applicable if the defendant received the stock as a common carrier, whereas it is respectfully submitted that the request was applicable even though the defendant did receive such horses as a common carrier." There was a contest betwixt the parties litigant as to what contract governed the defendant in the performance of its duty as a common carrier, to wit, whether under the common-law liability, without any special exemption limiting this liability, which, of course, would follow a contract under the common law for the transportation of the 24 head of stock from Birmingham, Ala., to Clinton, S. C., by the Southern Railway Company itself, or whether the contract of the Ft. Scott, Kansas City & Memphis Railroad Company governed. This being the contest here, it would have been improper for the circuit judge to have made the charge as requested, without adding his own closing words, if our statute (section 1720, Rev. St.) applies to the case at bar; and we may remark that we have some serious doubts as to whether the defendant has brought itself under the protection of that section, for this reason: That section says that the initial road shall continue liable for the articles received by it for shipment, unless it is able to produce a receipt in writing from a connecting road for the articles or article so shipped. Now, is the Southern Railway Company the initial road, and has it produced a receipt in writing from a connecting road for the articles so shipped? The articles shipped were 24 horses. Has the Southern Railway Company produced a receipt in writing therefor? Here is the paper they produce:

SOUTHERN RAILWAY CO., So DIVISION.

DAILY REPORT OF ALL CARS

Received from and Delivered to C. N. & L. R. R. at Newberry, S. C., Station,

Enter Home Cars First.

During the 24 Hours Ending 12 Midnight, Nov. 4th, 1896.

RECEIVED FROM								DELIVERED TO							
Hour Received	Initial of Road.	No. Cars	※	Kind.	L. or E.	Destination.		Hour Delivered	Initial of Road.	No.	※	Kind.	L. or E.	Destination.	
							1	11:40 a. m.	Sou.	3488		B.	L.	Laurens.	
							2		S. W.	1768		S.	L.	Clinton.	
							3								
							4								
							5								

I certify that the above is a correct list of cars received this day. Received the above cars from Southern Railway Co.

J. A. BURTON, Agent H. E. CAVANAUGH, Agent W.

Designate class of cars as follows: B, for Box; S, for Stock; F, for Flat; G, for Gondola; and C, for Coal.

※ This space for sup't. car service.

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Now, remembering that the section 1720 requires a receipt in writing for the article or articles, it may be asked where in the paper tendered by the defendant is there any receipt in writing for 24 horses? We see the letters "S," "L," which are interpreted to mean "Stock," "Loaded," yet no character to show the stock shipped, or number thereof, here appears. Besides, the very headlines say, "Daily Report of All Cars," and the receipt is "for the *above cars*." (Italics ours.) Might it not be stated that the very aim of this section of our law was to fasten upon some common carrier the receipt of the specific article or articles shipped, by the production of a receipt in writing of such article or articles? But, be this as it may, we find no error in this tenth exception pointed out, and it is overruled.

We will next consider the 11th exception: "(11) In refusing to charge the defendant's request to charge, to wit, 'Where horses have been transported by successive carriers, and the proof only shows that they were in good order when first delivered, and were damaged when they reached their destination, then the law presumes that such damage was caused while such horses were in the hands of the last railroad company,' and in instructing the jury that 'the whole matter is a question of fact for you. As I told you before, before you can hold this railroad liable you must be satisfied by a preponderance of the testimony that the injury, if any, occurred while the stock was in their possession, and on account of their negligence, provided you conclude they are shipped under a special contract.' The error being, as it is respectfully submitted, in instructing the jury: First. That this is a question of fact for them, whereas, it is respectfully submitted, it was a question of law for the court to instruct the jury what is or is not a presumption of law. Second. That, before the defendant could be held liable, they must be satisfied by the preponderance of the evidence that the injury, if any, occurred while the stock was in the possession of the defendant, and on account of its negligence, provided the stock was shipped under a special contract; thus overlooking the principle or rule of law which requires the plaintiff to prove by the preponderance of the evidence that any injuries which might have been inflicted upon the horses were caused by the negligence of the defendant, whether it receives the stock under special contract or as a common carrier." As to the first subdivision, we might ask what are juries provided for, unless it is to try questions of fact? It seems to us that whenever direct evidence of witnesses is introduced, bearing upon a disputed question of fact, presumptions, like the Arabs, "fold their tents and steal away." As to the second subdivision, we think the circuit judge in his charge has more than done his duty to the defendant on this line of thought. This exception is overruled. "(12) In refusing defendant's eleventh request to charge; it being respectfully submitted that such request embodied a sound rule of law, which is directly applicable to this case." Here is the eleventh request, and what the circuit judge said thereon: "'(11) Where horses have been transported by successive carriers, and the proof only shows that they were in good order when first delivered, and were damaged when they reached their destination, then the law presumes that such damage was caused while such horses were in the hands of the last railroad company.' I refuse to charge you that. The whole matter is a question of fact before you. As I told you before, before you can hold this road liable you must be satisfied by the preponderance of the evidence that the injury, if any, occurred while the stock was in their possession, and on account of their negligence, provided you conclude they are shipped under a special contract." The circuit judge was right. Presumptions cease when facts are proved. It was a matter for the jury. Let the exception be overruled.

"(13) In refusing to charge the defendant's second request, to wit: 'If the jury are satisfied that the bill of lading purporting to have been issued on October 28, 1896, by the Ft. Scott, Kansas City & Memphis Railroad Company to John S. Tough & Sons is the contract made, as above stated, for the transportation from Kansas City to Clinton, S. C., of the horses described in the complaint, then it was the duty of Tough & Sons, at their own risk and expense, to take care of, feed and water, and attend to said stock while the same were in the stock yards of the said railroad company awaiting shipment, and while they were being loaded, transported, unloaded, and reloaded, and to unload and reload the same at feeding and transfer points, and wherever the same might have been unloaded and reloaded for any purpose whatever; and the plaintiff cannot recover any damages from defendant in this case without proving to the satisfaction of the jury—First, that the horses in question were injured while in the possession of the defendant; secondly, by proving that the injuries were not caused by the negligence of John Tough & Sons to take care of said horses as they had contracted to do. In other words, under such circumstances, if they exist, the plaintiff cannot recover any damages of the defendant simply by proving that the horses were in good order in Kansas City, before they were delivered to defendant, and then by proving that they were damaged when they were received at Clinton, S. C.; but, before he could recover, he must go further, and prove that these injuries were not attributable to the negligence on the part of Tough & Sons to take care of said horses as they had contracted to do.' It being respectfully submitted that the defendant had the right to have this request charged, because—First, it was applicable on the question of contributory negligence on the part of plaintiff or of his agent; and, second, if the bill of lading was the

contract, then the burden of proving that the stock were not injured by the negligence of the plaintiff or his agent was, by the contract, upon the plaintiff, and the defendant was entitled to have the jury properly instructed as to the force and effect of such contract." This exception raises practically two questions: (1) The request to charge was proper, because it was applicable to the question of contributory negligence. In Comer v. Railroad Co., 52 S. C. 51, 29 S. E. 637, this court held that even if a plaintiff fails to feed, water, and rest his stock at the end of every 28 hours such stock is in a car for transportation, and during transportation, it is the duty, under the law, of the railroad company in charge of the same to so feed, water, and rest stock on board its cars. (2) The next question is that by the bill of lading signed in Kansas City, Mo., it devolved upon the plaintiff to point out by his proof that the 24 horses were not injured by his acts. The judge's charge clearly limits the liability of the defendant to such injuries as it inflicted. This exception is overruled.

"(14) Because, in refusing the defendant's third request to charge, to wit: 'Where one ships live stock over a railroad, and contracts to go along and take care of said stock while it is being transported, loaded, unloaded, and fed and watered, then, under such contract, it is the duty of such person to perform his part; and if he neglects to do so, and injuries occur to said stock on account of such negligence, the railroad company cannot be held liable for any damages occasioned thereby,'—his honor did not instruct the jury as to the force and effect of the bill of lading, and as to its bearing upon the contributory negligence of the plaintiff." The case of Comer v. Railroad Co., supra, disposes of this ground of appeal. It is dismissed.

"(15) Because the charge of his honor was calculated to mislead the jury and cause them to think, under the law, (1) that a railroad company could not by special contract shift the burden of proof from itself to a plaintiff, so as to make such plaintiff, who had bound himself by special contract, to go along and take care of live stock; (2) that it was plaintiff who did take upon himself the burden of showing that any injuries which were inflicted upon such stock while en route were not caused by his own negligence failing to comply with such contract; (3) that a railroad company, which, as a common carrier, received live stock to be transported to a point beyond its line, was an insurer against any damage which might be inflicted on said stock by the unruly dispositions of said stock, or by the ordinary jars and concussions incident to the ordinary running and management of a train, or through the negligence of a connecting line to which railroad company had, in the performance of its duty, delivered such stock for transportation to their destination." We have reproduced, in effect, the last exception of the defendant. We must say that in the light of the decision of the court in Comer v. Railroad Co., supra, the defendant is quite persistent in making the same question which was passed upon in that case. The positive testimony of the plaintiff was that no ticket was furnished him upon the trains of the Southern Railway Company. But why should we refer to testimony that is for the jury? As to the third subdivision, the circuit judge has left us no ground to criticise his charge. It covered the case admirably well. This exception is overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

LONG v. HUNTER et al.

(Supreme Court of South Carolina. July 9, 1900.)

CONTRACT—MODIFICATION—MORTGAGE TO SECURE PERFORMANCE — PAYMENT — SUBSEQUENT ADVERTISEMENT OF SECURITY — WRONGFUL SEIZURE AND SALE — SPECIAL DAMAGE—JOINDER OF ACTIONS—SUFFICIENCY OF COMPLAINT—DEMURRER—PRIOR RULING—REQUESTS TO CHARGE.

1. Where a demurrer to a complaint for want of facts was once overruled, such ruling was binding, when it was renewed on the subsequent trial before another judge.

2. Where plaintiff contracted to ship a stated amount of merchandise to defendants, and to pay a stipulated sum per barrel for shortage, he was not liable for such shortage as was caused by following defendants' subsequent instructions to discontinue an unprofitable portion of the contract.

3. Defendants seized and sold plaintiff's property on account of indebtedness, and thereafter advertised a sale of other property given to secure the debt. *Held*, that defendants were liable for advertising the sale of the security, if the amount due them had been paid prior thereto, on the other sale, to a party entitled to receive it, since payment to an agent is payment to the principal.

4. On an issue whether plaintiff was liable for failure to ship an agreed amount of merchandise, the court construed a letter written by defendants as a modification of the agreement. *Held*, that a request to charge that plaintiff would be liable for the shortage unless defendants made use of power over him to prevent his fulfilling the contract, or unless there was a modification of the contract, was properly refused, since the court's construction of the letter made the question raised merely speculative.

5. A request to charge that special damage could not be recovered unless the facts causing such damage were plainly shown was properly refused, since defendants should have moved to require plaintiff to make his complaint definite and certain if it was defective in that respect.

6. Where a request for instruction contained an abstract proposition of law, not relevant under the pleadings, it was properly refused.

7. In an action for damages for advertising a sale of mortgaged property after the indebtedness was satisfied, failure to charge, at defendant's request, that he had a right to make the sale if any part of the debt, however small, remained unpaid, was not error, where the proposition requested was covered by the general charge.

8. Plaintiff mortgaged property to defendant to secure an advance, and contracted therein to ship defendants a specified amount of merchandise, and to pay a stipulated sum per bar-

rel for any shortage. Thereafter defendant wrote plaintiff to discontinue certain work. A shortage resulted, which plaintiff claimed was caused by following the order. Upon his refusal to pay for the shortage, defendant seized and sold property consigned to other parties, and advertised a sale of the security also. Plaintiff sued, joining four causes of action: First, praying an injunction preventing a sale of the security; second, asking damages for breach of contract in ordering discontinuance of part of the work; third, asking damages for seizing and selling his property; fourth, asking damages for advertising the sale of the security. *Held*, on demurrer, that the causes of action were properly joined.

9. A cause of action alleging that defendants, under a pretended lien, voluntarily seized and sold certain merchandise shipped by plaintiff to other parties, and thereby damaged plaintiff's reputation and credit, stated sufficient facts, without showing the value of the property.

10. A cause of action alleged that defendants advertised a sale of property mortgaged as security, after the indebtedness was overpaid, and thereby forced plaintiff to raise and pay the balance claimed, at great inconvenience. *Held*, that a demurrer for want of facts was too general, and was properly overruled.

Appeal from common pleas circuit court of Hampton county; W. C. Benet, Judge.

Action by M. K. Long against John H. Hunter and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

The following is the order of Judge Aldrich overruling defendants' demurrer to the complaint: "The defendants, Hunter, Pearce & Battey, demurred to the amended complaint and amended supplemental complaint herein on several grounds. After hearing counsel, ordered, that the demurrer be overruled. The first ground of demurrer (that several causes of action have been improperly united) is not well taken, because it appears on the face of the complaint that the alleged causes of action (certainly two of them) arose out of the same transaction between the same parties, and all the causes of action as set forth in the complaint on their face state facts sufficient to constitute causes of action. I don't think a defendant can demur on antagonistic grounds; that is, on the grounds that the causes of action have been improperly united, and also raise the question that the same alleged causes of action do not state facts sufficient to constitute causes of action. The demurrer to the second cause of action is not well taken. It fails to state or point out the ground of objection. It states a conclusion of law, and plaintiff's second cause of action does, on its face, state facts sufficient to constitute a cause of action. The demurrer to the third cause of action is not well taken. The first ground taken may show a cause for election, but is not a ground of demurrer. The second ground cannot be sustained, as the relief is no part of the cause of action. An allegation of value may be essential in cases of conversion, but not in this alleged cause of action. To take a man's property under certain circumstances may be injurious to his credit and reputation, so as to give him an action for damages, and here we have on its face a good cause of action stated. The fourth ground of demurrer is too general to be considered. It fails to point out in what particular the alleged cause of action is insufficient, as required by the Code and rule of court. The demurrer to the second cause of action in the amended supplemental complaint is open to the same objection,—too general. The court has no guide as to the matters contested, and also states a conclusion of law,—as to the omission by defendants' counsel in his certificate to the demurrer. I think, to warrant or sustain an objection thereto, the counsel of plaintiff should have either returned demurrer or given notice of omission. The demurrer by the defendants being hereby overruled on all the grounds, it is ordered that defendants have leave to serve their answer herein within twenty days from date of this order."

I. L. Tobin, for appellants. A. McIver Bostick and W. S. Tillinghast, for respondent.

GARY, A. J. The complaint herein contains four causes of action, the first of which is as follows: Paragraph 1 of the complaint alleges the partnership of the defendants. Paragraph 2 alleges that the plaintiff and J. C. Smith, then doing business under the firm name of Long & Smith, on the 13th of January, 1898, executed a mortgage in favor of the defendants on certain real and personal property therein mentioned, to secure the payment of $1,055.86, to be advanced to the said Long & Smith by the defendants during that year. The other paragraphs are as follows: "(3) That the said Smith subsequently, and during the season of 1893, withdrew from the partnership of the said Long & Smith; transferred and delivered all his interest and ownership in the said business and property of the partnership to plaintiff, the said M. K. Long. (4) That the said Long & Smith, by their obligations above referred to, agreed to ship said defendants all turpentine and rosin manufactured by them during the said season of 1893, for sale on commission, and to pay ten cents per barrel on rosin short of nine hundred barrels by them, and fifty cents per barrel on spirits of turpentine short of three hundred barrels. (5) That plaintiff above named shipped defendants above named all turpentine and rosin manufactured by him and by the said Long & Smith during the year of 1893, in accordance with contract above referred to; said shipment falling short of number agreed to be shipped as aforesaid by one hundred and thirty-seven barrels spirits of turpentine, and three hundred and eighty-seven barrels of rosin. That the failure on the part of plaintiff to ship the number of barrels, both of spirits of turpentine and rosin, required by

the contract aforesaid, was not due to any default on his part, but was at the express order and direction of defendants aforesaid, subsequently delivered to him in the midst of the season of 1893, requiring him to curtail his manufacture and shipments, in compliance with which order and direction plaintiff greatly reduced, and to a large extent discontinued, the manufacture of and shipment of turpentine and rosin. (6) That notwithstanding the said plaintiff's failure to ship the said promised number, or more than he actually shipped, of barrels of turpentine and rosin, was the direct result of the said direction on the part of the defendants aforesaid, with which plaintiff was forced and compelled to comply, as he was dependent on them for advances to run the business, the defendants have unjustly, wrongfully, unlawfully, and without right, charged the account of said Long & Smith with one hundred and seven and $^{20}/_{100}$ dollars shortage. (7) That payments were made from time to time during the season of 1893, from the proceeds of sales of shipments as aforesaid, by said plaintiff, and applied to said indebtedness; leaving a balance due on said indebtedness by said plaintiff to defendants aforesaid at that time, to wit, the close of the season of 1893, of only seventy-two and $^{88}/_{100}$ dollars, not including the charge of one hundred and seven and $^{20}/_{100}$ dollars shortage unjustly, wrongfully, and unlawfully charged as aforesaid, as shown by the within statements of account furnished by defendants to plaintiff, and by their acknowledgments and admissions to him. (8) That afterwards, and some time during the year of 1894, the defendants aforesaid seized and caused to be sold in the city of Savannah, Georgia, seven barrels of spirits turpentine and eight barrels of rosin, of the value, respectively, of ninety-six dollars and sixteen dollars, the property of plaintiff, and have failed and refused to account in any way to plaintiff for proceeds or value of the said seizure and sale, and have not even credited the same, or any part thereof, on the balance claimed by them on the mortgage deed aforesaid, although plaintiff owed defendants no other debt than as aforesaid. (9) That said plaintiff, from the proceeds of his shipments of turpentine and rosin as aforesaid, and for the value of the turpentine and rosin seized and sold by the defendants as aforesaid in Savannah, Georgia, has overpaid the aforesaid mortgage indebtedness to the defendants by the sum of thirty-six dollars, and defendants are justly indebted to him in the sum of thirty-six dollars, with interest on same. (10) That notwithstanding said mortgage has been paid in full and overpaid as aforesaid, and subsequent to the seizure and sale of plaintiff's property, set forth in paragraph 8, above, during the month of November, 1894, defendants, by virtue of a power of sale contained in the mortgage herein set forth, advertised and are advertising for sale at public outcry at Hampton court house, in said county and state of South Carolina, on the first Monday in December, the same being sales day of the present year (1894), the above-described property of plaintiff, covered by the said mortgage, to satisfy balance claimed by them on the debt secured thereby. (11) That a sale of plaintiff's property, under power as aforesaid, before an adjudication and judicial determination of their accounts and claims between plaintiff and defendants, would greatly embarrass and would work an irreparable injury and loss to him in the event that anything at all should be adjudged due on said mortgage. (12) That plaintiff is ready and willing, in the event that any amount at all should be adjudged to defendants, to pay the same, and redeem his property, which is worth considerable more than the amount claimed by defendants, and not less than seven hundred dollars."

Second Cause of Action. After alleging the facts hereinbefore mentioned as to the partnership of the plaintiff with J. C. Smith, and the withdrawal of Smith therefrom; also, the facts as to the partnership between the defendants, and the facts relative to the execution of the mortgage hereinbefore mentioned,—the plaintiff makes the following allegations in his second cause of action: "(3) That, subsequent to the withdrawal of said Smith as aforesaid, the plaintiff herein was notified, directed, and ordered by the said defendants, in the midst of the season of 1893, to cease working any but first or virgin boxes in this business as a manufacturer and shipper of turpentine and rosin, which plaintiff did, to his great loss and damage, as a large number, to wit, about forty thousand, of his boxes were of the prohibited class, and plaintiff's manufacture of both turpentine and rosin was greatly curtailed thereby. (4) That plaintiff was forced and compelled to comply with the said order of defendants at all costs; he being absolutely dependent upon them for the advances in money and supplies agreed to be advanced by defendants and necessary to carry on his said business, and bound by the contract aforesaid to make all shipments for the year to the said defendants, which contract rendered it impossible for plaintiff to transfer his business at the time to other commission merchants, or elsewhere obtain the necessary advances to run the business. (5) That this order on the part of the defendants was never authorized or willingly acquiesced in by plaintiff, but was simply obeyed by him through necessity, as aforesaid, thereby inflicting upon him, wrongfully, unjustly, unlawfully, loss and damage in money, labor, and crude turpentine abandoned and wasted, to the value or amount of four hundred dollars."

Third Cause of Action. The first paragraph of this cause of action alleges the partnership of the defendants. The other allegations are as follows: "(2) That during the

year of 1894, in the city of Savannah, Georgia, the defendants above named unjustly, unlawfully, and without right or authority whatsoever, seized and caused to be sold seven barrels spirits of turpentine and eight barrels of rosin, the property of plaintiffs, shipped by him to other parties for sale on plaintiff's account, under a pretended lien or claim over the same on the part of the said defendants. (3) That plaintiff was damaged by said seizure and sale, in the diversion of the proceeds thereof from his business, and in the injury to his reputation for honesty and fair dealing, and consequently to his credit, which made it impossible for him to continue to obtain the necessary advances to run his business as a manufacturer and shipper of turpentine and rosin (the said seizure and sale being a matter of public and general notoriety), to the amount of three hundred dollars."

Fourth Cause of Action. Paragraph 1 is the same as that mentioned in the preceding cause of action. The other allegations are as follows: "(2) That in the month of November, 1894, defendants above named unjustly, wrongfully, and unlawfully, and without right or authority, by virtue of a power of sale contained in mortgage previously, to wit, in the year 1893, executed to defendants by the firm of Long & Smith, of which firm plaintiff was at the time a member (the said mortgage having been satisfied and paid in full), advertised and are advertising for sale at public outcry at Hampton C. H., South Carolina, on the first Monday in December of said year of 1894 (the same being sales day), real and personal property of plaintiff to satisfy a pretended balance claimed by said defendants on said mortgage debt. (3) That plaintiff has been damaged, by the aforesaid unauthorized and unlawful act of defendants, in his reputation and credit, and thereby hampered and damaged in his business as a manufacturer and shipper of turpentine and rosin, in the amount of three hundred dollars."

The amended supplemental complaint, omitting the first cause of action, to which the defendants did not interpose a demurrer, is as follows: "The plaintiff above named, for an amended supplemental complaint, herein alleges: * * * For a second cause of action: (1) That subsequent to the commencement of this action, and the various transactions set forth in the original complaint herein, the defendants named also in said complaint, to wit, John H. Hunter, Wm. K. Pearce, and Frank C. Battey, co-partners doing business under the firm name of Hunter, Pearce & Battey, proceeded to advertise, and were about to sell, pursuant to advertisement mentioned in the original complaint herein, the property of the plaintiff described in said complaint, which is hereby referred to and made a part of this amended supplemental complaint, and thereby forced plaintiff herein (the injunction prayed for in the original complaint having been refused) to raise and pay over the balance claimed by them upon the mortgage set out in the original complaint, to wit, a mortgage executed by the firm of Long & Smith, of which plaintiff was at the time of execution thereof a member, although the said mortgage had been paid in full and overpaid, as shown in the original complaint, to which said payment, made under protest, plaintiff was compelled in order to preserve the status of his property pending a judicial determination in this action of the state of accounts between parties hereto. (2) That the plaintiff was unjustly, wrongfully, unlawfully compelled by the aforesaid unjust and unauthorized act and attempt on the part of the defendants aforesaid, in the manner aforesaid, to raise a considerable sum of money to stop said sale, at great inconvenience, trouble, and expense to himself, to wit, loss of time from his business, worry of mind, trouble and expense of executing securities and borrowing money, loss of capital necessary to his business, and consequent embarrassment thereto, to his damage of one hundred dollars."

The jury rendered a verdict in favor of plaintiff of $611.44. The defendants appealed upon the following exceptions: "The presiding judge committed error of law: Ex. 1. In overruling defendants' demurrer to the second cause of action in the complaint, on the grounds stated therein,—that the same does not state facts sufficient to constitute a cause of action. Ex. 2. In overruling defendants' demurrer to the fourth cause of action stated in the complaint, on the ground stated therein,—that the same does not state facts sufficient to constitute a cause of action. Ex. 3. In charging the jury that 'if the shortage of three hundred and eighty-seven barrels of rosin, and the one hundred and thirty-seven barrels of turpentine, was caused because Long did not work the old boxes, he could not be held responsible for any loss to the other side, because he and the other side had agreed not to work the old boxes'; there being nothing in the letter referred to from the defendants to the plaintiff, containing the alleged agreement between the parties, which could be construed into anything more than a recommendation from a factor in the market to his customer to ship a better, a different quality of material, for the customer's advantage alone. Ex. 4. In charging the jury, 'If when Long's property was advertised in Hampton, and this two hundred and forty-three dollars was collected, if at that time the money was paid by knocking off of this account, and paid by collection in Hampton [Savannah], the defendant Hunter had no right to collect anything more, and, if thereby Long has been damaged, he is liable,' whereas it is submitted, as matter of law, that the defendants had the right at any time after the debt became due, and prior to receipt by him of the amount due thereon from the court in Savannah, and the plaintiff in Hampton, which occurred about the same time, to wit,

sales day in December, 1894, to advertise the land for sale under the mortgage. Ex. 5. In allowing proof of special and speculative damage to go to the jury under the allegations of the fourth cause of action on the amended complaint and the last cause of action in the supplemental complaint, over the objection of the defendants' attorney. Ex. 6. In refusing to charge the jury, as requested by the defendants, as follows, in the third request to charge: 'That the letter of the defendants does not change or modify the contract as to quantity of turpentine and rosin the plaintiff agreed to ship to the defendants, but simply expresses the wishes of the defendants, considering the welfare of the plaintiff, that the plaintiff would stop chipping old boxes, and chip no other but virgin timber, and the scrape from the old boxes.' Ex. 7. In refusing to charge the jury as requested by the defendants in their fourth request to charge: 'That unless the plaintiff was so under the influence or control of the defendants that he was not possessed of free agency in the matter, and the defendants made use of their power in such a way as to prevent him from shipping the number of barrels of turpentine agreed on, or unless there was some change in the contract, in whole or in part, with reference to payment for nonshipments, the plaintiff is bound by his contract, and the defendants have the right to make the charge against him for nonshipment provided in the agreement.' Ex. 8. In refusing to charge the jury as requested by the defendants in their fifth request to charge: 'That, where an attempt is made to prove special damages, the facts evidencing such damage must be so described and pointed out that the defendants may have such information in regard to the same as to enable them to intelligently investigate and inquire into the truth or falsity thereof; and, unless the proof of such damage is sufficiently specific as to furnish the information for such inquiry or information, the jury cannot consider such testimony.' Ex. 9. In refusing to charge the jury as requested by the defendants in the seventh request to charge: 'The proof of mere advertisement, without seizure, of another's property, under a power contained in a mortgage, in good faith, for the purpose of enforcing the collection of a debt which the mortgagee honestly believes to be due and secured by the same, will not sustain an action for damages for injury to reputation and credit.' Ex. 10. In refusing to charge the jury as requested by the defendants in the eighth request to charge: 'That if any amount, however small, was due on the mortgage debt, which the plaintiff refused to pay, the mortgagee had the right to advertise and sell the property to enforce collection of the same.' Ex. 11. In allowing plaintiff to testify, against the objection of the defendants, that in consequence of not receiving that one hundred dollars from Gregg, Jones & Wood, he was injured in his reputation and credit. Ex. 12. Defendants except to the order of Judge Aldrich in overruling the demurrer of the defendants that several causes of action are improperly united in the complaint. Ex. 13. Defendants except to the order of Judge Aldrich overruling defendants' demurrer to plaintiff's second cause of action. Ex. 14. Defendants except to order of Judge Aldrich overruling defendants' demurrer to plaintiff's third cause of action. Ex. 15. Defendants except to order of Judge Aldrich in overruling defendant's demurrer to plaintiff's second cause of action stated in amended supplemental complaint. Ex. 16. Defendants except to order of Judge Aldrich, in that, if the ruling of the court was correct, that the demurrers were inconsistent and would not stand together, the defendants should have been allowed to elect which they should rely upon, and the court should not have passed upon said demurrers until after such election or refusal to elect."

The respondent's attorneys served the following notice: "Please take notice that upon appeal herein plaintiff (respondent) will urge that the judgment of the court below, and the rulings of his honor, Judge Gage, especially as to the demurrers to the various causes of action, be sustained, not only upon the grounds mentioned in the proceedings herein by his honor, but also upon the additional grounds that said demurrers had already been passed upon and overruled by Judge Aldrich, and the same are res judicata."

The appellants' attorney argued only four of the foregoing exceptions. We will discuss the exceptions in regular order:

Exceptions 1 and 2. This case was first heard by Judge Aldrich, who ruled that the demurrer to the fourth cause of action was too general to be considered, and that the demurrer to the second cause of action in the supplemental complaint was open to the same objection, as they failed to point out in what particulars the alleged causes of action were insufficient. This ruling was binding on Judge Gage, and he did not err in overruling the said demurrers. Turner v. Association, 51 S. C. 33, 27 S. E. 947; Cartin v. Railroad Co., 43 S. C. 221, 20 S. E. 979; Kerchner v. Singletary, 15 S. C. 535.

Exception 3. The record contains the following, in the presiding judge's charge to the jury, to wit: "Long says that on the 22d day of August, 1893, he wrote this letter. Here it is: 'We received a notice from a meeting of the Naval Stores Association, through you, urging all operators to stop work on all turpentine boxes, except virgin, on or before the 26th of August. You will please let me know by return mail what you want me to do in regard to the matter, as I am at a loss to know what to do.' Long wrote that letter to Hunter. It is dated the 22d day of August. On the 24th day of August, Hunter writes back this letter to Long: 'Replying to your favor of the 22nd

instant, beg to say, as there is no money to you in working old boxes at the price that spirits and rosin are now bringing, we want you to stop chipping your old boxes and commence at once to take off your scrape.' Now, gentlemen, as I told you in the start, the relationship between these two parties was fixed and covered by this contract. When two parties meet and enter into a contract, it takes two parties to change that contract. If one undertakes to change it, he breaks the contract. Now, what do these letters mean? Long and Hunter made the contract, and Long and Hunter have the right to modify the contract or add anything to it. Now, I charge you— I can charge you this, because these letters are in writing, and I can see it in black and white; and the law says I can charge you on what's in writing,—can explain it to you and construe it. They mean, as I construe it, that Long and Hunter undertook to modify, or, more properly, to add to, the contract they had made, and they agreed this between themselves,—that, at least, no more old boxes should be worked in 1893; and they agreed that only virgin boxes should be worked after the 26th of August. Now, I charge you, this shortage of rosin and turpentine, to wit, if the three hundred and eighty-seven barrels of rosin, and the hundred and thirty-seven barrels of spirits of turpentine, of 1893, was caused because Long did not work the old boxes,—if it was caused because he didn't work the old boxes— I told you he had a right not to work the old boxes, because he and the other side agreed, and he can't be held responsible for any loss to the other side, because he and the other side agreed not to work the old boxes. So much for these two items (sixty-eight dollars and fifty cents and thirty-eight dollars and seventy cents) charged against Long." This court sees no error in the presiding judge's construction of said letters.

Exception 4. If the amount due by the plaintiff to the defendants had been paid to a person having the right to receive it for the defendants, they did not have the right to advertise his property for sale. Payment of money to an agent authorized to receive it is equivalent to payment to the principal, even if it never reaches his hands.

Exception 5. Waiving the objection to this exception as being too general for consideration, we have failed to find in the record any facts upon which it can be properly predicated.

Exception 6. This exception is disposed of by what has already been said in considering the third exception.

Exception 7. The circuit judge construed the letter to be a modification of the original contract, and this rendered merely speculative the question raised by said exception.

Exception 8. If the pleadings were defective and insufficient, the defendants' remedy was by motion to require the plaintiff to make his allegations definite and certain, but not by a request to charge.

Exception 9. The request contained an abstract proposition of law, as it was not responsive to the issues made by the pleadings.

Exception 10. Although the circuit judge did not specifically charge as requested, the proposition contained therein was nevertheless embraced in his general charge.

Exception 11. We fail to find in the record any facts to which the exception could properly be referred.

Exception 12. This court is satisfied with the reasons assigned by Judge Aldrich in overruling the demurrer.

Exceptions 13, 14, and 15. Waiving the objection to these exceptions that they are too general to be considered, we fail to discover any error on the part of Judge Aldrich in overruling the demurrers.

Exception 16. There were other grounds upon which Judge Aldrich overruled the demurrers, and, as they are satisfactory to us, the exception cannot be sustained, even conceding that one of the reasons assigned by him was erroneous. It is the judgment of this court that the judgment of the circuit court be affirmed.

Ex parte NEAL LOAN & BANKING CO. LANAHAN et al. v. BAILEY LIQUOR CO.

(Supreme Court of South Carolina. July 20, 1900.)

APPEAL AND ERROR—APPELLANT NOT PARTY IN INTEREST—INTOXICATING LIQUORS—DISPENSARY LAW—SALE—WHO MAY QUESTION—ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. An exception to instructions will not be considered when it appears that the objecting party has no interest in the property in controversy.

2. The question of the validity of a sale of intoxicating liquors situated in South Carolina, on the ground of their contraband nature, can be raised only by the state.

3. A bill of sale of all of one's property in the state of South Carolina, made on valid consideration, is not, in effect, an assignment for the benefit of creditors.

Appeal from common pleas circuit court of Abbeville county; R. C. Watts, Judge.

Attachment by William Lanahan & Son against the Bailey Liquor Company. The Neal Loan & Banking Company claimed part of the attached property, as owner. From a judgment for claimant on an issue framed to determine the ownership of the property, plaintiffs appeal. Affirmed.

Ansel, Cothran & Cothran, for appellants. Jos. A. McCollough, for respondent.

POPE, J. The Bailey Liquor Company, whose domicile is in the state of Georgia, became indebted to William Lanahan & Son (a firm doing business in the city of Baltimore, Md.) for about $1,575; and, having failed to pay that debt or any part thereof, said Lanahan & Son began suit against the said the Bailey Liquor Company to recover

the said $1,575, in the court of common pleas for Abbeville county, in the state of South Carolina, in which county the said Bailey Liquor Company had some liquors, of value; and, as incident to said suit, the said Lanahan & Son sued out a writ of attachment on the 10th day of November, 1897, under which F. W. R. Nance, Esq., as the sheriff of said Abbeville county, seized the liquor belonging to the Bailey Liquor Company. But on the 11th day of November, 1897, the Neal Loan & Banking Company, of Atlanta, Ga., gave a notice in writing to said F. W. R. Nance, Esq., as said sheriff, that all the interest and estate of the Bailey Liquor Company in the liquors, etc., attached by him in Abbeville had been conveyed, for full value, to the said Neal Loan & Banking Company, which said company was the legal owner thereof. A motion was made by the Bailey Liquor Company to dissolve the attachment sued out by Lanahan & Son. This motion was finally granted by the supreme court of this state. See Lanahan v. Bailey, 53 S. C. 489, 31 S. E. 332. After the remittitur reached the circuit court for Abbeville, S. C., the Neal Loan & Banking Company applied to the presiding judge of the court of common pleas for Abbeville county, S. C., for an order framing an issue as to the ownership of these liquors. William Lanahan & Son alone contested this ownership. On the 3d October, 1899, Judge Ernest Gary directed the following issue to be tried by a jury: "Was the Neal Loan & Banking Company the owner of and entitled to the property attached in this case, at the time of attachment?" On the 6th day of April, 1900, this issue came on for trial before his honor, Judge Watts, and a jury. Testimony was submitted by the Neal Loan & Banking Company, through several witnesses, showing that, for a bona fide indebtedness, the Bailey Liquor Company conveyed to the loan and banking company the liquors in question, which sale was evidenced by an instrument in writing executed in the presence of witnesses in the city of Atlanta, in the state of Georgia. At the conclusion of the testimony it was agreed by counsel on both sides that the verdict of the jury should be made under the direction of the court. Then Judge Watts said to the jury, "Well, I instruct you, gentlemen, to write the word 'Yes' to that question now." It was thus determined that such liquors were the property of the Neal Loan & Banking Company. William Lanahan & Son were not satisfied with this result. They have appealed on the following grounds: "Exceptions: The defendants except to the ruling and charge of the presiding judge on the trial of this case upon the following grounds: (1) Because his honor erred in holding that the bill of sale introduced in evidence carried the title to the property to the Neal Loan & Banking Company, and instructing the jury to answer the issue, 'Yes.' (2) Because, the liquors alleged to have been conveyed being within the limits of this state, and this court having held in the case of Lanahan v. Bailey, 53 S. C. 489, 31 S. E. 332, that liquors shipped into this state to be sold in original packages cannot be attached and sold by the sheriff in satisfaction of a debt (the dispensary law not allowing any one to sell but a county dispenser), his honor erred in holding that the title to the liquor attached in this case passed to the Neal Loan & Banking Company by the bill of sale introduced. (3) Because, this court having held in the case of Lanahan v. Bailey, supra, that when liquors were shipped into this state, as in this case, it was unlawful, and the liquor contraband and subject to seizure by the state, his honor erred in charging the jury to answer in the affirmative. (4) Because, the bill of sale put in evidence being a conveyance of all the property of the Bailey Liquor Company, it was, in effect, an assignment with a preference in favor of the Neal Loan & Banking Company, and therefore void; and his honor erred in holding that it passed the title to the liquors to said Neal Loan & Banking Company, and hence erred in directing the jury to answer the issue in the affirmative. (5) Because, this court having held in the case of Lanahan v. Bailey, supra, that 'the statute, in its efforts to prevent the mischief arising from the illegal use and possession as aforesaid, had even gone to the extent of declaring null and void all obligations contracted in sale thereof,' his honor erred in ruling that the title under the bill of sale put in evidence passed the title to the Neal Loan & Banking Company, and also erred in directing the jury to find the issue in the affirmative."

As to the first exception, we do not see that the circuit judge was guilty of any error. In the first place, what concern is it of Lanahan & Son to protect the property of the Bailey Liquor Company? Certainly, although the Bailey Liquor Company is a party to this action, we have yet to learn that any objection to the claim of the Neal Loan & Banking Company has been made by it. Certain it is that Lanahan & Son are not the owners of this property, for their attempted lien was upset by this court. See 53 S. C. 489, 31 S. E. 332.

As to the second exception, we do not see how the purposes of the Neal Loan & Banking Company as to these liquors can here be brought in question by Lanahan & Son. They do not represent the state of South Carolina, or any of its municipalities. They are citizens of Maryland. And this view disposes of the third exception, also.

As to the fourth exception, we will say that we do not regard the instrument executed by the Bailey Liquor Company to the Neal Loan & Banking Company as an assignment, in the light of our South Carolina laws governing assignments. It was a sale outright.

Lastly, as to the fifth exception, we must say that we cannot view with approval the solicitude manifested by Lanahan & Son, who are liquor dealers themselves, as to a violation of the dispensary law of the state of South Carolina rendering null and void any

obligations contracted in the sale of liquors. It is the judgment of this court that the judgment of the circuit court be affirmed.

ALLEN v. PETTY et al.

(Supreme Court of South Carolina. July 16, 1900.)

BILLS AND NOTES—USURIOUS INTEREST—PENALTY—SURVIVAL OF RIGHT TO RECOVER—REFEREE — EXCEPTIONS TO FINDING — APPEAL AND ERROR.

1. In an action on a note, where defendants set up a counterclaim for the amount of usurious interest paid on the note, the error, if any, of the referee in allowing limitations to be interposed as an amendment to the reply was rendered harmless by a finding of the referee that limitations had no application to the case.

2. Under Rev. St. § 1391, giving a person who has paid usurious interest the right to recover, as a forfeiture, a sum double the amount which exceeds the interest allowed by section 1390, either by separate action or counterclaim, the right to set up the counterclaim does not survive to the legal representatives or heirs of the promisor, since it is an action for a statutory penalty.

3. An exception, in an action on a note, that the circuit judge erred in sustaining the finding of the referee that a counterclaim setting up a payment should not be allowed, is unavailable unless the error is established by a preponderance of the evidence.

Appeal from common pleas circuit court of Cherokee county; O. W. Buchanan, Judge.

Action by Mrs. A. G. Allen against Harriet V. Petty and others on a note. Judgment for plaintiff, and defendants appeal. Affirmed.

J. C. Jefferies, for appellants. Simpson & Bomar, for respondent.

GARY, A. J. That part of the special master's report which states the facts of the case is as follows: "This is an action brought by Mrs. A. G. Allen against the administrator of the estate of C. C. Petty, deceased, as well as against his heirs at law, to foreclose a mortgage given her by the said intestate. The note given by C. C. Petty to Mrs. Allen is as follows: '$600.00. Twelve months after date I promise to pay to Mrs. A. G. Allen or order the sum of six hundred dollars, for value received, with interest from date until paid at the rate of eight per cent. per annum; interest to be paid annually, or to be added to principal annually and bear interest at same rate as principal till paid. [Signed] C. C. Petty. Dec. 31st, 1891.' A mortgage was also executed and delivered to Mrs. Allen, or to her agent, covering some land in Cherokee county, to secure the payment of the said note. The following paper was also given to the agent of Mrs. Allen at this time: 'Whereas, C. C. Petty has this day borrowed from Mrs. Annie G. Allen the sum of six hundred dollars, and agreed to pay her interest at the rate of ten per cent. per annum: Now, therefore, I personally guaranty that the said interest shall be paid annually, without any plea of usury, by the said C. C. Petty. [Signed] W. S. Thomason. Dec. 31st, 1891.' All these papers were in the handwriting of W. S. Thomason, who seemed to have represented both parties in these dealings with each other, and in collecting interest for Mrs. Allen for several years. The paper last above copied, signed by W. S. Thomason, was kept with the note herein sued on, and seems to have been considered practically a part of the same; and, in pursuance of the agreement evidenced by said paper, C. C. Petty paid interest on the note, not as stipulated therein, but at the rate of ten per cent., namely, sixty dollars a year, as shown by the credits on the note in handwriting of Judge Thomason, the receipts, also in his handwriting, and the testimony of Mrs. Allen, and her declarations to C. A. Petty. In addition to these payments of interest, defendant claims that C. C. Petty paid to W. S. Thomason, former attorney of Mrs. Allen, the sum of one hundred dollars, which he claims should be credited on the note. No receipt was produced on the trial for this payment, although receipts were shown for the payments of interest, and no effort was made on the part of defendant to fix the time and place of the alleged payment. The testimony on this point is indirect and rather vague, and it is unfortunate, if this payment was really made, that the reference was not brought on in the lifetime of Judge Thomason, who could have furnished direct evidence on this point, and that it should have been left in its present unsatisfactory shape. In the light of the above testimony, I find as follows: (1) That the note sued on herein was usurious in its inception, but, if not usurious, payments of interest were made upon it from the date of its maturity up to and including the payment of January, 1897; (2) that Judge Thomason was the agent and attorney of plaintiff throughout these transactions; (3) that the evidence is not sufficient to show the payment of one hundred dollars, and hence same is disallowed. The questions of law involved herein are new, and rather difficult to solve. The plaintiff demurred to the answer on two grounds: (1) That the counterclaim is based upon a statutory remedy in the nature of a penalty, the right of action on which does not survive; and, (2) if it does survive, it does not survive on behalf of the parties who are now claiming its benefits." The special master concluded his report as follows: "From these conclusions it follows that the plaintiff must recover of the defendant merely the face of the note, without interest or costs. * * *" The circuit judge confirmed the said report, and rendered judgment of foreclosure.

The appellants' first exception assigned error on the part of the circuit judge as follows: "(1) Because he did not sustain the defendants' first exception to the report of the said referee, which was as follows: '(1) The referee erred in allowing the statutes

of limitation to be interposed by the plaintiff as an amendment to their reply;' the error complained of being that the said referee allowed an amendment to plaintiff's reply by allowing the statutes of limitation to be placed in the said reply after the testimony had closed." The defendants alleged in their answer that the said agreement was usurious, and set up as a counterclaim the yearly payments of $60 for five years, aggregating $300, and double the amount of alleged usurious interest, to wit, 6 per cent. on $600 for five years, amounting to $180. The special master in his report states correctly the doctrine that the statute of limitations has no application to a case like this, citing Agency Co. v. Gillam, 49 S. C. 369, 26 S. E. 990, 29 S. E. 203. So that, even if there was error, it was harmless, especially in view of the conclusions hereinafter announced.

The second exception imputes error as follows: "In not sustaining defendants' second exception to the report of the referee, which was as follows: '(2) The referee erred in sustaining the first ground of demurrer: (a) In holding that a counterclaim based upon a statutory remedy in the nature of a penalty does not survive; (b) in holding that the counterclaim based upon a statutory remedy in the nature of a penalty does not survive to the administrators, heirs at law, and distributees of the deceased.' Also, 'in sustaining the first ground of plaintiff's demurrer.' Wherein it is respectfully submitted that the circuit judge erred: (a) In sustaining the referee, and in holding that a counterclaim based upon a statutory remedy is in the nature of a penalty, and does not survive. (b) In sustaining the referee, and in holding that it does not survive to the administrators, heirs at law, and distributees of the deceased. (c) In sustaining the referee, and in holding that the counterclaim set up herein is in the nature of a penalty, or is a penalty. (d) In sustaining the referee, and in considering the oral demurrer of the plaintiff as to defect of parties defendant at the hearing before him after answer."

Sections 1390, 1391, Rev. St., are as follows:

"Sec. 1390. No greater rate of interest than seven (7) per cent. per annum shall be charged, taken, agreed upon or allowed upon any contract arising in this state for the hiring, lending or use of money or other commodity, except upon written contracts, wherein, by express agreement, a rate of interest, not exceeding eight per cent., may be charged. No person or corporation lending or advancing money or other commodity upon a greater rate of interest shall be allowed to recover in any court in this state any portion of the interest unlawfully charged; and the principal sum, amount or value so lent or advanced, without any interest, shall be deemed and taken by the courts of this state to be the true legal debt or measure of damages to all intents and purposes whatsoever, to be recovered without costs. * * *

"Sec. 1391. Any person or corporation who shall receive, as interest, any greater amount than is provided for in the preceding section, shall, in addition to the forfeiture therein provided for, forfeit also double the sum so received, to be collected by a separate action, or allowed as a counterclaim to any action brought to recover the principal sum."

This case is to be decided by the law in force when the act of 1898 was passed regulating the rate of interest, for there is an express provision in said act that it should not apply to contracts made before it went into effect. There are two distinct penalties provided by sections 1390, 1391, Rev. St The penalty for a violation of section 1390 is that neither interest nor costs shall be allowed the plaintiff, but he is restricted to a recovery of the principal. The penalty for a violation of section 1391 is that the person or corporation receiving usurious interest shall, in addition to the forfeiture mentioned in section 1390, forfeit double the interest received in excess of the rate allowed by law. We will first consider whether there was error on the part of the circuit judge "in sustaining the special master, and in holding that a counterclaim based upon a statutory remedy is in the nature of a penalty, and does not survive." A counterclaim cannot be set up when usurious interest is "taken," under section 1390. That is not one of the penalties provided by that section. The court cannot allow a penalty which is not to be found in the statute. McBroom v. Investment Co., 153 U. S. 318, 14 Sup. Ct. 852, 38 L. Ed. 729. We are therefore restricted to a consideration of section 1391, in determining this question. The counterclaim can in no sense be said to arise ex contractu. On the contrary, it must be classed with those actions arising ex delicto. In the case of Middleton v. Robinson, 1 Bay, 58, the court says: "The common law gives no remedy to or against executors for torts or trespasses," etc. In order to mitigate the hardship of the common law, St. 4 Edw. III. c. 7 (Rev. St. § 2319), was enacted, and is as follows: "Executors, in cases of trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, shall have an action against the trespasser, and recover their damages, in like manner as they whose executors they are, should have had if they were in life." It will seen at a glance that this section is not applicable to the present case. In 5 Enc. Pl. & Prac. p. 811, the doctrine is thus stated: "At common law the death of the plaintiff in an action to recover a penalty abated the action, and such is still the general rule in the United States." See, also, Jenkins v. Bennett, 40 S. C. 393, 18 S. E. 929; Huff v. Watkins, 20 S. C. 477; and Ford v. Caldwell, 3 Hill, Law, 248. In the case of Zeigler v. Railroad Co., 53 S. C. 115, 32 S. E. 526, it was decided that the pur-

chaser of property affected by a usurious contract did not have the right to interpose the plea of usury on the ground that such plea is personal to the debtor. If a purchaser of such property cannot set up the defense of usury, even when he paid value for the property, it would seem, for a stronger reason, that mere volunteers would not have the right to avail themselves of that defense. As we have reached the conclusion that the right to set up the counterclaim did not survive, the other questions presented by this exception become merely speculative, and need not be considered.

The third, fourth, and fifth exceptions are as follows: "(3) In not sustaining defendants' third exception to the report of the referee, which was as follows: '(3) The referee erred in holding that the five payments of usurious interest, of sixty dollars each, should not be credited on the note, or reduce the amount from six hundred dollars to three hundred dollars.' Wherein it is respectfully submitted that the circuit judge erred in sustaining the referee, and in not allowing the counterclaim; the error complained of being that, defendants' intestate having made five payments of usurious interest, of sixty dollars each, these defendants, under a proper construction of section 1390, Rev. St., would be entitled to have credited on the note and mortgage the sum of three hundred dollars, as a counterclaim for usurious interest paid plaintiff. (4) In refusing to sustain defendants' fourth exception to the report of the referee, which was as follows: '(4) The referee erred in failing to sustain defendants' counterclaim of double the amount of usurious interest collected.' Wherein it is respectfully submitted the circuit judge erred in not holding that under a proper construction of section 1391, Rev. St., the defendants were entitled to their counterclaim of double the amount of usurious interest collected; the circuit judge thereby disallowing defendants' counterclaim of ninety dollars. (5) In not sustaining the defendants' fifth exception to the report of the referee, which was as follows: '(5) The referee erred in holding that there should be a foreclosure of the mortgage herein for the amount of six hundred dollars when he should have held that it should be for one hundred and eighty dollars, if not allowing the credit of one hundred dollars paid to the attorney and agent of Mrs. Allen.' Wherein it is respectfully submitted the circuit judge erred in sustaining the referee, and in holding that there should be a foreclosure of the mortgage for six hundred dollars, whereas, it is respectfully submitted, he should have held that the foreclosure should be for one hundred and eighty dollars, if not allowing the credit for one hundred dollars paid to the attorney or agent of Mrs. Allen, thereby disallowing defendants' counterclaim for four hundred and twenty dollars." The questions raised by these exceptions are disposed of by what was said in considering the second exception.

The sixth exception is as follows: "(6) In not sustaining defendants' sixth exception to the report of the referee, which was as follows: '(6) The referee erred in not sustaining the counterclaim of one hundred dollars set up by the defendants as having been paid to W. S. Thomason, agent and attorney to Mrs. Allen.' Wherein it is respectfully submitted that the circuit judge erred in sustaining the referee, and in not allowing defendants credit for one hundred dollars paid by defendants' intestate to W. S. Thomason, agent and attorney for plaintiff; thereby disallowing defendants' counterclaim of one hundred dollars." It was incumbent on the appellants to satisfy this court by the preponderance of evidence that the circuit judge erred as alleged in the exceptions, but they have failed to do so. This exception must likewise be overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

FINLEY v. LAURENS COUNTY.

(Supreme Court of South Carolina. July 20, 1900.)

COUNTIES—COMPENSATION OF AUDITOR.

18 St. at Large, pp. 581, 582, § 252, provided that L. county auditor should receive, in addition to his salary, such sums as might be necessary to defray the expense of the assessment of property, not to exceed $400. Rev. St. 1893, § 274, declared that such auditor should "receive $400 additional compensation," without stating the purpose. *Held*, that where the auditor of L. county held over, after his term of office had expired, from January 1st to February 26th, and the returns of taxpayers were required to be filed between January 1st and February 20th, he was entitled only to his proportion of the $400 for the time in office after January 1st, and not to the entire sum.

Appeal from common pleas circuit court of Laurens county; R. C. Watts, Judge.

Action by John R. Finley against the county of Laurens. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Ball, Simpkins & Ball and Irby & Babb, for appellant. Ferguson & Featherstone, for respondent.

POPE, J. John R. Finley presented a claim to the county board of commissioners for Laurens county, S. C., for $400, for making assessments for the fiscal year 1899, as auditor for Laurens county. The fiscal year began January 1, 1899, and John R. Finley surrendered the office of auditor to his successor, W. L. Ferguson, on the 26th of February, 1899. The said board of commissioners refused to allow the said Finley the sum of $400, but did allow him the sum of $64.28, as the proportion of said $400 for 1 month and 26 days of the 12 months comprising the fiscal year. An appeal was taken by Finley to the circuit court, which came on to be heard before Judge Watts, who, in a short order, dismissed the appeal. He now appeals to this court on the following grounds: "(1) Because it is respectfully sub-

mitted that his honor erred in adjudging that the appeal of the plaintiff from the finding of the county board of commissioners herein be dismissed, and their judgment affirmed; (2) that he erred in not finding and adjudging that John R. Finley, as the county auditor of the county of Laurens, was entitled to four hundred dollars for compensation for making such assessments for the fiscal year 1899; (3) that he erred in not finding and adjudging that the auditor, J. R. Finley, appellant, was not entitled to four hundred dollars, as a specific appropriation and allowance for making the assessments for the fiscal year 1899."

Both parties to this contention admit that the law fixing salaries for county auditors in this state is set out in section 274 of volume 1 of the Revised Statutes of this state, which is but the reproduction of an act to amend section 252 and section 274 of the General Statutes (adopted in 1882) in relation to the compensation of county auditors and county treasurers. 18 St. at Large, pp. 581, 582. Section 252, before being amended, read as follows: "Sec. 252. The county auditors of the several counties shall receive the annual salaries hereinafter mentioned, respectively: * * * The county auditors of Abbeville, * * * Laurens, * * * six hundred dollars; * * *: provided, that the comptroller general shall not issue to any county auditor any warrant for salary until said auditor shall file in the office of the comptroller general all abstracts and reports due by such auditor. And, in addition to the salaries as hereinbefore provided, the county auditors shall receive, to defray the expenses of assessment of property, such sums as may be necessary, but not to exceed the following, to wit: * * * The auditor of * * * Laurens * * * four hundred dollars each. And the county commissioners of the several counties as aforesaid shall, upon the application of the county auditors, draw their checks on the county treasurers for the several amounts to which the auditors may be entitled under this section, and the county treasurers shall pay said checks from the first collection of the county funds of the fiscal year in which the work shall be performed. * * *" But the act of 1883, which is now section 274 of the Revised Statutes of 1893, omits from the law theretofore governing the salaries and compensation of county auditors certain words, where provision is being made for the payment of additional compensation from the respective counties of the auditors, so that it now reads: "Sec. 274. * * * And, in addition to the salaries of the auditors as is hereinbefore provided, the county auditors shall receive from the funds of their respective counties additional compensation as follows: * * * Laurens * * * four hundred dollars. * * * And the county commissioners as aforesaid shall, upon the application of the county auditors, draw their checks upon the county treasurers for the several amounts to which the auditors may be entitled from the funds of their respective counties as hereinbefore provided, and the county treasurers shall pay the said checks from the first collection of county funds of the current fiscal year. * * *" Now, it must be apparent that in the short interval of one year the legislature of this state had changed its mind, so to speak, in relation to the salary and compensation of county auditors. It no longer required the county auditor to be allowed such additional compensation, not to exceed, in the case of the county auditor of Laurens, such sums as may be necessary, but not to exceed the sum of $400, to defray the expenses of the assessment of property, for all these words are stricken from the section; and, besides, the county auditor is no longer required to file in the office of the county commissioners "an itemized statement of the services rendered by his assistant, the number of days each of said assistants was employed, and the compensation they were severally to receive, which statement shall be examined and approved by the board of county commissioners," which he was bound to do under the act of 1882. It seems to us, the legislature has applied its ax to the old tree, and has converted it, by lopping limbs here and there, into an entirely different one. By the last legislative action, it seems to us, a salary is provided to be paid annually from the state treasury to the county auditors, and, in addition to the salary to be paid by the state, auditors shall receive an additional salary (or compensation) to be paid by the county. Appellant lays great stress upon the use of the words "compensation to defray the expenses of assessment," and then seems to rely upon the words that the returns of taxpayers must be filed between the 1st of January of each year and the 20th of February of each year as fixing the duty of auditors. But this view is not broad enough, for a careful study of the tax acts of our state affecting auditors (see sections 272 to 305 of volume 1 of the General Statutes) will show that the assessment of taxes is not finished by the 20th of February of each year, when individual taxpayers finish making their returns of property for taxation. The county auditor's duty as to assessments of property has, so to speak, just begun on the 20th day of February of each year. This is our view of the law here involved. Hence we do not think his honor erred as alleged in the first exception. Under our views, John R. Finley was dealt with as required by law when he was denied the $400 which he sought, and was only allowed his proportionate share of that year's salary. We do not conceive that the matter of simply taking the returns of individual taxpayers makes up what was in the legislature's mind as to additional compensation to be paid by the county. We must overrule the exception. It is the judgment of this court that the judgment of the circuit court be affirmed.

BOWEN v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. July 16, 1900.)

RAILROADS—NEGLIGENCE—INJURY AT CROSSINGS—INSTRUCTIONS.

1. In an action for injuries, under Rev. St. §§ 1685, 1692, requiring railway companies to blow a whistle or ring a bell at crossings, and fixing their liability for injuries on failure so to do, an instruction that, if the company conformed to the statute as to ringing the bell and blowing the whistle, it would not be liable, did not impose the duty of both blowing the whistle and ringing the bell, where the statute itself was also read to the jury.

2. Where the complaint alleged negligence in failing to comply with statutory requirements as to signals, and in causing a train to approach plaintiff without warning and at a high speed, an instruction that if the company conformed to the statute as to blowing a whistle and ringing a bell it would not be liable, if there was no want of ordinary care, did not require the company to disprove the negligence alleged and show it was guilty of no other acts of negligence.

3. An instruction that, if defendant company did not conform to the statute in blowing the whistle and ringing the bell, then it was liable, did not impose absolute liability on defendant on failure to comply with statutory requirements as to signals, where the statute naming the conditions under which the company would be liable was read to the jury.

4. An instruction misstating the issues made by the pleadings, to which the court's attention was not called at the trial, cannot be considered on appeal.

5. A railway company's failure to comply with Rev. St. §§ 1685, 1692, requiring the blowing of a whistle or ringing a bell at crossings, is negligence per se.

6. Where appellant presented no request for a more comprehensive charge, he cannot complain on appeal that the charge given was not comprehensive enough.

7. Contributory negligence must be the direct and proximate cause of an injury, and an instruction was properly refused that plaintiff could not recover if there was any negligence on his part contributing to the accident in question.

8. A party cannot complain of a modification of an instruction, though the same be good law, which was not prejudicial to him.

9. An instruction that negligence was a fact for the jury was not error, where the court also defined what negligence was.

10. An instruction that if plaintiff, injured at a railway crossing, could have observed the approach of a train by the exercise of ordinary prudence and foresight, he could not recover, was properly refused, since it deprived plaintiff of his right to recover, under Rev. St. § 1692, where no signals were given, unless guilty of gross negligence.

Appeal from common pleas circuit court of Pickens county; Ernest Gary, Judge.

Action by G. W. Bowen against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. P. Cothran, for appellant. Morgan & Blassingame, for respondent.

GARY, A. J. The record contains the following statement of facts: "Action for damages to person and property, $1,950, alleged to have been sustained by G. W. Bowen, plaintiff, in a collision with defendant's train at a highway crossing on November 2, 1898, near Easley, in Pickens county. The action is brought under the statute requiring certain signals to be given by railroad companies as their trains approach a crossing, the negligence alleged being a failure on the defendant's part to observe said requirements. The defendant answered, denying the said injury and pleading contributory negligence. The cause was tried before Judge Ernest Gary and a jury at Pickens on October 26, 1899. The jury rendered a verdict in favor of the plaintiff for $1,925. Upon motion for a new trial the circuit judge granted an order allowing a new trial unless the plaintiff within ten days remitted all of said verdict in excess of $1,200. Plaintiff duly remitted said excess, and entered up judgment for $1,200 and costs. Within ten days after the rising of the court the defendant gave notice of intention to appeal, and within due time served the exceptions."

The first exception is as follows: "The presiding judge charged the jury as follows: 'But, if it [railroad company] did conform to the statute as to blowing the whistle and ringing the bell, then they would not be liable, if there was no want of ordinary care.' Such charges being erroneous in the following particulars: (a) In imposing upon the defendant the duty of both blowing the whistle and ringing the bell, whereas the statute exculpates it if either signal is given. (b) The action was brought under the statute (Rev. St. §§ 1685, 1692), and the only negligence alleged was the failure to give the statutory signals. The plaintiff was not entitled to recover upon proof of any other negligence. The judge's charge required the defendant to disprove the negligence alleged, and to show, also, that it was guilty of no other act of negligence, or allowed the plaintiff to recover upon some act of negligence not alleged." We will first consider subdivision "a." The presiding judge read to the jury the section of the Revised Statutes mentioned in the exception. In the case of Smith v. Railway Co., 53 S. C. 121, 30 S. E. 697, the court uses this language: "This court has frequently declared the rule to be that, when a judge has once laid down the law correctly, he will not be held to a stern responsibility if he failed thereafter to charge requests embodying the law which he has already charged. It seems to us not to be reversible error, if a judge has read the statute itself in the presence of the jury, and should thereafter, in commenting upon the law, drop the disjunctive conjunction 'or,' using instead the copulative conjunction 'and,' unless he was doing more than running over the statutory proviso. If, however, the circuit judge was subjecting the language employed in the statute to a critical analysis, whereby and wherein it became important that the difference in meaning and effect between the word 'and' and 'or' should be carefully noted, then in such instance it would be error; but, as in case at bar, and

under its surrounding facts, for the circuit judge to ignore the distinction, if error at all, would be harmless error." This ruling shows that said subdivision cannot be sustained. Subdivision "b" will next be considered. The defendant's negligence is thus alleged in paragraph 3 of the complaint: "(3) That the defendant, by its servants, agents, and employés having in their care, control, and management a certain locomotive engine and train of cars thereto attached, forming train number 2, and south bound, carelessly, negligently, and wrongfully failed to sound the whistle of said locomotive or ring the bell thereon as was required by the law of the said state, appearing as section 1685 of the Revised Statutes of 1893 of said state, and caused the said locomotive and train of cars to approach the plaintiff without warning, and unexpectedly to him and at a rapid and high rate of speed, while he was attempting to go over said crossing as aforesaid, and, without his fault, caused said locomotive to strike him, severely cutting and bruising various parts of his body, causing great suffering and pain, and permanently injuring him." The acts of negligence alleged are (1) failure to comply with the statutory requirements as to signals; (2) "causing the said locomotive and train of cars to approach the plaintiff without warning, and unexpectedly to him, and at a rapid and high rate of speed." The plaintiff, under the act of 1898 entitled "An act to regulate the practice in the courts of this state in actions ex delicto for damages," had the right to submit to the jury both acts of alleged negligence.

The second exception is as follows: "The presiding judge charged the jury as follows: 'If the railroad did not conform to the statute in blowing the whistle and ringing the bell, then the law says that it is liable;' such charge being erroneous in the following particulars: (a) In imposing upon the defendant the duty of both blowing the whistle and ringing the bell, whereas the statute exculpates it if either signal is given. (b) The statute does not impose an absolute liability upon the defendant for a failure to comply with the requirements as to signals, but such liability attaches only under these circumstances: (1) An injury to person or property by collision with the train must have occurred; (2) the collision must have taken place at a highway crossing; (3) the neglect to give the signals must have contributed to the injury; (4) the injured must not have been guilty of gross negligence contributing to the injury." Subdivision "a" is disposed of by what was said in considering the first exception. We will next consider subdivision "b." The exception sets out only a portion of the sentence in which the presiding judge charged the jury as therein stated. He also read the statute, as explanatory of his words. The charge must be considered in its entirety, and when thus considered it will be seen that subdivision "b" cannot be sustained.

The third exception is as follows: "The presiding judge charged the jury as follows: 'The defendant railroad company says that he [the plaintiff] has not been injured, and, if he has been injured, it was through his own carelessness in not observing the train, and that they were not at fault because they did not ring the bell or blow the whistle.' The defendant contended that the plaintiff was guilty of contributory negligence, under all circumstances detailed, in driving upon the track in an empty wagon, between two other empty wagons, making a great deal of noise, without looking out for the train; that the signals were given, and the plaintiff must have heard them, but recklessly drove upon the track in attempting to cross in front of an approaching train. It was error, therefore, to limit the plaintiff's negligence, as the circuit judge did, to his 'carelessness in not observing the train.'" The foregoing words were used by the circuit judge in stating the issues made by the pleadings, and, if he made a mistake, it was the duty of the defendant to call his attention to the mistake, if it intended to rely upon it as a ground of appeal. Westbury v. Simmons (S. C.) 35 S. E. 764.

The fourth exception is as follows: "The presiding judge charged the jury as follows: 'If the railroad company failed to blow the whistle or ring the bell in accordance with the requirements, that would be negligence on the part of the railroad company; and if, as a result of that negligence, it came into collision with the defendant [plaintiff?] and injured him, the railroad would be liable, and should compensate him for such damages as he has sustained, unless he was negligent in being upon the railroad track.' Error is imputed for the following reasons: (a) The statute makes the railroad company liable only in case it omits both the signals required. This charge makes it liable for failure to give either signal. (b) Said portion of the judge's remarks is a charge upon the facts, and a statement of the testimony, in violation of the constitution. (c) It limits the contributory negligence of the plaintiff to his negligence 'in being upon the track.'" Subdivision "a" has already been disposed of. The case of Smith v. Railway Co., hereinabove mentioned, shows that subdivision "b" cannot be sustained, as it is negligence per se to fail to comply with the said statutory requirements. We will next consider subdivision "c." The acts of contributory negligence relied upon by the defendant are not specified in the answer. The proposition of law embodied in the charge was sound. If the defendant desired a more comprehensive charge, it could have accomplished it by presenting requests to that effect.

The fifth exception is as follows: "The presiding judge erred in refusing to charge

the defendant's second request, which was as follows: 'It may have been possible that the disaster would have occurred even if there had been no gross negligence on the part of the plaintiff, and yet, if there was such negligence on his part, and it contributed to the disaster, the plaintiff cannot recover.' Said request contains a correct proposition of law, and was intended to convey the idea that the gross negligence of the plaintiff need not be the proximate cause of the disaster, but that, if it contributed in any way to it, the plaintiff could not recover." When the law speaks of an act of negligence as contributory to an injury, it means as a direct and proximate cause thereof. Contributory negligence is thus defined in 7 Am. & Eng. Enc. Law (2d Ed.) p. 371: "Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another combining and concurring with that negligence, and contributing to the injury, as a proximate cause thereof, without which the injury would not have occurred." This definition is approved in Cooper v. Railway Co. (S. C.) 34 S. E. 16. Subdivision "b" must therefore be overruled.

The sixth exception is as follows: "The defendant's third request to charge was as follows: 'Gross negligence is equivalent to the absence of slight care. If, therefore, at the time of the collision the plaintiff did not exercise slight care to avoid the collision, and such negligence contributed to the disaster, the plaintiff cannot recover.' The presiding judge modified it as follows: 'I charge you that, with this qualification: If the failure to exercise ordinary care [existed], and that failure amounted to gross negligence, then he could not recover, and negligence is a question of fact for you.' Error is imputed to such modification for the following reasons: (a) The request states a correct principle of law applicable to the case, and defendant was entitled to have the jury so instructed. (b) The presiding judge substituted 'ordinary' for 'slight' care, which totally changed the meaning of the request. (c) The modification was erroneous and confusing, for it is impossible that the failure to exercise ordinary care can ever constitute gross negligence. (d) Negligence is not a question of fact for the jury, but a mixed question of law and fact. (e) The rule stated in 'd' did not prevent the presiding judge from charging said request." The request contained a sound proposition of law, and should have been charged without modification; but the defendant has no ground of complaint by reason of the modification, as it was too favorable to it. After the presiding judge had defined negligence, it was not reversible error to tell the jury that negligence was a fact for them. It is the duty of the presiding judge to instruct the jury as to what constitutes negligence, and it is the duty of the jury to decide whether it exists in a particular case.

The seventh exception is as follows: "The defendant's fourth request to charge was as follows: 'If the plaintiff at the time of the alleged collision did not exercise that kind of care which even the careless and indifferent would be expected to exercise under the circumstances, and such want of care contributed to the disaster, he cannot recover a verdict.' The presiding judge modified it as follows: 'I charge you that, with this qualification that, if that care which a careless or indifferent person would be expected under ordinary circumstances to observe would amount to gross negligence, then he cannot recover.' Error is imputed to such modification for the following reasons: (a) In omitting the words 'in want of,' immediately preceding the words 'that care,' in the second sentence in said modification. (b) The request states a correct principle of law applicable to the case, which the defendant was entitled to have submitted to the jury. (c) Defendant was entitled to the charge that the absence of that care which even the careless and indifferent would be expected to exercise under the circumstances, as matter of law, amounted to gross negligence, and it was error to submit that question to the jury." We proceed to a consideration of subdivision "a." The language of the circuit judge modifying the request shows upon its face that words were accidentally omitted. It, however, appears that the only modification intended was to substitute the word "ordinary" in the place of the word "the," immediately preceding the word "circumstances." Even conceding that the request was free from error, the modification was not prejudicial to the defendant, and enabled the jury more clearly to comprehend the proposition of law embodied in the request. As the circuit judge only modified the request in the particular hereinbefore mentioned, he did not submit to the jury whether the absence of that care which even the careless would be expected to exercise amounted to gross negligence. When the charge is considered as a whole, it will be seen that it was not erroneous in the particular just mentioned.

The eighth exception is as follows: "The seventh request of defendant was as follows: 'If the jury believe from the evidence that the plaintiff, by the exercise of ordinary prudence and foresight, could have observed the approach of the train, then he cannot recover, and their verdict must be for the defendant.' No reference is made in the charge to said request, and it is submitted that the presiding judge erred in not charging said request." This request was obnoxious to the law in two particulars: (1) It contained a charge upon the facts; and (2) it deprived the plaintiff of the right he had to recover damages unless he was guilty of gross negligence, as provided by the statute hereinbefore mentioned. It is the judgment of this court that the judgment of the circuit court be affirmed.

REYNOLDS v. WOOD.

(Supreme Court of Georgia. July 14, 1900.)

TAX LIENS—PROPERTY SUBJECT AS BETWEEN CREDITORS.

This case, upon its facts, is controlled by the rule laid down in Brooks v. Matledge, 28 S. E. 119, 100 Ga. 367, and is distinguishable from Bank v. McWilliams, 33 S. E. 860, 107 Ga. 532, for the reason that in the latter the tax liens were in existence before the party owing the taxes had made the first conveyance of property, while in the former, as in the present case, the tax liens arose after the tax debtor had executed a security deed conveying one of the parcels of realty involved.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action between J. H. Reynolds and C. D. Wood. From the judgment, Reynolds brings error. Reversed.

C. A. Thornwell and Fouche & Fouche, for plaintiff in error. M. B. Eubanks, for defendant in error.

PER CURIAM. Judgment reversed.

SOUTH CAROLINA & G. R. CO. v. AUGUSTA SOUTHERN R. CO.

(Supreme Court of Georgia. July 13, 1900.)

EQUITABLE PETITION — DEMURRER — REDUNDANCY — LEASE OF RAILROAD — CONSTRUCTION—DEFAULT BY LESSEE—FORFEITURE—PLEADING.

1. A petition, though mainly in the form of an equitable petition, is, under the uniform procedure act of 1887 (now embodied in Civ. Code, § 4937), maintainable as an action at law if it sets forth a legal cause of action. If it does this in substance, it is good against a general demurrer, or a motion to dismiss in the nature of such a demurrer. In case such a petition is unnecessarily voluminous, or contains redundant, superfluous, or irrelevant matter, or is not properly paragraphed, or is in any respects not sufficiently clear and distinct, its defects in these respects may and should be reached by an appropriate and timely special demurrer.

2. Where two railroad companies entered into a contract for the lease by one of them of all the property of the other for the entire period of its corporate existence under its charter and all renewals thereof, the main consideration of the contract operating beneficially for the lessor being, "The rents and covenants hereinafter contained to be paid and performed by" the lessee, and where the contract stipulated that the latter was "to have and to hold," during the stipulated term, the property of the lessor, the lessee "paying the rents, keeping and performing the covenants herein contained, to be kept and performed on its part, as hereinafter stipulated," then all of the agreements, promises, and stipulations on the part of the lessee preceding the words last quoted, the keeping of which was essential to a just, fair, and reasonable performance by it of the contract as a whole, should be treated as covenants, whether in the parts of the contracts setting forth these agreements, promises, and stipulations they were expressly so designated or not.

3. When, in a contract of the nature above indicated, it was expressly provided that in case the lessee should at any time fail to pay to the lessor such sums of money as may be due under the contract, "or shall fail to perform any other covenant herein, and such default or failure to perform shall continue for thirty days after written notice requiring such performance, then and in every such case it shall be lawful for the [lessor], at its option, to re-enter into and upon its said line of railway and other property hereby leased, and every part thereof, and take possession thereof, and have and hold such property, together with all additions and improvements which shall have been made to the same; and all the right, title, and interest whatsoever of the [lessee] in and to said property shall, upon such re-entry, thereupon wholly cease and determine." *Held*, that upon a breach by the lessee of any one or more of such agreements, promises, and stipulations as are indicated in the preceding note, it became the right of the lessor to institute an action for the forfeiture of the lease.

4. When, among the covenants contained in such a contract, there was one for the payment of interest on certain bonds, mere failure to promptly pay such interest would not constitute a ground of forfeiture, if the lessor did not elect to do so when the default occurred, and if, before the filing of its petition, the interest had in fact been paid.

5. The petition in the present case sufficiently set forth the covenants made by the defendant company, and sufficiently alleged breaches of several of them by the defendant to entitle the plaintiff to institute its action, and the same was in substance good against the motion to dismiss made at the trial term.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by the Augusta Southern Railroad Company against the South Carolina & Georgia Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Jos. B. Cumming, for plaintiff in error. Boykin Wright, J. R. Lamar, and E. H. Callaway, for defendant in error.

LEWIS, J. 1-3. This case was before this court at the October term, 1898, and is reported in 107 Ga. 164, 33 S. E. 36. The contract upon which the plaintiff's action was based is set forth fully in that volume, which renders it unnecessary to copy the same again in the report of the case now before us. After that decision, when the case came on again to be heard before the court below, a motion was made by defendant's counsel, orally, to dismiss the petition ("the supreme court of Georgia having held that said petition did not present any grounds for equitable relief"), on the following grounds: First, because there were no proper pleadings to support an action at law; second, because a legal cause of action is not set out. The court, after argument for and against the motion, took the same under advisement, and on January 16, 1900, rendered judgment refusing said motion to dismiss. On this judgment of the court, error is assigned in the bill of exceptions.

It was simply decided in this case, when it was first here, that the contract entered into by these railway corporations was one of lease, and not of partnership, and did not establish any trust relations between the parties thereto. The petition seems to be mainly in the form of an equitable proceeding. It

was evidently filed under the uniform procedure act of 1887 (now embodied in Civ. Code, § 4987). The petition prayed for a decree declaring the lease forfeited, for damages, for a receiver pending the litigation, for an accounting, and for general relief. At the first preliminary hearing had in the case, the trial judge appointed receivers to take charge of the road and operate it until final decree. The lessee excepted to that decision, and the case was brought here for review. In order to obtain the equitable relief sought in the petition, it was contended that, under the contract between the parties, a partnership was created, or at least a trust relation existed between them, and therefore equity had jurisdiction. This court held that that was not a correct construction of the contract, and therefore equity had no jurisdiction to grant the relief sought, and, inasmuch as the judgment excepted to granted equitable relief purely, it was reversed. This court, however, did not decide, nor is there any such intimation in the opinion written by Chief Justice Simmons, that the petition set forth no valid cause of action at law. On the contrary, at the conclusion of the opinion, it was recognized that, under our system, legal and equitable causes may be joined in one action, yet, if the petition contain no equity, the court cannot award equitable relief. The further idea is conveyed, in the decision in that case, that the plaintiff's petition was predicated solely upon matters over which courts of law have jurisdiction. This court has not held, therefore, that no cause of action whatever was set forth in this case, but simply that the facts alleged did not entitle plaintiff to the equitable relief sought. The decision was to the effect that plaintiff made a case at law only, and was not entitled to the extraordinary remedy of a receiver. We think it a well-established doctrine by the decisions of this court that a petition brought under the uniform procedure act of 1887 may embrace both equitable and legal causes of action; but, because the equitable rights prayed for are denied, it does not follow that the legal rights set forth will not be enforced. We will therefore consider briefly the main question involved in the present issue before us, as to whether or not a legal cause of action is set forth in plaintiff's petition, upon which the court can grant adequate relief in law.

We call attention to that provision in the contract which is set forth in the petition, to the following effect: "In case the South Carolina Company shall at any time fail to pay such sums of money as may be payable by it to the Augusta Company, when the same shall have become payable according to the terms hereof, and such default shall continue thirty days after written demand for payment of the same, or shall fail to perform any other covenant herein, and such default or failure to perform shall continue for thirty days after written notice requiring such performance, then and in every such case it shall be lawful for the Augusta Company, at its option, to re-enter into and upon its said line of railway and other property hereby leased, and every part thereof, and take possession thereof, and have and hold such property, together with all additions and improvements which shall have been made to the same; and all the right, title, and interest whatsoever of the South Carolina Company in and to said property shall, upon such re-entry, thereupon wholly cease and determine." Among the charges in the petition it was alleged that the covenant under article 2 of the contract was violated by the defendant, in that the rolling stock and engines of the company had been allowed to get out of repair and run down without renewing the same, and are in such condition that the business handled has to be done at greatly increased cost and risk to the company; and, in addition to this, good engines and coaches from the Augusta Southern have been taken and put on the main line of the South Carolina & Georgia Railroad, and inferior engines and coaches substituted for them, which were unfit for hauling and handling the business of the Augusta Southern to advantage and with economy and safety, etc. The petition also alleges that the agreement under article 3 of the contract has been violated, in that the defendant failed to keep said accounts therein mentioned in the manner required, and has failed to keep the same open at all times to the inspection of the officers of the Augusta Company, and has failed and refused them the privilege of taking copies and memoranda of them, though so requested to do by petitioner and its officers duly appointed for that purpose; that defendant failed to furnish to the president of the Augusta Company on the 15th day of September, 1897, and 15th day of March, 1898, a complete statement, as stipulated for, of all the receipts and disbursements received and paid out for the Augusta Company during the preceding current half years ending June 30th and December 31st, respectively; that defendant has failed to furnish such a statement at other times, when the same was called for by resolution of the board of directors of the Augusta Company, and failed, in compliance with such resolution, to submit to the inspection of persons designated by said board vouchers which said board asked to be inspected, in connection with the statement of accounts in the traffic department, and failed and refused to allow said persons so designated to take memoranda and copies thereof, to the injury and damage of petitioner, —— dollars. There were a number of other breaches of the contract alleged against the defendant just as specifically as we have pointed out in the above cases,—for instance, in charging a higher rate of interest than was agreed upon for carrying the floating indebtedness of plaintiff company, as provided for in articles 4, 5, 6, and 7 of the contract, and by charging interest not paid on bonds; and, again, for violating the agreement in article 8 to make fair and just

division of freight and passenger rates; and also by violating a provision in the same article by charging expenses of agents working for both roads, and by allowing plaintiff to have no voice in fixing insurance upon its property. Following the article containing the above stipulation is the clause in the contract hereinabove quoted from article 10, which, in effect, stipulates that if the South Carolina Company shall fail to pay any sums of money that may be payable to the Augusta Company, or shall fail to perform any covenant therein, and such default or failure to perform shall continue for 30 days after written notice requiring such performance, then the South Carolina Company forfeits its rights under the lease, and plaintiff has a right to the possession of the property. We think the term "covenants," used in this article, clearly refers to those agreements just preceding in the contract, alleged in the petition to have been violated as above specified; for the keeping of these stipulations, and a compliance with the obligations imposed upon the defendant thereby, we think, is essential to a fair and reasonable performance of the contract as a whole, and they should be treated as covenants, whether the parts of the contract setting forth these agreements and stipulations were expressly so designated or not. A material and serious violation of any of these undertakings and obligations on the part of the defendant company would, by virtue of the terms of the contract itself, work a forfeiture of the property leased, and would give the right to plaintiff to recover possession thereof. Upon this point the contract itself is the law of the case. While the petition in this case may contain irrelevant matter, and may not properly be paragraphed, yet it does set forth a legal cause of action in substance, and we think, after a careful reading of it, that it is good against a general demurrer, or a motion to dismiss in the nature of such demurrer. If the first ground of the motion to dismiss means anything more than that a legal cause of action is not set out, the purpose is to attack the form of pleading for some defect which is amendable, and this cannot be done by a motion nor by a demurrer after the appearance term. Ward v. Frick Co., 95 Ga. 804, 22 S. E. 899; City of Augusta v. Lombard, 101 Ga. 724, 28 S. E. 994. In Telegraph Co. v. Jenkins, 92 Ga. 398, 17 S. E. 620, the principle is announced that if the declaration is defective in matter of form, in failing to make proper or full allegations with reference to the defendant company's negligence, that was a matter for special demurrer. The declaration being good in substance, the court did not err in overruling a general demurrer thereto. In Printup v. Land Co., 90 Ga. 180, 15 S. E. 764, it was decided: "Want of certainty and definiteness in setting forth the defense, being a defect of form, would not vitiate the pleas, unless pointed out by special demurrer." See, also, James v. Railroad Co., 90 Ga. 695, 16 S. E. 642, where it was held that, though a petition was defective in form at the first term, it should not, at the trial term, be dismissed on defendant's motion, made on the ground that the allegations as to the nature and extent of the injuries were too vague, uncertain, and indefinite to put defendant on notice as to the nature of the case to be proved. We think, therefore, the special objections urged by learned counsel for plaintiff in error in this case, as to defects in the petition, while many of them might have been taken advantage of by special demurrer, are not, under repeated rulings of this court, good in a motion to dismiss a case at the trial term.

4. Among the covenants contained in the contract in this case there was one for the payment of interest on certain bonds, which plaintiff alleges to have been violated. It seems that, under article 1 of the contract, defendant obligated itself to pay the principal and interest, as they became due, upon a certain series of bonds; and it was charged in the petition that it failed and refused to perform said covenant and agreement by refusing payment of certain coupons on said bonds, although they were duly presented to defendant for payment by the lawful owners and holders thereof under the terms of the contract of lease, to the injury and damage of petitioner. It further alleged that this failure and refusal continued for many months, to the annoyance and damage of plaintiff. Construing this under the rule that pleadings should be construed most strongly against the pleader, as there is no allegation that these bonds had not been paid before the suit, while the failure and refusal continued for many months, the inference is that defendant finally paid them before any action was taken against it by the plaintiff. If the plaintiff then did not elect to avail itself of its rights growing out of this default while it was in existence, we do not think such a failure to promptly pay this interest would constitute a good ground of forfeiture.

5. We conclude, therefore, that the petition in the present case sufficiently sets forth the covenants made by the defendant company, and sufficiently alleges breaches of several of them to entitle the plaintiff to proceed with this action for the purpose of having adjudicated its rights at law; and there was therefore no error in the court overruling the motion to dismiss, made at the trial term. Judgment affirmed. All the justices concurring.

GARLAND v. SOUTHERN RY. CO.

(Supreme Court of Georgia. July 13, 1900.)

CARRIERS—INJURY TO PASSENGER—COMPLAINT.

Where a petition, in an action against a railway company for personal injuries, alleged, in substance, that the plaintiff was a passenger upon a freight train of the defendant; that, at the request of the conductor, he occupied a seat in the upper part of the cab, and remained there until the train reached the outskirts of

the town to which he was going, when, the train coming to a full stop, which the plaintiff thought was for the purpose of allowing him to get off, he, in order to get his effects together, preparatory to leaving the train, followed the conductor to the lower part of the cab, where the conductor left him standing, saying to him, "Stay here until we pull up to the depot, and you can then get out;" that the train then moved forward rapidly, and plaintiff, for the purpose of seeing when he reached the depot, stood by a window of the cab, holding firmly to the window, in such a position as to protect himself against all ordinary and usual jerks and jars incident to a freight train; that while he was in this position the train, by reason of the negligence of the defendant's employés in charge thereof, was suddenly, and without warning, stopped, with such a tremendous, unusual, and unnecessary shock as to jerk plaintiff's hands loose from the widow, so violently wrenching them from their hold upon the window as to tear a ring and the flesh from one of his fingers; that the shock overturned buckets of water in the car, moved several inches an iron stove, which was fastened to the floor, and threw the plaintiff violently against some obstacle in the car and to the floor, rendering him for a time unconscious; that he sustained very serious injuries, the nature and extent of which, his sufferings therefrom, his earning capacity before, and for a stated period after, the injury, and the pecuniary amount of his damages, being all set forth,—*held*, that the petition set forth a cause of action, and should not have been dismissed upon demurrer.

(Syllabus by the Court.)

Error from superior court, Henry county; E. J. Reagan, Judge.

Action by H. J. Garland against the Southern Railway Company. Judgment for defendant. Plaintiff brings error. Reversed.

Lloyd Cleveland, for plaintiff in error. C. E. Battle, for defendant in error.

PER CURIAM. Judgment reversed.

PHILLIPS et al. v. LOWTHER.

(Supreme Court of Georgia. July 13, 1900.)

WILLS—TRUST—ACTION—NECESSARY PARTIES.

1. Where a testator directly devised and bequeathed to two minor grandsons described realty and personalty, "to be equally divided between them," and in his will directed that, "if either of them should die without children or the descendants of children, then his part shall go to the survivor or his children or descendants of children, but, if neither of them should leave any child or descendants of children, then said property" to revert to the testator's estate, and where two named persons were by the will "appointed guardians and trustees of the property hereby bequeathed to" the grandsons, the will, however, not imposing upon them any duties, the intention was to make these persons trustees of the estate which the grandsons took under the will, and the trust thus created became executed on the arrival of both grandsons at majority. This being so, the trustees so appointed were not necessary parties to an action subsequently instituted by one of the grandsons against the legal representative of the other, who had died, for the recovery of property which the latter in his lifetime had received under this provision of the will.

2. The court erred in dismissing the action for want of proper parties.

(Syllabus by the Court.)

Error from superior court, Polk county; C. G. Janes, Judge.

Action by W. P. Phillips and others against B. F. Lowther, executor. From a judgment of dismissal, plaintiffs bring error. Reversed.

J. B. Conyers and Neel & Neel, for plaintiffs in error. F. A. Irvin and W. C. Bunn, for defendant in error.

PER CURIAM. Judgment reversed.

BAILEY v. FULTON COUNTY.

(Supreme Court of Georgia. July 12, 1900.)

COUNTIES—TORT OF CHAIN-GANG SUPERINTENDENT.

A county is not liable for a tort committed by a chain-gang superintendent in unlawfully imprisoning one and compelling him to work, although the same was done in obedience to instructions from the county authorities.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by Henry Bailey against Fulton county. Judgment for defendant, and plaintiff brings error. Affirmed.

Daley & Hall, for plaintiff in error. L. Z. Rosser, for defendant in error.

LUMPKIN, P. J. The petition of Henry Bailey set forth that for some alleged violation of the municipal ordinances of the city of College Park he was sentenced by the mayor to serve a term of six months in the county chain gang of Fulton county; that after the imposition of this sentence, which was wholly unauthorized by law, the marshal of that city delivered the plaintiff into the custody of the superintendent of the chain gang, who confined and kept the plaintiff at work thereon for a period of more than five months; and that "the acts and doings of said superintendent in thus confining this petitioner at hard labor in said chain gang was done in obedience to instructions issued to him by the county authorities of said county." The petition was dismissed on demurrer, and the plaintiff excepted.

The only question for decision is whether or not a county is liable in damages for a tort of the character committed upon the plaintiff in error. We are quite clear that it is not. That "a municipal corporation is not liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law" is now a part of our statute law, codified from decisions of this court. Pol. Code, § 744. The principle upon which the cases referred to were based is obviously applicable to like torts committed by county officials. Aside from this, it is also in the Code expressly provided that "a county is not liable to suit for any cause of action unless made so by statute" (Id., § 341); and there is in this state no statute rendering a county liable for any such cause of ac-

tion as that set forth in the present petition. The question of the liability of a county for torts committed by its officers was fully discussed in the case of Millwood v. Dekalb Co., 106 Ga. 743, 32 S. E. 577. See the opinion of Mr. Justice Cobb and the authorities therein cited. Counsel for the plaintiff in error sought to bring this case within the ruling announced in Barfield v. Macon Co. (Ga.) 34 S. E. 596, following the decision in Smith v. Floyd Co., 85 Ga. 420, 11 S. E. 850, in which it was held that, "construing the constitution of 1877 and the Code together, a right of action exists against a county for damaging private property for public uses in constructing the approaches to a county bridge, thereby elevating the roadway above an adjacent lot, so as to hinder access to the lot from the road." These cases, however, turned upon the constitutional right of persons whose property is taken or damaged for public uses to have just and adequate compensation for the same, and the corresponding liability which would necessarily attach when the taking or damaging was done by a county in its capacity as a public corporation. Manifestly, the framers of the constitution contemplated that counties, in making public improvements, would take or damage private property, and accordingly the constitutional provision above referred to was held to create a right, irrespective of express legislative enactment, to bring an action against a county in such cases. The whole subject is fully discussed by Chief Justice Bleckley in the case cited from 85 Ga. and 11 S. E., and therefore need not now be further elaborated. The present case is of an altogether different character. While it is true that the constitution declares that "no person shall be deprived of life, liberty, or property except by due process of law," there is nothing in that instrument which either expressly or by implication imposes upon counties a liability for the tortious acts of any officer committed in violation of this provision of our fundamental law. Judgment affirmed. All the justices concurring.

ADAMS v. CARNES.

(Supreme Court of Georgia. July 12, 1900.)

EXECUTION—CLAIM OF THIRD PARTY—WITHDRAWAL—DAMAGES—FRIVOLOUS APPEAL—NEW TRIAL.

1. The privilege given by the statute to a claimant to withdraw his claim one time without the consent of the plaintiff in fi. fa. must be exercised before a judgment has been rendered finding the property subject, and assessing damages because the claim was interposed for delay only; and when, after such a judgment has been rendered in a justice's court, an appeal therefrom is taken to the superior court, the claimant has no right in the latter court to withdraw his claim without the consent of the plaintiff.

2. There being in this case no finding by the jury as to the value of the property levied upon, the court erred in adjudging that the 10 per cent. damages which they found against the claimant because, in their opinion, the claim was filed for delay only, should be assessed upon the full amount of the execution; for, under section 4627 of the Civil Code, this cannot be done unless the value of the property in dispute exceeds that amount, and, in the absence of any finding that such is the fact, there is no lawful basis for making such an assessment.

3. Inasmuch as the provisions of the Code in relation to the assessment of damages for entering a frivolous appeal are necessarily applicable to those cases only in which money verdicts are rendered, and cannot be enforced in claim cases, the court committed further error in giving judgment against the claimant for 20 per cent. of the amount of the execution as damages for entering an appeal which the jury found was frivolous.

4. Since, however, the commission of errors in entering a judgment affords no cause for granting a new trial, but should be made the subject-matter of a direct bill of exceptions, the grounds of the motion for a new trial now under review, complaining of the errors pointed out in the two preceding notes, were entirely without legal merit.

5. The evidence in this case demanded the verdict returned by the jury. This being so, the general grounds of the motion for a new trial afforded no reason for setting the verdict aside; and as the only special ground of that motion, other than those relating to the errors committed in rendering the judgment, is based upon the refusal to allow the claim to be withdrawn, which ruling was right, there was no cause whatever for granting a new trial, and the court erred in so doing.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Action by J. J. Adams against one Carnes. On levy of execution, Emma J. Carnes, defendant's wife, interposed a claim. The property was found subject in the justice court, and, on appeal to superior court, judgment was rendered for the plaintiff in execution, and a new trial was granted. Plaintiff brings error. Reversed.

Jas. B. Conyers, for plaintiff in error. Thos. W. Milner, for defendant in error.

LITTLE, J. An execution issued from a justice's court in favor of Adams against Carnes for the principal sum of $100, besides interest and costs of suit, and was levied on two mules, as the property of the defendant; and a claim was interposed by Emma J. Carnes, his wife. On the trial of the issue in the justice's court the property was found subject, with a judgment for damages, the justice having found that the claim was interposed for delay only. An appeal was entered to the superior court, and the jury there returned a verdict that the property levied on and claimed was subject, and that the claim was frivolous and intended for delay only, and assessed 10 per cent. damages against the claimant. The jury also found that the appeal was frivolous. On this verdict a judgment was rendered in the superior court that the execution do proceed, and that the plaintiff in fi. fa. recover of the claimant $14.99 as damages, because the claim was frivolous and intended for delay only, this sum being 10 per cent. of the principal and interest appearing to be due on the fi. fa. It was also further adjudged that

the plaintiff recover of the claimant the further sum of $29.98 as damages because the appeal was found to be frivolous and intended for delay only, this last sum being 20 per cent. of the amount of the execution. The claimant made a motion for a new trial on the grounds that the verdict was contrary to law and evidence, and because the court erred in refusing to permit the claimant to withdraw her claim on the trial of the appeal in the superior court, it being the first withdrawal insisted on by the claimant. The motion also contained two other grounds, which will be noticed below. A new trial was granted, and the plaintiff sued out a bill of exceptions, alleging that the court erred in granting a new trial. No cross bill of exceptions, alleging error in entering the judgment, was sued out by the claimant.

1. There was no merit in the special ground of the motion for a new trial alleging error in the refusal of the court to allow the withdrawal of the claim. We are of the opinion that after the case had reached the superior court on appeal from a judgment in the justice's court, which had determined the property to be subject to the execution, and assessed damages because, in the opinion of the justice, the claim was interposed for delay only, the claimant had no right to withdraw her claim. It is true that section 4625 of the Civil Code negatively grants the right to a claimant to withdraw or discontinue a claim one time without the consent of the plaintiff in execution. Explanations have been attempted to be made of this provision of our statute, from time to time, which are not altogether satisfactory; but, without regard to the wisdom or justice of granting this privilege, this court is committed to the doctrine that it must be exercised before a judgment has been rendered assessing damages in favor of the plaintiff in execution. Attaway v. Dyer, 8 Ga. 184. That case was tried when the laws providing for an appeal from one jury to another in the superior court were in force. On the first jury trial the property was found subject, together with 50 per cent. damages for delay. From this verdict the claimant appealed, and, after the appeal, moved to withdraw his claim. The court ruled that it could not be done after such a verdict. It is true that the appeal in that case was not made from a justice's court, but the principle ruled in the case is that this privilege of withdrawal must be exercised before a judgment has been rendered which awarded damages to the plaintiff in fi. fa. The ruling there made covers this case, because, undoubtedly, by the judgment of a court of competent jurisdiction the property in the case at bar had been found subject, and damages for delay only awarded, and it was that very judgment which the claimant sought to have set aside by an appeal to the superior court. Clearly, she could, within the restrictions imposed by law, have dismissed her appeal; but after an adjudication on the merits of the claim case, on a verdict finding damages against her for delay, and an appeal taken from the judgment rendered, there is not, as we understand the law, any privilege on the part of the claimant to withdraw her claim. See Strickland v. Maddox, 9 Ga. 196; Parker v. Beeman, 28 Ga. 475; Renneker v. McMichael, 33 Ga. 94.

2. One of the grounds of the motion for a new trial above referred to alleged that the judge erred in including in the judgment an award of the 10 per cent. damages which the jury found against the claimant because, in their opinion, the claim was filed for delay only. We are of the opinion that in this respect the court did commit error, for there was no finding as to the value of the property levied upon. Indeed, there was no evidence on this subject. Section 4627 of the Civil Code provides that, on the trial of claims to property which are pending in the superior court, when damages shall be found by the jury they shall be assessed upon the whole amount then due upon the execution, provided the value of the property in dispute exceeds the amount of the execution, and upon the value of the property when it is less than the amount of the execution which had been levied. In this case the damages which were found by the jury were assessed upon the whole amount of the execution, without any proof of the value of the property on which the execution was levied, or any finding by the jury as to this matter. In the absence of such a finding, no legal assessment of the damages could have been made, and the court therefore erred in assessing the damages on the amount of the execution.

3. In their verdict the jury declared that the appeal was frivolous and intended for delay, and the court thereupon entered a judgment, also, for 20 per cent. on the amount of the plaintiff's execution against the claimant. This, we think, was also error. By section 4473 of the Civil Code it is provided that if on the trial of any appeal, except from a justice's court, it appears to the jury that the appeal was frivolous and intended for delay only, they shall assess damages against the appellant, in favor of the respondent, for such delay, not exceeding 25 per cent. on the principal sum which they shall find due, and, if the judgment of the superior court should be that an appeal from a justice's court is frivolous and intended for delay only, said court shall, in addition to the final judgment in the case, enter judgment against the appellant for 20 per cent. damages on said frivolous appeal. Evidently the presiding judge applied these provisions to the case at bar, but, in our opinion, they cannot be made applicable to a claim case, but only to cases of appeal, wherein the jury returns a verdict for a sum of money. This is undoubtedly correct, because the provisions of the section are intended to impose a penalty on litigants who enter an appeal to the superior court on grounds which are frivolous, for the purpose of delaying the processes of the courts. In claim cases a separate provi-

sion to accomplish the same purpose is made by statute. In the trial of all claim cases the jury is invested with full power to fix such penalty on the claimant, in the nature of damages, as they think proper, not less than 10 per cent., where it is determined that the claim is interposed for delay. The section which authorizes damages to be assessed for a frivolous appeal contemplates two classes of cases: The first is a case where the appeal is entered from a court other than a justice's court, where a verdict for money is rendered on the appeal. In such a case, if the jury are of the opinion that the appeal was frivolous and intended for delay, they shall assess damages against the appellant, not exceeding 25 per cent. on the amount they shall find to be due. The second is that if, on the trial of an appeal from a justice's court, the judge of the superior court determines that the appeal was frivolous and intended for delay only, he shall, in addition to the final judgment, enter a judgment against the appellant for 20 per cent. damages. In each case a final money judgment must express a sum on which a given per cent. shall be assessed.

4. While it is clear that the court erred in the particulars pointed out in the two preceding divisions of this opinion, it was not permissible to attempt to review these errors by motion for a new trial. If anything is well settled, it is that the commission of errors in entering a judgment affords no cause for granting a new trial, but the same should be made the subject-matter of a direct bill of exceptions. It follows, without doubt, that the two grounds of the motion for a new trial now under consideration were entirely without legal merit, and that it was improper to set the verdict aside and grant a new trial for the reasons set forth in these grounds.

5. The verdict which the jury rendered in this case was absolutely demanded by the evidence. This being so, the general grounds of the motion for a new trial afforded no reason whatever for setting the verdict aside; and having shown that the one special ground of that motion, other than those relating to the errors committed in rendering the judgment, is based upon the refusal to allow the withdrawal of the claim, which ruling, we have undertaken to show, was correct, it follows that the motion for a new trial had not in it a single meritorious ground. The court therefore erred in setting aside the verdict, and this is so although this was the first grant of a new trial in this case. Judgment reversed. All the justices concurring.

QUIROUET v. ALABAMA G. S. R. CO.

(Supreme Court of Georgia. July 12, 1900.)

INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE—DIRECTING VERDICT.

1. An employé of a railroad company, who was injured in undertaking to mount a rapidly moving flat car by placing his foot upon the lid of the journal box, and seizing a standard which had been inserted in an opening in the side of the car in order to prevent the freight thereon from falling off, was not, either under the general rules of law or any Alabama statute, entitled to a recovery on the ground that the standard slipped in the socket and caused him to fall, when there was no testimony tending to show that the standard was placed on the car as a means of mounting the same, but, on the contrary, positive testimony that it was not placed there or intended to be used for that purpose.

2. When an employé has his choice of two ways in which to perform a duty, the one safe, though inconvenient, and the other dangerous, he is bound to select the safe method; and if, instead of so doing, he elects to pursue the dangerous way, and is, in consequence, injured, he is guilty of such negligence as will bar an action for damages against the master. The principle here announced is recognized law in the state of Alabama.

3. If there was, in the present case, any evidence tending to show that the plaintiff acted in an emergency, it was one of his own making, and the defendant company could not be held responsible on the theory that it had by its negligence placed him in such a position as to relieve him of the duty of exercising ordinary care for his own safety.

4. The evidence demanded a verdict for the defendant, and there was no error in directing the jury to find accordingly.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by A. J. Quirouet against the Alabama Great Southern Railroad Company. Judgment for defendant. Plaintiff brings error. Affirmed.

Westmoreland Bros., for plaintiff in error. Dorsey, Brewster & Howell and A. Heymans, for defendant in error.

COBB, J. Quirouet brought suit in the city court of Atlanta against the Alabama Great Southern Railroad Company, a corporation chartered under the laws of the state of Alabama, for damages for personal injuries alleged to have been brought about by the negligence of the defendant. At the trial the court directed a verdict for the defendant, and the plaintiff excepted.

The case, taken in its most favorable light for the plaintiff, will appear from the following summary of the evidence: The plaintiff testified that he was employed by the defendant as a flagman on one of its freight trains, and that, on the occasion on which he was injured, the train had entered a side track to let a passenger train pass. After the latter train had gone by, the freight train backed out from the side track onto the main line. "He had performed all he was required to do when he turned the switch to let the train back out." The train had a caboose attached, with steps to it. The plaintiff sought to mount the fourth car from the caboose. The brakes on this car, which the plaintiff had himself "put on," were causing the wheels to slide and smoke, and his purpose in mounting the car was to release the brakes. When brakes are on so tight as to cause the wheels to slide, there is danger of the wheels bursting, and thus causing the

train to be wrecked. The journal box upon which he stepped was sometimes called the "grease box." The wheels of the car are fastened to the axle, and the wheel and the axle both turn. The axle passes through the journal box, which has a lid on it, placed somewhat like the roof of a house,—a little slanting. Grease and waste are put in the journal box to keep it from getting warm. There was no hand hold on the car, or other means provided for mounting this car. The train was running at the rate of five or six miles an hour. When the plaintiff attempted to mount the car, it was necessary for him to take hold of a large standard, which was on the car for the purpose of preventing the pipes with which the car was loaded from rolling off, and place his foot upon the journal box, and in this way mount. The standard was so large that he could not grasp it, but was required to throw his hand and wrist around it, and as he did so, and placed his foot upon the journal box, and threw his weight on the standard, it turned with him, threw him down, and threw his foot off the journal box under the wheels of the car, which passed over his ankle, foot, and leg, and caused him to sustain painful and serious injuries. The socket in which the standard worked was square, and the standard was round, and not properly fitted in it, or it would not have turned. The plaintiff further testified that it was the custom of the employés to mount the car in the way he sought to do, but there was no evidence showing that the company knew of this custom and assented to it. The defendant introduced in evidence a copy of one of its rules in force at the time the plaintiff was injured, which declared that the defendant's employés must not attempt to get on or off trains while in motion, and that, if they did so, it would be at their own peril and risk. Certain statutes of Alabama were introduced in evidence by the plaintiff, the following being so much of the same as are material to the present investigation: "When a personal injury is received by a servant or employé in the service or business of the master or employer, the master or employer is liable to answer in damage to such servant or employé, as if he were a stranger, and not engaged in such service or employment, in the cases following: When the injury is caused by reason of any defects in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, point, locomotive engine, switch, car, or train upon a railway, or of any part of the track of a railway."

1. It is a general rule of law that a servant cannot recover of the master for injuries resulting from the use of machinery or appliances for a purpose for which they were not intended by the master, and for which it was not necessary that they should be used, however defective such appliances may be. In undertaking to use an appliance for a purpose for which it was not intended by the master, the servant takes upon himself the risk incident to such use. Wood, Mast. & Serv. § 402; Bailey, Mast. Liab. p. 22; 1 Shear. & R. Neg. p. 346, and numerous cases cited in note 4; Hamilton v. Railroad Co., 83 Ga. 346; 9 S. E. 670; Railroad Co. v. Dickey, 90 Ga. 491, 16 S. E. 212; Railway Co. v. Reynolds, 93 Ga. 570, 20 S. E. 70. This rule is not contravened by the statute of Alabama above quoted, or any statute introduced in evidence, and it will be presumed that the general law on the subject is of force in that state. Applying this rule to the facts of the present case, we do not think the plaintiff would have been entitled to recover on the theory that the standard was defective. The standard was not placed on the car for the purpose of being used by employés in mounting the car. It was placed there to prevent the pipes from rolling off, and was suitable for this purpose. The fact that the standard was round, and did not fit the socket, which was square, is not a matter about which the plaintiff can complain, unless there was a necessity for him to use the standard for that purpose at that time in order to properly discharge the duties imposed upon him by the master.

2. There was, however, according to the evidence, no such necessity. The car he attempted to mount was the fourth car from the caboose, and the latter could have been easily and safely mounted by steps. This, therefore, was the safer and less dangerous method of reaching the brake which needed attention. Nor was it necessary for the plaintiff to remain at the switch until the caboose had passed, for he testified that he had performed all he was required to do when he turned the switch to let the train back out. While it was more inconvenient, still he could have reached the car by going first upon the caboose or other cars, which had appropriate appliances for use in going upon them, and it was his duty to have used the more appropriate and less dangerous method. In such a case, the use of the more dangerous method, even though it be the one of greater convenience, would preclude a recovery if injury results. This principle was recognized by the supreme court of Alabama in the case of Railroad Co. v. George, 94 Ala. 200, 10 South. 145, cited in Railway Co. v. Harbin (Ga.) 36 S. E. 218. In the Alabama case it was held: "If there are two apparent ways of discharging the required service, one more dangerous than the other, the employé is bound to select the latter, and is guilty of such negligence as will bar an action for damages if he selects the former, and is thereby injured."

3. If the locking of the wheel and consequent danger to the train, and the failure to mount the caboose or other cars with proper appliances for that purpose, brought about an emergency, it was one of the plaintiff's own creation, and he will not be allowed to take any advantage therefrom. See, in this con-

nection, Briscoe v. Railway Co., 108 Ga. 224, 28 S. E. 638.

4. We think there was no possible view of the case which would have justified a recovery for the plaintiff, but that his injuries were the result of his own gross negligence in the premises. There was therefore no error in directing the jury to return a verdict in favor of the defendant. Judgment affirmed. All the justices concurring.

BOMAR v. EQUITABLE MORTG. CO.

(Supreme Court of Georgia. July 9, 1900.)

NOTE—ACTION BY PAYEE—TITLE.

The payee of a promissory note, in possession of the same, is presumed to own it, although his indorsement thereon, in full or in blank, may stand uncanceled. He may sue upon such note, and his title to the same cannot be inquired into, unless it be necessary for the protection of the defendant, or to let in the defense which he seeks to make.

(Syllabus by the Court.)

Error from superior court, Douglas county; C. G. Janes, Judge.

Action by the Equitable Mortgage Company against Parker M. Bomar. Judgment for plaintiff. Defendant brings error. Affirmed.

L. R. Ray, for plaintiff in error. Payne & Tye, J. A. Noyes, and J. S. James, for defendant in error.

FISH, J. The Equitable Mortgage Company brought suit against Parker M. Bomar upon two promissory notes; one being for the principal sum due, and the other being an interest coupon note. Both notes were payable to the order of the plaintiff. When the notes were offered in evidence by the plaintiff upon the trial, the following entry appeared upon the back of the principal note: "American Loan and Trust Company, Trustee for Debenture Holders under Agreement with Equitable Mortgage Company, October 15, 1896. Equitable Mortgage Company, by Chas. B. Hobbs, Assistant Treasurer." The defendant objected to the notes going in evidence "because it appeared from the indorsement upon the principal note that the plaintiff had parted with its title to said notes before the filing of said suit, and that the right of action was in the American Loan & Trust Company, trustee, and not in said plaintiff." The objection was overruled, and the notes admitted in evidence. Defendant excepted and assigned error upon this ruling of the court. We are of opinion that there is no merit in the exception. The note was in possession of the payee, and the presumption was that it was the owner, notwithstanding its indorsement upon the note stood uncanceled, and it had a right to sue thereon in its own name. In Dugan v. U. S., 3 Wheat. 172, 4 L. Ed. 362, it was held "that if any person who indorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill, or not, as he may think proper." In Daniel, Neg. Inst. § 1198, the rule is stated to be that, "where there appears on the paper the plaintiff's own indorsement, it will be presumed either that he had not perfected his indorsement by delivery, or that the paper has been returned to him as his own property, and in either case he has the right to sue upon it." In 2 Rand. Com. Paper, § 717, the author says: "The payee's possession of a bill or note is prima facie evidence of title in him, notwithstanding his own indorsement is erased, and even, it has been held, notwithstanding his own special indorsement, or indorsement in blank, uncanceled." To the same effect, see 3 Rand. Com. Paper, § 1645, and 4 Am. & Eng. Enc. Law, 280. There are numerous adjudicated cases to this effect cited by the authorities above referred to, and there can be no question but that the great weight of judicial opinion sustains the doctrine. It is true that this court held in Southern Bank of Georgia v. Mechanics' Sav. Bank, 27 Ga. 252, that, "where a bill of exchange or draft is indorsed in full by the payee, suit cannot be maintained in the name of the payee while the indorsement stands." The decision, however, was rendered by only two judges, and we are therefore not compelled to follow it. In Leitner v. Miller, 49 Ga. 486, it appeared that Miller sued C. B. Leitner, as principal, and S. A. Leitner, as indorser, on a note made by C. B. Leitner, payable to S. A. Leitner or bearer, and indorsed as follows: "S. A. Leitner. J. V. H. Allen, Treasurer. L. H. Miller. Pay I. C. Plant, or order, for collection." The plaintiff introduced the note and closed, when the defendant moved for a nonsuit on the ground that plaintiff had shown title out of himself by his indorsement on the note sued on. The motion was overruled, and the defendant excepted. This court held that, "although plaintiff's name may be on the back of the note sued on, he may recover against the maker, as the law will presume, in the absence of proof to the contrary, that an indorsement by him was never completed by delivery, or, if he had delivered it so indorsed, that he had taken it up, and was again the legal holder or indorsee."

When the objection of the defendant to the introduction of the notes in the present case was overruled, he tendered what he termed a "plea in abatement," which was, in effect, the same as the objection urged by him to the admission of the notes in evidence, alleging that knowledge of the fact that title to the notes sued on was not in the plaintiff had just come to him, by reason of the in-

dorsement upon the principal note not having been entered upon the copy note attached to the copy declaration served upon him. Upon objection by the plaintiff, this plea was disallowed, and the defendant assigns error upon this ruling. The plea was not verified, and it does not appear upon what ground the court based its order disallowing it. It is clear, however, that there was no error in this ruling of the court. Section 3698 of the Civil Code provides that "the title of the holder of a note cannot be inquired into unless it is necessary for the protection of the defendant, or to let in the defense which he seeks to make." It was not pretended that it was necessary to attack the plaintiff's title to the notes for the protection of the defendant, or to let in any defense which he sought to make. Judgment affirmed. All the justices concurring.

FULGHUM v. FULGHUM.

(Supreme Court of Georgia. July 9, 1900.)

WIDOW'S SUPPORT—JUDGMENT.

The administrator of an estate from which a year's support for the widow of the intestate has been duly and finally set apart in money cannot, when an execution has been issued against him for the collection of the same, go behind the judgment for the purpose of showing that he is entitled to a credit upon the judgment for money advanced by him from the estate to the widow upon her year's support, before it was finally set aside.

Little, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Pulaski county; B. D. Evans, Judge.

Action by M. J. Fulghum against A. R. Fulghum as administrator. Judgment for plaintiff. On levy of execution, administrator files affidavit of liability. Motion to dismiss overruled, and plaintiff brings error. Reversed.

J. H. Martin, for plaintiff in error. Jordan & Watson, for defendant in error.

FISH, J. An execution in favor of Mrs. M. J. Fulghum against A. R. Fulghum, as administrator of the estate of R. G. Fulghum, based upon a judgment rendered, upon appeal from the court of ordinary, in the superior court of Pulaski county, on the 10th of August, 1898, was levied upon certain land in that county. To this levy the administrator filed an affidavit of illegality, upon the following grounds: "(1) Because the judgment upon which said fi. fa. is issued against him, as administrator, is founded upon a suit by the plaintiff for her twelve months' support from the estate of her husband, R. G. Fulghum, assessing the amount of said support at six hundred and fifty dollars. (2) That deponent has paid and held, and now holds, the receipt of said Mrs. Fulghum for one hundred and two dollars, as a part of her said twelve months' support, dated the 28th day of January, 1898, which is a part of the allowance for her said twelve months' support, and which is a credit to the amount of the judgment for the amount of said receipt and the interest thereon. (3) That this receipt, and the amount thereof, was never pleaded as a part payment of said support at the trial, and the verdict of the jury in the case, when tried, was intended to cover the whole amount allowed said plaintiff for her said twelve months' support. (4) Deponent further says that he has paid to the sheriff the amount of said fi. fa., less the amount of said receipt and interest, for which amount said fi. fa. is legally proceeding." Plaintiff in fi. fa. moved to dismiss this affidavit of illegality upon the following grounds: "(1) No good and sufficient ground or grounds are set forth in the affidavit of illegality to arrest the fi. fa.; (2) that the affidavit of illegality seeks to go behind the judgment; (3) that neither of the grounds or all of the grounds in the affidavit of illegality combined are sufficient to support the affidavit of illegality." This motion was overruled, and the plaintiff in execution excepted.

The judgment is for $650, and for this amount the execution was proceeding. The administrator, in his affidavit of illegality, claims that he is entitled to have credited upon this judgment the sum of $102, which he alleges he paid to Mrs. Fulghum upon her year's support before the judgment was rendered. It is very evident that, if this were an ordinary judgment, an affidavit of illegality which set up a payment made to the plaintiff in execution prior to the rendition of the judgment would have no standing in court, as it would seek to go behind the judgment. Unless, therefore, the effect of a judgment setting apart a year's support is different from that of other judgments, this affidavit of illegality is without merit. Recognizing the general rule,—that an affidavit of illegality cannot go behind a valid judgment,—the plaintiff in error contends that a judgment setting apart a year's support simply determines the proper amount which should be allowed out of the assets of the estate for such support, and does not preclude the representative of the estate from showing that this amount, or some portion of it, was received by the beneficiary or beneficiaries before the rendition of the judgment. We do not think that this contention is sound. The proposition that any judgment can be paid in advance of its rendition is, to say the least, a novel one. The law provides that, when application is made for a year's support, it shall be the duty of the ordinary, on notice to the representative of the estate, if there be one, and, if none, without notice, to appoint five discreet appraisers, whose duty it shall be to set apart and assign, either in property or money, a sufficiency from the estate for a year's support. Civ. Code, § 3465. The appraisers are required to file their return with the ordinary, and upon the filing thereof he is required to issue citation and publish notice citing all persons concerned

to show cause why said application should not be granted. If no objection is made after the publication of the notice once a week for four weeks, or, if made, is disallowed, the ordinary shall record the return so made in a book to be kept for that purpose. Id. § 3467. "Such a record has the binding force and effect of any other judgment of a court of competent jurisdiction." Birt v. Brown, 106 Ga. 23, 31 S. E. 765; Josey v. Gordon, 107 Ga. 110, 32 S. E. 951. That it has the binding force and effect of a judgment is shown by section 3468, which provides that the title to property set apart shall vest in the beneficiary or beneficiaries, and the same shall not be administered as the estate of the decedent; and also by section 3471, which provides that the ordinary may issue execution against the representative of the estate for an amount in money which is set apart as a year's support. "Every presumption is in favor of the judgment of the ordinary setting apart a year's support, and it cannot be collaterally attacked." Tabb v. Collier, 68 Ga. 641; Goss v. Greenaway, 70 Ga. 130. In Wells v. Wilder, 36 Ga. 194, it was held: "Whenever the widow applies for an assignment of the year's support, she must be charged with the value of what she previously consumed." In Tabb v. Collier, supra, the judgment setting aside the year's support was attacked upon the ground that the family had already consumed enough of the property of the estate to amount to a 12 months' support before such support was formally set apart. The court, as we have seen, held that the judgment could not be collaterally attacked; and Crawford, J., delivering the opinion, said: "But it is insisted that this family had a year's support before this was set apart, the husband and father having been dead some years before the application was made; and cases are cited to sustain that view. The principle here invoked is to be applied before, not after, the final judgment of the ordinary has been pronounced. Every presumption is in favor of their judgments, nor are they to be collaterally attacked, except where the record shows a want of jurisdictional facts." The decision rendered in that case was followed in Goss v. Greenaway, supra, where it was held that, "while lapse of time between the death of a husband and the application of his wife for a year's support, during which time she lived upon the land and made use of the personalty of her deceased husband, may furnish a good ground to defeat the application before the ordinary, yet when final judgment of that court has been rendered in the case, it is too late to attack it, especially before another court, except for causes apparent upon the face of the record, showing a want of jurisdiction either of the person or subject-matter." These decisions are directly in point. If, in determining and fixing the amount which is to be allowed and set apart as a year's support, the widow must be charged with the value of what she has previously consumed, it would seem to follow that, when the year's support has been finally set aside, the presumption is that the amount, in value, of the assets of the estate, if any, which she consumed prior to the setting apart of the 12 months' support, was taken into consideration when the judgment for such support was rendered. As the title to specific property set apart vests in the beneficiaries, it is apparent that the representative of the estate cannot, after the title to such property has vested, deprive them of such property, or of any portion of the same, upon the ground that they had received, in whole or in part, their year's support, before the same was formally set aside. If the representative of the estate cannot, either in whole or in part, question the title of the beneficiaries to specific property set apart, how can he, if a definite sum of money is set apart, question the right of the beneficiaries to receive from the estate in his hands the whole of the designated sum? Surely, the right to specific property set apart is no more secure or sacred than the right to money set aside as a year's support. In the present case, if the judgment of court, instead of setting apart $650 in money, had set apart to the widow, as her year's support, a described portion of the land belonging to the estate, of equal value, the title to such land would have vested at once in her, and the administrator could not afterwards have been heard to say: "Mrs. Fulghum is not entitled to receive all of this land, because, before it was set apart, I advanced to her $102, which was to be credited against her year's support when the same should be set aside." A complete answer to such a claim upon his part would be: "You ought to have made this question before the judgment setting apart the year's support was rendered. Not having made it then, you cannot be heard now, because to sustain your contention would be to override the law, which declares that the property set apart as a year's support shall vest in the beneficiary or beneficiaries." He occupies no better position because of the fact that, instead of specific property, a designated sum of money has been set apart. He can no more reduce a sum of money which a judgment setting aside a year's support requires him, as the representative of the estate, to pay to the widow, than he could deprive her of any portion of specific property which had been so set apart. As the title to all the property set apart as a 12 months' support vests in the beneficiary or beneficiaries, so the right to receive all the money so set apart vests. If Mrs. Fulghum was paid the amount stated in the affidavit of illegality, upon her year's support, by the administrator, the time for him to have made this showing was before the judgment in her favor against the estate was rendered. Everything which lies behind that judgment is concluded by it. The motion to dismiss the illegality should have been sustained. The decision now made is entirely consistent with that rendered in King v. Johnson, 94 Ga. 665,

21 S. E. 895. In that case this court distinctly recognized the rule that the return of the appraisers, when duly allowed, became final as to the amount of the year's support, and the effect of the decision simply was that, as against the judgment setting apart the year's support, the widow could be compelled to account for money of the estate actually in her hands, which was received by her as administratrix, and out of which the year's support should have been paid by her. Judgment reversed. All the justices concurring, except LITTLE, J., dissenting.

McRAE v. STILLWELL et al.

(Supreme Court of Georgia. June 6, 1900.)

DEED—CONSTRUCTION—FORFEITURE—RECORD—PAYMENT—CONVEYANCE BY FIRM.

1. An instrument in the form of a deed purported to convey to named grantees, their heirs and assigns, at a specified price per acre, "all the pine timber suitable for sawmill purposes" on described lots of land. It acknowledged receipt of a specified sum, and recited that the grantor agreed "that the amounts left unpaid this day shall be paid as follows: When each lot is entered to cut said timber, the balance due on each lot is one hundred dollars, which will be due as above stated." The instrument also purported to convey to the grantees, their heirs and assigns, "the full right of way for railroads, tramroads, and wagonroads in and through the said lands for the purposes above stated; said right of way to continue as long as said mill operations may require." *Held*: (a) That the true intent and meaning of this instrument was to convey to the grantees, their heirs and assigns, all the timber suitable at the date of the instrument for the purposes indicated, but that it was incumbent on the grantees, or their successors in title, to cut and remove such timber from the lots within a reasonable time from the date of the conveyance, and that on failure so to do their interest in the timber ceased and determined; (b) that what would be a reasonable time for so doing was a question of fact to be passed upon and decided in the light of all the facts and circumstances surrounding the transaction; (c) that inasmuch as the instrument in question conveyed an interest in realty, though the estate was determinable, it was entitled to be recorded, and, if duly recorded, it was admissible in evidence without proof of execution; (d) that, under such an instrument, payment of the balance of the purchase money due on each lot was not a condition precedent to the right to enter and cut the timber.

2. Where a grant was made to a partnership composed of two persons, even if a conveyance by them of the property therein described was not properly executed if only signed by the partnership, yet where such conveyance purported to be to another partnership, composed of these two persons and another, if the latter partnership conveyed the property by a deed executed by each of the three partners, and also signed in the firm name, the title to the property passed to the grantee named in that conveyance.

3. As the trial judge did not properly construe the instrument referred to in the first of the above notes, and as the case was tried under a misapprehension of its true intent and meaning, the judgment directing a verdict for the plaintiffs was erroneous, and there should be another hearing in the light of what is here laid down.

(Syllabus by the Court.)

Error from superior court, Montgomery county; C. C. Smith, Judge.

Action by Stillwell, Millen & Co. against John McRae and others. Judgment against defendant McRae, and he brings error. Reversed.

W. G. Brantley and J. H. Martin, for plaintiff in error. A. C. Wright, for defendants in error.

COBB, J. Stillwell, Millen & Co. brought suit against McRae and others, alleging in their petition that the defendants had damaged them by cutting large quantities of pine timber, the property of the plaintiffs, which was growing on a described lot of land, and that the defendants were still cutting such timber. The prayer of the petition was that the defendants be enjoined from cutting the timber, and from removing or otherwise interfering with that which had already been cut. The defendant McRae appeared and answered the petition, and assumed responsibility for the acts of the other defendants, and the case proceeded against him alone. At the trial the court directed the jury to find a verdict that the defendant be perpetually enjoined from cutting the timber on the land, and that the plaintiffs recover of the defendant a given sum; it being agreed by counsel that, if the plaintiffs were entitled to recover at all, the amount for which the court directed a verdict was the proper sum. The defendant filed a bill of exceptions, assigning error upon the decision of the court directing a verdict in favor of the plaintiffs, and also upon other rulings made during the progress of the trial.

1. The plaintiffs claimed title to the timber as the successors in title of Peacock & Peterson, who were the grantees in a deed from the defendant McRae. The paper was in form a deed, and, in consideration of 75 cents per acre, purported to convey "all the pine timber suitable for sawmill purposes" on eleven described lots of land, each containing 202½ acres. The paper also contained the following clauses: "I acknowledge the receipt of the sum of five hundred and fifty in cash and note dollars this day paid me by the party of the second part, and do agree that the amounts left unpaid this day shall be paid as follows: When each lot is entered to cut said timber, the balance due on each lot is one hundred dollars, which will be due as above stated. And I also, for the above-stated consideration, give, grant, bargain, sell, alien, and convey to said party of the second part, their heirs and assigns, the full right of way for railroads, tramroads and wagonroads in and through the said lands for the purposes above stated; said right of way to continue as long as said mill operations may require. And I will, for myself, my heirs and assigns, the above-named premises, for said sawmill purposes, to the said Peacock & Peterson, their heirs and assigns, forever warrant and defend." It is contended by

the plaintiffs that, as they are the successors in title of the grantees in this deed, they are the owners in fee of the timber described in the deed, and that, while they are not the owners of the fee in the land, they have such an interest in the land itself as is necessary for the support and nurture of the trees, which are their property; that they have the right to enter upon the land whenever they desire to remove these trees for the purposes indicated in the deed, and lapse of time does not at all interfere with this right. On the other hand, the defendant contends that while the effect of the conveyance was to pass to the grantees and their successors in title an absolute interest in the trees, construing the paper as a whole it was not the intention of the parties that the grantees should have a perpetual right to enter and remove the standing timber on the land, and that their estate in the trees was by the very language of the conveyance determinable if the trees were not removed from the land within a reasonable time after the deed was executed. The court gave to the deed the construction contended for by the plaintiffs, and refused to allow the defendant to introduce evidence tending to show that a reasonable time to cut and remove the trees had elapsed. Counsel for defendant (the plaintiff in error here) contended that the estate of the plaintiffs in the trees had determined, and the title to the same become revested in the defendant, and that, this being true, the acts complained of in the petition did not constitute any wrong as against the plaintiffs.

Counsel for plaintiffs (defendants in error here) contend that this case is controlled by the decision in Baxter v. Mattox, 106 Ga. 844, 32 S. E. 94, and it appears from the record that the judge placed his ruling in construing the deed upon that decision. We think, however, there is a clear distinction between the two cases. The deed in that case conveyed the timber and growing trees "suitable for sawmill purposes, and being manufactured into lumber, now upon, or that may hereafter grow upon," the land, and also conveyed to the grantee, his heirs and assigns, the right and privilege "now and at any and all times hereafter" to enter upon the land for the purpose of cutting such timber. The terms of that deed clearly manifested an intention on the part of the grantor to convey to the grantee a perpetual right to enter upon the land and cut and remove the timber and trees,—not only the trees that were growing at the date of the conveyance, but also any trees that might thereafter grow, although not in existence at the time the deed was made. As remarked by Mr. Justice Lewis in that case, "If it be possible to convey such a license in perpetuity, it would be difficult to conceive how such an intention could be more clearly expressed than it is in this deed." In the present case, however, the conveyance, so far as the timber is concerned, is limited to the timber suitable for sawmill purposes on the land at the date of the conveyance. While the conveyance does not in express terms so declare, no other conclusion can be reached from the language therein employed. In addition to this, the deed contains a provision that the grantees shall have the right of way for railroads, tramroads, and wagonroads through the land; "said right of way to continue as long as said mill operations may require"; and the warranty clause of the deed declares that the grantor will forever warrant and defend "the premises, for said sawmill purposes," to the grantees, their heirs and assigns. It would seem that nothing could be clearer than that it was the intention of the parties to this instrument that the grantees should become the owners of the timber suitable for sawmill purposes growing on the land at the date of the execution of the deed, and that such timber was to be removed from the premises within a reasonable time after the execution of the conveyance. The expression, that the right of way through the land was to "continue as long as said sawmill operations may require," strongly indicates that it was not the intention of the parties to this instrument that the right to enter and remove the timber should continue in perpetuity, but was to come to an end at some time in the future. What that time was cannot be declared to be other than what would be a reasonable time to be allowed for the removal of the timber according to the circumstances of the case. In the case of Baxter v. Mattox a perpetual right to enter was absolutely necessary to carry out the purpose of the parties as indicated by the terms of the deed. In the present case, if the right to enter and remove is given for a reasonable time, the purpose of the parties as indicated by the terms of the conveyance can be thoroughly accomplished. It is contended, however, by counsel for the defendants in error, that the rule laid down in Washburn on Real Property, which is quoted in the opinion of Mr. Justice Lewis in Baxter v. Mattox, is decisive of the case in their favor. The rule referred to is as follows: "But if the owner of land grants the trees growing thereon to another and his heirs, with liberty to cut and carry away at his pleasure, forever, the grantee acquires an estate in fee in the trees, with an interest in the soil sufficient for their growth, while the fee in the soil itself remains in the grantor." 1 Washb. Real Prop. 16. The authorities cited by the author to support that proposition are Clap v. Draper, 4 Mass. 266, and Knotts v. Hydrick, 12 Rich. Law, 314. In Clap v. Draper it was held that "grant to one, his heirs and assigns, of all the trees and timber standing and growing on certain lands, forever, with liberty to cut and carry them away, conveys an estate of inheritance in the trees and timber, and the grantee can maintain trespass quare clausum fregit against the owner of the soil for cutting down the trees." There was no question in that case as to whether under such a conveyance, the right to remove the trees was a perpetual right, or one determina-

ble after the expiration of a reasonable time. In Knotts v. Hydrick it was held that when growing timber trees are reserved for the grantor, and excepted from a conveyance of the fee, the grantor has not only an estate in the trees, but also an interest in so much of the soil as is necessary to sustain them, and such estate cannot be terminated at the will of the grantee by giving the grantor reasonable notice to remove the trees. Upon a careful examination of this case, it will be found to support the contention of counsel for the defendants in error. The judge in the conclusion of his opinion said: "If his convenience be thwarted and his interests affected, as a tiller of the soil, by the interest therein which he has allowed his grantor to retain, a court can only say to him, 'You have entered into the covenant, and must abide its operation.'" In Heflin v. Bingham, 56 Ala. 566, it was held that, when a conveyance of land contained an express reservation and exception of the growing trees suitable for lumber, the title to the trees did not pass to the grantee, but remained in the grantor with the right to enter upon the land and cut and remove them, and that, if no time was specified in the contract within which the trees were to be cut and removed, it must be done within a reasonable time, and this would be a question to be determined by a jury under all the circumstances of the case. In Boults v. Mitchell, 15 Pa. St. 371, a conveyance of the timber on a tract of land, suitable for rafting and sawing, was held to convey a right which from its nature was determinable, and if the party refuse to exercise his right in a reasonable time, after notice to do so, the right will be terminated, and the privilege of entry gone. In the opinion Bell, J., says: "The grant was in its very nature determinable. The right to cut timber was not to continue forever, at the pleasure of the grantee and his assigns; and if, from the destruction of the trees, the subject of it, or the refusal of the party to exercise his right after a reasonable notice to do so, the right itself is determined, the privilege of entry is gone with it, and the owner of the land may sue for a breach of close, though he may not recover, in damages, the value of trees taken, the property of which is not in him." To the same effect was the ruling in Holt v. Stratton Mills, 54 N. H. 109. See, also, Magnetic Ore Co. v. Marbury Lumber Co. (Ala.) 16 South. 632, 27 L. R. A. 434; Davidson v. Moore (Ky.) 37 S. W. 200. In Rich v. Zeilsdorff, 22 Wis. 544, the right to enter and cut timber was to be exercised within two years; and it was there held that the absolute right of property in the trees was not excepted out of the estate granted, but only a right reserved to enter within two years to cut and remove the trees. To the same effect is Reed v. Merrifield, 10 Metc. (Mass.) 155. While it is possible, as was held in Baxter v. Mattox and Knotts v. Hydrick, supra, for parties to make a contract whereby one would be entitled to a perpetual right to enter upon the land of another and remove timber therefrom, as such an agreement is so unreasonable in its nature no contract will be presumed to have this effect unless it is plainly manifest from the terms of the same that such was the intention of the parties. The language of the deed in the present case not only does not require, but does not authorize, such an interpretation. It is true that the effect of the paper is to pass title to the timber, but the estate in the timber is determinable, and comes to an end after a lapse of time which would be a reasonable time to be allowed to the grantees to enter and remove the timber from the land. Under this construction, after the lapse of a reasonable time the timber again becomes the property of the grantor. Such a construction prevents the anomaly which is apparent in Boults v. Mitchell and Holt v. Stratton Mills, supra, where the instrument under construction in each case was held to authorize an entry for the purpose of removing the timber only for a reasonable time, and that an entry after the lapse of such a time was unlawful, but that, the timber still belonging to the person guilty of making the unlawful entry, the value thereof should not be taken into account in estimating the damages for the trespass.

The court should have allowed the defendant in the court below to introduce evidence from which a jury could find what was a reasonable time to be allowed to the plaintiffs to remove the growing timber from the land, and this question should have been submitted to a jury under instructions that they were to take into consideration all the facts and circumstances of the case, and the conditions surrounding the parties at the time of the execution of the contract, and from this determine what would be a reasonable time to allow the plaintiffs to remove the trees, and, if such a time had elapsed before the defendant commenced cutting the timber, his act would not be wrongful, as against the rights of the plaintiffs. If, on the other hand, the time which elapsed between the execution of the contract and the date at which the defendant commenced to cut the timber on the land was not such as would amount to a reasonable time to be allowed to the plaintiffs to remove the timber from the land, then the defendant would be guilty of a trespass, and would be liable to the plaintiffs for whatever damages they had suffered up to the time of the bringing of the suit, and the plaintiffs would be entitled to an injunction restraining the defendant from cutting the timber until after the expiration of such time as the jury should find would be a reasonable time in which the plaintiffs would be allowed to remove the timber from the land. Growing timber is realty. Balkcom v. Lumber Co., 91 Ga. 651, 17 S. E. 1020. And the deed conveying such timber, although the estate therein granted is determinable, conveys land, within the meaning of the registry laws; and therefore such a deed, if duly recorded, was admissible in evidence without proof of exe-

cution. Payment of the balance due on the purchase money to the grantor in the deed involved in the present case was not a condition precedent to the entry upon the land by the plaintiffs to cut the timber thereon. The title to the trees passed absolutely upon the execution and delivery of the conveyance. The time when the purchase money was to be paid is fixed in the conveyance, but it does not make payment of the same a condition to be complied with before the title passed. The deed merely fixed the time when the purchase money shall be paid, reciting that a certain part of the same had been paid, and that the amount unpaid was $100 for each lot, and that this amount was to be paid as each lot was entered for the purpose of cutting the timber.

2. Peacock & Peterson sold the timber, title to which was acquired under the deed from McRae, to Peacock, Peterson & Co.; but the deed was not signed by the members of the firm as individuals, but simply in the firm name. It appears that the individuals who composed the firm of Peacock & Peterson subsequently became members of a firm known as Peacock, Peterson & Co., who were the grantees in the deed from Peacock & Peterson. A deed was made by Peacock, Peterson & Co. to the plaintiffs to the timber described in the deed from McRae to Peacock & Peterson; but this deed was signed, not only in the firm name, but also by the individual members of the firm.—Peacock, Peterson, and another. Error is assigned upon the ruling of the judge in allowing the deed from Peacock & Peterson to be introduced in evidence, on the ground that it was improperly executed, not being signed by the individual members of the firm. Even if this ruling was erroneous, it was an immaterial error, for the reason that the question was whether the title had passed out of the individuals composing the firm of Peacock & Peterson into the plaintiffs; and, even if it had not passed out of them by the execution in the firm name of the deed to Peacock, Peterson & Co., when Peacock and Peterson united with their co-partner in the new firm in executing a deed, not only in the firm name, but also in their individual names, then whatever interest they had in the property, either as individuals or as members of the firm of Peacock & Peterson, as between the parties to this transaction, certainly passed to the grantees in the deed executed by the persons composing the firm of Peacock, Peterson & Co.

3. There are other assignments of error, which we do not deem it necessary to deal with in the present case. Under the view that we have taken of the case, the judge erroneously construed the deed, and this error at the outset of the trial resulted in the case having been tried under what appears to us an entire misapprehension of the true intent and meaning of the deed, and many of the questions which were raised at the trial will probably not arise at another hearing. The judgment directing a verdict in favor of the plaintiffs must be reversed, and a new trial had in the light of what is herein laid down. Judgment reversed. All the justices concurring, except FISH, J., absent on account of sickness.

WILLIAMS v. CITY COUNCIL OF AUGUSTA.

(Supreme Court of Georgia. July 9, 1900.)

INTOXICATING LIQUORS—ILLEGAL SALE—RECORDER'S COURT—JURISDICTION—CERTIORARI.

1. The offense "of retailing spirituous or malt liquors without license," though committed upon the Sabbath day, is a violation of a penal statute of this state. Moran v. City of Atlanta, 30 S. E. 298, 102 Ga. 840.

2. Accordingly, the recorder's court of the city of Augusta has no jurisdiction to try and punish for this offense.

3. Though the plaintiff in error entered in that court a plea of guilty to a charge of the nature above indicated, the recorder had no authority of law to impose a penalty upon him, and it was his right, by petition for certiorari, to correct the error which the recorder committed in so doing.

4. The court erred in refusing to sanction the petition for certiorari.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

L. R. Williams was convicted of illegal sale of liquors in the city of Augusta, and brings error. Reversed.

Saml. F. Garlington, for plaintiff in error. Wm. H. Barrett, for defendant in error.

PER CURIAM. Judgment reversed. All the justices concurring.

BAKER v. STATE.

(Supreme Court of Georgia. July 9, 1900.)

CRIMINAL LAW—CONTINUANCE—MANSLAUGHTER—INSTRUCTIONS—NEWLY-DISCOVERED EVIDENCE.

1. Under the facts disclosed by the record, there was no abuse of discretion in refusing to postpone the trial a second time in order to allow counsel "time for study of case."

2. Neither the evidence nor the statement of the accused would have authorized the trial judge to charge the jury upon the offense of manslaughter. Even if, under the statement, the defense of manslaughter was involved, there was no request to charge upon the subject.

3. The newly-discovered evidence as to the unsoundness of the mind of the accused would, when taken in connection with the counter showing made by the state, not probably produce a different verdict upon another trial.

4. The evidence fully warranted the verdict, and the trial judge did not abuse his discretion in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. S. Candler, Judge.

James L. Baker was convicted of murder, and brings error. Affirmed.

Lee J. Langley, for plaintiff in error. C. D. Hill, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

SIMMONS, C. J. This case arises upon exceptions taken to the refusal of the court below to grant a motion for a new trial, made by Baker, who had been tried and convicted of murder.

1. The principal ground relied upon here by counsel for the plaintiff in error was the refusal of the judge to continue or postpone the trial of the case upon the facts and circumstances shown in the motion. Counsel had been employed, we infer from the record, at least six days before the trial actually took place. The trial was once postponed for two or three days upon his application, and, when the case was again called, he asked for a further postponement in order that he might study the case. He did not intimate to the court that any of his witnesses were absent, or that he wished time to search for evidence. He simply showed that he had been busy in court with other matters, and wished time for further study of the case. This was a matter entirely within the discretion of the trial judge, who knew the facts and the business in which counsel had been engaged, and who could determine, better than we, whether it was proper to grant the postponement. See Moody v. State, 54 Ga. 660; Charlon v. State, 106 Ga. 400, 32 S. E. 347, and cases cited.

2. Complaint is made of the failure of the court to charge upon the subject of manslaughter. We have carefully read the evidence and the statement of the accused, and find nothing in either which would have authorized the submission to the jury of the question of manslaughter. According to the statement, the accused, on Friday evening, went to the house of a neighbor, where his wife, who had separated from him, was living. In the dining room he found his wife and a man named Pitman. On entering the room he saw Pitman with his hands around Mrs. Baker's neck, kissing her, and he thereupon shot her. Even had this statement been true (and it was positively contradicted, as to the position of Pitman and Mrs. Baker, by the witnesses for the state), it was not sufficient to reduce the homicide from murder to manslaughter. The rule, as laid down by decisions of this court, is that, in order to reduce such a homicide to manslaughter, it must appear that the accused found his wife in the very act of adultery, or under such circumstances as to indicate that she had just committed the adulterous act. Mays v. State, 88 Ga. 399, 14 S. E. 560. The statement of the accused does not show that the deceased was found, at the time of the killing, under such circumstances as would reduce the homicide to manslaughter. It is true, the accused did state that he had, on Wednesday morning before the killing on Friday, seen his wife and Pitman in bed together. If this be true, he might have been justified, under the decision in Hill v. State, 64 Ga. 453, in then killing her to prevent the act of adultery, or the homicide might have been reduced to manslaughter had the killing occurred immediately after the commission of the adulterous act. Instead of moving at that time, however, the accused, according to his own statement, left the premises, and subsequently invited Pitman to a conference in his room. He returned to the house where his wife was living on the night of the second day after he claims to have seen this misconduct of Pitman and Mrs. Baker, and then, seeing them together in the dining room, and that Pitman had his hands around Mrs. Baker's neck and was kissing her, he shot and killed her. There seems to us to be nothing in his own statement to show that the crime was manslaughter, and not murder. Conceding, however, that there was enough in the statement of the accused to have authorized a finding that the crime was manslaughter, certainly there was nothing in the evidence to have done so, and, under repeated rulings of this court, it was not error to fail to charge on the subject in the absence of any request so to do. "In the absence of a proper and pertinent written request for instructions thereon, the court is not bound to give in charge the law of a theory of the case arising solely from the statement of the accused." Hardin v. State, 107 Ga. 718, 33 S. E. 700; Carroll v. State, 99 Ga. 36, 25 S. E. 680; Taylor v. State, 108 Ga. 394, 34 S. E. 2.

3. The newly-discovered evidence, taken in connection with the strong counter showing made by the state, would not, in our opinion, authorize another jury to find a different verdict. The trial judge heard the evidence and the state's counter showing, and, in the exercise of his sound discretion, refused to grant a new trial on this ground. We cannot say, as matter of law, that he abused his discretion.

4. The evidence fully warranted the verdict, and the trial judge did not abuse his discretion in refusing to grant a new trial. Judgment affirmed. All the justices concurring.

SILVEY v. STATE.

(Supreme Court of Georgia. July 9, 1900.)

CRIMINAL LAW—EVIDENCE.

The evidence, at best, only tended to raise a suspicion of the guilt of the defendant, and was not sufficient to support a conviction of the offense with which he was charged. The court erred in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Union county; J. B. Estes, Judge.

Spurge Silvey was convicted of crime, and brings error. Reversed.

I. L. Oakes, for plaintiff in error. W. A. Charters, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

GREEN v. STATE.

(Supreme Court of Georgia. July 9, 1900.)

ARSON—EVIDENCE.

The evidence in this case being entirely circumstantial, and being insufficient to connect the accused in any way with the crime, the verdict of guilty was contrary to law, and the court erred in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Hezekiah Green was convicted of arson, and brings error. Reversed.

C. E. Carpenter, J. S. Crawford, and C. A. Thornwell, for plaintiff in error. Moses Wright, Sol. Gen., for the State.

SIMMONS, C. J. A barn belonging to Mrs. Graham was burned on the night of February 15, 1899. Green was arrested and charged with the arson. He was tried and found guilty. The evidence showed that he had been a laborer on Mrs. Graham's farm for several months. Green's wife desired to live with him upon the place, but there was no room for her. Green told Mrs. Graham that he would leave on that account. Accordingly, after a settlement, with which he did not seem fully satisfied, he removed from the premises. A few days thereafter the barn was burned. The night on which the burning occurred was very cold, and the ground was covered with snow. There was a hard rain during the night, but the snow was not melted off of the ground, except where it was thinnest. After the burning, tracks were discovered leading towards the barn, and leading from it towards the place where Green resided, some three miles distant. Whoever made the tracks walked into an ashbank in the yard, and the ashes stuck to his shoes, and were plainly visible in the tracks for a considerable distance from the barn. Some of the witnesses testified that Green, in walking, put his right foot down on the side, and that a man walking in that manner would make a track like those discovered near the barn. The tracks were followed from the barn to within a half-mile of the place where Green lived. There was some other testimony to the effect that when Green came to Mrs. Graham's place, the day after the burning, he jumped over muddy places and "flanked around" all soft or sandy spots. This raised a suspicion in the minds of the witnesses that he desired to avoid making tracks which could be compared with those made by the person who burned the barn. There was no measurement of the tracks, and no comparison of them with tracks known to have been made by Green, except that one witness testified that she had noticed Green's track while he worked on Mrs. Graham's place, that it was peculiar, that she had looked at it where he had made it in the sand, and that it corresponded, to the best of her knowledge, with the tracks discovered near the scene of the burning. Upon this evidence the jury returned a verdict of guilty. A motion for a new trial was made by Green and was overruled by the trial judge. To this Green excepted.

We think that the evidence was not sufficient to authorize the verdict. It was entirely circumstantial, and in no way connected the accused with the arson. The law does not permit any one to be convicted upon mere suspicion. If the evidence be circumstantial, it must connect the accused with the offense so as to exclude every other reasonable hypothesis than that of his guilt. It is possible that Green was guilty of the arson with which he was charged, but the state has not produced sufficient evidence to show beyond a reasonable doubt that he was so. The court therefore erred in refusing to grant a new trial. Judgment reversed. All the justices concurring.

MADDOX et al. v. WAGNER.

(Supreme Court of Georgia. July 9, 1900.)

CONTRACT TO PURCHASE—BREACH—ACTION FOR PRICE.

A breach of an executory contract for the purchase of goods will not support an action upon an open account for the price thereof. (a) Thus, where a mercantile partnership in one city gave to an importer in another an order to "import and ship" to the firm certain goods at stated prices, the order specifying that "import orders are not subject to cancellation," and containing a stipulation, "This order not to be shipped until notified by the buyer," the partnership was bound within a reasonable time after the importation of the goods to direct that they be shipped to it, and, failing to do so, was guilty of a breach of contract, for which it is liable in damages to the other party. But he was not, after the arrival of the goods from abroad, authorized to ship them to the firm except by its express direction, and could not, if he shipped without such direction, and it declined to accept the shipment, maintain against the firm an action upon account as for goods sold and delivered.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by Edward H. Wagner against J. J. & J. E. Maddox. Judgment for plaintiff. Defendants bring error. Reversed.

C. D. Maddox, for plaintiffs in error. W. R. Brown, for defendant in error.

LUMPKIN, P. J. It appears from the record that J. J. & J. E. Maddox, of Atlanta, Ga., executed and delivered to a soliciting agent of Edward H. Wagner, of New York, a written order for goods. It authorized and directed Wagner to "import and ship to J. J. & J. E. Maddox" certain specified articles, at stated prices, contained a clause reciting that "import orders are not subject to cancellation," and embraced a further stipulation in these words: "This order not to be shipped until notified by buyer." Some time after receiving the order, Wagner, without any direction or request from J. J. & J. E. Maddox, shipped to them goods of the na-

ture specified, and rendered to them a bill for the same. Upon the arrival of the goods in Atlanta, J. J. & J. E. Maddox promptly notified Wagner that, never having directed him to ship the goods, they were not bound to take the same; that they declined to accept them, and held them subject to his order. Thereupon Wagner brought against J. J. & J. E. Maddox an action upon an open account as for goods sold and delivered, and attached to his petition a bill of particulars containing an itemized statement of the goods which he claimed had been purchased of him by the defendants. In defense to this action, they filed an answer setting up, among other things, that never having directed a shipment of the goods, and having declined to accept the same, they were not liable for the price thereof. The jury returned a verdict in favor of the plaintiff, and the defendants bring the case here upon exceptions to a judgment overruling their motion for a new trial.

Without entering into a detailed discussion of the various grounds of this motion, it is sufficient to say that the case turned upon the construction of the written order given by the defendants to the plaintiff's agent. The trial judge based his instructions to the jury upon the theory that this order authorized the plaintiff, without further notification from the defendants, not only to import, but to ship, the goods, and that, upon his so doing, J. J. & J. E. Maddox became at once bound to accept and pay for the same. We do not think this was the legal effect of the contract embraced in this order. It is quite true that the defendants had no right to arbitrarily cancel the order. Obviously, they could not do this in the face of the express stipulation that "import orders are not subject to cancellation." It is likewise clear that Wagner, after receiving the order, was fully authorized, without further direction from the defendants, to at once import the goods, and for the loss, if any, thus arising, the defendants were undoubtedly liable. But, under the express terms of the contract, Wagner had no right to ship the goods from New York to Atlanta until expressly so directed by the defendants. They were bound by the contract to give a direction to this effect within a reasonable time, and, upon failure to comply with their obligation in this respect, became liable to Wagner for all damages occasioned by their breach of contract. Had the order unconditionally directed Wagner to import and ship the goods, the contract of sale would have been fully executed on his part upon his delivering the goods to the carrier to be forwarded to the defendants; but such was not the character of the order with which we are called upon to deal. Under its terms, Wagner was unauthorized, after importing the goods, to ship them from New York to Atlanta until he was notified so to do by the defendants. When, therefore, he made the shipment without being so notified, he took the risk of acceptance by J. J. & J. E. Maddox. Certainly, he had no right to compel their acquiescence in a shipment made in the teeth of the contract, and necessarily shipped the goods at his risk. We do not mean to say that J. J. & J. E. Maddox could escape all liability to Wagner simply by declining to give directions for the shipment of the goods to them. As stated above, they were bound to notify the plaintiff, within a reasonable time, of their readiness to receive the shipment; but, clearly, their mere failure to comply with their obligation in this respect would not subject them to liability for the contract price of the goods upon the theory that the same were actually sold and delivered to them by Wagner. If they in fact made a breach of their contract by refusing, without sufficient reason, to direct a shipment to them of the goods after the arrival of the same in New York, they were, as stated above, liable to Wagner for whatever damages he may have thus sustained. An action for the recovery of the same would, however, be very different from the one now before the court. The case as laid was a plain suit upon an open account, and the liability, if any, proved at the trial, was that arising from the breach of what was, in substance, an executory contract to purchase. We therefore, without difficulty, dispose of the case on its merits. It was tried upon an erroneous conception by the court below of the meaning and effect of the contract, and, considering the nature of the action instituted by the plaintiff, the evidence did not warrant any finding whatever against the defendants. Judgment reversed. All the justices concurring.

ST. JOHN et ux. v. LEYDEN

(Supreme Court of Georgia. July 9, 1900.)

COVENANTS—BREACH OF WARRANTY—PETITION — SUFFICIENCY — DEED — APPEAL — HARMLESS ERROR—NEW TRIAL.

1. A petition which in substance alleges that the defendant by "warranty title deed" conveyed to the plaintiff a described city lot; that 10 feet of the lot thus described never in fact belonged to defendant, and is in possession of another, who is the owner thereof; that a specified sum was the "purchase money" of this strip of land; and praying for a recovery of this sum,—though loosely drawn, is in fact an action for a breach of warranty of title to land. (a) When, as originally drafted, such a petition claimed as the measure of plaintiff's damages the value of the property to which title failed, it was amendable so as to make the sum claimed as such damages the purchase price of the property. (b) The petition in the present case, as amended, was of the character above indicated; and, though there was a general demurrer to the same, yet, as it does not appear that the demurrer was sustained, but the case went to trial on the merits, the petition is sufficient to sustain the verdict in plaintiff's favor.

2. That the court, in the trial of a case, treated as ambiguous, in the matter of description, a deed which was not so, affords no cause of complaint to a party whose contention as to its real meaning was, under a proper construction of the deed, not well founded. (a) In view

of the evidence introduced in the present case, the jury were warranted in finding that the deed from the defendant to the plaintiff covered the land for which she contended, and that as to a portion of it the title failed.

3. A ground of a motion for a new trial alleging in general terms that the entire charge of the court is erroneous, "in giving to plaintiff's suit two distinct grounds of recovery" (specifying them), does not plainly and distinctly point out any error, unless it sets forth, either literally or in substance, the language used by the judge in thus allowing two grounds of recovery.

4. Treating the action as one for a breach of warranty of title to land, it is immaterial whether the court did or did not err in several of the rulings and charges complained of in the motion for a new trial.

5. There was sufficient evidence to warrant the verdict as amended by the order of the judge requiring one item thereof to be written off, and it does not appear that the court erred in denying the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Mrs. R. C. Leyden against J. F. St. John and wife. Judgment for plaintiff. Defendants bring error. Affirmed.

Anderson, Felder & Davis, for plaintiffs in error. Reed & Hartsfield, for defendant in error.

LEWIS, J. Mrs. R. C. Leyden brought her suit in Fulton superior court against Jacob F. St. John and his wife, Mrs. Alice J. St. John. The substantial allegations in the petition, in so far as concern the issues involved on the trial, are as follows: In April, 1896, Jacob F. St. John entered into a contract with petitioner "to exchange with her his lot on Auburn avenue, in the city of Atlanta, in land lot 51 of the Fourteenth district of said county and state, fronting 55 feet on the south side of Auburn avenue, and running back 179 feet along a 20-foot alley, which lies east of said lot, subject to a loan deed of $2,500." In accordance with this agreement, St. John executed to her his warranty title deed to said property on April 30, 1896, which was duly recorded May 6, 1896, the consideration named in the deed being $5,000. In exchange for this property, petitioner executed to said St. John her warranty deed to 10 acres of land in land lot 176 in the Fourteenth district of Fulton county, the consideration of that deed being $4,000. St. John gave to petitioner, also, five shares, of the par value of $100, of the capital stock of the Georgia Tile & Artificial Stone Company. Petitioner further charged that, in delivering the Auburn avenue lot to her, St. John represented and pointed out the lines of said lot as extending west from the corner of a 20-foot alley 55 feet along Auburn avenue to the middle of the third row of small tenement houses situated on said lot and the lot next adjoining it on the west, and running back 179 feet of uniform width with front. Since receiving the deed to this land, she ascertained that St. John misrepresented to her the number of front feet he owned in the lot conveyed to her; that the western line of the lot, instead of extending to the place pointed out, was in fact 10 feet east of said point; and that the 10 feet, extending the full length of the lot sold, was never owned by St. John, but was owned by another party, thus making petitioner's actual frontage on Auburn avenue from said alley 45 instead of 55 feet, as bargained for. She then demanded of St. John that he make good the missing 10 feet, or their value. He replied that, if she would have the lot surveyed and establish the lines, he would make good his error. She accordingly had such survey made, the result of which confirmed petitioner's belief that the lot sold her by St. John extended only 45 feet from the 20-foot alley, instead of 55 feet; but St. John, when his attention was called to this, failed and refused to make good the 10 feet, or to pay the value thereof. Petitioner prayed for a general judgment against St. John for $1,100, alleged to be the value of the missing feet from the Auburn avenue lot. The court allowed an amendment to this petition to the effect that the purchase money for the 10 feet in question paid by petitioner was $1,100. Petitioner further alleged that, on account of defect in the title to this portion of the land, it would require her to move some houses, at a cost of $300, for which she claimed damages. She also alleged that St. John represented to her the solvency of the company in which she held the stock paid her by him, whereas the company was totally insolvent and the stock worthless, and that the lot, or some portion thereof, she conveyed to St. John had been by him conveyed to his wife; that he was insolvent, and this conveyance was made to prevent her recovering from him in this cause of action. It appears, however, from the record, that all these claims seeking recovery, except the loss growing out of the breach of warranty, were abandoned, and that the evidence was confined to the issue as to whether there was a breach of the warranty in the deed, and, if so, the extent of the damages sustained by petitioner in consequence of such breach. In answer to the charges in the petition which related to a breach of the warranty in the deed as to the 10 feet, the defendant denied that he misrepresented to petitioner the number of front feet conveyed to her, and averred that petitioner not only had title to, but also the actual use and occupation of, the 55-foot lot conveyed to her by him. The answer further joins issue with the allegations in the petition with reference to the other causes of complaint therein set forth, but as these were abandoned, as above indicated, it is unnecessary to set forth the replies thereto made by the defendant in the pleadings. The jury returned a verdict for the plaintiff for $500 principal, $103.07 interest to date, and $54 damages to building. Defendant below made a motion for a new trial, which was overruled after petitioner's counsel, under direction of the court, had written off the finding of $54 damages. On

the judgment of the court overruling the motion, error is assigned.

1. It is contended by counsel for plaintiff in error that plaintiff's original petition was based solely upon a fraudulent misrepresentation made by the defendant to petitioner, and, there being no evidence whatever to sustain the action on such a basis, the verdict was contrary to the evidence. It is further urged that the court erred in allowing the amendment to the petition by asserting that the judgment prayed for, of $1,100, was the amount of the purchase money paid for that portion, 10 feet in width, of the land to which the defendant had no title, it being contended that this added a new cause of action to the petition. We do not think there is anything whatever in his contention. The original petition, fairly construed, clearly sought a recovery for damages sustained by petitioner on account of a breach of warranty in the deed; and the fact that the damages in this original petition were alleged to be the value of that portion of the land which was alleged to have been included in the purchase price by petitioner did not affect the allegations touching the breach of the warranty, but was only inaccurate in stating a wrong measure of the damages for such breach. (a) We think it was, therefore, clearly amendable so as to make the same claim as such damages the purchase price of the property. It is true, this original petition was loosely drawn, and was perhaps defective on account of the dual nature of the case. As the judge stated in his order overruling the motion: "It is quite possible that as such it was demurrable for duplicity or misjoinder of actions, but no such demurrer was made, nor any motion based on this on like grounds." There is no question about the original petition containing elements of a suit for a breach of warranty; that the amendment therefore added no new cause of action, but simply that the $1,100 sought to be recovered was the purchase money of the land missing. While there are some allegations in the original petition which partake of the nature of an action for deceit and of tort, on the trial these seem to have been abandoned; yet, as the judge stated in his order overruling the motion, "as an action for breach of warranty it contains every necessary element, sale, warranty, partial breach by lack of land, and loss of the value or purchase money." (b) We conclude that the petition as amended was properly treated as an action for a breach of warranty, and the record shows that the case went to trial on the issue as to whether such breach had occurred, and, if so, the extent of the damages caused thereby. The verdict of the jury for $500 and interest was sustainable under the pleadings. The finding by the jury of $54 damages has resulted in no injury whatever to the defendant below, for the reason that that portion of the verdict has, under the direction of the court, been written off by petitioner's counsel.

2. In one of the grounds in the motion for a new trial (No. 15) it is alleged that the court erred in charging as follows: "Under the terms of this deed [alluding to deed from defendant to plaintiff], and what is stated in it, and the references made in it, the court deems it proper to submit to the jury the question as to what was in fact the land covered and conveyed and warranted by this deed,—whether it was the land lying west of the alley and exclusive of the alley, or whether it was the land extending from the center of the alley westward, and including half of the alley;" movant adding that "the evidence being clear and conclusive that the deed from defendant to plaintiff did not take in the ten feet in controversy." In a note to this ground the court stated that this "statement that the evidence was clear and conclusive is defendant's contention." The deed which plaintiff below introduced in evidence contained the following description of the land, title to which was therein warranted by defendant to the plaintiff: "Part of land lot 51 in the 14th district of originally Henry (now Fulton) county, Georgia, and known and distinguished as the 'East Half of City Lot 126,' fronting 55 feet on the south side of formerly Wheat (now Auburn) avenue, and running back south a uniform width 176 feet to north line of Mrs. T. W. Hubner's line, along a 20-foot alley, with perpetual and joint use of said alley, which lies east of the lot herein conveyed; this being the same property conveyed by Charles W. Hubner to said Jacob F. St. John by deed recorded in Book 109, folio 230, of Fulton county records, August 22, A. D. 1895." An examination of the deed from Charles W. Hubner to St. John, which is referred to in the deed from the latter to Mrs. Leyden, will show that the lot in question, as described in the Hubner deed, really commenced on the side of the alley, and not in the center of it. In the light of the description of the land in the deed from St. John to Mrs. Leyden, we cannot possibly see how it was claimed by movant in his motion for a new trial that the evidence was clear and conclusive that the deed from defendant to plaintiff did not take in the 10 feet in controversy. To our minds the descriptive words used in the deed tend much more strongly to sustain the contention of the defendant in error as to the exact lot which she purchased, and which plaintiff in error intended to convey to her. The contention of the defendant below on the trial was that he intended to convey, and did by his deed convey, 55 feet fronting on Auburn avenue, by a line commencing in the middle of an alley 20 feet wide. This contention was supported only by parol testimony, but there is really nothing in his deed which in the least indicates that he intended to convey land from the center of the alley, thus embracing 10 feet of that alley in his frontage of 55 feet. On the contrary, the deed expressly declares that the line bounding the lot conveyed, instead of running along the center of the al-

ley, runs "along a 20-foot alley," and further specifies that this alley "lies east of the lot herein conveyed," and not simply that half of the alley lies east of the lot. We do not think there was any ambiguity whatever in this description in the deed, relatively to the question as to whether the line on Auburn avenue was to commence in the center of the alley or on the edge of the alley. The language clearly indicates to our minds that this line on Auburn avenue should be exclusive of any portion of the alley. Construing the deed, therefore, as ambiguous in its description, we think, was giving the defendant every advantage he could possibly ask for under the terms of his conveyance. He was also allowed to introduce parol testimony that the property he owned really commenced in the center of the alley, and that 55 feet from the center of the alley would not encroach upon the land of another. We think the court committed no error against St. John in giving instruction complained of in the above-stated ground. (a) Even viewing this case in the light of the parol evidence introduced, we think, unquestionably, the jury were warranted in finding that the deed from defendant to plaintiff covered the land for which she contended, and that as to a portion of it the title failed. As to the 10 feet in controversy, it was on the trial practically conceded that the defendant claimed no title whatever thereto. It was virtually admitted that another party, by 20 years' prescriptive possession, had paramount title to this strip of land. It is true, the defendant introduced some evidence tending to show that the title of his grantor embraced one-half of the alley, but there was nothing in his deed from which this fact necessarily appeared, and what title he had to half of the alley was established purely by parol. But the question is, what did he intend to convey to his grantee in this case? There was testimony in behalf of plaintiff below to the effect that, about the time or soon after the execution of this deed, defendant pointed out the land line to the plaintiff's son, and located it exactly where plaintiff contends the deed designates it. There is a ground in the motion for a new trial objecting to this testimony of the son, for the reason that plaintiff was not present when this representation was made; but it appears from the record of the evidence that, while she was not in their immediate presence during the location of the line, she was near enough to hear the remarks he made about where it terminated. After this it seems that the attention of defendant was by plaintiff called to the adverse claim of the party who had paramount title to the 10 feet of land in dispute, and that he requested her to have it surveyed, and, if there was any deficiency of his title in the land covered by his deed, he would rectify it. Defendant also afterwards wrote a letter in which he seemed to recognize his mistake in locating the line where he did. All this testimony was objected to in several grounds of the motion for a new trial, upon the theory that they were representations made by the defendant after the execution of the deed to the plaintiff, and therefore she could not have acted upon these representations in making the purchase. Counsel, however, seem to lose sight of the fact that this trial had been reduced down to an issue touching a breach of warranty as to the particular land in controversy, and that these statements and conversations of defendant were clearly admissible in evidence, not as a misrepresentation upon which his grantee had acted in the contract of purchase, but as admissions that under his deed to her, and in his transactions had with her touching a sale of the land, he intended to convey, and thought he was conveying, the identical lot of land claimed by her to be described in the deed, and contended for in this suit. In several grounds of the motion for a new trial, particularly the ninth and tenth, complaint is made of the charge of the court with reference to the conduct of defendant in pointing out the line after the trade had closed. Among the instructions of the court on this subject excepted to is one to the effect that "if, after the trade was closed, and after both parties had conveyed titles, respectively, to each other, the defendant then undertook to point out the lines of the Auburn avenue lot, and did so erroneously, but there was no consideration for doing so, and this was not a part of the making of the trade, then this would not furnish a ground for recovery by the plaintiff of this cause of complaint." It is alleged in the motion that this charge suggested to the jury that they might find that pointing out the line after both parties had conveyed titles to each other was a part of making the trade. Instead of the charge containing any such suggestion, it was exactly the opposite, and operated beneficially to the defendant, instead of to the plaintiff. In the tenth ground of the motion another charge on this subject, excepted to, was to the effect that the evidence as to whether there was a pointing out of the line after the trade was made and concluded might be considered by the jury as to whether there were admissions by the defendant as to what he claimed the line to be, or as to whether he had located it erroneously, and that, so far as this throws any light upon the question at issue between the parties, it is admissible, and may be considered along with the other evidence in the case, but, as representations, if made after the trade had been closed, and not acted upon, they would not amount to a warranty, or furnish ground of recovery, if made without a new consideration. This was a correct view of the law. As above seen, the sayings and conduct of the defendant after the trade were unquestionably admissible in evidence as an admission against his contention on the trial. We therefore conclude that, in view of the evidence introduced in the present case, the jury were warranted in finding that the deed from defendant to plaintiff covered the

land for which she contended, and that as to a portion of it the title failed.

3. Another ground in the motion (No. 13) complains of the charge of the court as a whole, in giving to the plaintiff's suit two distinct grounds of recovery, either fraudulent misrepresentations or breach of warranty, when the suit itself was on the sole ground of misrepresentation. The judge below, in the order overruling the motion, states that the only grounds which present any serious question to his mind are those touching the dual nature of the case, and the charge accordingly. He recognizes that as the case began, certain equitable features were involved, but these were removed or abandoned, leaving the case a legal one against St. John alone; that it is possible that as such it was demurrable for duplicity or misjoinder of actions, but no such demurrer was made, or any motion based on that ground. In the first place, the ground in the motion above referred to attacks in general terms simply the entire charge of the court as being erroneous, in giving to plaintiff's suit two distinct grounds of recovery; but this ground should not be considered, for the reason that it does not plainly or distinctly point out any error in any one of these charges. It should have set forth, literally or in substance, the language used by the judge in thus improperly allowing two grounds of recovery. Besides this, the judge, in overruling the motion, says that on this last trial defendant's counsel presented several requests more especially applicable to an action of deceit,—for example, that the representations must have been made before the trade was closed, unless upon a new consideration, and that if each had equal opportunities for knowing, etc., there could be no recovery, etc. He gave some of these in charge, either literally or substantially, and this necessitated a further charge on that subject, which he gave. It perhaps was error to charge on this view of the case at all, but, if so, it was error of which the defendant cannot well complain, as it seems from the judge's order that he introduced that element into the charge by request.

4. But, in the view we take of this case, we think it was really immaterial as to whether the court did or did not err in several of the rulings and charges complained of in the motion bearing upon an action of deceit; for this cause of action set forth was abandoned, the evidence did not cover the issue, and what plaintiff finally sought to recover was only for damages for breach of warranty in the deed. The verdict, too, in the light of the testimony before the jury, clearly indicates that the portion thereof which was allowed to stand by the judge below was for the value of the land embraced in the defendant's deed to plaintiff, to which he had no title. Counsel for plaintiff below contends in his argument that the verdict was not large enough, estimating the value of the lot purchased by her by the consideration of $5,000 mentioned in the deed, and that the verdict ought to have been several hundred dollars larger than the jury found. There was some evidence, however, in behalf of defendant below, that these 10 feet running the full length of the lot embraced in her deed was worth $50 a front foot, and the jury evidently based their verdict upon this testimony as to the present value of that strip of land. If there was any error in this particular, it was in favor of the defendant. There is no proof tending to show that the damages could have been less than $500, but, as no exceptions were filed by the plaintiff, there was, of course, no error in refusing a new trial.

5. We think the evidence was amply sufficient to warrant the verdict as amended by the order of the judge requiring one item thereof to be written off. We note from the record (the fact being recited in the judgment of the court overruling the motion) that this case has been twice tried, and each time a verdict rendered for the plaintiff. It further appears that the first trial proceeded upon the theory that the action was one for a breach of warranty, and this last trial was evidently based upon the same theory. In view of the proper construction to be placed upon the pleadings and the evidence introduced upon the trial, as above indicated, we think the court did right in denying the motion for a new trial.

We have not made special reference to all the grounds in the motion. Those herein referred to and considered embrace the controlling issues of this case, and we deem it entirely unimportant to discuss the other grounds. Judgment affirmed. All the justices concurring

JOHNSON v. AMERICAN FREEHOLD LAND MORTG. CO. OF LONDON, Limited.

(Supreme Court of Georgia. July 10, 1900.)

AUTHORITY OF AGENT—SALE OF LAND—ACTION AGAINST CORPORATION—PLEADING.

1. An agent who has authority only to receive proposals to purchase the property of his principal, and submit the same to the latter for acceptance or rejection, cannot make an absolute contract of sale, which will be binding upon the principal.

2. When, in an action against a corporation for the breach of an alleged contract for the sale of land, the petition described the person with whom the plaintiff dealt in making the contract as "the agent of said defendant company, empowered by said defendant company to negotiate with this complainant the sale of" the land, the words quoted, whatever might be their true intent and meaning when standing alone, must be construed in connection with all the allegations of the petition.

3. Thus construing these words in the petition now under review, the agent therein referred to was not authorized to make for the defendant a binding contract of sale, but only to receive and submit to the company offers for the purchase of the land in controversy. This being so, and the plaintiff not being entitled to recover save on the theory that the agent

had power to sell, the demurrer to the petition was properly sustained.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by Jesse Johnson against the American Freehold Land Mortgage Company, Limited. Judgment for defendant, and plaintiff brings error. Affirmed.

J. S. & W. T. Davidson and F. W. Capers, for plaintiff in error. J. R. Lamar, for defendant in error.

LITTLE, J. This was an action by Jesse Johnson against the American Freehold Land Mortgage Company of London, Limited, for the breach of an alleged contract for the sale of land. On demurrer, the action was dismissed, and Johnson excepted.

The petition was, in brief, as follows: The plaintiff submitted to the defendant an offer for the purchase of a tract of land in Richmond county, known as the "McLaughlin Place," at the price of $1,000. In reply to this offer, one W. M. Fulcher, "the agent of said defendant company, empowered by said company to negotiate with this complainant the sale of said McLaughlin place," addressed to the plaintiff a letter containing the following words: "I inclose you a letter from my people, in which they make you a proposition to sell the land." Accompanying this letter was another, at the top of which was written the word "McLaughlin." This letter was addressed to Fulcher, and signed by Cuyler, Morgan & Co., in which the following language was employed: "Replying to your favor * * * submitting offer of $1,000 for this place, without interest, we beg to state that we would prefer to put offer in somewhat different shape. We will sell the place for $850, with 6% interest, payments apportioned as follows." Then followed a list of figures specifying the terms of payment. On receipt of the letter from Fulcher with the above-mentioned inclosure, Johnson addressed a letter to Fulcher, accepting the offer. Thereupon Fulcher wrote him another letter, stating that he had notified the owner of the place that Johnson would accept the same "on conditions that it was offered" to him. Subsequently, Fulcher again wrote to Johnson, informing him that the papers were ready for his signature, and asking him to come and execute the same. Still later, Fulcher informed Johnson "that he was in receipt of instructions from the defendant to declare the trade off."

It will have been observed that the petition did not distinctly and unequivocally allege that Fulcher had power from the defendant company to make a sale of the land. He was described as an agent empowered to "negotiate" with the plaintiff for a sale thereof. Even if the words employed in describing this agent could, if taken alone, be construed to mean that he was clothed with an absolute power of sale, it is, of course, proper, for the purpose of ascertaining what they did really mean in the present case, to look to all the allegations of the petition. Pursuing this course, we have reached the conclusion that the petition, taken as a whole, does not sufficiently allege that Fulcher had power to sell. Presumably, the original offer of $1,000 by Johnson was made to Fulcher. He did not accept it, but evidently submitted it to Cuyler, Morgan & Co., whoever they were. If his power to sell had been absolute, he could have accepted Johnson's offer without consulting any other person. Again, when he inclosed to Johnson the letter to himself from Cuyler, Morgan & Co., which itself embraced instructions authorizing Fulcher to submit a proposition to Johnson, he distinctly stated that this was a letter from his people in which they made Johnson an offer to sell. On receipt of Johnson's reply accepting this offer, Fulcher did not at once confirm the trade, but again communicated with some other person or persons, from whom he received papers for Johnson's signature. Viewing all these matters together, we think it clear that Fulcher's authority was limited to receiving proposals, and submitting them to the owner for acceptance or rejection. He therefore had no power to make a contract of sale binding upon the defendant company, and there is nothing in the petition amounting to an allegation that the company itself either contracted with Johnson for the sale of the land, or authorized any other person to make for it the alleged contract, for the breach of which Johnson's action is brought. Certainly, the petition does not aver that Cuyler, Morgan & Co. were the agents of the defendant, or had power to bind it. Limiting Fulcher's agency as above indicated, the petition, in its last analysis, amounts simply to this: Cuyler, Morgan & Co. authorized Fulcher to submit to Johnson an offer for the sale of the land, and Johnson accepted this offer. In the absence of an allegation that Cuyler, Morgan & Co. had from the defendant authority to do what they did, the petition is lacking in an indispensable averment, and fails to set forth, even in substance, a good cause of action. The demurrer made another point, with which we have not dealt, because, in our judgment, the case properly went out of court for the reasons above stated. Judgment affirmed. All the justices concurring.

STACK v. HARRIS.

(Supreme Court of Georgia. July 9, 1900.)

INJURY TO TENANT—LIABILITY OF LANDLORD.

Though a landlord will not be liable in damages for injuries to a tenant resulting from the defective condition of a plank in the floor of the rented building, of which the landlord had no notice, a petition which alleges that the plaintiff (a tenant) was injured by reason of such a defect, and that the landlord (the defendant) had notice of the "defective condition of the floor," sufficiently alleges, as against a general demurrer, that the defendant had notice of the defective condition of the plank.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by J. L. Harris against Minnie Stack. Judgment for plaintiff. Defendant brings error. Affirmed.

Hammond, Skeen & Langley, for plaintiff in error. D. W. Rountree, for defendant in error.

COBB, J. Harris brought suit against Miss Minnie Stack, alleging in his petition: That on the 18th day of May, 1899, he rented from the defendant a storehouse in the city of Atlanta. That he was a gunsmith by trade, and used the store rented as a general repair shop. That on the night of July 15, 1899, about 11 o'clock, when he quit work and was preparing to clean the floor of the storehouse, he stepped upon a plank in the floor, which was apparently sound, and the same gave way under him, causing him to fall, and by reason thereof he sustained serious and painful injuries. When he rented the premises, the floor was out of repair in different places, but portions of the floor seemed to be sound and in good condition, and such was the appearance of those portions of the floor where he usually worked, and where he was at the time he received the injuries above referred to. When he used those portions of the floor that were out of repair, he did so with the greatest caution. There was nothing in the appearance of the plank that gave way under him to indicate that it was at all dangerous. At the time that he rented the store he called the attention of the defendant to the "defective condition of the floor," and she agreed to repair it. When he paid the second month's rent, he made a similar complaint to the agent of the defendant who collected the rent, and subsequently he reported to the defendant that the floor was out of repair, and she agreed to make the repairs. He complains that his injuries were due to the negligence of the defendant in not having the floor repaired after her attention was called to the same. The defendant filed a general demurrer to the petition, which the court overruled, and she excepted.

As against a general demurrer, the petition sets forth a cause of action. The common law placed the burden of repairs upon the tenant, and the landlord was not bound to make repairs unless there was an express stipulation to that effect in the contract which created the relation of landlord and tenant. Neither was there any implied warranty on the part of the landlord that the premises were suitable for the purposes for which they were leased, or that they were in a condition to be occupied. 1 Tayl. Land. & Ten. (8th Ed.) §§ 175a, 327, 328; Gear, Land. & Ten. § 104. The common-law rule is not of force in Georgia. Under our Code, the landlord, in the absence of a stipulation to the contrary, is bound to keep the premises in repair. Civ. Code, § 3123. He is, however, entitled to notice from the tenant that the premises are out of repair, and if, after such notice has been given, the tenant suffers damage on account of the failure of the landlord to make the necessary repairs, the landlord is liable for the damage thus sustained, provided the conduct of the tenant was not such as to preclude him from recovering. Guthman v. Castleberry, 48 Ga. 172. Under the law of this state, it is presumed that the premises leased are in a condition suitable for the purposes for which they were rented; and if such is not the case, and damage results therefrom to the tenant, the landlord is liable, provided he has had notice of the defective condition of the premises, and has failed after a reasonable time to make the necessary repairs, and provided also that the tenant has not been guilty of such negligence as to bar a recovery by him. Whittle v. Webster, 55 Ga. 180. See, also, Driver v. Maxwell, 56 Ga. 11; White v. Montgomery, 58 Ga. 204; Lewis v. Chisolm, 68 Ga. 40; Miller v. Smithe, 95 Ga. 288, 22 S. E. 532; Johnson v. Collins, 98 Ga. 271, 26 S. E. 744. When the landlord is notified that the premises are out of repair, it becomes his duty to inspect and investigate, in order that he may make such repairs as the safety of the tenant requires. It follows, therefore, that when, after such notice, the landlord fails, within a reasonable time, to make the repairs, he is chargeable with notice of all the defects that a proper inspection would have disclosed. To this extent he might be charged with liability for injury arising from a defect which was hidden so far as the tenant was concerned. When rented premises become out of repair, it is the duty of the tenant to notify the landlord of this fact, and also to abstain from using any part of the premises, the use of which would be attended with danger. But even after notice to the landlord the tenant has a right to use those parts of the premises which are apparently in good condition, if there is nothing to call his attention to what may be a hidden defect. The failure of the landlord to repair in such a case would give to the tenant a right of action for any damages sustained by him, and his use of that part of the premises which was in an apparently sound condition would not preclude him from recovering, notwithstanding he had knowledge that there were other parts of the premises in a defective condition. Applying what is above said to the facts of the present case, after the defendant had been notified three times that the floor of the storehouse was out of repair, it became her duty to inspect the premises, and make such repairs as were necessary. This is not a case where the landlord is sought to be held liable for injuries arising from defects which were hidden both from the landlord and the tenant. Neither is it a case where the landlord is sought to be held liable on account of the defects which were hidden from him, and known to the tenant. But it is a case where the landlord is sought to be held liable for injuries resulting from

defects which were hidden from the tenant, and which the landlord could have discovered by the exercise of ordinary diligence, and where the circumstances were such as to require that he should make an investigation, which, when made, would have necessarily resulted in his discovering the defects which were the cause of the plaintiff's injury. As the petition distinctly alleged that the plaintiff, at the time he was injured, was in the use of a portion of the floor which was apparently sound, and that there was nothing to indicate that there was any defect in that portion of the floor, there was nothing appearing on the face of the petition which would authorize the conclusion that the plaintiff was guilty of such negligence as would preclude a recovery on his part. Judgment affirmed. All the justices concurring.

ROBERTS v. KEELER.

(Supreme Court of Georgia. July 10, 1900.)

SHERIFFS AND CONSTABLES — EXECUTION — FAILURE TO MAKE—OFFICER'S LIABILITY—DEFENSES—PAYMENT—COSTS—MALICIOUS ISSUANCE OF RULE—EVIDENCE—APPEAL—ASSIGNMENTS OF ERROR.

1. Suing out a money rule against a levying officer is, in effect, the bringing of a suit or civil action against him.

2. A levying officer may show, as an excuse for not making the money on an execution placed in his hands, that the same has been paid.

3. Issuing a rule nisi against the officer is not an adjudication that there is probable cause for suing out the same, when the petition for the rule does not truly set forth the facts.

4. That the costs upon a fi. fa. have not been paid will not justify the institution of a rule against the officer for the principal and interest as well, when the plaintiff in execution has himself received payment of the principal and interest, and therefore knows the officer is not liable therefor.

5. The evidence in this case fully warranted the jury in finding that the rules against the constable were sued out maliciously, without probable cause, and solely for the purpose of annoying the officer and putting him to trouble and expense.

6. A general complaint, in a motion for a new trial, that the verdict is "contrary to law," is not a special assignment of error; nor does such an assignment authorize the supreme court, at the instance of one against whom a verdict was rendered in the trial court, to pass upon the question whether or not the plaintiff's petition was good as against a general demurrer. (a) The question whether the bringing of a civil action maliciously and without probable cause affords ground for instituting against the plaintiff a suit for damages is not made in the present case, and therefore is not decided.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Jones, Judge.

Action by one Keeler against one Roberts for maliciously ruling plaintiff, a constable, to show cause why he had not made the money on certain executions placed in his hands for collection. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

J. S. Roberts and Edwards & Ault, for plaintiff in error. E. S. & G. D. Griffith and W. R. Hutcheson, for defendant in error.

LUMPKIN, P. J. The plaintiff below, Keeler, who was a constable, brought an action for damages against Roberts, alleging in his petition that the defendant maliciously and without probable cause instituted against him in a justice's court five rules requiring him to show cause why he had not made the money on certain executions which had been placed in his hands for collection. There was no demurrer to the petition, but the case went to trial on its merits, and a verdict in favor of the plaintiff was returned. The case is here at the instance of the defendant, whose assignments of error have been disposed of by the rulings above announced.

1. One of the contentions of the plaintiff in error is: "That the rules nisi issued by the magistrate, * * * and which were the foundation of the proceedings, were not suits instituted by the defendant, Roberts, but were rules by a court of law calling on the executing officer to show cause why he should not be punished as for a contempt for a failure to perform his official duty." We are unable to conjecture why the institution of such a rule may not be regarded as a suit. In a broad and general sense, it is certainly an action by the movant of the rule against the respondent thereto. It is a proceeding in a court by one person against another, whereby the former seeks to obtain against the latter a judgment for money, and the right to enforce the collection of the same by attachment. The defendant is, to all intents and purposes, placed in the position of being "sued." The mere fact that the magistrate issued the rule does not make it the court's case, rather than that of the movant, for he is as much responsible for the institution of the proceedings as is the plaintiff in an ordinary action for the filing of the petition by which it is begun. The difference is merely in the form of process prayed for in order to compel the defendant to appear in court and answer the plaintiff's complaint.

2. It appeared at the trial that one of the reasons set up by the constable for his failure to make the money on some of the executions was that the same had been paid, and that Roberts knew this to be so when he instituted the rules. In this connection, exception is taken to the refusal of the court to give in charge to the jury the following request presented in writing by counsel for the defendant: "If a fi. fa. regularly issued by a justice of the peace has been placed in the hands of a constable, it is his duty to execute same by a levy on the defendant's property, and he cannot excuse himself for a failure to do so by setting up a defense thereto in favor of such defendant." Clearly, in view of the issue involved in the present case, this request would have had a decided tendency to mislead the jury; and, moreover, it was not at all applicable. Surely, it cannot be doubted that a levying officer may show, as an excuse for not making the money on an execution placed in his hands, that the same has been paid. Wheel-

er v. Thomas, 57 Ga. 161. If the court had given the request above quoted, it would have been, in effect, instructing the jury to the contrary.

3. Another contention of the plaintiff in error is that the fact that the magistrate granted rules nisi against the constable amounted to an adjudication that Roberts had probable cause for instituting the rules. In support of this contention the case of Short v. Spragins, 104 Ga. 628, 30 S. E. 810, is cited. In that case it was held that the sanctioning of an equitable petition, and the granting of a restraining order, by a judge of the superior court, afforded conclusive evidence of probable cause for the bringing of the action, if the petition "fairly and honestly set forth the facts relied upon by the plaintiffs therein." But the principle thus announced has no application to the present case, for the reason that it affirmatively appeared at the trial that the allegations in the petitions for the rules which Roberts presented to the magistrate were not true.

4. Error is assigned upon the refusal of the court to charge as follows: "If suit is pending or judgment has been obtained, and a settlement of the principal and interest by the defendant has been made, and there is no agreement as to which party shall pay costs, then, as between the plaintiff and the defendant, the defendant would be liable to plaintiff for costs." This request was evidently predicated upon evidence tending to show that, upon one of the executions placed in the hands of the constable, the costs, amounting to $4.35, were due and unpaid. It appears, however, that, in the petition for the rule against the constable relating to this particular execution, Roberts claimed that the officer was liable for $94.35, although, as matter of fact, the principal and interest due upon the execution, amounting to $90, had been paid to Roberts himself before the rule was sued out. The only theory, therefore, upon which the request just quoted would have been pertinent, was that even if Roberts did maliciously rule the constable for $94.35, knowing the officer was really liable for only $4.35, yet if the smaller amount was actually due upon the execution, and the constable failed to levy, the conduct of Roberts in instituting this rule could not be made the basis of an action for malicious prosecution. Clearly, such a theory is not tenable, and consequently the refusal of the request did not deprive the defendant of the benefit of a defense which he was entitled to set up.

5. Complaint is made in general terms that the verdict is "contrary to the evidence." We certainly cannot hold that this complaint is meritorious, for, while there was some conflict in the testimony, that which was favorable to the plaintiff amply made out his case as laid, and fully warranted the jury in finding that the rules against him were sued out maliciously, that the defendant had no cause for instituting them, and that his sole purpose in so doing was to harass and annoy the plaintiff, and subject him to trouble and expense.

6. The motion for a new trial also alleges that the verdict is "contrary to law." We have already attempted to show that suing out a money rule against an officer is, in effect, the bringing of a civil action against him. In our consultation over this case, the question arose whether or not the institution of such an action, maliciously and without probable cause, afforded to the defendant therein ground for bringing against the plaintiff a suit for damages. It was, in view of the ruling announced in Mitchell v. Railroad Co., 75 Ga. 399, that "the bringing of a civil suit maliciously and without probable cause was not a ground upon which an action could be maintained, unless the action was one whereby the person of the defendant was arrested or his property attached, or some special damage was done to him," quite natural that this question should occur to us. We cannot, however, undertake to deal with it in the present case, for the imperative reason that it is not made, and we are therefore without jurisdiction to do so. Even before the passage of the supreme court practice act of November 11, 1889 (Acts 1889, p. 114), this court uniformly held that it had no authority to decide any question which was not passed upon by the trial court, and brought here for review by a plain and distinct assignment of error. A striking and pointed illustration is to be found in the case of Jenkins v. State, 50 Ga. 258, in which it was held: "When there is a verdict of guilty in a criminal case, and a motion is made for a new trial on the sole ground that the verdict is contrary to law and to evidence, and the motion is overruled, this court will not inquire into the sufficiency of the indictment, no such question having been decided by the judge." The undoubted effect of this ruling was that a general assignment, in a motion for a new trial, that a verdict was "contrary to law," was the equivalent of no assignment at all, and the court accordingly allowed a verdict and sentence in a criminal case to stand, regardless of the question whether the indictment charged an offense or not. Again, in Mayor, etc., v. Johnson, 84 Ga. 279, 10 S. E. 719, a case which was tried in the superior court of Spalding county at the February term, 1889, this court held: "Points of law proper as grounds for demurrer ought not to be made first in this court under a ground for new trial that the verdict was contrary to law." And see comments of the present chief justice on page 283, 84 Ga., and pages 720, 721, 10 S. E. In view of the constitutional provision that "the supreme court shall have no original jurisdiction, but shall be a court alone for the trial and correction of errors" (Civ. Code, § 5836), it is clear that we have no jurisdiction to pass upon any question not made in the court below, and, since the passage of the act above mentioned, the question of the authority of this court to deal with points not properly brought here for re-

view is likewise jurisdictional, though the record may show that such points were in fact presented to and passed upon by the trial court. Section 5584 of the Civil Code, which was taken from that act, in express terms declares that "the supreme court shall not decide any question unless it is made by a special assignment of error in the bill of exceptions, and shall decide any question made by a specific assignment of error in the bill of exceptions." Of course, if a motion for a new trial contains a special assignment of error, and the bill of exceptions alleges error in overruling the motion, the bill will be treated as itself making a special assignment of error. A general complaint that a verdict is "contrary to law" is certainly not "a special assignment of error." It is anything but "special," in that it signally fails to point out a single respect in which the verdict is violative of law. There is statutory authority for moving for a new trial on the ground that the verdict is "contrary to evidence," or "decidedly and strongly against the weight of evidence" (Id. §§ 5477, 5482), but no such authority for complaining in such a motion that the verdict is "contrary to law." Certainly, then, a ground of this nature ought to distinctly specify how or why the verdict is unlawful. Even if the general assignment that a verdict is "contrary to law" could in any case be regarded as a proper ground of a motion for a new trial, it could not, as was held in Mayor, etc., v. Johnson, 84 Ga. 279, 10 S. E. 719, be so treated in a case where the petition failed to set forth a cause of action. If, then, the present petition is of that character, the defendant is not entitled to a new trial on any ground, for nothing is better settled than that a new trial will not be granted in a case where the petition is fatally defective in substance. In such a case, the remedy is by general demurrer before a trial on the merits, or by motion in arrest after verdict. The case of Brock v. State, 23 Ga. 371, has never been followed by this court, and the ruling therein on the question of practice is obviously unsound. It is not, however, necessary to formally overrule it, for unquestionably it has not, since the passage of the supreme court practice act of 1889, been binding as authority.

There is yet another reason why we ought not to decide whether the present petition does or does not set forth a cause of action, viz.: We have not, even in the brief of counsel for the plaintiff in error, been requested so to do. Were we, therefore, to reverse the judgment on the ground that the petition is fatally defective, we would be ruling upon a point not argued before us or insisted upon here, and as to which the defendant in error has had no opportunity to be heard. Accordingly, it is apparent that we have neither right nor pretext for usurping authority which the law has expressly forbidden us to exercise. Judgment affirmed. All the justices concurring.

BRYSON v. SCOTT.

(Supreme Court of Georgia. July 10, 1900.)

ACTION AGAINST ADMINISTRATOR—APPEAL—BOND.

Suit was brought in a justice's court against an administrator, as such, seeking a judgment binding the assets of the deceased. The defendant pleaded no assets and plene administravit. The finding upon these pleas was against the defendant, and judgment was rendered by the justice in favor of the plaintiff for the amount sued for, to be satisfied of the assets of the deceased, if to be found; if not to be found, then of the assets of the defendant personally. The defendant entered an appeal to a jury in the justice's court from so much of the judgment as affected the assets of the estate, and neither paid the costs nor gave bond for the eventual condemnation money. *Held*: (1) That the defendant could not enter an appeal from only a part of the judgment; (2) that, as the judgment rendered bound the administrator personally, an appeal could not be entered under the provisions of section 4464 of the Civil Code, which provides that administrators, when sued as such, or defending solely the title of the estate, may enter an appeal without paying the costs and giving security.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by S. A. Scott against H. M. Bryson, administratrix. Judgment for plaintiff before a justice, and defendant appealed to a jury in that court. From a refusal to dismiss the appeal, plaintiff brings certiorari. Appeal dismissed, and defendant brings error. Affirmed.

Hunt & Golightly, for plaintiff in error. J. N. Glenn, for defendant in error.

COBB, J. Scott brought suit in a justice's court against Mrs. Bryson, "as administratrix of the estate of Thomas M. Bryson, deceased," seeking to obtain a judgment against her in her representative capacity. The defendant pleaded that she had no assets of the estate in her hands, and also that all the assets of the estate had been properly applied to the payment of debts of higher dignity than that of the plaintiff. The justice, after hearing evidence, found against these pleas, and entered a judgment for the amount sued for, to be satisfied of the property of the deceased, if any to be found, and, if not to be found, then to be satisfied of the property of Mrs. Bryson individually. Within four days after the rendition of this judgment, Mrs. Bryson filed with the justice a paper in which it was stated that she desired, "in her representative capacity," to enter an appeal to a jury in that court, and prayed that the same be allowed "without the giving of a bond or the payment of costs"; the paper reciting that she entered the appeal to protect the estate. When the case came on to be tried on the appeal, the plaintiff moved to dismiss the appeal on two grounds: First, because the defendant had neither paid the costs nor given bond as required by law; second, because the appeal was entered for the estate only, and no appeal was taken so

far as the judgment bound Mrs. Bryson individually. The justice overruled the motion to dismiss, and the case proceeded to trial, and resulted in a verdict for the plaintiff for the amount sued for, to be satisfied of the property of the deceased when the same should come into the hands of the administratrix. The jury further found that the administratrix had fully administered the estate. The plaintiff filed a petition for certiorari, assigning error upon the refusal of the justice to dismiss the appeal. Upon the hearing the judge sustained the certiorari, and ordered the appeal dismissed. To this judgment the defendant excepted.

The general rule applicable to appeals requires that the appellant, as a condition precedent to entering the appeal, shall pay the costs and give bond for the eventual condemnation money. Civ. Code, § 4458. One of the exceptions to this general rule is found in section 4464 of the Civil Code, which declares: "Executors, administrators, and other trustees, when sued as such, or defending solely the title of the estate, may enter an appeal without paying costs and giving bond and security as hereinbefore required; but if a judgment should be obtained against such executor, administrator, or other trustee, and not the assets of the estate, he must pay costs and give security as in other cases." It is manifest from the terms of this section that the exception in favor of persons sued in a representative capacity is intended for the benefit of those who are really litigating in the interest of others, and who are not themselves to be affected by the judgment to be rendered. It is clearly inferable from the latter part of the section that, if the person sued in a representative capacity is bound personally in any way by the judgment, the section does not apply, and such person would be compelled to pay the costs and give the bond, as required by the general rule. The test seems to be this: Does the judgment bind the defendant in his representative capacity only, or does it bind him personally as well? If the former, then the case is within the terms of the section; if the latter, then the case is within neither the letter nor spirit of the section, but falls under the general rule. While this exact question has never been ruled by this court, what has been heretofore said in passing upon questions growing out of the right to enter an appeal under this section, as well as under the statute from which it was taken, has some bearing upon the question now before us. In McCay v. Devers, 9 Ga. 184, it was held: "An executor is entitled to appeal without security when the judgment is to affect only the assets of the decedent in his hands; aliter, where the judgment is against him personally, and for which he is responsible out of his own funds." In Irving v. Melton, 27 Ga. 330, it was held that, in a suit in equity against an administrator for a settlement, the defendant was entitled to appeal without giving security. This decision was rendered by two judges; Judge McDonald being absent. In Hickman v. Hickman, 74 Ga. 401, it was held that where an executor was cited to appear and settle his accounts, and pay over to the legatees the amounts to which they were entitled, the executor could not appeal from a judgment rendered against him without paying the costs and giving security. While the decision in 27 Ga. was a suit for a settlement in a court of equity, and the decision last cited was a citation for a settlement in the court of ordinary, the principle controlling in each case would be the same, and therefore the two decisions are in direct conflict. The latter decision, having been concurred in by three judges, must be allowed to control. This seems also to us to be the better view of the matter. In Cannon v. Sheffield, 59 Ga. 103, it was held that where an appeal was taken from a judgment de bonis testatoris without giving security, and subsequently the judgment was amended so as to charge the defendant individually the appeal should not be dismissed because entered without giving bond and security. Chief Justice Warner thus disposes of the question in that case: "As the judgment stood against the defendant as administrator at the time he entered his appeal therefrom, he was not required to give security in order to obtain it. Having obtained an appeal from the judgment of the justice according to law, his legal right thereto could not be defeated by the subsequent amendment of the judgment, even if the justice had the legal authority to amend the judgment as he did, pending the appeal." As the judgment in the present case bound the defendant personally, she could not enter an appeal under the provisions of Civ. Code, § 4464, without paying the costs and giving bond, at least so far as the judgment against her personally was concerned.

Could she enter an appeal from so much of the judgment as bound the assets of the estate, and leave the judgment to stand in so far as it bound her individually? We know of no law which authorizes an appeal to be entered from a part of a judgment. An appeal is a de novo investigation. "It brings up the whole record from the court below, and all competent evidence is admissible on the trial thereof, whether adduced on a former trial or not. Either party is entitled to be heard on the whole merits of the case." Civ. Code, § 4469. Even in a case where more than one person is bound by the judgment, an appeal entered by one will carry up the whole record, and any judgment rendered will bind the parties not appealing as well as the appellants. Civ. Code, §§ 4461, 4462; Murray v. Marshall, 106 Ga. 523, 32 S. E. 634. As any appeal entered by the defendant in the present case would have the effect of carrying to the appeal the entire case, and as the judgment rendered by the justice was one which bound her personally, and was not one in which the estate represented by her was alone interested, no appeal could be en-

tered until after the payment of the costs and the giving of security required under the general rule in reference to such matters. The present case furnishes an illustration showing the wisdom of the law which prevents the administratrix from entering the appeal from so much of the judgment as affects the estate of her intestate. Upon the trial of the appeal, the jury found in favor of the administratrix on her plea of plene administravit, and the effect of the finding was to discharge her from individual liability to the plaintiff. She thus appealed in behalf of the estate, and took advantage of the law allowing representatives of estate, when sued as such, to appeal without paying the costs and giving bond, and secured a judgment releasing her from individual liability. The justice erred in refusing to dismiss the appeal, and a reversal of this judgment upon certiorari was proper. Judgment affirmed. All the justices concurring.

CAMPBELL v. MORGAN.

MORGAN v. CAMPBELL.

(Supreme Court of Georgia. July 10, 1900.)

SALE OF NOTE—USURY—ESTOPPEL OF SURETY—TITLE IN THIRD PERSON.

1. When the payee of a negotiable promissory note sold it outright to another, the mere fact that the seller indorsed the paper did not place him in the attitude of a borrower of money from the purchaser; nor, as between the latter and the maker of the note, was the transaction usurious because the discount amounted to more than the maximum lawful rate of interest.

2. Even if a promissory note was usurious, yet, if this fact did not appear on its face, the maker, who induced another to sign the note as surety in ignorance of the usury, and in good faith believing that the payment of the note was secured by a bill of sale to personalty which the maker had executed, was estopped from setting up the usury in defense to an action of trover brought by the surety for the personalty after he had paid off the note and taken an assignment of the same and of the bill of sale.

3. Nor could the defendant, in such a case, for the purpose of defeating the plaintiff's action, set up as outstanding title a duly-recorded bill of sale which the defendant had executed to a third person after making the bill of sale relied on by the plaintiff, which was not so recorded.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by J. A. Campbell against W. A. Morgan. From the judgment, plaintiff brings error, and defendant assigns cross error. Affirmed on cross bill and reversed on main bill of exceptions.

Tompkins & Alston, for plaintiff in error. John C. Reed, for defendant in error.

LEWIS, J. Campbell brought bail trover against Morgan in the city court of Atlanta. The case was submitted to the judge upon substantially the following agreed statement of facts: Hardaway held three notes dated August 16, 1897, signed by one Morgan, payable to the order of Hardaway,—one for $100, due 60 days after date; one for $100, due 90 days after date; one for $125, due 120 days after date. Hardaway applied to one Jackson for a loan, and offered him these notes made by Morgan, but Jackson refused to discount them. Hardaway than asked him if he would discount the notes in case they were indorsed by Campbell, the plaintiff. Jackson agreed to do so. Campbell indorsed the notes, and Jackson let Hardaway have thereon $275. At the same time a bill of sale from Morgan to Jackson of the personal property herein involved was delivered to Jackson in order to secure the notes. Campbell, the plaintiff, did not know at what price the notes were sold, to whom they were sold, and did not know who held the same, until about the time the first note became due, when he was informed who held the notes, but not what had been paid for the same. Campbell called upon Morgan and asked him to pay each of said notes as they became due. Morgan told Campbell that he (Morgan) did not have the money to pay off the notes, and asked Campbell to pay the same; and, upon Campbell paying same, Morgan stated that he would pay back to Campbell the money so expended. In pursuance of this request of Morgan, Campbell paid to Jackson the sum of $325, the full face of the notes, without knowledge of what sum had been paid for the notes by Jackson. The three notes were introduced in evidence, indorsed on the back by "J. A. Campbell, Scty.," and transferred to J. A. Campbell by Jackson as follows: "Without recourse, this note is transferred to J. A. Campbell, for value received." The bill of sale was also introduced in evidence. It was made for the purpose of securing the payment of these notes, under section 1969 et seq. of the Code of 1882, and in accordance with the act of the legislature approved December 17, 1894. It was properly signed by Morgan, legally attested, and was filed for record on December 24, 1897, and recorded on January 3, 1898. On September 16, 1897, Jackson transferred to Campbell, in writing, the bill of sale. Jackson swore upon the trial that he took the notes which were secured by the bill of sale from Morgan to himself, and transferred by himself to Campbell, in the regular course of business,—discounted them as commercial paper, that they were represented to him as such; that he took the bill of sale, and upon payment of the notes by Campbell, the security, transferred the bill of sale to Campbell, the plaintiff in this case. Defendant then introduced R. P. Bush, who was surety upon defendant's bond in the bail-trover action. Bush testified that Morgan had executed to him a bill of sale upon the property described in the petition, and in the bond which he had signed, for a valuable consideration, and which was taken without notice of the outstanding title claimed by plaintiff in this case, and that his bill of sale was

recorded prior to the date of recording the bill of sale under which Campbell, the plaintiff, claims. This evidence was objected to by plaintiff as being irrelevant and immaterial, in that the outstanding title could not be pleaded or shown by the defendant, Morgan, to defeat a bill of sale which he had previously executed, and in which bill of sale he had warranted the title to the property attempted to be sold or conveyed; that Morgan was estopped to defeat the title which he had conveyed in the bill of sale, which contained his warranty, and which had previously been introduced by the plaintiff in this cause, by showing an adverse title created by himself. This objection was overruled. The bill of sale from Morgan to Bush was then admitted in evidence. The court rendered a judgment deciding that the defendant, Morgan, could not set up the outstanding title of Bush in his defense, and that the defendant is estopped to plead usury as against Campbell, holding the notes; but he ruled that the evidence showed that the bill of sale under which plaintiff claimed was void for usury, and that the plaintiff could not bring this kind of action (that is, trover), as he had no title; and that his action therefore failed. Plaintiff in error in his bill of exceptions assigns error upon the admission of the evidence of Bush and of the bill of sale from Morgan to Bush, and also assigns as error the judgment of the court finding against the plaintiff, for the reason that the same was contrary to law and the evidence, and because the defendant Morgan was estopped by his acts from pleading usury against Campbell; was estopped by the warranty in his bill of sale from setting up an outstanding title previously or subsequently made to the property which is the subject-matter of this suit. There was a cross bill of exceptions filed by counsel for defendant in error, alleging error in the following ruling of the court: In holding that Morgan could not set up the outstanding title of Bush in his defense,—and further error in holding that the defendant, Morgan, was estopped to plead usury as against Campbell, the holder of the note.

1, 2. We do not think that under the evidence in this case the court was authorized to draw the inference that any usury had been established either in the notes or in the bill of sale given to secure the same, which is the foundation of this action of trover. It seems that Hardaway held the notes of Morgan, which were unsecured then by bill of sale. What the consideration of those notes was, does not appear from the evidence,—whether Morgan gave them as a mere matter of accommodation to Hardaway, or whether he gave them for the payment of a debt he was due Hardaway. Therefore there is an utter failure of proof to show that any usurious consideration ever entered into these notes in the transaction between the maker and the payee thereof. Hardaway applied to Jackson for a loan, and offered him these notes, we presume, as collateral security. Jackson refused to accept them. Hardaway then offered to have them indorsed by Campbell, the plaintiff in this case, whereupon Jackson agreed to discount them, and bought them in at $275. At the same time Morgan gave to Jackson a bill of sale of the property herein sued for, for the purpose of securing the notes. There is no contradiction of Jackson's testimony that he took the notes in the regular course of business, discounted them as commercial paper, and had no reason to believe that they were not commercial paper, as they were represented to him as such. He took the bill of sale, and upon payment of the notes by Campbell, the security, transferred the same to him. The fact that Jackson was dealing in commercial paper, and bought these notes up at a discount, so that he paid for them less than their face value, does not render the transaction at all usurious. But, even conceding that these notes were usurious, yet this fact did not appear upon their face. The plaintiff was induced to sign the same as security in utter ignorance of any taint of usury, and in good faith believing that the payment of the notes was secured by bill of sale to the personalty which Morgan had made. When the notes fell due, plaintiff tried to get Morgan to pay them off; and Morgan's reply was a request that plaintiff pay them off as they matured, and that he would reimburse plaintiff for his expenses in so doing. This conduct on the part of the maker clearly estops him from impeaching the validity of his title on the ground of usury. To allow such a defense would be giving the debtor the privilege of taking advantage of his own fraud perpetrated upon his creditor. If Campbell, before he paid the money appearing due upon the face of these notes, had discovered that they were tainted with usury, he would have been discharged from all liability thereon. This was decided in the case of Prather v. Smith, 101 Ga. 283, 28 S. E. 857, where it was held: "A waiver of a homestead and exemption right, even though such right be inchoate only, is valid and will be binding upon the person making the waiver when the right becomes complete. Such a waiver is, however, void if embraced in a promissory note infected with usury, and a surety thereon signing in ignorance of the usury will be discharged." The decisions relied on by counsel for defendant in error have no application to the facts in this case. For instance, in Beach v. Lattner, 101 Ga. 357, (Syl., pt. 2), 28 S. E. 110, it was decided: "A grantee in a security deed tainted with usury cannot, as against the maker thereof, convey a good title, even to a person who takes bona fide, before maturity, for value, and without notice of the fact of usury." To the same effect, see Angier v. Smith, 101 Ga. 844, 28 S. E. 167. But in none of these cases does it appear that an innocent party was induced to purchase the note, or the property covered by the deed tainted with usury, by the representations and at the request of

the maker thereof. Nearer allied to the facts in this case is the principle decided in Polhill v. Brown, 84 Ga. 338, 339 (Syl., pt. 3), 10 S. E. 921, where it was held: "Whatever usury may have been in the contract under which defendant had formerly conveyed the land to one to secure a debt could not affect a deed which defendant procured this one to make to plaintiff to indemnify him for standing security for defendant upon a note to a fourth person for borrowed money." See, also, Lay v. Seago, 47 Ga. 82, 83, where it is held: "If a surety on a contract originally usurious pays it, and in payment includes the usury, he is entitled to recover it of his principal, unless previous to the payment he had notice of the intention of the principal to resist the usury." A case more directly in point, and the principle in which necessarily controls the present one, is Henry v. McAllister, 99 Ga. 557, 26 S. E. 469. There it appeared: That the deed was tainted with usury, it being given as security for a usurious note. That the usury did not appear upon the face of the papers. The maker of the note and deed appealed to a third person to purchase the note, representing to him that the deed was valid and all right. It was held in that case that the maker of the usurious deed was, as against the rights of such a purchaser, estopped from setting up usury in the transaction.

3. Complaint is made in the cross bill of exceptions that the court erred in ruling that the defendant, Morgan, could not set up the outstanding title of Bush in his defense; and plaintiff in error, in the main bill, likewise complains of error in the court admitting in evidence the testimony of Bush, and the bill of sale to the property in dispute from Morgan to Bush. It seems, however, that the error in admitting that evidence was cured by the judgment of the judge, who held that the defendant Morgan could not set up the outstanding title of Bush in his defense, and that Morgan was estopped to plead usury as against Campbell, holding the notes. Bush was no party to the case. The question would have been quite different if this action had been brought against Bush, and he had been in possession of the property, claiming under this title. But the plaintiff brings his suit against Morgan, the grantor from whom he derived title, which he has made the basis of his action of trover. We think the principle announced in Hall v. Davis, 73 Ga. 101, controls this question. It was there held: "The defendant was estopped by his deed from denying title to the mortgaged premises, and neither he, nor the court at his suggestion, could intervene for the protection of the rights of a third person who would not be bound by a judgment to which he was not, and could not be made, a party." See, also, authorities therein cited. Judgment on main bill of exceptions reversed. On cross bill, affirmed. All the justices concurring.

WILKINSON et al. v. BERTOCK et al.

(Supreme Court of Georgia. July 10, 1900.)

STIPULATION — TRIAL BY COURT — CORPORATIONS—LIABILITY OF STOCKHOLDERS—SET-OFF—HARMLESS ERROR.

1. When the parties on both sides of a case agree, in effect, that all contested questions shall be submitted to the jury, to be answered by specific findings; that questions not contested need not be passed upon by the jury; and that upon their findings and the undisputed facts the judge may enter a decree,—it is not erroneous, but proper, for him to take into consideration, so far as the same can be legitimately gathered from the pleadings and evidence, all the material facts concerning which the parties are not at issue, and give due effect thereto in making up the decree.

2. Shareholders of an insolvent corporation, who are indebted to it upon unpaid stock subscriptions, and who are also its creditors, cannot, in defense to an equitable proceeding brought by another creditor in behalf of himself and all the creditors of the corporation to wind up its affairs, and, as an incident thereto, to subject these shareholders to liability upon such stock subscriptions, set off against the amounts due thereon the debts due to them by the corporation. In such a case "they must pay up what they owe, like other debtors, and then get their dividends, like other creditors," when the court distributes the assets among those entitled to the same. (a) The present case is of the nature above indicated. (b) To such a case the rules governing the right of a stockholder of a corporation to set off a debt due by it to him in defense to a common-law action brought to enforce an individual liability for its debts imposed upon him by statute have no application.

3. An error of calculation which the court committed in the present case is cured by an appropriate direction.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Suit by F. Bertock & Co. against the Wilkinson Paper Company and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Simmons & Corrigan, Sidney Holderness, and W. C. Hodnett, for plaintiffs in error. Oscar Reese and Robt. Zahner, for defendants in error.

LUMPKIN, P. J. The plaintiffs below, F. Bertock & Co., filed an equitable petition against the Wilkinson Paper Company, a corporation, certain named individuals as its stockholders, and others, alleged to be acting in collusion with the officers of that company with a view to hindering, delaying, and defrauding its creditors. Petitioners averred that the paper company was indebted to them in the sum of $1,171.57, as was evidenced by two promissory notes which were past due and unpaid; that it was hopelessly insolvent; and that, with intent to defeat the collection of their just debt, it had fraudulently conveyed all its visible assets to the Hutcheson Manufacturing Company, for the benefit of certain named persons, who held mortgages covering the property so conveyed. These mortgages were attacked as being

without consideration, and in fraud of petitioners' rights in the premises. They further alleged that the stockholders of the paper company named as defendants had not paid in full their subscriptions to its capital stock, and that accordingly each was, in equity, liable to account to petitioners and other creditors for the amount of his unpaid subscription. The prayers of the petition were (1) that judgment in favor of the plaintiffs be rendered against the paper company for the full amount of their claim; (2) that a receiver be appointed to take charge of the company's assets fraudulently conveyed by it to the Hutcheson Manufacturing Company; (3) that the stockholders of the paper company who had not paid in full their stock subscription be required to pay into the hands of the receiver the several amounts, respectively, due thereon, "for the benefit of the creditors of said company, and especially petitioners"; (4) that the deed to the Hutcheson Manufacturing Company and the mortgages above mentioned be canceled; (5) that the receiver be directed to sell the property fraudulently turned over to that company, to the end that the proceeds thus realized might be justly and equitably distributed among creditors according to their respective rights as fixed by final decree; and (6) that process issue, directed to all the defendants named in the petition. It appears that at the trial the controversy finally narrowed down to a contest between the plaintiffs and the defendants who were stockholders of the paper company as to their liability to account for unpaid stock subscriptions, and they bring the case to this court upon exceptions to a decree based upon a special verdict of the jury which was adverse to them upon this issue.

1. The first attack made upon this decree is that the trial court erred in rendering judgment in favor of Bertock & Co. for the amount due upon the promissory notes held by them, "because there was no finding in favor of the plaintiffs and against the Wilkinson Paper Company in the verdict of the jury, and, without a finding by the jury in favor of the plaintiffs, the court had no jurisdiction to render that portion of the decree." That there is no merit in this contention is conclusively established by the following facts which the record before us discloses: So far as appears, the paper company interposed no defense to the action; and none of the plaintiffs in error, each of whom filed a separate answer thereto, undertook to deny the alleged indebtedness of the company, or to raise any issue in regard thereto. Furthermore, at the trial Bertock & Co. introduced in evidence the two promissory notes which were the basis of their claim against the company, and no attempt to meet and overcome the prima facie case thus made out was essayed by the plaintiffs in error, or by any one of their co-defendants. The decree rendered by the court is set forth in full in the bill of exceptions, and contains a recital to the following effect: After argument had, an agreement was entered into between the plaintiffs in error and other parties at interest that "all contested questions in the case should be submitted to the jury by the court, in the shape of written questions," but "that all other questions in the case necessary to an adjudication of the same which were not contested, and which were outside the written questions, were conceded, and that the judge of said court should decree upon the same without the intervention of a jury." The Wilkinson Paper Company was represented in open court, when said agreement was made, by its president "and other officers"; and it being by them conceded "as an admission binding not only upon the company, but also upon" themselves, as defendants, individually, that there was no contest over plaintiffs' demand against the Wilkinson Paper Company, "or over certain other specified matters, the court, in pursuance of said agreement, submitted" to the jury the questions really at issue. These questions, the bill of exceptions states, are correctly set forth in the decree. None of them remotely referred to the plaintiffs' claim against the paper company, notwithstanding they were framed under the following circumstances: "The defense submitted such questions as they desired to have the jury pass upon. The plaintiffs also submitted such questions as they desired to have the jury pass upon. The court revised the questions submitted by both sides, and changed and altered" the same "to meet the views of the court and counsel of both sides," after which revision they were reduced to writing and duly passed upon by the jury. It is to be noted in this connection that, as presented to the trial judge for verification, the bill of exceptions contained various recitals as to what transpired at the hearing at variance with those above referred to as appearing in the decree of the court with regard to the agreement between the parties; but, before certifying the bill of exceptions, his honor eliminated all conflict in this respect by striking therefrom all statements not in harmony with those set forth in his decree, being unwilling, evidently, to adopt as true counsel's version as to what was conceded by their clients. In view of this fact, it is somewhat remarkable that counsel pressed before this court their contention that the trial judge improperly rendered judgment against the paper company, yet, as they have seen fit to do so, we deal with the point, and announce as our conclusion thereon the ruling made in the first headnote.

2. It appeared from evidence introduced in behalf of the defense that, prior to the institution of the plaintiffs' action, M. R. Wilkinson and E. P. McBurney, the principal stockholders of the paper company, had advanced out of their individual means large sums of money with which to pay off and discharge various claims against that company which were being pressed by its creditors, and in this manner it had become large-

ly indebted to them. In one instance suit had been commenced against the company, and payment was made to prevent a judgment being rendered against it. Some of these claims were based on promissory notes of the company, many of which had been indorsed by McBurney, and others of which bore the personal indorsement of Wilkinson. In the aggregate, the sums of money each had thus expended in behalf of the company far exceeded the amount of his unpaid stock subscription. They accordingly sought to defeat any recovery against them in the present action on the ground that, as accounts stood between themselves and the paper company, it was really largely their debtor. The question squarely presented, therefore, is whether or not, as against Bertock & Co. or other creditors of the corporation, Wilkinson and McBurney were at liberty to plead as a set-off their just demands against the paper company. The reply to this question is to be found in the following extracts taken from Judge Thompson's admirable work on the Law of Corporations (volume 3, §§ 3785–3787): "As a corporation is a distinct person in law from each of its members, and as it may sue one of its members and be sued by him, the same as one natural person may sue another and be sued by him, it follows that in any action by a corporation against one of its stockholders, while the corporation is a going concern, the stockholder has the same right to set off any debt which may be due to him from the corporation which he would have if sued by a natural person. And the same rules govern in determining whether the right of set-off exists which governs in ordinary actions. A leading one of these rules is that no debts can be set off against each other which are not mutual. But the right of set-off resembles, in one respect, the right of rescission for fraud. It ceases as soon as the corporation becomes insolvent. The stockholder cannot, in a proceeding against him by or on behalf of a creditor or creditors, set off a debt due to him by the corporation. Where there is a general winding-up proceeding, either by means of a receiver or liquidator appointed under a statute such as the * * * late federal bankruptcy act, or a state insolvency law, no right of set-off exists in favor of the shareholder, since to allow such a right would be to allow a preference to the shareholders over other creditors. On the contrary, they must pay up what they owe, like other debtors, and then get their dividends, like other creditors. The first reason generally given for the rule denying the right of set-off after a corporation has become insolvent is the theoretical reason which often operates to deny the right of set-off in courts of law, which is that there can be no set-off unless the debts are mutual and in the same right. Briefly explained, the meaning is that, when the assets have been impressed with the quality of a trust fund for the equal benefit of all the creditors, their custodian, whether the corporation, its directors, a receiver, assignee, or other liquidator, holds them, not in the right of the corporation against which the set-off is claimed, but in right of the creditors." Accordingly, this rule obtains as against a stockholder who is at once both a debtor and a creditor of a corporation, when his "liability is for moneys due on account of stock held by him which has not been fully paid. Such a debt, as we have seen, is deemed in equity a part of the capital stock of the company, and is a trust fund to be devoted to the payment of all its creditors; and hence, while the company, as long as it continues a going concern, may call it in, and the stockholder, without doubt, set off against it any demand he may have against the company, yet when the company becomes insolvent, and there is not enough to satisfy all its creditors, this trust fund manifestly cannot be appropriated by a creditor who is a stockholder to the exclusive payment of his own claim. Substantially the same reasons are held in the English courts of equity. The winding-up acts of that country are framed on the idea of doing justice to creditors by allowing them to share pari passu. By allowing the right of set-off to a shareholder who is a creditor, he thereby obtains a preference over other creditors. * * * The disallowance of the right of set-off does the shareholder no injustice, because, if the company is insolvent, he will share pari passu with other creditors, whereas, if there is enough to pay all the debts in full, of course his debt will be paid among the rest, and the right of set-off will not be wanted, to do justice between him and the other shareholders." It is worthy of note that Judge Thompson, before dismissing the subject, adds: "Where the object of the proceeding is to sequester what remains unpaid by the stockholder to the corporation upon his share subscription, and there are no other creditors, then no reason exists why he should not be exonerated to the extent of his demand against the corporation." Id. § 3788, citing McAvity v. Paper Co., 82 Me. 504, 20 Atl. 82, wherein the contest was wholly between the plaintiff and fellow stockholders, who were represented by an assignee. That is to say, it is evidently just to allow such a set-off so long as the rights of creditors will not be thereby prejudiced. For illustration, when, as in Stinson v. Williams, 35 Ga. 170, a single creditor of a corporation, without regard to its solvency or to the rights of other creditors, seeks through the aid of a court of equity to subject to the payment of his claim equitable assets of the corporation which cannot be reached by the legal process of garnishment, he necessarily predicates his action upon the ground that, as a creditor of the corporation, he is entitled to enforce against a stockholder its legal or equitable rights in the premises,—not upon the idea that unpaid stock subscriptions constitute a trust fund to be equitably distributed among all creditors, for he proceeds in behalf of himself alone, with a view to reaping all the

benefits sought, to the entire exclusion of every one else. It follows, of course, that there would, in that sort of a case, be no equity in depriving the shareholder of the benefit of any of his defenses as against the corporation itself. Indeed, the only theory upon which, as to the corporation itself, a proceeding can be maintained, says the eminent writer just referred to, in section 3481 of the volume above cited, is that a "creditor who has exhausted his remedy at law, and who seeks the aid of equity, is not bound to proceed in behalf of other creditors, and to shake the tree in order that they may come in and help him pick up the fruit"; and he has nothing to do with adjusting the equities among the stockholders, but that, having exhausted his remedies at law, he is entitled to the aid of equity to discover and subject to the payment of his debt any assets of the corporation, wherever he can find them,—whether in the possession of a stockholder or elsewhere. While very properly permitted to bring an action of this character, it does not follow that such creditor will at all events be granted the relief he seeks. On the contrary, "a court of equity will not allow a single creditor to proceed where it appears (1) that there are other creditors, and (2) that there is not enough for all,—in other words, that the particular creditor is endeavoring to use a court of equity as the instrument of getting an advantage over other creditors who stand equal with him in right." 3 Thomp. Corp. § 3482. "The general rule is that a creditor who proceeds in chancery to subject the liability of the shareholders of an insolvent corporation must bring his bill on behalf of all other creditors who may come in and establish their debts according to the course of a court of chancery. Whilst liens and legal priorities are preserved, he does not obtain a preference over other creditors by the filing of such a bill, but the property of the corporation, or the sums due from other shareholders in respect to their individual liability, are sequestered for the ratable benefit of all the creditors." Id. § 3483.

It is not difficult to properly classify the present proceeding. As will have been perceived from the foregoing preliminary statement of facts, the obvious purpose of the petition filed by Bertock & Co. was to bring about a speedy and equitable winding up of the affairs of the paper company. They alleged it was hopelessly insolvent, and this was proved upon the hearing. They prayed for the appointment of a receiver to take charge of all its assets, and that he be empowered and directed to convert the same into cash, to the end that there might be an equitable distribution of the proceeds among all its creditors. In so far as their petition sought to hold the stockholders of the corporation individually liable for unpaid stock subscriptions, they, in direct and unequivocal terms, stated their object to be to thus reach a trust fund to be paid into the hands of the receiver "for the benefit of the creditors of said company, and especially petitioners." Therefore, while, perhaps pardonably, chiefly concerned as to their own protection, they at the same time recognized to the fullest extent the right of other creditors to share in the fruits of the litigation. Furthermore, the plaintiffs averred in their petition that they had therein "disclosed the names of the creditors or alleged creditors of defendants, so far as [was] within the knowledge of petitioners or their power of ascertaining," and it appears that at the hearing all creditors concerned in the controversy were properly before the court. Upon the argument here, counsel for the plaintiffs in error sought to draw an analogy between the present action and that class of cases in which a creditor of an insolvent corporation, basing his right to recover upon a statute imposing upon each of its stockholders a limited individual liability for its debts, brings a common-law action against one or more of them to enforce such statutory liability. In this connection the cases of Lane v. Harris, 16 Ga. 217, Robinson v. Bank, 18 Ga. 65, and Jones v. Wiltberger, 42 Ga. 575, were cited in support of the proposition that where a stockholder, prior to the filing of a suit against him, had voluntarily discharged debts of the corporation equal in amount to his statutory liability, he could not be compelled to pay anything more at the instance of a creditor whose claim remained unsatisfied. The case of Boyd v. Hall, 56 Ga. 563, wherein it was ruled that "a bona fide judgment debt of a stockholder against the company in which he holds stock may be set off by him in equity against a suit to make him individually liable in proportion to his stock," was also relied on. None of these cases, or others on the same line which might be cited, can, however, properly be considered as having any bearing whatever on the question now in hand. The decision in each was predicated upon what this court deemed the proper construction of a statute imposing upon stockholders a liability for the debts of the corporation, in the event it should itself be unable to pay the same. In other words, in each instance the court undertook to construe an act of the general assembly, determine its true intent and meaning, and then give effect to the legislative will with reference to its subject-matter. Whether or not a correct interpretation of these several statutes was arrived at, it is not now pertinent to inquire. On the contrary, it is only necessary to contrast the case at bar—an equitable proceeding to marshal and administer the assets of an insolvent corporation—with those in which the rulings relied on were announced. It is not, in the present case, contended that the stockholders of the paper company were, under the terms of its charter, individually liable for one dollar of the company's debts. Its charter is not in the record before us, but presumably it was such as is usually granted to ordinary private mercantile or manufacturing concerns, and imposed upon its stock-

holders no statutory individual liability for its debts. Certain it is that Bertock & Co. did not attempt to show any such liability, or to recover anything upon the theory that the plaintiffs in error were under any duty whatever to pay, in whole or in part, the company's debts. Their debts, and their debts alone, were they called upon to pay,—debts which constituted a portion of the assets of an insolvent corporation, and were therefore impressed with a trust raised by law for the equal protection and benefit of all its creditors. Civ. Code, § 1886; Railroad Co. v. McDaniel, 56 Ga. 191; Turner v. Insurance Co., 65 Ga. 649; Hamilton v. Insurance Co., 67 Ga. 145, 150; Beck v. Henderson, 76 Ga. 360, 370; King v. Sullivan, 93 Ga. 621, 626, 20 S. E. 76. Our attention has not been called to any statute, general or special, wherein the legislature has expressed its will that, as regards debts of this character, the debtor of a corporation shall be left undisturbed and unmolested, provided only he be also its creditor in an equal or in a greater degree. We know of none. It would therefore seem that the familiar rules which obtain in equity procedure should be held to apply in the present case, and it results that the plaintiffs in error were not entitled to a preference over another creditor, the justice of whose claim they do not even pretend to dispute, but voluntarily conceded upon the hearing below.

3. His honor of the trial bench gave proper direction to the case in this respect, and undertook to prorate the proceeds realized from unpaid stock subscriptions among Bertock & Co., Wilkinson, and McBurney, the only creditors of the paper company entitled to share in this fund, according to the amount of its indebtedness to each of them, respectively. It appears, however, that, in calculating the amount due upon the various claims held by Wilkinson and McBurney, the court computed interest only from the date the present action was instituted, whereas the evidence discloses that all of these claims had been paid off by, and assigned to, one or the other of them several months prior to that time. As direct exception is taken to the decree upon this ground, we have given appropriate direction whereby the error thus committed may be corrected. Judgment affirmed, with direction. All the justices concurring.

CORNELL et al. v. SIMS et al.

(Supreme Court of Georgia. July 10, 1900.)

CORPORATIONS—ACTION BY STOCKHOLDERS—REQUEST TO DIRECTORS.

As a general proposition, stockholders in a corporation cannot, in their own names, institute an action against it, nor defend one brought against it, until a request from them to the directors to institute or defend such action has been made and refused, which fact must be alleged in either instance. Such allegation, however, may be omitted when the corporate management is under the control of parties who, it is alleged, are guilty of fraud or collusive conduct in refusing to bring or to defend the suit which such stockholders desire shall be instituted or defended. But in neither of these events can the stockholders institute or defend an action in the name of the corporation. On the contrary, the corporation must be a party defendant to the action, and sufficient allegations of the failure of the corporate authorities to take action be made, to authorize the stockholders to intervene in their own name. Accordingly, it is held that when stockholders intervene in a suit filed against the corporation, and allege that, through fraud and collusive conduct, the officers and directors refuse to defend such suit, it is not error to refuse to permit such stockholders to appear and defend in the name of the corporation, when they decline to proceed in their own names as stockholders, in behalf of themselves and other stockholders who may see proper to join with them in defense of such suit.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action between William Cornell and others and Roff Sims and others. From the judgment, Cornell and others bring error. Affirmed.

Hugh V. Washington and Olin J. Wimberly, for plaintiffs in error. Anderson, Anderson & Grace, Dessau, Bartlett & Ellis, Bacon, Miller & Brunson, and Hardeman, Davis & Turner, for defendants in error.

PER CURIAM. Judgment affirmed.

MORTON v. MAYOR, ETC., OF MACON.

(Supreme Court of Georgia. July 10, 1900.)

LICENSE—PROHIBITORY TAX—LOANS ON PERSONALTY.

1. The mayor and council of a city have not, under a legislative grant of "authority to levy and collect a license tax * * * upon all persons exercising any profession, trade or calling within said city," the power to impose upon a useful and legitimate business a prohibitory tax.

2. "Lending money on household or kitchen furniture and wearing apparel" is, if lawfully conducted, such a business, and therefore one which cannot be classed as injurious to the public, although some persons who make loans on such security may be usurers.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

J. M. Morton was convicted of violating an ordinance of the city of Macon. A writ of certiorari was overruled, and he brings error. Reversed.

M. Felton Hatcher and Guerry & Hall, for plaintiff in error. Roland Ellis, Minter Wimberly, and Robert Hodges, Sol. Gen., for defendant in error.

LUMPKIN, P. J. Section 72 of the charter of Macon provides: "That the mayor and council shall have power to license, regulate and control all hotels and public houses within the city; also, to regulate all butcher pens and slaughter houses within the corporation,

and to remove the same if they shall become nuisances or injurious to the health of the city. They shall also have power to license drays, hacks and other vehicles used for business purposes, and to regulate the same. They shall also have full power to regulate and control all livery stables, pumps, bar-rooms, restaurants, places of amusement, telegraph, telephone and electric companies, all gas, water and railroad companies doing business or seeking to do business within said city." Section 79 confers upon the mayor and council "power to levy and collect a tax * * * upon all persons exercising within the city any profession, trade, calling or business of any nature whatever." And section 84 declares: "That said mayor and council shall have authority to levy and collect a license tax * * * upon all persons exercising any profession, trade or calling in said city, when not prohibited from so doing by the constitution and laws of this state; to compel the payment of the same; to make all suitable laws and regulations necessary and proper to carry out the powers herein conferred, and to prescribe suitable penalties for the violation thereof." The tax ordinance of the city for the year 1900 imposed a tax of $500 upon "money lenders, copartners, associations, corporations, or individuals, lending money on household or kitchen furniture and wearing apparel." If further provided that this license tax should be paid "by January 15, 1900, or within fifteen days from commencing business," and declared that all persons failing to comply with this provision should "be deemed guilty of doing business without a license" and subject to a prescribed penalty. Morton was, in the recorder's court, convicted upon a charge brought against him of doing business in violation of this ordinance. He thereupon sued out a certiorari to the superior court, to the overruling of which he excepted. At the trial before the recorder it was affirmatively proved that the tax in question was, in effect, prohibitory. It also appeared that Morton and other money lenders of the class described in the ordinance exacted from their customers exorbitant and usurious rates of interest. Did the municipal authorities, under and by virtue of the above-recited provisions of the city's charter, and in view of the fact last mentioned, have power to impose such a tax? As this is the main and controlling question in the case, we will confine ourselves to a discussion of it, without noticing the minor points presented by the bill of exceptions.

There is a very wide difference between a power to license an occupation with a view to regulation, and a power to tax it for the sole purpose of raising revenue. "A power to license, when specifically given in the charter of a city, is * * * a police power. The exaction of license fees for revenue purposes is the exercise of the power of taxation." North Hudson Co. Ry. Co. v. City of Hoboken, 41 N. J. Law, 71. As will have been perceived, the general assembly, in the seventy-second section of the charter of Macon, dealt expressly with the question of empowering the municipal authorities to license, regulate, and control occupations carried on within the city, and, in so doing, specifically enumerated the various callings to which their powers in these respects should apply. Among them we find no mention of money lenders. The mayor and council therefore have not, under this section, any power to exercise police supervision over the business of persons whose occupation it is to lend money. Nor can the municipal authorities rightly claim that any such power is given them by the provisions contained in section 84. The term "license tax," as therein used, cannot be understood as expressly conferring, or even implying, a grant of power to regulate the professions, trades, or callings which are by this section made the subject-matter of taxation. On the contrary, this term, as here employed, has relation strictly to the power of taxation, and not to that of police regulation. We are further of the opinion that no right to regulate or supervise is derivable from the concluding provisions of this section, whereby the municipal authorities are empowered "to make all suitable laws and regulations necessary and proper to" enforce payment of the tax, "and to prescribe suitable penalties for the violation thereof." To our minds it is clear that these provisions cannot be tortured into a grant of power to regulate or to exercise police supervision over the various occupations upon which the license taxes may be imposed. Obviously, it was the legislative intent simply to confer upon the mayor and council power "to compel the payment of the" taxes by adopting such ordinances looking to that end as might be necessary and proper. Our views respecting those portions of the charter of Macon with which we are now concerned coincide with those expressed in the case of Fretwell v. City of Troy, 18 Kan. 271, in which it was held that power to levy and collect a "license tax" on specified occupations "was designed for purposes of revenue, rather than of police regulation." The question before us is therefore resolved into simply this: Does a power given by law to a municipal corporation to tax a useful and legitimate business include the right of imposing upon it a tax so high as to render it impossible to pay the same and carry on the business profitably? As the purpose of such taxation is to raise money for the support of the municipal government, and as the power of taxing is given exclusively for the accomplishment of this needful purpose, ordinances adopted in pursuance of this power must tend to effectuate, and not to defeat, the end in view. Cooley, Const. Lim. (6th Ed.) 240, 241. We find the following in Cooley, Tax'n (2d Ed.) 597, 598: "If a revenue authority is what seems to be conferred, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal gov-

ernment, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue would not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose." In 13 Am. & Eng. Enc. Law it is, with reference to the imposition of license taxes on useful trades and occupations, laid down that a municipality is not "authorized to entirely prohibit the exercise of the trade or occupation by any excessive license fee." See pages 532–534, and cases cited in notes.

Under a Nebraska statute relating to cities of the "second class," the city of Lincoln was authorized "to raise revenue by levying and collecting a license tax on any occupation or business within the limits of the city, and regulate the same by ordinance." The supreme court of that state, in the case of Caldwell v. City of Lincoln, 19 Neb. 569, 27 N. W. 647, held that taxes imposed by virtue of this act "must be reasonable, considering the nature of the business, and not so high as to prohibit the carrying on of the business." See, also, in this connection, Ex parte Burnett, 30 Ala. 461; Craig v. Burnett, 32 Ala. 728. In the Kansas case cited above, Mr. Justice Brewer plainly indicated that in his opinion it was not true "that a city having authority to collect revenue by license may impose any sum, however large, as license, and thus, in effect, destroy certain kinds of business." See 18 Kan. 275. In City of Lyons v. Cooper, 39 Kan. 324, 18 Pac. 296, it was expressly ruled that, under legislative authority to levy and collect "just and reasonable" license taxes from persons pursuing designated occupations, "an ordinance of such city purporting upon its face to be enacted for the levying and collecting of a license tax, but which is a clear and palpable attempt to destroy and forbid a legitimate, necessary, and commendable business, is void and cannot be enforced." The tax then under review was held to have been laid, "not for revenue, but for destruction," and therefore wholly unauthorized. As all taxes ought to be "just and reasonable," we do not think the Kansas statute, by stipulating in express terms that the license taxes which it authorized the city to impose should be so, was really more restrictive than an act which in general terms merely gives the power to tax. Chief Justice Horton, in denying the right of the city to levy the tax complained of, took the ground that, even where the power embraced authority to both regulate and tax, the city could not make the tax so large as to be prohibitory. He said: "The grant of authority to a mayor and city council to impose license fees for the purposes of revenue would not warrant them to be so heavy as to be prohibitory, thereby defeating the purposes. Where the grant is not made for revenue alone, but for regulation also, and the business is one that does not injuriously affect the public interests, or lead to disorder or to increased necessity for police supervision, like the sale of intoxicating drinks as a beverage, the license fee, while somewhat within the discretion of the mayor and council, ought not to and cannot be so excessive as to prohibit or destroy a business carried on for necessary purposes." Page 327, 39 Kan., and page 298, 18 Pac. On the same line is the case of Hirshfield v. City of Dallas, 29 Tex. App. 242, 15 S. W. 124, wherein it was held that a tax "laid for the double purpose of regulation and revenue must be grounded in both the police and taxing power, but the grant of a power to tax will not authorize the imposition of a burden in its nature and purpose prohibitory." White, P. J., expressed the opinion that under its broad charter power to "license, tax and regulate" occupations, "the city was empowered not only to exact a reasonable license fee and license for the purpose of regulating the occupation under its police power, but to impose, if it desired to do so, a reasonable tax for purposes of revenue on the pursuit of the occupation." Page 245, 29 Tex. App., and page 125, 15 S. W. The word "reasonable," twice used in the clause just quoted, is of the utmost significance in arriving at its meaning. It is true that on the same page this learned judge does say that "some occupations are so injurious that a tax prohibitory entirely would be justifiable," and the same idea has been advanced by Judge Cooley. After stating that license fees may be imposed (1) for regulation, (2) for revenue, (3) to give monopolies, and (4) for prohibition, and declaring that "the third purpose is inadmissible in any free government," he says: "The fourth purpose is entirely admissible in the case of pursuits or indulgences which in their general effect are believed to be more harmful than beneficial to society, and which consequently the public interest requires should be put an end to. A case of this nature is that of heavy fees imposed on the keepers of implements of gaming. When, however, prohibition is the object, the end may generally be more directly accomplished by legislation which in its terms is prohibitory, than by the circuitous method of imposing a burden difficult or impossible to be borne, and the direct method is consequently the one usually adopted." Cooley, Tax'n (2d Ed.) 592, 593.

We think the best way to prohibit is to prohibit. But be this as it may, the charter of Macon did not expressly confer any power to prohibit; and, moreover, even if such a power, relatively to injurious pursuits, could be inferred from its provisions, the business of money lenders of the particular class sought to be taxed by the ordinance now under consideration is not on its face an injurious one, but one which, if carried on without violating the usury laws, would apparently be beneficial to people of small means. It is to be observed that the tax is not imposed on usurers. Indeed, it is doubtful whether the city could license their unlawful calling; for it can hardly be supposed that the legisla-

ture deliberately intended to authorize the collection of taxes upon forbidden pursuits, and thus give at least a qualified sanction to the carrying on of the same. The fact that some money lenders practiced usury cannot be held to make the useful and legitimate business to which the ordinance applied one which should be considered as per se hurtful. There is scarcely any calling which unscrupulous persons cannot, if they choose, carry on in an unlawful manner.

Before concluding, it is proper to remark that the question above discussed widely differs from that which might arise respecting the validity of a tariff imposed by congress ostensibly for revenue, but really for protection, and in effect prohibitory, or upon the constitutionality of a state statute professing merely to tax a particular occupation, but in fact designed to destroy it. We may, for the purposes of this case, grant to the fullest extent the authority of the lawmaking power of the nation or of any state to respectively enact laws of the nature above indicated without touching the question we have herein undertaken to decide. Granting that the general assembly of this state might tax out of existence useful occupations, and even that it might in terms empower a city so to do, we are perfectly certain that nothing of the kind has been attempted in the present instance. The city of Macon may tax occupations, but there is nothing in its charter which either expressly or by implication authorizes it to directly suppress any legitimate business, or to indirectly accomplish such a result under the guise of an ordinance purporting to impose a license tax for the purpose of raising revenue, but having for its real object the prohibition of that very business.

The foregoing, we think, conclusively establishes the propositions laid down in the headnotes, and it results that so much of the Macon ordinance as seeks to impose the tax of which the plaintiff in error complains is void. That the courts have the power to declare inoperative municipal ordinances which are ultra vires or unreasonable and oppressive is too well settled to require argument or the citation of authority. The certiorari ought to have been sustained. Judgment reversed. All the justices concurring.

BRADLEY v. STATE ex rel. HILL, Sol. Gen. LOONEY v. SAME.

(Supreme Court of Georgia. July 10, 1900.)

CONTEMPT—POWER TO PUNISH—JURISDICTION.

1. The power to punish contempts is inherent in every court of record. If the court is created by the constitution, the legislature cannot, without express constitutional authority, define what are contempts, and declare that the court shall have jurisdiction over no acts except those specified.

2. The provision of the constitution which declares that "the power of the courts to punish for contempts shall be limited by legislative acts" does not confer such authority, but only the power to prescribe the punishment after conviction. Consequently, section 4046 of the Civil Code, in so far as it seeks to limit the jurisdiction of a constitutional court to punish contempts to certain specified acts, is not binding upon such courts. They may go beyond the provisions of the statute, in order to preserve and enforce their constitutional powers, by treating as contempts, acts which clearly invade them.

3. That a given act may be indictable does not deprive a court of the power of dealing with it as a contempt of court.

(Syllabus by the Court.)

Error from superior court, Fulton county: J. H. Lumpkin, Judge.

Informations by the state, on the relation of C. D. Hill, solicitor general, against W. A. Bradley and T. S. Looney, for contempt. From a judgment of conviction, they bring error. Affirmed.

King & Anderson, Lewis W. Thomas, and Rosser & Carter, for plaintiffs in error. C. D. Hill, Sol. Gen., for defendant in error.

SIMMONS, C. J. Information under oath was filed before the judge of the superior court of the Atlanta circuit, charging Bradley and Looney with contempt of court. The specifications of the charges will be found in the official report. Neither Bradley nor Looney was an officer or juror of the court, or connected with the case on trial. Both filed demurrers on the grounds that the facts set out did not show that they were guilty of any contempt of court; that the allegations did not show that the contempt, if any was committed, was in the presence of the court, or so near thereto as to obstruct the administration of justice; that, if the facts alleged were true, they were liable to be indicted for the violation of a criminal statute. These were, in substance, the grounds of demurrer argued before this court The court overruled the demurrers, trials were had, Bradley and Looney were adjudged in contempt, and both fines and imprisonment were imposed. To this judgment and sentence, and to the overruling of their demurrers, Bradley and Looney excepted. A separate information was filed against each, and they were tried separately, but the cases were argued together here, and we will treat them together, as they present the same questions.

The power to punish for contempts is inherent in every court of justice. It is absolutely necessary that a court should possess this power in order that it may carry on the administration of justice, and preserve order and decorum in the court. As far as we can ascertain, this power has existed since courts were first established. Judge Wilmot, in 1765, in a treatise upon the subject, said he had been unable to find where it was first exercised, but, in his opinion, it was as old as the courts themselves. All the courts in their decisions, and all the text writers, lay down the same doctrine,—that this power is necessary to all courts, and is inherent in them. It is so well established that we deem it unnecessary to cite authorities upon the

subject. This power being inherent and necessary, can the legislature, by defining what are contempts, limit the courts to treating as contempts such acts only as are embraced in the legislative definition? In the formation of our government, federal and state, the three departments of government were in each constitution ordained to be separate, distinct, and independent of each other. No one of them had any right or power to infringe upon the power or jurisdiction of the other without an express constitutional provision granting this right or power. The legislature cannot take away, restrict, or modify any of the powers conferred by the constitution upon the executive. Nor can the executive infringe upon the powers of the legislature. Nor can either the legislative or executive abridge the powers conferred by the constitution upon the courts, unless express authority is given. Each of these departments represents the sovereignty of the people. Indeed, the executive, the legislature, and the judiciary are but the servants and agents of the people. To each department the people have given certain powers, and have declared that neither of the other departments shall interfere therewith. The people have intrusted these servants or agents with the duty of carrying out their will, and for that purpose, in one of these departments, they have, by their organic law, established certain courts. Among these are the superior courts. When these courts were established by the constitution, they were established with all the rights and powers possessed by all courts of record prior to that time. Among these powers was that of defining and punishing contempts of court, whether such contempts were direct—that is, committed in the presence of the court—or constructive, interfering indirectly with the administration of justice. This power was incident to the court itself, and belonged, not to the judges as individuals, but to the court. The courts established by the constitution were established by the people, and represented the majesty of the people. Whoever disobeyed an order of such a court, or was in contempt of its proceedings, or did anything which tended to impede or corrupt the administration of justice, committed a contempt against the majesty of the people. Without power and ability to preserve order and decorum, to preserve the purity of jury trial, and to enforce their own orders, and the like, courts could not carry out the wishes of the people. The courts established by the constitution were therefore vested with all these necessary powers,—powers which were, at common law, possessed by all courts of record. Whatever a court of record could, under the common law, punish as a contempt, these courts had power to deal with as a contempt. This power came to them as much as did the common law. Indeed, it is a part of the common law. 1 Bailey, Juris. § 297. When the constitutional convention established our courts, it vested in them all the power necessary to carry out the purposes for which they were designed. Such a court, established with such powers, is not, in the exercise of these powers, subject to legislative control. The superior court is a constitutional court, established with these powers, and the legislature has no right, without express constitutional authority, to abridge, restrict, or modify either its jurisdiction or its powers. 1 Bailey, Juris. § 297; State v. Morrill, 16 Ark. 384; Carter v. Com. (Va.) 32 S. E. 780, 45 L. R. A. 310; Ex parte Robinson, 19 Wall. 505, 22 L. Ed. 205; 7 Am. & Eng. Enc. Law (2d Ed.) p. 33, and cases cited. These points were conceded by the able and learned counsel who argued these cases here, but they claimed that the constitution of this state had granted to the legislature the express power to define what are contempts, to classify them, and to take away from the courts jurisdiction to punish as contempts any act not mentioned in the statute, which is now codified as section 4046 of the Civil Code. Paragraph 20 of section 1 of article 1 of the constitution of our state (Civ. Code, § 5717), in the bill of rights, says: "The power of the courts to punish for contempts shall be limited by legislative acts." We think that neither a literal nor a liberal construction of this paragraph can make it mean what counsel for the plaintiffs in error insisted it did mean. The word "power," used in this connection, and as applied to courts, means "the right, ability, or faculty of doing something." Bouv. Law Dict. (2d Ed.) tit. "Power." It is "the ability to act, regarded as latent or inherent; the faculty of doing or performing something; capacity for action or performance." Webster. The word "punish" is defined by Webster to mean "to impose a penalty upon; to afflict with pain, loss, or suffering for a crime or fault; * * * to inflict a penalty for (an offense) upon the offender"; and by Anderson, "to impose a penalty for the commission of a crime." Giving to these two words their ordinary and usual meaning, the paragraph would read as follows: "The right or authority of the courts to impose penalties or inflict punishment for contempts shall be restricted by legislative acts." If the framers of the constitution had desired that the legislature should classify and define contempts of court, they would certainly have put in this paragraph, or in some other, words expressly giving the legislature power to do so. Had they said that the legislature should have power to define what are contempts, there could be no possible doubt upon the subject. Many illustrations could be given of where constitutions give to the legislature power to define offenses and to fix the punishment for the same, but we think that nothing of the sort, in regard to contempts, is contained in our constitution. Where a court is established by the constitution, it is given all the powers usually possessed by all courts, and we will not construe another provision of the constitution so as to take away from the court a power which is essential to its preserva-

tion, and to its accomplishment of the purposes for which it is created, unless constrained to do so by express words or necessary implication.

The power to limit the punishment of contempts was first given the legislature by the constitution of 1861. The chairman of the committee on the revision of the constitution in that convention was T. R. R. Cobb, who, in my opinion, was the greatest lawyer this state has ever produced, and who had, I think, no superior in any other state. His codification of the common law, of equitable principles, of the statutes of this state, and of the decisions of this court will stand as a monument to his great learning, research, and ability as long as our system of laws prevails. Being chairman of the committee which reported the constitution of 1861, he doubtless drafted the paragraph now under consideration. He was not only a great lawyer, but a scholar as well, and must certainly have known the meaning of the words used, and what would be their effect, and must have used them with reference to their ordinary meaning, as defined by lexicographers. Taking these words in this sense, it is clear to us that the only power given to the legislature was the power to fix the limit of the punishment which the courts could inflict for contempts. Before that time, courts were not restricted, in punishing contempts, to any certain sum or to any certain period of imprisonment. Knowing the fallibility of human nature, and perhaps believing, from his experience and practice in the courts, that a judge sometimes took a contempt as personal, rather than as a contempt of his authority or office, and punished it too severely, and knowing, also, that the legislature would have no power, without a constitutional provision, to control the judge in this matter, Mr. Cobb doubtless inserted this provision in order to give the legislature power to restrict and limit the amount or quantum of punishment which could be inflicted. We are strengthened in this view by certain provisions inserted by Mr. Cobb in his codification of the laws of the state. From a diligent search of the statutes in force prior to 1861, we can find no act of the legislature which attempted to restrict the amount of punishment to be imposed for contempts of court, the only hint at it being in the judiciary act of 1799, which prescribed the practice in summoning jurors, and declared they should be fined $300 for nonappearance. When Mr. Cobb came to codify the laws of the state, he knew that there was no act limiting the punishment for contempt, and we first find a limitation upon the amount of such punishment in the Code of 1863. In that Code were sections limiting the amount of punishment for contempts in the supreme and superior courts and courts of ordinary. These sections were doubtless inserted by him to carry out the provisions of the paragraph of the bill of rights quoted above. They limit the punishment for contempt by prescribing the maximum of fine or imprisonment which could be imposed. They apparently show Mr. Cobb's construction of the constitutional provision, and they have been adopted and incorporated in all succeeding Codes of this state.

If these views are correct, it follows, as a necessary consequence, that constitutional courts are not, in dealing with contempts, restricted exclusively to the acts specified in section 4046 of the Civil Code, and that the legislature had no power, so far as these courts were concerned, to take away the inherent power to punish for contempt. Such a court may still "go beyond the provisions of the statute in order to preserve and enforce its constitutional powers by treating as contempts acts which clearly invade them." Rap. Contempt, § 11. Tampering with a juror or officer of court, corrupting or attempting to corrupt him, bribing or attempting to bribe him, are held by all courts to be contempts. Nor does it make any difference that the same act is indictable under the penal laws of the state. On this subject, Judge Seymour D. Thompson, in an admirable article in 5 Cr. Law Mag., says (page 155): "The power of the courts in this regard being founded in the principle of self-preservation, it does not at all go to deprive them of it that the law has provided some other mode for punishing the offender. It is quite immaterial that the offense is indictable. Courts are not obliged to trust the preservation of their dignity and authority to such weak agencies as information, indictment, and trial by jury, it may be before some other tribunal, where the success of the prosecution and the conviction of the offender may depend upon the zeal of a prosecuting witness, or the state's attorney, or upon circumstances purely accidental. Besides, the exigencies may not admit of so tardy a remedy." See the authorities cited in the footnote, and see, also, 2 Bish. New Cr. Law, § 264. On the general subject of contempts and the power of the legislature to regulate their punishment, see an admirable treatise by Judge Bailey in his work on Jurisdiction (volume 1, § 287 et seq.). In the argument of this case, counsel cited many decisions of the United States courts construing the act of congress of March, 1831, of which section 4046 of our Code is substantially a copy. These decisions simply hold that the circuit and district courts, being the mere creatures of congress, are bound by the act of congress defining what contempts shall be punishable. Judge Field, in Ex parte Robinson, supra, puts his decision on that ground, and virtually holds that the supreme court of the United States, being a constitutional court, would not be bound by the act. So, while in this state courts created by the legislature are bound by section 4046 of the Civil Code, our superior courts, being created by the constitution, and having the inherent power to decide what are contempts and to punish for contempts, cannot be controlled in this respect by the legislature. The latter

has no more power to abridge, restrict, or modify the jurisdiction of the superior courts over contempts than it has to abridge their jurisdiction over matters conferred upon them exclusively by the constitution, such as the trial of title to land and the like. The constitutional provision giving the legislature power to limit the power to punish for contempts does not authorize it to define or classify contempts, but only to fix the maximum amount of punishment to be imposed after the contempt has been adjudicated. Judgment in each case affirmed. All the justices concurring.

SHARP v. STATE.

(Supreme Court of Georgia. July 10, 1900.)

CRIMINAL LAW—STATEMENT OF ACCUSED—APPEAL—REVIEW.

1. The accused has no legal right to make more than one statement. Whether he should be allowed to make a second statement, because the state has introduced additional evidence, strengthening the case against him, is a matter which is within the discretion of the trial court.

2. Grounds of a motion for a new trial which are not approved by the presiding judge cannot be considered. In the present case, the grounds of the motion which were approved by the judge do not, when taken in connection with his explanatory notes, present any error.

3. The evidence was sufficient to authorize the verdict.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Hiram Sharp was convicted of murder, and brings error. Affirmed.

Hooper Alexander and Milner & Brand, for plaintiff in error. W. T. Kimsey, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

SIMMONS, C. J. Upon an indictment for murder, Sharp was tried and convicted. He made a motion for a new trial. This motion contained eighteen grounds. Three of these were general; six of the remaining fifteen were not approved at all by the court; seven were approved with such qualifications and explanations as showed that the rulings complained of were not erroneous; one of the two remaining cannot be considered because it complained of the admission of testimony, without setting forth such testimony, either literally or in substance. Thus, there really remains, aside from the general grounds that the verdict was contrary to law and the evidence, but one ground which it is necessary to consider.

1. The question presented by this ground is whether, after the accused has made his statement, and the state has been allowed to reopen the case, and introduce evidence, partly in rebuttal of the statement of the accused, and partly relating to new and distinct facts, and not in rebuttal of the statement, it is error to refuse to allow the accused to make a supplemental statement, explaining and replying to the new evidence brought out by the state. The judge's certificate would seem to indicate that the judge considered that all the evidence introduced by the state after the accused had made his statement was in rebuttal of that statement, but, after examining the record, we think that new and distinct facts were brought out,—facts which were not in rebuttal of anything stated by the accused. Witnesses were allowed to testify as to the flight of the accused and as to his resistance to arrest. These things were not in any respect in rebuttal of the statement of the accused. The accused was then allowed to introduce evidence, but not to make a second statement. Under the former rulings of this court, it was within the discretion of the trial judge, after the accused had made his statement and put in his evidence, to allow the state to reopen the case, and prove new and independent facts to strengthen its case. Huff v. State, 104 Ga. 521, 30 S. E. 808; Hunley v. State, 104 Ga. 755, 30 S. E. 958. This court has, in several cases, ruled that it is likewise within the discretion of the trial judge to allow the accused to make a second or supplemental statement. In Vaughn v. State, 88 Ga. 732, 16 S. E. 64, the decision was as follows: "The statute gives the prisoner no right to make more than one statement. Whether he should be allowed to supplement it with another is discretionary with the court." In Boston v. State, 94 Ga. 590, 21 S. E. 603, it was held: "It is not matter of right for the accused to make a second statement to the court and jury because the state has introduced additional evidence which strengthens the case against him." In the present case, the judge, in the exercise of the discretion given him, allowed the accused to introduce additional evidence in reply to that introduced by the state, but refused to allow him to make a second statement. While it would have been most proper for the judge to do this, and we would have been better satisfied if he had pursued this course, still it was a matter within his discretion, and we cannot say that it was abused. If this court should ever, in any case, undertake to say that a judge did, in such a matter, abuse his discretion, it would have to be an extreme one. We certainly could not do so when the record does not disclose what the accused proposed to state, if allowed to again go upon the stand, but merely, as in the present instance, that he asked leave to do so, saying that "the statement was desired only for the purpose of replying to new evidence not before the court at the time of the first statement."

2. We, of course, cannot consider the grounds of the motion for new trial which were not approved by the presiding judge. Of the remaining grounds, other than the general ones, one cannot be considered, for the reasons given in the statement of the facts of the case, and another has just been considered. The rest, when taken in connection with the judge's notes, not only present

no error, but present no question which it would be profitable to discuss.

3. The evidence was amply sufficient to authorize the verdict of the jury. Judgment affirmed. All the justices concurring.

HERNDON v. STATE.

(Supreme Court of Georgia. July 10, 1900.)

CRIMINAL LAW—SUSPENSION OF TRIAL—SANITY OF ACCUSED—EVIDENCE—REMARKS OF COUNSEL—MURDER—EVIDENCE.

1. It is discretionary with the court to suspend the trial of a criminal case to allow an expert witness, introduced by the accused and then on the stand, to examine an indenture in the skull of the accused, in order to enable him to testify as to its effect upon the accused, as to sanity or insanity.

2. It is not error to allow nonexpert witnesses on the subject of the sanity of the accused to testify that they knew the accused, and had seen nothing in his appearance or conduct to indicate insanity.

3. Improper remarks by the solicitor general, unrebuked by the judge, will not work a reversal of the judgment in this case, as no objection was made, and no ruling of the court invoked.

4. The evidence amply supported the verdict.

(Syllabus by the Court.)

Error from superior court, Wilkes county; S. Reese, Judge.

Dillard Herndon was convicted of murder, and brings error. Affirmed.

W. D. Tutt & Son and R. C. Norman, for plaintiff in error. R. H. Lewis, Sol. Gen., Z. D. Hornson, and J. M. Terrell, Atty. Gen., for the State.

SIMMONS, C. J. Upon an indictment for murder, Herndon was tried and convicted. His motion for a new trial was overruled, and he excepted.

1. One of the grounds relied upon by counsel for the plaintiff in error was that the court refused to allow a medical expert, who had been introduced by the accused, and who was upon the stand testifying as a witness, to examine an indenture or depression in the skull of the accused, and then testify as to the effect it would produce upon his mind; the accused having, in his statement to the jury, stated that the depression had been made in his early youth by a falling stone, that he had subsequently had a severe case of typhoid fever, and that since then he had been at times ignorant or unconscious of what he said and did. We think this was a matter entirely within the discretion of the trial court. The court may or may not suspend a trial for this purpose, according to the circumstances of each particular case. Where a matter of practice is within the discretion of the trial court, this court will not interfere unless such discretion is manifestly abused. We cannot establish any fixed rules to govern courts in this respect. In some cases an examination of an injury might be made in a few minutes. In others, hours might be consumed before the expert could come to any definite conclusion as to the nature and character of the injuries. Then, too, this appears to have been the second trial of the present case, and the accused and his counsel had abundant opportunity to have the examination made before the trial. Had he done so, then the expert could have testified as to his opinion of the effect the injury would have produced upon the mind of the accused. The rule governing the testimony of experts is thus laid down in Lawson, Exp. Ev. (2d Ed.) p. 257, rule 42: "An expert may give an opinion based on a state of facts which he himself has witnessed, or which are detailed by other witnesses, or which are put before him in the form of a hypothetical case." See, also, Tayl. Med. Jur. (Clark Bell's Ed.) p. 53 et seq.

2. The next ground of the motion which was insisted on was that the court allowed certain witnesses to testify, over the objection of the accused, as to his sanity, without giving the facts or reasons upon which their testimony was based. We have carefully read the testimony of these witnesses, and find that each of them stated the length of time he had known the accused, and the frequency with which he met or was thrown with him, and that he had never seen about him anything to indicate unsoundness of mind. The substance of their evidence was that after intercourse with the accused for a number of years, a knowledge of his character, and observation of him at church, in Sunday school, and at the court house, as well as on other occasions, they had in all these years seen nothing in his appearance or conduct to indicate in any way that he was not of sound mind. While it is true that nonexpert witnesses cannot give opinions without stating the facts upon which the opinions are based, we think the facts stated by these witnesses were sufficient to form the basis of the opinions given. There is no other way, as far as we know, in which a nonexpert can form an opinion as to a person's sanity than observation of his acts and doings,—observation of his ordinary and everyday appearance and conduct. One may associate for years with another and see no signs of unsoundness of mind, and, if asked to give his opinion in regard to the matter, could only make just such a statement of facts on which to predicate his opinion as was given in this case,—that he had observed nothing which would seem to indicate insanity. A witness may base his belief that one is insane upon some particular and peculiar conduct, or upon something in the appearance, and may easily state just what it is upon which his opinion is based. Where the belief in one's insanity is a general impression, the facts upon which it is based would be more difficult of statement. Where the witness believes that the person about whom he is testifying is of sound mind, he can then usually testify only in a general and negative manner,—that he has noticed nothing about him to indicate that he is not of sound mind.

It is somewhat analogous to proof of general good character. One may live for years in the neighborhood of another, never hear his character impeached or any remarks or rumors concerning it, and form an opinion that his character is good because he has never heard anything against it. Powell v. State, 101 Ga. 9, 29 S. E. 309, and cases cited. The identical question made in this case has, however, been settled by decisions of this court. In Walker v. Walker, 14 Ga. 242, the question was made, and the court decided that the witnesses gave sufficient facts and circumstances upon which to base an opinion as to the sanity of the decedent, following the rule laid down in Potts v. House, 6 Ga. 324. In the case of Taylor v. State, 83 Ga. 647, 10 S. E. 442, it was held, "Knowledge of the defendant for a long time by witnesses, and his always acting like a sane man, were facts upon which they could base opinions as to his sanity." See, also, an elaborate discussion of the subject in Lawson, Exp. Ev. (2d Ed.) p. 532, rule 64, subrule 4.

3. The ruling made in the third headnote is supported by repeated decisions of this court,—among them, the following: Bowens v. State, 106 Ga. 760, 32 S. E. 666, and cases cited; Owens v. State, 34 S. E. 1015; Robinson v. State, 34 S. E. 1017; O'Neill Mfg. Co. v. Pruitt, 36 S. E. 59.

4. The evidence amply supported the verdict. Judgment affirmed. All the justices concurring.

KILLIAN v. BANKS.

(Supreme Court of Georgia. July 10, 1900.)

APPEAL—REVIEW—GRANT OF NEW TRIAL.

This was the first grant of a new trial, and, in view of the evidence disclosed by the record, falls within the provision of Civ. Code, § 5585.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action between Elizabeth Killian and Mary A. Banks. From an order granting a new trial, Killian brings error. Affirmed.

W. J. Spealrs and C. J. Simmons, for plaintiff in error. C. W. Smith and C. T. Ladson, for defendant in error.

PER CURIAM. Judgment affirmed.

MOON v. McRAE.

(Supreme Court of Georgia. July 10, 1900.)

MALPRACTICE—DAMAGES—PAIN AND SUFFERING.

Under the allegations of the petition and the testimony in the present case, the trial judge was not authorized to conclude that the plaintiff's entire case was placed throughout on the amputation of his limb, caused by the alleged negligent and unskillful treatment by the defendant as plaintiff's physician. As elements of damages claimed by the plaintiff, pain and suffering are sufficiently set forth in the declaration, and there was sufficient evidence to submit to the jury the issue as to whether, by the unskillful treatment of the defendant, the plaintiff sustained damages in consequence of such pain and suffering, notwithstanding such treatment may not have led to the loss of his limb. The court therefore erred in instructing the jury, in effect, that damages could not be recovered for pain and suffering resulting from unskillful treatment by the physician, unless such treatment was the cause of the loss of plaintiff's limb.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Z. Moon, as next friend of Emmet Moon, against Floyd McRae. Judgment for defendant, and plaintiff brings error. Reversed.

T. W. Rucker and Arnold & Arnold, for plaintiff in error. Alexander & Lambdin, Rosser & Carter, and J. T. Pendleton, for defendant in error.

LEWIS, J. On December 13, 1898, Z. Moon, as next friend of his minor son, Emmet Moon, brought suit in the city court of Atlanta against Dr. Floyd W. McRae, substantially alleging the following facts as a cause of action: On November 4, 1891, Emmet Moon bruised his right leg or shin bone, just below the knee, on a wheelbarrow, and after about a week, considerable pain ensuing, the defendant, a practicing physician, then and now of Fulton county, Ga., was called in to treat the wound. When he examined the leg, he was informed by petitioner and his wife and son of the manner in which Emmet was hurt, and was told that, in their judgment, the pain was the result of the blow in falling against the wheelbarrow, which petitioner alleges is the case. Defendant replied that this was not the cause, but that Emmet was suffering from inflammatory rheumatism, and prescribed, as a proper treatment therefor, that the place should be rubbed with a liniment which he furnished, stating this was the treatment needed. The leg commenced to get worse, and defendant continued his visits at very short intervals. He was told by petitioner that the treatment was not doing any good, and that the leg was getting worse. Defendant was again informed that the trouble was not rheumatism, but that it was produced from the effect of the blow; but defendant declared that this was a mistake, and ordered his treatment for rheumatism to be continued. After about the 10th of November there was evidence of the formation of pus under the place where the wound had been received on the leg, and the attention of defendant was called to this from about the time of his second visit, but, notwithstanding, he continued his treatment for rheumatism, and Emmet's pain and suffering became so great that he had to be given opiates. Petitioner continued to tell defendant that he was sure pus had formed in the wound, and that it was present in large quantities. The defendant finally admitted he had made a mistake in his diagnosis of the case,

and, at the urgent request of petitioner, lanced the leg below the knee and above the foot, and pus to the amount of a quart or more, much of it in large clots, was taken out of the leg. Defendant then prescribed a wash for the wound, washing it himself, and after a few more visits he told petitioner that his wife could wash the wound as well as he, and that he would call again after a few days. The treatment prescribed by defendant was followed, but Emmet became much worse, not being able to sleep, and suffering intense pain. After several days, defendant called to see Emmet, pronouncing him worse, and ordered a continuance of his prescribed treatment. He then ceased his visits, and petitioner had to call in other physicians, who split the leg open from near the knee to near the foot, and it was found that the periosteum of the bone had been destroyed, and that the bone of the leg had decayed. It was charged that this was the result of defendant allowing the pus to remain in the leg, and, as the result of unskillful treatment and wrongful diagnosis of the case by defendant, the leg had to be amputated. Petitioner further charges that Emmet suffered great pain and anguish in consequence of his leg being unskillfully treated, which made amputation necessary; that his suffering had been severe and protracted,—all to his damage in the sum of $10,000. In answer to this petition, the defendant, in effect, denied all the allegations therein which attempted to charge him with liability on account of his alleged negligent, improper, or unskillful treatment of the patient. Quite a volume of evidence was introduced pro and con, and the jury, after the charge of the court, returned a verdict for the defendant. Plaintiff moved for a new trial on various grounds, and in his bill of exceptions assigns error on the judgment of the court overruling his motion.

In one ground of the motion, error is assigned on the following charge of the court: "It is further contended, gentlemen of the jury, in the case, that although there was a mistake as to the first diagnosis of the disease by the defendant, and treatment kept up as for another disease, up to the time when the treatment was changed, it is contended by the defendant that this did not result in the necessity for the amputation, but the amputation resulted from an entirely different disease, which would have been the result notwithstanding the original mistake that may have been made. Well, gentlemen of the jury, if that is true,—if you believe that Dr. McRae made any mistake in his diagnosis, any mistake as to the treatment, but yet, if you believe it did not cause the amputation,—then the defendant would not be liable; the rule being, as already stated to you, in order to make the defendant liable, it must appear that he failed to exercise a reasonable degree of skill and care, and that such failure resulted in the injury. If the injury resulted from something else, but did not result from such failure, then the defendant would not be liable." One ground of objection to this charge is that it is argumentative, and it eliminated the fact that the plaintiff could have recovered for all the results of the defendant's mistreatment, such as pain and suffering and the like, even though it may not have caused the amputation itself; that if the defendant's negligence caused the plaintiff's leg to become swollen and inflamed, and caused his pain and suffering, then there could have been a recovery, although the amputation itself resulted from some other disease. The court's charge amounts to stating that, if the amputation itself did not result from the defendant's treatment, there could be no recovery, short of the amputation. We think the criticism made on the charge excepted to is entirely correct, and that the charge necessarily excluded from the jury the consideration of any damages growing out of pain and suffering, although the result of defendant's negligence in the treatment, provided this mistreatment did not result in the amputation of the limb. We presume this charge was evidently based upon the idea that in his petition the plaintiff sought a recovery exclusively on account of the treatment resulting in an amputation of the leg. Counsel for defendant in error, in their brief and argument before us, do not absolutely and unequivocally claim that the declaration cannot possibly be construed as declaring for pain and suffering, yet they do contend that it is exceedingly doubtful whether it does, and that the record indicates that the entire case was placed throughout on the amputation,—loss of the leg,—and that nowhere in the pleadings and evidence were pain and suffering mentioned, except as mere inducement. While the petition is not as full and explicit on the point of pain and suffering as it perhaps should have been, yet there was no demurrer filed to it. It expressly sets forth the extent of the patient's pain and suffering, much of which, from the charges in the declaration, was clearly attributable to an improper diagnosis of the case by the physician, and to his delay in administering the proper treatment until pus had so accumulated in the diseased leg as to unnecessarily add to his pain and suffering. The damages claimed in the declaration were not only for the loss of the leg by amputation, but also for pain and suffering occasioned by the alleged mistreatment. There was much uncontradicted evidence admitted upon this subject, showing to what extent the accumulated pus in the leg had caused injury and suffering, from which no relief whatever was experienced until it had been removed therefrom. Some evidence was also introduced in behalf of the plaintiff, which does not seem to be denied by the defendant, that an earnest effort was made to persuade the latter to operate so as to remove pus from the leg, because of its swelling and pain, days before he acted upon the suggestion; and there is also testimony to the effect that after operating, and finding such a quantity of pus

discharged therefrom, he admitted making a great mistake in his diagnosis of the case, and that, if he had operated on the leg sooner, he would have saved the patient much pain and suffering.

The evidence in this case is quite voluminous. It would serve no useful purpose to enter into minute detail of the volume of testimony that was introduced on each side of the issues of fact on trial. We only make brief allusion to the above facts appearing in the testimony with the view of showing that pain and suffering was evidently an important element in the damages claimed by the plaintiff, and that the testimony did not demand a finding by the jury that no part of such pain was caused by the unskillful or negligent treatment by the defendant. It was fair, therefore, to the plaintiff's cause, that the court should have presented this theory to the jury for their consideration, that they might determine the issues of fact upon this particular branch of the case. For this reason, we think the charge of the court complained of requires the grant of a new trial.

There are various other grounds in the motion for a new trial, complaining principally of certain charges of the court, some of which are alleged to be argumentative, and some because they present only defendant's side of the case; and the theory of defendant was by certain charges repeated too often, and was presented more prominently than the contentions of the plaintiff. After carefully reading over all of these grounds, and comparing them with the entire charge of the court, which is embodied in the record, we see nothing in them which would necessitate a new trial or justify a discussion. In so far as the requests to charge were pertinent, the principles therein embodied were covered by the general charge of the court. We think, in the main, the charge fully and fairly covered the case. We, of course, do not mean to intimate upon what side even apparently rests a preponderance of the evidence. In this connection we will only say that we have carefully read, at a consumption of much time and thought, this voluminous record of evidence, and we cannot say that it necessarily demanded the verdict that was found. The charge above quoted and excepted to in the motion for a new trial is on such a material issue that, in view of the testimony, it requires the grant of a new trial, and on this ground alone is the judgment of the lower court reversed. Judgment reversed. All the justices concurring, except COBB, J., disqualified.

REESE v. FIDELITY MUT. LIFE ASS'N.

(Supreme Court of Georgia. July 10, 1900.)

LIFE INSURANCE—DEFAULT IN FIRST PREMIUM—NOTE—DELIVERY.

1. Where the application for a policy of life insurance and the policy itself both stipulated, in effect, that the policy should not become binding on the association issuing it until the first premium had been actually received by the association or its authorized agent during the good health of the applicant, and that no agent of the association should have power to make, alter, or discharge contracts or grant credit, and that no alteration of the terms of the contract should be valid unless such alteration should be in writing and be signed by the president of the association, *held*, that the actual payment of the first premium during the good health of the applicant was a condition precedent to the liability of the association, and that no agent of the association could waive such condition.

2. Delivery is essential to the validity of a promissory note.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Lucy L. Reese against the Fidelity Mutual Life Association. Judgment for defendant, and plaintiff brings error. Affirmed.

The following is the official report:

Mrs. Lucy L. Reese sued the Fidelity Mutual Life Association to recover the amount of a policy issued by the defendant company upon the life of her husband, T. B. Reese. Upon the trial the evidence submitted in behalf of the plaintiff was, in brief, as follows: T. B. Reese applied to the defendant company for a policy of insurance on his life for $2,000 in favor of his wife, Lucy L. Reese. The written application which was signed by him contained the following stipulations: "I hereby agree and bind myself as follows: * * * That the policy issued hereon shall not become binding on the association until the first payment due thereon has been actually received by the association or its authorized agents during my lifetime and good health; that no verbal statements, to whomsoever made, shall modify this contract, or in any manner affect the rights of the association, unless the same be reduced to writing, and be presented and approved by the officers of the association at the home office, in Philadelphia, no agent or examiner having any power or authority to make or alter contracts, waive forfeitures, or grant credit. * * * This application shall be the sole basis of the contract with the association if a policy be issued hereon." On September 8, 1894, the association issued a policy, as applied for, containing stipulations similar to those set out in the application, and in terms making the application a part of the policy, a copy of the application being attached thereto. The policy was sent to W. M. Reese, a soliciting agent of the association and a brother of T. B. Reese, at Thomasville, Ga., who received it about the 13th day of the same month. T. B. Reese was then living at New Holland Springs, Ga. On the 15th of the same month, W. M. Reese, in pursuance of an agreement with S. A. Loyless, state agent of the association, executed his promissory note for the amount of the first premium due on the policy, payable to Loyless or order, and on the same date signed a receipt to T. B. Reese for the premium.

This note was never delivered to Loyless, nor was he ever notified of its execution, so far as the evidence shows, but it was retained by W. M. Reese, who intended forwarding it soon, with some other papers, to Loyless. W. M. Reese kept the receipt and the insurance policy for his brother. It appeared that T. B. Reese was in good health until the 16th or 17th of September, when he was taken sick and continued ill until his death, which occurred on the night of the 26th of September. On the 25th of September, J. A. Linton, the father-in-law of T. B. Reese, received a telegram from his daughter, Mrs. Reese, announcing the illness of her husband and requesting him to come to New Holland Springs. Linton showed this telegram to W. M. Reese, who thereupon told him about T. B. Reese's insurance policy. Linton then paid to W. M. Reese the amount of the first premium, and W. M. Reese destroyed the note which he had executed to Loyless, and which he had held up to that time. Linton took the policy and receipt, and had them in his possession at the time of the death of T. B. Reese. Some weeks after the death of T. B. Reese, Charles G. Beck, state agent of the defendant association, made a demand upon the plaintiff for the insurance policy, giving as a reason for demanding the policy that the company would never pay it, and tendered her the premium that had been paid. Upon this evidence the court granted a nonsuit, and the plaintiff excepted.

King & Spalding and J. T. Pendleton, for plaintiff in error. Hamilton Douglas, D. S. Craig, and J. E. Bond, for defendant in error.

FISH, J. In the written application which was signed by the applicant, he expressly agreed that it should be the sole basis of the contract with the insurance association, if a policy should be issued thereon, and that the policy should not become binding on the association until the first payment due upon it had been actually received by the association or its authorized agent during the good health of the applicant. The policy likewise contained the stipulation that it should not be binding until delivered during the good health of the applicant, and until the first payment due thereon had been made, and recited that the application, a copy of which was attached, was made part thereof. It is clear from these explicit and unambiguous terms of the contract between the applicant and the association that the latter merely entered into an executory agreement, the performance of which absolutely depended upon the contingency that the first premium on the policy should be actually paid during the applicant's good health. This prerequisite had to be complied with before the policy could become effectual. In Ormond v. Association, 96 N. C. 158, 1 S. E. 796, it was decided that, "where an application for a life insurance policy declares on its face that the payment of the premium is a condition precedent to the issuing of the policy, the policy is not in force until the premium is actually paid." And in Oliver v. Insurance Co. (Va.) 33 S. E. 536, the court held that "an applicant's express agreement in his written application that the policy should not take effect until the first premium was paid, and the policy delivered during his continuance in good health, created a condition precedent to the company's liability." The contract, as expressed in the application and the policy, established the respective rights and obligations of the parties; and this court has no power to alter its provisions, and to declare a liability under a state of facts which the parties never agreed should fix it. As was said by Mr. Justice Little in Lippman v. Insurance Co., 108 Ga. 391, 33 S. E. 897, "A contract of insurance is governed by the same rules of interpretation as extend to other contracts, and, when parties incorporate terms or stipulations in their contracts, it is not the province of the court to extend or enlarge them, but, in construing them, to give expression to the true intent of the parties, and in so doing the language used is the best criterion of intention."

The controlling question in this case is, did the applicant comply with the essential condition upon which the association's liability depended; in other words, was the first premium actually paid during his good health? Counsel for plaintiff in error contended here, in argument and by brief, that "the execution by W. M. Reese of his note to the defendant's agent, Loyless, in pursuance of his previous agreement with the company through Loyless, was a good payment of the premium." The applicant, it appears, was in good health at the date of this note, and, if it amounted to a payment of the first premium, then the policy became binding on the association. Even if Loyless, whose powers to bind the association were not otherwise indicated than by being denominated its "state agent," had been vested with authority to alter the terms of the contract, so as to accept the note of W. M. Reese, the soliciting agent, in lieu of cash, for the first premium, we do not think the note claimed to have been executed in this case would have constituted a payment. The proof was to the effect that the note was filled out and signed by W. M. Reese on September 15th; that he kept it in his possession for about 10 days, intending to forward it to Loyless with some other premiums; that it was never sent, nor was Loyless ever notified of the fact that the note had been signed. W. M. Reese testified that he destroyed the note upon its payment by Linton, the applicant's father-in-law, the day before the applicant died. In our opinion, these facts did not constitute a delivery of the note, and it was therefore never duly executed and was a nullity. A delivery, actual or constructive, was as essential as the maker's signature. "No contract arises upon a bill of exchange or promissory note until the delivery of the instrument, and until such delivery it remains revocable

and unenforceable. Thus, a promissory note has no inception until it has been delivered by the maker to the payee." 4 Am. & Eng. Enc. Law (2d Ed.) p. 201. "While actual or manual delivery is not indispensable to the validity of a note, still it must appear that the maker in some way exercised an intention to make it an enforceable obligation against himself according to its terms, by surrendering control over it, and intentionally placing it under the control of the payee, or of some third person for his use." Purviance v. Jones, 120 Ind. 162, 21 N. E. 1099. See 1 Daniel, Neg. Inst. § 63 et seq.; Pars. Notes & B. § 49; Tied. Com. Paper, § 84. The payment of the sum of money by Linton to W. M. Reese could not be in satisfaction of the note which the latter claimed to have made to Loyless, for the reason that such note, for want of delivery, never became operative. It seems to have been an anomalous transaction for Reese to have written out and signed a note payable to Loyless, to have kept it in his possession without notice to Loyless that it had been made, and for Linton to have paid Reese the amount of Reese's own note, and such a payment to have been designated as a satisfaction of the note.

Another contention of the plaintiff in error was that the agents of the association, Loyless and Reese, waived the condition of payment of the first premium by becoming responsible therefor to the association. Mechanics' & Traders' Ins. Co. v. Mutual Real-Estate & Building Ass'n, 98 Ga. 262, 25 S. E. 457, and Insurance Co. v. Pekor, 106 Ga. 1, 31 S. E. 779, were cited in support of this contention. In both of those cases it appears that the agents who dealt with the assured were general agents, who had authority to issue and deliver policies and renewals thereof, and that, according to the course of dealing between them and their customers, it was usual for them to issue renewals and charge the premiums to themselves, and afterwards to account with the companies they represented. The rulings made in those cases were therefore based upon the implied assent of the insurance companies for such general agents to waive the payment of the premiums in cash for the renewal policies. There was no pretense in either of those cases that the authority to make the waiver had been expressly withheld from the agent, as was done, both in the application and in the policy, in the case at bar. Here there was no evidence of any custom or course of dealing upon the part of Loyless and W. M. Reese which could warrant an inference that the association impliedly assented that they might become responsible to it for the first premium, in order that credit might be extended to the applicant. Under the express terms of the agreement in this case, the agents had no authority to make such a waiver. The policy declared that "no agent of the association has any power or authority to make, alter, or discharge contracts, waive forfeitures, or grant credit; and no alteration of the terms of this contract shall be valid, and no forfeiture hereunder shall be waived, unless such alteration or waiver be in writing, and be signed by the president of the association"; and the application contained substantially the same provisions. More distinct and unequivocal language could hardly have been used to express the mutual understanding of the parties to the contract. The applicant was an intelligent business man; he signed the application; and in the absence of any want of opportunity to read it, or of any suggestion of fraud practiced upon him, it must be conclusively presumed that he fully understood the entire transaction. Furthermore, his brother, W. M. Reese, the soliciting agent, who was acting for him in endeavoring to arrange the payment of the first premium, certainly knew the contents of the application which he took, and of the policy he had in his possession, and was fully aware that neither he nor Loyless had authority to grant credit for the first premium, or in any way to alter the terms of the contract agreed upon between the applicant and the association. It is a familiar rule that a principal may limit the power of his agent, even within the apparent scope of his authority, so that the agent cannot, in violation of the restriction, bind his principal when dealing with one who has notice of the limitation. Here the applicant expressly agreed in writing that no agent of the association should have authority to grant credit, and no alteration of the terms of the contract of insurance should be valid unless in writing and signed by the president of the association, and there was no pretense that the president ever signed such a writing. If, in violation of these specific provisions of the contract, it were held that the agent of the association could vary its terms and grant credit for the first premium, instead of requiring its payment in cash, then must we subscribe to the rule, which seems to be supported by some adjudicated cases, that an insurance agent, unlike all other agents, may bind his principal, though acting contrary to express instructions, and dealing with one who has full knowledge of the limitations of his authority. The soundness of such a doctrine does not commend itself to our minds. "It must not be thought that the established rules of the law of agency do not apply to the transactions of life insurance companies. There is no particular sanctity about the business of life or any other kind of insurance. The companies engaged in it have the right to employ agents and give to them such authority as they please. Whatever limitations are imposed upon such agents, if communicated to those dealing with them, will be binding, and if this authority be exceeded the act will not bind the principal. On the other hand, if the agents are held out to the public as possessing certain powers, their acts within the apparent scope of this authority will bind their principals. While the business of life insurance has its recognized

peculiarities, the courts have constantly endeavored to apply to all the transactions of fire and life insurance organizations, or mutual benefit societies engaged in doing a life insurance business, the general doctrines of the law of agency. The inquiry is, what was the contract entered into by the parties? If made through an agent, what was the authority of the agent, and had the party dealing with him any notice of limitations or restrictions upon such authority, or were there sufficient circumstances to put him on his guard and to require him to acquaint himself with this actual authority?" Bac. Ben. Soc. § 151. See, also, §§ 152–155, 158. In Conway v. Insurance Co., 140 N. Y. 79, 35 N. E. 420, the court held: "No different rules apply to contracts of insurance from those which obtain in the case of other contracts, and, where the parties have deliberately and formally executed a contract for the purpose of defining their respective engagements and securing due and exact performance thereof, they should be held to the same; and the only cases in which recoveries have been permitted contrary to the provisions of the contract are where it has been shown that there has been such a usage or course of business, or such consent, express or implied, as to justify the inference that the insurer had extended its agent's authority, and thus modified the restrictions contained in the policy." In 1 Joyce, Ins. § 433, the author says: "It is undoubtedly within the power of the parties to stipulate that an agent's authority shall be exercised only within certain limits. It is equally true that an insurance company may validly, as between itself and its agent, define and limit his powers, and this will affect all third persons, dealing with an agent, who have knowledge or notice thereof." In Woods, Ins. § 411, it is said: "In all cases where the assured has notice of any limitation upon the agent's power, or where there is anything about the transaction to put him on inquiry as to the actual authority of the agent, acts done by him in excess of his authority are not binding; as where it is generally known that limitations are imposed in certain respects. So, where direct notice, or any notice which a prudent man is bound to regard, is brought home to the assured, limiting the powers of the agent, he relies upon any act in excess of such limited authority at his peril. That an insurance company has a right, in a fair way, to limit the powers of its agent, must be conceded; and when it does impose such limitations upon his authority, in such a way that no prudent man might be mistaken in reference thereto, it is not bound by an act done by its agent in contravention of such notice." Id. §§ 414, 416, 417. In this connection, see 1 May, Ins. § 137; Cooke, Life Ins. §§ 894, 1062, 1081; Ostr. Ins. p. 36; and the numerous cases cited in support of the text by these various authors. See, also, Fowler v. Insurance Co., 100 Ga. 330, 28 S. E. 398; Morris v. Insurance Co., 106 Ga. 461, 32 S. E. 595; Insurance Co. v. Rogers, 108 Ga. 191, 33 S. E. 954; and the recent case of Murphy v. Insurance Co. (La.) 27 South. 143. In Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, Mr. Justice Field, in the course of his opinion, made use of the following expressions: "The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed." "The present case is very different from Insurance Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617, and from Insurance Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593. In neither of those cases was any limitation upon the power of the agent brought to the notice of the assured." "Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements."

Counsel for plaintiff in error also insisted that, as to the delivery of the policy, W. M. Reese was the general agent of the association, and that his acceptance of the premium from, and delivery of the policy to, Linton, for the benefit of the plaintiff, with full knowledge of the applicant's illness, bound the association. If correct in what we have already said, then this contention cannot be sound. So far as the evidence discloses, W. M. Reese was not the general agent of the association; but, even if he had been, he could not, in the very teeth of the express limitations upon his power as agreed to by the applicant, have bound the association by delivering the policy in violation of the contract. The mere fact that the agent knew at the time he received the premium from Linton,—who, by the way, was an entire stranger to the contract between the applicant and the association,—and delivered the policy to him, that the terms of the contract were being violated, could not affect the liability of the association.

Applying the law, as we conceive it to be, to the evidence submitted by the plaintiff upon the trial, we conclude that she was not entitled to a recovery, and therefore the court did not err in granting a nonsuit. Judgment affirmed. All the justices concurring.

LAMAR v. GARDNER et al.

(Supreme Court of Georgia. July 11, 1900.)

INJUNCTION—CONFLICTING EVIDENCE.

The evidence was conflicting on the material issues in the case, and the trial judge did not abuse his discretion in refusing the injunction.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Suit by T. R. Lamar, administrator, against G. G. Gardner and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Townsend & Westmoreland and Z. D. Harrison, for plaintiff in error. B. B. Bower and Hawes & Hawes, for defendants in error.

PER CURIAM. Judgment affirmed. All the justices concurring, except COBB, J., disqualified.

WAYCROSS AIR-LINE R. CO. v. SOUTHERN PINE CO. OF GEORGIA et al.

(Supreme Court of Georgia. July 11, 1900.)

RAILROADS — RIGHT OF WAY — CONTRACTS — CONSTRUCTION — TRESPASS — INJUNCTION — PHYSICAL ACTS—STATUTES—PRIVATE RAILROAD—CONSTRUCTION RIGHT.

1. Where a lumber company, by a written contract, granted to a railroad company a right of way over all the lands which the grantor then owned, or might thereafter own, through which the railroad of the grantee then ran, or over which it might thereafter run, "to and from any and all points authorized by the [then existing] charter" of the railroad company, the meaning of the contract was that the railroad company should have a right of way for its railroad, over the lands of the grantor, to and from any of the termini of the railroad designated or indicated in the charter of the railroad company. Under such a contract, the railroad company did not acquire a right of way through the lands of the lumber company for a temporary spur track, for private use only, from its main line to a point some three or four miles distant therefrom, which was not named or indicated in the charter as one of the points to which it was authorized to build its road. (a) Consequently, when the railroad company undertook, solely under the right which it acquired by this contract, to construct such a spur track upon and across the lands of the lumber company, and the latter forcibly prevented it from doing so, it was not erroneous, upon petition by the railroad company for an injunction, for the court to refuse to enjoin the lumber company from further interfering with the construction of such track upon its lands. Nor was it erroneous, upon the cross application of the lumber company, to enjoin the railroad company from constructing this track upon the lands in question.

2. When, in acting upon an equitable petition for injunction, the court grants to one of the parties the right to exercise a specific privilege on stated conditions, such party, by accepting the grant, becomes bound by the conditions, and the court may subsequently enforce compliance therewith, and in so doing does not, though ordering the party to do physical acts, violate the rule against granting mandatory injunctions.

3. The general railroad law of this state, which provides that "the general direction and location" of a new railroad, constructed by one railroad company, "shall be at least ten miles from [a] railroad already constructed" by another railroad company, except at points "within ten miles of either terminus" (Civ. Code, § 2176), does not prevent a purely private corporation from constructing, and itself operating, for its own exclusive use, upon its own land, a tramroad, for the purpose of hauling lumber, etc., from its sawmill, located upon one railroad, to another and competing railroad, for shipment over the latter road, although such tramroad may run parallel to and in close proximity to the first-mentioned railroad.

(Syllabus by the Court.)

Error from superior court, Coffee county; Joseph W. Bennett, Judge.

Suit by the Waycross Air-Line Railroad Company against the Southern Pine Company of Georgia and others to restrain defendants from interfering with complainant's construction of a railroad over defendant's lands. From an order denying the injunction, and granting a cross injunction against the construction of the road, plaintiff brings error. Affirmed.

J. L. Sweat, for plaintiff in error. W. E. Kay and John C. McDonald, for defendants in error.

FISH, J. 1. The Waycross Air-Line Railroad Company undertook to build a spur track, extending from its main line to a point three or four miles distant therefrom, upon and across the land of the Southern Pine Company of Georgia, without consulting the latter, and without resorting to condemnation proceedings to procure a right of way for such track. We by no means intend to intimate that the railroad company could have procured a right of way for the spur track which it was seeking to construct, by exercising the state's power of eminent domain, but are merely stating the facts, which show that its claim was not based upon an alleged right to take this private property for public use, under the forms and by due process of law. It based its claim to a right of way for this track over the lands of the pine company entirely upon a written contract with the latter company. Therefore, so far as this case is concerned, if the railroad company's claim is not supported by the contract upon which it relies, the court below committed no error in refusing to enjoin the pine company from preventing or interfering with the construction of the spur track upon its land, nor in enjoining the railroad company, until the further order of the court, from constructing the track upon this land. The contract upon which the railroad company relies was executed by the parties on the 5th of August, 1895, and in it the Southern Pine Company of Georgia, which is otherwise designated therein as the "party of the first part," grants to the Waycross Air-Line Railroad Company, otherwise designated as the "party of the second part," a right of way, not less than 150 feet wide, "over all lands the said party of the first part now owns, or which it may hereafter own or become entitled to, through which the railroad of the said party of the second part now runs, or over which it may hereafter be run, to and from all points authorized by the present charter of the party of the second part." There is nothing in the original charter of the Waycross Air-Line Railroad Company, nor in either of the amendments thereto, which expressly authorizes it to build its railroad, or any branch thereof, to the proposed terminus of this spur track. Its original charter authorized it to build a railroad

"from Waycross, in the county of Ware, to the city of Macon or Hawkinsville, in Pulaski county, or to some point on the East Tennessee, Virginia & Georgia Railroad in the counties of Appling, Telfair or Dodge, and thence to Dublin in Laurens county, and from Waycross to the Florida line, at some point on the St. Mary's river, with the right of extending the same to the port of St. Mary's, Georgia." Acts 1887, p. 227. By an amendment to its charter, in 1889, it was authorized to build a railroad "from Waycross, through the counties of Ware, Appling, Coffee, Irwin and Wilcox, to Cordele, Dooly county." Acts 1889, p. 247. Another amendment, in 1891, authorized "an extension of said road from some point on the line thereof as now surveyed and located in the counties of Coffee or Irwin, through the counties of Wilcox and Dooly, to Fort Valley, in Houston county, and also an extension or branch from its line between Waycross and St. Mary's to Brunswick or South Brunswick, in Glynn county." Acts 1890–91, p. 416. As we have seen, under the contract with the Southern Pine Company of Georgia, the Waycross Air-Line Railroad Company was granted a right of way through all the lands of the former company over which the railroad company's railroad then run or might thereafter be run, "to and from all points authorized by the [then existing] charter" of the railroad company. The "points" to and from which the Waycross Air-Line Railroad Company, by its charter, was then authorized to run its railroad, are those designated or indicated in the acts of the legislature from which we have quoted; that is, they are the termini mentioned or indicated in its charter, to and from which it was authorized to construct and operate its main line, or main lines, or the extensions or branches thereof. The meaning of this contract, therefore, was that the Waycross Air-Line Railroad Company should have a right of way for its railroad, over the lands of the Southern Pine Company of Georgia, to and from any of the termini of the railroad designated or indicated in the charter; not that the railroad company should have a right of way through the lands of the grantor to reach any point indicated in the charter, and also the right to build, over the land of the grantor, spur tracks extending from its main line in any direction that it might see fit. "The railroad of the said party of the second part," which was contemplated and intended by this contract, was its main line, or main lines, and the extensions or branches thereof authorized by the charter, built or to be built, to the points designated in its charter, for the public convenience and benefit. The spur track which the Waycross Air-Line Railroad Company was engaged in constructing when this controversy arose, by its own showing, was not for the purpose of reaching any point named or indicated in its charter, and was to be neither a part of, nor even an essential appendage to, its railroad, but was to be purely temporary in duration and for private use only. The plaintiff alleged in its petition that it was to be built "for the purpose of facilitating the transportation of the freights of Lott & Hatfield, engaged in the sawmill business, and McLean & Perkins and J. F. Cook, engaged in the naval-stores business, at or near" the point it was intended to reach; and the superintendent of the plaintiff's railroad testified that the purpose in constructing this spur track was "to facilitate the handling of the lumber and naval stores of" these parties "at said point, at the prevailing rate from Nicholls, to meet the emergency and necessity therefor, the same to be used only temporarily for said purpose, and not to be operated, either temporarily or permanently, as a branch railroad; the freight and passenger trains of plaintiff not to be run thereon, but only cars of lumber and naval stores of said parties to be transferred thereon to plaintiff's depot at Nicholls on its said main line." While, in a purely mechanical and material sense, this spur track was a railroad, it was not the railroad of the Waycross Air-Line Railroad Company for which the Southern Pine Company of Georgia granted a right of way through its lands. One who, in general terms, grants to a railroad company, chartered for the purpose of constructing and operating a railroad for public use, a right of way for its railroad over the lands of the grantor, does not thereby grant a right of way for any and every temporary and private spur track or branch road which the railroad company may see fit to construct from its railroad across such lands. The parties in such a case are presumed to have contracted with reference to the kind of a railroad which the railroad company was chartered to build and operate; that is, a railroad for public convenience and benefit, upon which freight and passenger trains are to be operated. The court did not err in refusing the injunction prayed for by the Waycross Air-Line Railroad Company, nor in enjoining it, until the further order of the court, from constructing this spur track upon the lands of the Southern Pine Company of Georgia.

2. The Waycross Air-Line Railroad Company began to build this spur track upon and across the lands of the Southern Pine Company of Georgia without the consent of the latter, and without authority of law. While this work was in progress, the latter company assembled a force of its employés, tore up the track which had been constructed upon its land, except a portion thereof upon which stood an engine and cars of the railroad company, which had been used in the work of construction, and prevented the railroad company from further prosecuting the work. The destruction of the track left the engine and cars cut off from the main line of the railroad company. When the railroad company's petition for injunction was presented to the judge, he granted a temporary restraining order against the pine company, and restrained the railroad company, until

the further order of the court, from constructing, or attempting to construct, the spur track, but in the same order granted the railroad company permission to temporarily relay the track which had been torn up, for the sole purpose of removing its engine and cars to its main line, upon the express condition that the railroad company, if thereafter so directed by the court, would take up and remove the spur track entirely from the land of the pine company. The railroad company relaid the track for the purpose indicated. Upon the subsequent interlocutory hearing, the court, after refusing the injunction prayed for by the railroad company, and enjoining it from constructing the spur track, ordered it to take up and remove all the track which had been laid on the land of the pine company. One of the assignments of error is that the court had no power to order the railroad company to take up and remove this track. While, as a general rule, a court cannot, by injunction, compel the performance of an act, we think, under the circumstances of this case, the court had the power to compel the railroad company to take up and remove the track from the land of the pine company. When the railroad company, in order to recover its engine and cars, availed itself of the permission granted it by the court to relay the track for this purpose, it elected to accept and abide by the condition upon which the right to do this was granted, and could not thereafter be heard to complain if the court compelled it to take up and remove all the track which it had laid on the land of the pine company. It could not exercise the right conferred upon it by the order of the court, without submitting to the terms imposed upon it by that order. Submission to these terms was a condition precedent to the exercise of the right. It is too late, after exercising the right conferred upon it by the order, to question the terms under which it was exercised, or the power of the court to enforce them.

8. The charge that the Southern Pine Company of Georgia and the Offerman & Western Railroad Company had combined and confederated for the purpose of, and were "actually engaged in, paralleling the plaintiff's main line of railroad, by constructing a road from the mill (of the pine company) at Marie to said town of Nicholls, there to connect with the Nicholls mill (of the pine company) and the said Offerman & Western Railroad," was not sustained by the evidence. The evidence did show that the pine company, for the purpose of connecting its mill at Marie with the Offerman & Western Railroad at Nicholls, was constructing, through and upon its own land, a tramroad from Marie to Nicholls, and that this tramroad would run parallel to and very close to the plaintiff's railroad between these points. But the evidence did not show that the Offerman & Western Railroad Company had anything to do with the construction of this tramroad, or that such tramroad was to be controlled and operated by this railroad company. It is true that the plaintiff, by an amendment to its petition, did allege, and the allegation was not denied, that the stockholders in the Offerman & Western Railroad Company and the stockholders in the Southern Pine Company of Georgia were "largely the same, with certain of their officers the same, * * * both being practically under one control and management." But this did not keep the pine company from being a purely private corporation, separate and distinct from the Offerman & Western Railroad Company, nor make the tramroad which it was building, for its own exclusive use, a part of the railroad of such company. The general railroad law of this state, which provides that "the general direction and location" of a new railroad constructed by one railroad company "shall be at least ten miles from [a] railroad already constructed" by another railroad company, except at points "within ten miles of either terminus" (Civ. Code, § 2176), does not prevent a purely private corporation from constructing, and itself operating, for its own exclusive use, entirely upon its own land, a tramroad, for the purpose of hauling its own products from its mill, located upon one railroad, to another and competing railroad, for shipment over the latter road, although such tramroad may run parallel to and in close proximity to the first-mentioned railroad. The public policy indicated by this section of the Civil Code applies to railroad companies chartered by the state to act as common carriers. It puts no restrictions upon private individuals, or purely private corporations, who may seek to construct and operate, upon their own premises, tramroads, or railroads, for their own exclusive use and benefit. Judgment affirmed. All the justices concurring.

CRITTENDEN v. SOUTHERN HOME BUILDING & LOAN ASS'N.

(Supreme Court of Georgia. July 11, 1900.)

CORPORATIONS — BY-LAWS — AMENDMENT — ACTION BY STOCKHOLDER—PETITION —DEMURRER—APPEAL.

1. A business corporation may make amendments to its by-laws which are not inconsistent with its charter or constitution. Consequently an allegation in a petition that the defendant, a corporation, made specified amendments to its by-laws, does not negative its authority so to do, when there is no allegation that these amendments were contrary to the defendant's charter or constitution.

2. Where given amendments to the by-laws of such a corporation were, under its charter and constitution, allowable, they were not, as to a particular stockholder, fraudulent or void merely because made without his knowledge, or because he "has never ratified, acquiesced in, or consented to, the same."

3. A stockholder who brings an action against a corporation, and in his petition alleges that certain amendments to its by-laws were in violation of his contract with the defendant, must set out the contract with sufficient fullness to enable the court to determine whether or not his allegation is well founded.

4. When the petition in such a case alleges that the plaintiff is entitled under the by-laws to recover a designated amount as the withdrawal value of his stock, it is incumbent upon him to show, by the terms of his contract, that his rights to recover such withdrawal value accrued under the contract in connection with the by-laws; and, to do this, it is essential that the terms of the contract be set forth.

5. When a demurrer to a petition is based on several grounds, and the court in terms sustains some of them, and thereupon dismisses the petition, the judgment will be affirmed, whether these grounds were well taken or not, if the other grounds of the demurrer were good.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by O. H. Crittenden against the Southern Home Building & Loan Association. From a judgment sustaining a demurrer in part, plaintiff brings error. Affirmed.

Malcolm Johnson, for plaintiff in error. W. A. Wimbish and Ligon Johnson, for defendant in error.

LEWIS, J. O. H. Crittenden brought suit in the city court of Atlanta against the Southern Home Building & Loan Association, alleging defendant's indebtedness to him to be the sum of $1,005, principal, besides interest, for money had and received to his use. The following were substantially the allegations in the petition: On December 17, 1889, he subscribed for 10 shares of the capital stock in said corporation, and paid as a membership fee thereon $10, and as dues on said shares $678, in monthly installments of $6 each, covering a period of 113 months, to wit, from January, 1890, to May, 1899, both inclusive. On September 1, 1890, he subscribed to 5 other shares of the capital stock of said corporation, and paid as a membership fee thereon $5, and as dues on said 5 shares $312, in monthly installments of $3 each, covering a period of 104 months, to wit, from October, 1890, to May, 1899, both inclusive, making an aggregate amount of $1,005. When petitioner subscribed for the stock and made payments on the same, defendant accepted the subscriptions and payments under contract that it was a true building and loan association, on the ordinary plan, upon which petitioner relied, and knew nothing to the contrary until since the last payment made by him in May, 1899, since which time he has made no other payments. He avers that defendant is not a building and loan association: First, because it requires members to pay on loans a fixed or arbitrary premium, and not a premium which is the result of free and open competition among the members, or of any competition at all; second, because there is a material want of mutuality among the members in the benefits and burdens of the association, in that loans are not made to members tendering sufficient and proper security, as the result of free and fair competition, but arbitrarily, by the board of directors; third, in addition to the regular interest charge of 6 per cent. per annum on loans, some members are required to pay a fixed or arbitrary premium of 6 per cent. per annum, while others are required to pay a fixed or arbitrary premium of 4 per cent. per annum only; fourth, on or about December —, 1897, defendant materially changed several of its most important by-laws, which materially violates its contracts with petitioner and a large majority of its members, and changes the relation of its members to each other. The petition then goes on to briefly mention the changes made in the by-laws, to the effect, for instance, of abolishing the expense fund, repealing the by-law with reference to time for withdrawal of stock by members, etc. It was alleged that these changes violated defendant's contract with petitioner to his great injury, and his prayer was to recover back the money he had paid into the association. There is a second count in the petition, for a further cause of action, in which plaintiff claims the sum of $1,341.65, besides interest, for the withdrawal value of his stock. It is alleged that the by-laws of defendant provided that stock might be withdrawn upon giving 60 days' notice to the association by the stockholder of his intention to withdraw, and that when withdrawn after seven years, and before maturity, the holder shall receive the actual book value of same, as shown by the last statement of the division of profits. More than 60 days before the filing of this suit, petitioner filed an application to withdraw his stock, the actual book value thereof on that date being $1,341.65. He claims to have perfected his right of withdrawal, and complied with all requirements of defendant in the premises, but defendant fails and refuses to pay him the withdrawal value of his stock. He therefore seeks a recovery, also, of $1,341.65. To this petition a demurrer was filed upon the following grounds: (1) Petitioner fails to set forth in sufficient form and detail the alleged contract between him and defendant. (2) Petitioner avers that the contract between him and defendant is in writing, and fails to state in sufficient detail the nature of the contract and the terms thereof. (3) Petition fails to show any good and sufficient reason why plaintiff, being a stockholder, is entitled to a judgment. (4) Petition fails to show that there are any funds available for payment of withdrawals. (5) Petition fails to show that the withdrawal claim of the plaintiff had ever been reached. (6) Petition fails to show that plaintiff paid his dues, so as to entitle him to withdrawal. (7) Paragraph 4 of petition is argumentative, and conclusions of law, and indefinite and vague, and should be stricken; that it contains immaterial matter. Paragraph 6 of the petition is demurred to on the same ground. After argument by counsel, the judge rendered his judgment sustaining the demurrer and dismissing the case, under the following order: "Ordered, that this demurrer be sustained on the third ground thereof, and the first count of the declaration is stricken, as setting forth no cause of action in favor of the plaintiff. As to the second

count, the demurrer is sustained, on the fourth, fifth, and sixth grounds thereof, with leave to the plaintiff to amend; and, plaintiff declining to amend under this leave, the second count of the declaration is stricken, and the case is dismissed." Upon this judgment, error is assigned in the bill of exceptions.

1. After a careful reading of the allegations in this petition on the first count, we fail to see that any cause of action is set forth against the defendant company. There is no allegation in the petition that the dues, premiums, etc., paid by plaintiff were not paid properly, and entirely in accord with his obligations under the contract he made with the association. He claims that the association has no right to require members to pay on loans a fixed premium. We know of nothing under the laws of Georgia that prohibits such charge. Under section 8 of the act approved October 19, 1891 (Acts 1890–91, vol. 1, p. 181), it is declared "that no fines, interest or premiums paid on loans in any building and loan association shall be deemed usurious, and the same may be collected as debts of like amount are now collected by law in this state and according to the terms and stipulations of the agreement between the association and the borrower." There is no allegation in the petition that the charge of a fixed premium is in violation of the contract made by plaintiff with the defendant. In 4 Am. & Eng. Enc. Law (2d Ed.) p. 1070, it is declared, "Where, however, the statutes make no provision for awarding the loan by competitive bidding, a loan made without bidding is valid." See, also, Investment Co. v. Bachelor, 54 N. J. Eq. 600, 607, 35 Atl. 745. These views also cover the second assignment, as to why the corporation is not a building and loan association. As to the allegation that some of the stockholders are charged a fixed premium of 6 per cent. per annum, while others were required to pay only 4 per cent. per annum, it does not appear that they belonged to the same class of stockholders, nor that such charges are contrary to the charter and constitution of the association. It does not necessarily follow that there is a want of mutuality in this regulation. Mutuality does not imply perfect equality. In building and loan associations, it means that each member shall share alike the profits and losses with all other members of his class. There is nothing in the allegation that the loans were made arbitrarily by the directors. Necessarily, the management of all corporations is intrusted to its directors and officers. No fraud or misconduct is charged against the officers of this association, and by their system of loaning money no injury is alleged to the plaintiff, and no loss to the association. Petitioner further alleges as a reason why he is relieved from his obligations as a stockholder, and is entitled to recover back the money paid by him to the association, that in September, 1897, the defendant materially changed several of its most important by-laws, and made new ones, which materially violated its contract with petitioner and a large majority of the members, and changed the relation of the members to each other. The petition then refers to the changes that were made, but it does not allege that there is a single change made which was not authorized by the charter and the constitution of the association. While it does allege that his contract was violated by such changes, yet he fails to set forth what that contract was, and thus there is a failure to enlighten the court upon such facts as would enable it to determine whether the acts of the association complained of in any wise violated the contract it made with plaintiff. This is made a special ground of demurrer. Even if it were shown (and there is no allegation in the petition that authorizes such a conclusion) that the board of directors or other officers of the association, in the change of its by-laws or in any other respect, had exercised powers ultra vires, this in itself would not relieve the members of the association from performing their duties under their contract as stockholders; and, if the change in the by-laws referred to in the petition were unauthorized, we cannot see what rights this in itself gives a shareholder to recover back from the association the dues he has paid. In End. Bldg. Ass'ns (2d Ed.) § 310, it is declared: "The unlawful departure of a building association from its proper functions in purchasing real estate, even to the extent of changing its character entirely into that of a land society, will not, of course, eo ipso, put an end to its chartered existence as a building association, nor relieve its members from obedience to its rules and performance of their duties in the society."

2, 3. It is contended that the amendments to the by-laws complained of were void as to the plaintiff, because made without his knowledge, and because he has never ratified or consented to the same. As above stated, there is nothing in the petition to indicate that the amendments to the by-laws were not lawfully made. In End. Bldg. Ass'ns (2d Ed.) § 272, it is declared: "But the rule that members of a corporation are bound, in matters pertaining to their rights and duties as such, by every by-law lawfully adopted, results, not from any supposed notice to them of the by-law, but from the implied terms of their agreement of membership, wherefore it is ordinarily quite immaterial whether they had notice of a new by-law or not. The contract of membership carries in gremio the right on the part of the society to alter the by-laws from time to time. It is a right which is given it by statute. A person cannot, therefore, become a member on condition, expressed or implied, that the by-laws shall remain as they are at the time of his accession to it, and has no right to presume that they will so remain, or at any time to bind the society by his acting upon the supposition that they have so remained, beyond

this: that the fundamental terms of his original contract of membership must continue unchanged, except by his consent." The petitioner, failing to enlighten the court as to what were the fundamental terms of his original contract, and not setting forth that contract in any of its details, does not show that he has been injured or damaged, or has any right of action whatever against the association to recover back the dues he has paid.

4. What has been said in regard to the plaintiff's claim on the first count of his petition applies with equal force to the second count, where he seeks to recover a designated amount as the withdrawal value of his stock. It is incumbent upon him to show by the terms of his contract that his rights to recover such withdrawal value accrued under the contract in connection with the by-laws, and hence the absolute necessity that the terms of the contract should be fully and fairly set forth. This right of withdrawal must be regulated by statute or the by-laws of the association. As stated in 4 Am. & Eng. Enc. Law (2d Ed.) p. 1046: "As the idea underlying the building association requires that the membership continue throughout the life of the body, if a terminating society, and, if not, of the series, the member logically has no right to receive any part of his contributions or of the profits until that life has terminated. To avoid the evident hardship of the strict application of this rule, a right of withdrawal is generally secured to the members; that is, a right to terminate their membership in the society, with its attendant interests and liabilities, at such time as they may desire, upon the basis of a settlement with the association, wherein they are allowed due credit with the association for the amounts previously paid in by them. No such right exists at common law. It is founded upon statute, charter, by-law, or agreement, the terms of which must be complied with." There is no statute in Georgia conferring such a right, nor does it appear from this petition that it is conferred by the charter of the defendant association, nor is the privilege of withdrawal claimed by the plaintiff under either. His privilege depends entirely upon his contract and the by-laws of the association, and a failure to set them forth is necessarily a fatal defect in his petition.

5. While we do not think the judge in this case put his judgment upon the strongest ground in the demurrer, yet we really think the petition was demurrable on the general ground. The strongest special ground is the failure of plaintiff to attach and set forth with any particularity whatever the contract upon which he relied for a recovery, which was practically a failure to set forth a cause of action, which would seem to be covered by the general ground. Unquestionably, to our minds, however, the ground touching the contract is well taken. As a general rule, when a judgment of court complained of is correct, it will be sustained, although based upon a wrong reason. The judgment in the present case was right, and, in the language of this court in Summerlin v. Hesterly, 20 Ga. 689, "a judgment that is right remains right, notwithstanding that the court rendering the judgment may assign a wrong reason for it." See, also, Garner v. Keaton, 13 Ga. 431; Sabattie v. Baggs, 55 Ga. 572; Eve v. Crowder, 59 Ga. 799; Wynn v. Wynn, 68 Ga. 820; Donovan v. Simmons, 96 Ga. 340, 22 S. E. 966, Syl., point 3. We think, in the case at bar, the petition was so clearly demurrable, and the judge having given the plaintiff an opportunity to amend it to conform to the special objections therein made, which he failed to do, that his judgment in dismissing the action was right, and should be affirmed, regardless of the ground upon which he based it. Judgment affirmed. All the justices concurring.

FLETCHER v. COLLINS.

(Supreme Court of Georgia. July 11, 1900.)

NEW TRIAL—GROUNDS OF MOTION—VERIFICATION—ASSIGNMENTS OF ERROR—INTOXICATING LIQUORS—LICENSE—OFFICER—EVIDENCE OF ELECTION—OUSTING TENANT—AFFIDAVIT—CONTINUANCE—NEW TRIAL.

1. Grounds of a motion for a new trial which are not verified cannot be considered by this court. A ground of such a motion will be held not to be verified when (a) the record is silent on the subject; (b) when the record discloses an affirmative refusal to verify; (c) and when the judge appends to the motion a note which states facts in conflict with any statement in the ground which would be material in the consideration of the errors complained of.

2. Assignments of error complaining of the admission or rejection of evidence, either oral or documentary, cannot be considered when the evidence admitted or rejected is not embodied in the motion or attached thereto as an exhibit.

3. There is no law in this state authorizing the chief executive officer of a municipal corporation to grant an exclusive right to sell liquor within the limits of such corporation.

4. "That two bailiffs were regularly elected in" a given militia district cannot be proven by the parol evidence of the justice of the peace in that district.

5. The election of an officer cannot be proven by parol, nor by the production of the "precinct returns of election" made by the managers.

6. The affidavit required by section 4813 of the Civil Code may be administered by any justice of the peace; and it is not essential to the validity of the warrant issued thereon that the affidavit should be made before the justice of the peace of the district where the land lies.

7. The discretion of a trial judge in refusing to continue a case on the ground of the sickness of a party will not be controlled when the record discloses that "there was much evidence pro and con as to whether" the absent party "was able to attend court, and what was his condition." The fact that, on the hearing of a motion for a new trial in the case, affidavits were read tending to show that the absent party was in fact sick at the date of the trial, will not have the effect of varying the rule just stated.

8. Affidavits read at the hearing of a motion for a new trial, setting forth what purports to be newly-discovered evidence, will not be considered by this court, when there is no ground in the motion asking for a new trial on account of newly-discovered evidence. (a) The alleged

newly-discovered evidence in the present case was, in part, clearly inadmissible, and, to say the most of the other portion, it was of doubtful admissibility.

9. There was no error in any of the rulings of the judge upon which proper assignments of error were made. The evidence demanded the verdict rendered, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by A. E. Collins against W. J. Fletcher. Judgment for plaintiff. Defendant brings error. Affirmed.

John Clay Smith, for plaintiff in error. E. M. & G. F. Mitchell and F. M. O'Bryan, for defendant in error.

COBB, J. This was a proceeding, under the provisions of section 4813 of the Civil Code, to oust a tenant. The affidavit which was the foundation of the proceeding set up four reasons why the tenant should be removed. The tenant, by counter affidavit, denied the right of the landlord to remove him, and gave 4 reasons which he claimed would sustain this conclusion. The judge directed a verdict in favor of the landlord, and the tenant, by a motion for a new trial, gave 21 reasons why he thought this action was erroneous. Such of the errors as are assigned in a way that we can deal with them are disposed of by the rulings set forth in the headnotes, and we do not think any further discussion of the points involved is necessary. Judgment affirmed. All the justices concurring.

FULTON GROCERY CO. v. MADDOX et al.

(Supreme Court of Georgia. July 11, 1900.)

CONSPIRACY—DESTROYING PLAINTIFF'S BUSINESS—PETITION—TRESPASS.

1. A petition alleging that named defendants conspired together to injure the plaintiff, a corporation, by causing one of the former to execute a fraudulent mortgage in its name, upon its property, with the purpose of having the same foreclosed and levied with a view to obtaining possession thereof at sheriff's sale, and which further alleged that the fraudulent scheme was so far carried into effect as to obtain the mortgage, have the same foreclosed, cause execution issued thereon to be levied, and the plaintiff's place of business closed, and that the plaintiff had stopped the illegal proceedings by giving bond, and also alleged that the entire proceeding was carried on maliciously and without probable cause, but failed to allege that the foreclosure proceedings were at an end, was fatally defective for lack of the latter allegation, and was properly dismissed on a general demurrer.

2. A petition containing such allegations as those above indicated cannot be upheld as one setting forth a cause of action in trespass.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Suit by the Fulton Grocery Company against J. J. & J. E. Maddox and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Frank A. Arnold and T. L. Bishop, for plaintiff in error. C. D. Maddox and Jas. L. Key, for defendants in error.

COBB, J. This was a suit brought by the Fulton Grocery Company, a corporation, against J. J. & J. E. Maddox, L. B. Jackson, Kelly Bros., a firm composed of Edgar S. and Kendrick K. Kelly, and Mrs. Ida Humphries. The petition, though loosely drawn and somewhat vague in its allegations, made substantially the following case: The defendants entered into a malicious conspiracy for the purpose of breaking up petitioner's business, in order that they might obtain possession of its stock of goods. The defendant Jackson, who was the moving spirit in the conspiracy, together with the defendants Mrs. Humphries and Kelly Bros., fraudulently and illegally, and with the knowledge that the property they were seeking to obtain belonged to petitioner, maliciously and illegally persuaded and induced the defendant Mrs. Humphries to execute and deliver to J. J. & J. E. Maddox a fraudulent mortgage upon the property of petitioner, though at the time of the execution of the mortgage all of the defendants well knew that Mrs. Humphries had no authority to execute the same, she being only a small stockholder in the plaintiff company. Defendants also well knew that the property sought to be mortgaged did not belong to Mrs. Humphries, but to petitioner, and that petitioner was not indebted either to J. J. & J. E. Maddox or to Kelly Bros. in any sum whatever. The scheme and purpose of the defendants was expressed by Jackson to Mrs. Humphries in the following language: "You can execute this mortgage, and they (meaning your petitioner) cannot make bond, and we will get possession of their stock by selling the same at sheriff's sale." The defendants collusively, maliciously, and without probable cause conspired together in the execution and foreclosure of the mortgage for the purpose of obtaining possession of petitioner's stock of goods, to its great injury and damage. Pursuant to this conspiracy, and with the knowledge of each and every one of the defendants, a mortgage fi. fa. was issued by the clerk of the superior court of Fulton county to be levied on the stock of goods covered by the mortgage. The fi. fa. was levied, petitioner's store was closed, and remained closed the greater part of one day, until petitioner, with great difficulty, obtained bond, and stopped the illegal proceedings. The defendants maliciously caused the fi. fa. to be levied for the purpose of breaking up, injuring, and damaging petitioner's business, and it was a part of the original scheme to obtain its goods without paying for them. Damages are laid in the sum of $10,000. The mortgage referred to in the petition was attached thereto as an exhibit. This mortgage recites that the Fulton Grocery Company is indebted to J. J. & J. E. Maddox on a promissory note for $107.76, and to Kelly Bros. on a promissory note for $138.09; that, to secure the payment of these

notes, a mortgage was created in favor of the payees thereof on the stock of goods and merchandise (describing it) and the business of the Fulton Grocery Company. The mortgage was signed: "Fulton Grocery Company, a firm composed of W. J. Shockley & Mrs. Ida Humphries, per Mrs. Ida Humphries." The court sustained a general demurrer to the petition, and to this judgment the plaintiff excepted.

Counsel for the plaintiff in error contends that the petition set forth a cause of action in trespass, and that, therefore, the plaintiff's right of action was complete the moment its goods were seized, and for this reason the court erred in sustaining a general demurrer to the petition. Counsel for the defendants in error contends that, if the facts alleged in the petition give to the plaintiff any right of action at all, it is one for the malicious prosecution of a civil suit, and that the petition was fatally defective for the reason that it failed to allege that the suit claimed to have been maliciously carried on without probable cause had terminated in favor of the plaintiff before the filing of the present action, and that, therefore, the court rightly dismissed the case on a general demurrer filed to the petition. The case made by the petition is simply this: The defendants have obtained a mortgage upon the property of the plaintiff, signed by one who is a stockholder in the company, and they have sought to enforce this mortgage by a proper foreclosure proceeding. The plaintiff says that the person who signed this mortgage in behalf of the company had no authority to execute the same. The foreclosure of a chattel mortgage obtained under such circumstances is nothing more nor less than a civil suit, and the consequences which result to the plaintiff from bringing such a suit will be the same as would have flowed from the bringing of any other civil action. Before the defendants would be liable to the plaintiff for any damages growing out of the institution of such foreclosure proceeding, it must appear that it was instituted maliciously and without probable cause. In the case of Porter v. Johnson, 96 Ga. 148, 23 S. E. 124, Chief Justice Simmons, in referring to the subject now under discussion, says: "So far as I know, no respectable court in this country has ever held that an action will lie against a person for having brought an action against another, unless he did so with malice and without probable cause. If the law were otherwise, the ending of an action would be merely the beginning of litigation. The defendant, immediately upon the failure of the action, would begin one against the plaintiff; and, if the latter action should fail, the defendant therein would in turn bring another action, and so on ad infinitum. This court is fully committed to the doctrine that such an action is not maintainable without proof of malice and want of probable cause." It is also there stated that this doctrine was first announced in Sledge v. McLaren, 29 Ga. 64, and has been repeatedly recognized in other cases since. The opinion in the Porter Case deals with many, if not all, of the former decisions of the court relating to this subject, and some apparent conflicts in the same are reconcilable. The rule there announced may be now considered as settled in this state. Applying this rule to the petition in the present case, did the same set forth a cause of action? The petition alleges clearly and distinctly that the foreclosure proceeding was instituted maliciously and without probable cause, and therefore, so far as these elements are concerned, there is a cause of action set forth. The petition does not, however, allege that the foreclosure proceedings had terminated in favor of the plaintiff in the present case. The petition does allege that the "petitioner obtained bond, and stopped the illegal proceedings that they had instituted against the plaintiff company." An execution issued upon the foreclosure of a chattel mortgage may be stopped by giving a bond in two ways: First, by an affidavit of illegality filed by the defendant in execution; and, second, by a claim to the property, filed by one who is not a party to the execution. It is true that the defendant in execution may, without filing an affidavit of illegality, give to the sheriff a bond to have the property forthcoming at the time and place of sale; but such a forthcoming bond does not "stop" the proceeding, but merely obligates the defendant to have the property on hand to be sold when the day of sale arrives. As the allegation is that the plaintiff obtained bond, and stopped the illegal proceedings, but one conclusion can be reached, and that is that the plaintiff filed an affidavit of illegality, and that the bond given was the one required in such cases. Of course, the defendant in execution could not interpose a claim to the property. Wynn v. Music House (Ga.) 34 S. E. 582. The effect of the filing of an affidavit of illegality to the foreclosure of a chattel mortgage would be to convert what would otherwise be final process into mesne process, and the proceeding, though in the beginning one simply to foreclose a chattel mortgage, is, by the filing of the affidavit of illegality, converted into a trial of various issues which the defendant may therein raise. Such being the case, it cannot be determined from the allegations in the present case whether the foreclosure suit has terminated, as there is no allegation that the issues raised by the affidavit of illegality have ever been passed on. The question arises, therefore, whether or not, in such a case, it is incumbent upon the plaintiff to allege distinctly that the suit had terminated in his favor before the bringing of the action for malicious prosecution. The Code declares that the prosecution must be ended before the right of action accrued. Civ. Code, § 3850. It is contended, however, that this applies only to criminal prosecutions. In the case of Marable v. Mayer, 78 Ga. 710, 3 S. E. 429, which was an action to recover damages alleged to have been sustained by reason of the foreclosure of mortgages and levying of executions issued

thereon on the plaintiff's property, it was held that a declaration which failed to allege that the suit on which the action was founded had terminated in favor of the plaintiff set forth no cause of action, and the court committed no error in dismissing the same on demurrer. See, also, Wilcox v. McKenzie, 75 Ga. 73; Printup v. Smith, 74 Ga. 157; Hyfield v. Furnace Co., 89 Ga. 827, 15 S. E. 752. Treating the case as one for malicious prosecution of a civil action, the petition was fatally defective for want of the averment that the suit upon which it was founded had terminated favorably to the plaintiff in the present case, and the court did not err in sustaining a general demurrer thereto.

The petition cannot be sustained as one setting up a cause of action in trespass for wrongfully seizing the goods of the plaintiff. Counsel for the plaintiff in error contends that the suit is maintainable as one for trespass under the decisions rendered in the cases of Baker v. Boozer, 58 Ga. 195, Printup v. Smith, supra, and Holton v. Taylor, 80 Ga. 508, 6 S. E. 15. In the cases of Baker v. Boozer, and Holton v. Taylor, it was held that, where an execution was levied upon personal property which did not belong to the defendant in execution, such levy was a trespass. In the former case it was held that the right of action accrued at the date of the seizure, and, in the latter, that the plaintiff under whose direction the levy was made, as well as the levying officer, were liable to the defendant for whatever actual damages he sustained growing out of the levy. There is such a clear distinction between a wrongful seizure of the property of a person under a process against him, and the seizure of the property of a person against whom no process was ever issued, that the distinction between those cases and the present one will readily appear from the simple recital of the facts. Where the property of a person is seized under a valid process issued against him, as has been seen, malice, want of probable cause, and termination of the proceeding in favor of the defendant in the process must all be alleged and proved to support an action for damages against the persons causing the process to be issued and levied. Where property of a person against whom no process has ever issued is seized, such seizure, followed by actual damages to the owner of the property, will give a right of action. In Printup v. Smith it was held that the rule that, in suits for malicious prosecutions on the criminal side of the court, the right of action does not arise until the action is ended, was by analogy applicable to suits brought for such prosecutions on the civil side of the court, except in cases of the seizure of personal property under execution, where a claim is interposed by the person whose property is seized. An examination of the facts of that case will show that there were seizures of personalty by attachments to which claims were interposed, and that there were garnishment proceedings, and the granting of an injunction, all alleged to have been procured wrongfully and maliciously. It was held that the suit was really one for the malicious prosecution of a civil action, and therefore the cause of action was not complete until the claim cases and other proceedings were at an end.

We do not think that the petition could be maintained as one setting forth a cause of action in trespass. The language used in the petition clearly indicates that the purpose of the pleader was to set forth a cause of action for malicious prosecution of a civil suit, and we think that, if he has any cause of action at all, growing out of the wrongful acts complained of, it would be of this character; and the present case fails for want of the essential averments above referred to. Judgment affirmed. All the justices concurring.

SMITH v. WOOD.

(Supreme Court of Georgia. July 11, 1900.)

SALE OF PATENT—NOTE FOR PRICE—VALIDITY.

1. A promissory note, given for the purchase price of a patent right, which fails to comply with the act approved December 21, 1897 (Acts 1897, p. 81), in that it does not express upon its face "the consideration of the same, stating the thing or article for which the same was given," is not void in the hands of a bona fide holder.

2. The judgment was not contrary to the evidence.

(Syllabus by the Court.)

Error from city court of Floyd county; G. A. H. Harris, Judge.

Action by C. D. Wood against T. J. Smith, as administrator. Judgment for plaintiff. Defendant brings error. Affirmed.

The following is the official report:

C. D. Wood brought suit in the city court of Floyd county against S. W. Smith upon a promissory note, a copy of which, so far as material to the questions to be considered, was as follows:

"State of Georgia, Floyd County. On the first day of November, 1898, I promise to pay to the order of Q. T. Gregory, for a patent right, the sum of two hundred and ten dollars, value received, with interest from March 16th, 1898, until paid at the rate of eight per cent. per annum. Witness my hand and seal this 16th day of March, 1898. S. W. Smith. [L. S.]

"Signed, sealed, and delivered in the presence of R. B. McArver, L. W. Early, N. P. & J. P."

There was a mortgage upon realty embodied in the note. Upon the note there was the following indorsement: "For value received, I hereby transfer this note and mortgage to Chas. Wood, this April 7th, 1898, without recourse. Q. T. Gregory."

The defendant, after denying in his plea that he was indebted to the plaintiff as alleged in the petition, pleaded: "(2) For further plea and answer defendant says that said note as executed is based upon an il-

legal and criminal transaction, for that the same was taken by the payee, one Q. T. Gregory, for the purchase price of all the right, title, and interest which said Q. T. Gregory had in letters patent No. 476,127, issued to Charlie Cardwell on the 31st day of May, 1892, by the United States of America, for improvements in gates and automatic latcher, so far as the right of said Gregory appertained to, for, and in the counties of Floyd and Bartow in the state of Georgia. (3) That said Gregory failed to have expressed on the face of said note the consideration of the same, stating the thing or articles for which said note was given. (4) Defendant alleges that said note was made to and taken by said Gregory, that his failure to express the consideration thereof in the face thereof was a crime under the laws of Georgia, and for this reason said note is illegal and void. (5) For further plea and answer defendant says that the consideration for said note has partially failed, to wit, one-half, in that said Gregory failed to convey to the defendant the right under said patent to the county of Bartow as a consideration for said note."

The plaintiff demurred to the defendant's plea upon the following grounds: "And now comes the plaintiff, and demurs to the defendant's plea, and says that the same does not set up any cause of defense. And for special demurrer plaintiff says that the plaintiff's declaration shows that the consideration of said note is expressed in the face of the note, and shows that such consideration is a patent right." The demurrer was sustained as to the second, third, and fourth paragraphs of the plea, and such paragraphs were stricken. To this ruling the defendant filed exceptions pendente lite.

Upon the trial of the case at the next term of the court the following evidence was submitted:

The plaintiff introduced in evidence the note sued on. The defendant, sworn in his own behalf, testified: "The consideration of the note sued on was a patent right for a gate for the counties of Floyd and Bartow. I never got any showing for it. My first trade was with J. R. Oglesby, January 13, 1898. I then bought of him the right for Floyd for $125. Afterwards I met Q. T. Gregory, and agreed with him to take Bartow as well; he agreeing to make a discount of 40 per cent. on what I had paid for Floyd. He said that he would destroy the note and deed that had been executed in January, and give me a deed to Bartow and Floyd together, and this I thought he had done until I came to look at the papers last December, when I found I had only the papers I got in January, 1898, which only called for Floyd. Then on April 7, 1898, I bought of Gregory a half interest in six counties—Pike, Upson, Talbot, Taylor, Marion, and Macon—for $125; he agreeing to go with me and help sell the said counties. This he never did, and I have never seen him since, though I have written him. I did not know that Bartow had been stuck into the last paper. That $210 note ought to be for only $200 anyhow, even if he had deeded me the whole of Bartow, as he was to discount Bartow 40 per cent. on what I had contracted to pay him for Floyd. In the shuffle these are the only two papers I got [indicating the two assignments of territory hereinafter abstracted]." Cross-examination: "I didn't see the plaintiff on April 7, 1898. I was not in Rome that day. I didn't tell him, on the street near the Norton corner, that I wanted him to buy this note. I did sign the certificate dated Early, Ga., April 7, 1898, because I thought I had full titles to the counties that he had sold me, and for which I gave notes, and because I expected him to come and comply with his contract by traveling with me and selling the six counties in lower Georgia. I never saw the plaintiff about this note, nor knew that he had it until I got a letter from him in November, 1898, saying that he had traded for it. When I got his letter, I came to Rome to see him. He then tried to make me say that I had had conversation with him on April 7, 1898, about this note. I at that time told him I had had no such conversation, and that I didn't even know he had the note until I got his letter in November, 1898. The certificate held by the plaintiff, dated Early, Ga., April 7, 1898, was signed by me on that day, but at Coosa, Ga., in the presence of Gregory, who went home with me and spent the night. Neither Gregory nor I were in Rome on that day after that paper was signed, and I was not in Rome at all on that day." C. D. Wood, the plaintiff, sworn in his own behalf, testified: "On April 7, 1898, I met the defendant on Broad street, in Rome, near Norton corner, about noon. He told me the note was all right, and that he wanted me to buy it, as it would be a favor to him [Smith]. After this conversation I traded for the note, giving therefor a horse and buggy. I would not have made the trade but for the conversation I had with Mr. Smith, and the certificate of April 7th, referred to, which I had in my possession, and which the defendant admitted signing before I traded for the note. This certificate was brought to me by Gregory before I saw defendant, and I took it and the note, and hunted up defendant, and showed them to him, and he told me they were all right, and wanted me to buy the note." Plaintiff read in evidence the certificate signed "S. W. Smith," dated Early, Ga., April 7, 1898, stating that on or about March 16, 1898, he gave his note to Q. T. Gregory for a patent right, that he expected to pay it when due, that he had value received therefor, and that he was willing for Gregory to sell or trade it. George Ramey, sworn for plaintiff, testified: "On April 7, 1898, Gregory came to our stable to trade the note sued on for a horse and buggy. We declined to take the note at first, but afterwards did trade Gregory a horse and buggy for the note." Defendant read in evidence two papers, called "Assignment of Territory,"—

the first dated January 13, 1898, and signed "Q. T. Gregory, by J. R. Oglesby, Atty.," consideration $125, grantee S. W. Smith, wherein is conveyed to grantee all right of Floyd county under patent 476,127, issued to Charlie Cardwell for improvements in gates and automatic latcher; the other dated April 7, 1898, signed "Q. T. Gregory," consideration $300, grantee S. W. Smith, wherein is conveyed to grantee all of a one-half interest in said patent for the counties of Pike, Upson, Talbot, Taylor, Marion, Macon, and Bartow.

Dean & Dean, for plaintiff in error. M. B. Eubanks, for defendant in error.

FISH, J. There was no error in the judgment of the court sustaining the demurrer to so much of the plea as set up that the note sued upon was illegal and void. The note was not void, although it failed to comply with the act approved December 21, 1897. Acts 1897, p. 81. A failure to comply with the requirements of that act, by expressing in the face of a note or contract given for the purchase price of any patent right, or territory for the sale of such right, the consideration, stating the thing or article for which the same was given, does not render the note or contract void, but makes the seller who takes such note or contract guilty of a misdemeanor. Had the purpose of the legislature been to render void every note and contract for the purchase of a patent right which failed to express upon its face the consideration and the particular thing or article for which it was given, doubtless the act would have declared such notes or contracts to be illegal and void. Instead of doing this, however, the act imposes upon the seller of a patent right who takes a note or contract for the purchase money of the same the legal duty of expressing in the note or contract the consideration of the same, and makes his failure to do so a misdemeanor, and further provides that, when the consideration is expressed in the writing as required by the act, any one who purchases the note or contract shall take it subject to all the equities existing between the original parties. It is true that the title of the act, after stating the requirements of the act in reference to such notes and contracts, does indicate a purpose to declare void all notes and contracts which fail to comply therewith; but there is nothing in the act itself which declares them to be void, nor is there anything which indicates an intention to render them void. If the meaning of the act itself were doubtful, resort might be had to the title, in order, if possible, to resolve the doubt; but, as the provisions of the act are clear and unambiguous, it is neither necessary nor proper to resort to its title in order to ascertain its meaning. Counsel for plaintiff in error contend that the note is void "because based upon a crime," and in support of this contention cite Kleckley v. Leyden, 63 Ga. 215, Johnston v. McConnell, 65 Ga. 129, and Conley v. Sims, 71 Ga. 161. It is undoubtedly true, from these decisions, that a note based upon an illegal consideration is void, even in the hands of a bona fide holder thereof. In each of the cases cited the note involved was founded upon an illegal consideration, having been given for the purchase price of commercial fertilizers which had not been inspected, branded, and tagged as required by law. The law made it a crime to sell such fertilizers. A note given for something the sale of which the law absolutely prohibits and makes penal is based upon an illegal consideration, and is consequently void in the hands of any holder thereof. The thing for which the note is given is outlawed, and the note standing upon such a foundation is outlawed also. There is a wide difference between those cases and the one now under consideration. In the present case the consideration for the note was perfectly legal. It is not illegal to sell a patent right. The crime consists, not in the sale of the patent right, but in the failure of the seller to express in the note the article or thing which forms its consideration. The note in question was not "based upon a crime." If it had been, no matter how it might have been written, or with what particularity it described the consideration, it would have been void. The consideration of a note given for a patent right may be perfectly legal, and the maker of the note may have even received full value for the note, and yet the seller of the patent right may have violated the law by not properly expressing in the note the consideration for which it was given. It is one thing to sell an article the sale of which the law prohibits and makes penal. It is quite another thing to sell an article the sale of which is perfectly lawful, and to violate the law by taking a note for the purchase money which does not properly express the consideration for which the note was given. In the one case the consideration upon which the contract is based is illegal, while in the other the consideration of the contract is perfectly legal.

2. The only other ground to be considered is whether, as alleged in the motion for a new trial, the judgment was contrary to the evidence. The court tried the case without the intervention of a jury, and rendered judgment in favor of the plaintiff for the full amount of the note. Was this judgment contrary to the evidence? The only defense to the merits was the plea of partial failure of consideration. This plea was not stricken by the court, and the question to be considered is, did the defendant, as against the plaintiff, sustain this defense? Failure of consideration is no defense against one who purchases a negotiable instrument before its maturity, unless at the time of the purchase he knew, or had reasonable grounds to suspect, that the consideration had failed. The note, while not complying with the statute by stating the particular article or thing for which it was given, did show that it was given for a patent

right. While it is only when the consideration of a note given for the purchase of a patent right "is expressed in the face thereof, as is provided in section 1" of the act of 1897, that the note carries upon its face such notice of its consideration as necessarily subjects any one who purchases the note before its maturity to the equities which may exist between the original parties, in view of the policy of the law as shown by the act of 1897 with reference to notes given for the purchase of patent rights, it may be that the statement of the consideration in this note was sufficient to put a prospective purchaser upon inquiry as to its consideration, and what equities, if any, might exist between the maker and the payee. Granting this to be true, we are of opinion that, under the evidence, the defense of partial failure of consideration was not available as against the plaintiff. It appears from the testimony of the defendant himself that "the consideration for the note sued on was a patent right for a gate for the counties of Floyd and Bartow." On January 13, 1898, he bought the right for Floyd county for $125, for which amount he gave his note. Afterwards he purchased of Gregory the right for Bartow county, for which he was to pay $75. Gregory said "he would destroy the note and deed that had been executed in January, and give [the defendant] a deed to Bartow and Floyd together." The note sued on was executed on the 16th of March, 1898, and it may be inferred from the defendant's testimony—he nowhere expressly states it—that its consideration was the right to the patent for both Floyd and Bartow counties. According to the agreement, the note should have been for only $200, instead of $210. The consideration for this note has partially failed, because Gregory failed to convey to the defendant the right to Bartow county. On April 7, 1898, which was more than three weeks after the note sued on was executed, the defendant gave to Gregory, who then held the note, a certificate stating that he had given the note to Gregory for a patent right, "that he expected to pay it when due, that he had value received therefor, and that he was willing for Gregory to sell or trade it." So much appears from the defendant's own testimony. Gregory presented this certificate to the plaintiff before the plaintiff traded for the note. At the time that the defendant gave this certificate to Gregory, he was obliged to have known that he had received no conveyance of the right for the county of Bartow. The "deed," to use his expression, which he had received when he purchased the right for Floyd county, covered only Floyd county; and this he knew. He testified that Gregory said "he would destroy the note and deed that had been executed in January, and give me a deed to Bartow and Floyd together, and this I thought he had done until I came to look at the papers last December, when I found I had only the papers I got in January, 1898, which only called for Floyd." It is extremely difficult to conceive how the defendant could have thought that Gregory had destroyed the conveyance of the patent right for Floyd county, which the defendant still retained in his possession, and had given to him another conveyance covering both Floyd and Bartow counties, when Gregory had given to him no paper of any kind from the time that the defendant had received the conveyance covering only the right to Floyd county until April 7th, when he purchased of Gregory a half interest in six other counties. The defendant himself testified that the only papers he got were the one covering Floyd county, which he received in January, and the one given him when he purchased the half interest in the six counties, and that he "did not know that Bartow had been stuck in the last paper." It would be an insult to his intelligence, therefore, to believe that he did not know of the partial failure of consideration for the note sued on on April 7, 1898, when he signed the certificate which Gregory used in inducing the plaintiff to purchase the note. After ample opportunity to know that there had been a failure of consideration in the respect alleged, he, over his own signature, said—in effect to all whom it might concern—that he gave this note to Gregory for a patent right, "that he expected to pay it when due, that he had value received therefor, and that he was willing for Gregory to sell or trade it"; and this written statement of the defendant was presented by Gregory to the plaintiff, who was thus induced to exchange valuable property for the note. Irrespective, therefore, of the plaintiff's testimony in reference to the conversation which he testified he had with the defendant before the purchase of the note from Gregory, we think that the defendant was estopped from setting up failure of consideration against the plaintiff. See rule 10, Greenh. Pub. Pol. Judgment affirmed. All the justices concurring.

TRIMMIER v. LILES et al.

(Supreme Court of South Carolina. July 27, 1900.)

EQUITY—CHANCELLOR — POWERS — MASTER'S REPORT—SUBMISSION OF ISSUES TO JURY—WRITTEN INSTRUMENT — CONSIDERATION — ORAL TESTIMONY—AFFIRMATIVE OF ISSUE—REFERENCE OUT OF TERM.

1. Plaintiff sued on a note executed to his testator by defendant, who claimed that $3[illegible] of it was to save the testator harmless as surety on defendant's bond, and that the obligation of the bond had been discharged. By agreement of attorneys the matter was referred to a master, who reported adversely to defendant. *Held*, that the chancellor had power on return of the report, of his own discretion and without a motion for reference, to order the issue to be submitted to a jury.

2. Where plaintiff sued on a note executed to his testator by defendant, oral evidence was admissible to show that part of the consideration for the note was to save the testator harmless as surety on defendant's bond, and that the obligation of the bond had been discharged.

3. Where the chancellor, on return of the master's report, ordered one of the issues to be submitted to a jury, he had power to deal

nate which party should uphold the affirmative of the issue.

4. Where the chancellor, on return of a master's report, ordered one of the issues to be submitted to a jury, an objection that he had no authority to order the issue to be tried at another term of court was not well taken, since the issue was heard at a regular term, and the chancellor's decision, when rendered, would be referred as a matter of law to the term at which the issue was tried.

Appeal from common pleas circuit court of Spartanburg county; G. W. Gage, Judge.

Action by T. R. Trimmier, as administrator, against J. B. Liles and another. From a decree denying a part of defendant J. B. Liles' counterclaim, and ordering the finding of a master in favor of plaintiff to be submitted to a jury, both plaintiff and defendants appeal. Affirmed.

J. T. Johnson and Duncan & Sanders, for plaintiff. Simpson & Bomar, for defendants.

POPE, J. On the 13th day of February, 1883, the defendant J. B. Liles made his promissory note, due at 10 months after date, for $4,061.51, with interest from date at 10 per cent. per annum payable annually, unto F. M. Trimmier, or order, and on the same day he executed unto the said F. M. Trimmier, in order to secure said note, a mortgage on a fraction of an acre of land situate in the town of Spartanburg, S. C., and whereon was located a two-story brick storehouse, occupied at that time by Reed & Liles, and a warehouse, occupied by J. B. Liles. On the —— day of July, 1894, this action was brought. In the complaint it was alleged that F. M. Trimmier departed this life on the 17th of August, 1888, testate; that Margaret Trimmier procured letters of administration on his estate with his will annexed, and that, upon her death, the plaintiff was duly appointed administrator de bonis non cum testamento annexo of the estate of the said F. M. Trimmier, deceased; that the said J. B. Liles has not paid said debt, but "has made some payments on his said note, but the exact amount of same this plaintiff does not know"; that Henry V. Liles is made party defendant because he claims to own some interest in or lien upon the real estate mortgaged to plaintiff's testator, but no personal judgment will be demanded against him in this transaction. J. B. Liles answered, admitting that he made the promissory note in question, together with the mortgage of real estate, as alleged in plaintiff's complaint; but he avers that said note represented in all of its terms only a debt due by J. B. Liles of $1,060, and the remaining $3,000 thereof was a liability of his to said F. M. Trimmier, as his surety to the guardianship bond of J. B. Liles as the guardian of the estate of J. H. Fowler, a minor, which liability is canceled and annulled by reason of J. B. Liles having paid and discharged every part of the estate of said J. H. Fowler to the administrator of the estate of said J. H. Fowler, deceased, and that J. B. Liles has paid much, if not all, of the sum of $1,000 which said note of his to F. M. Trimmier called for. By consent, an order was passed by Judge Fraser, on October 31, 1894, by which all the issues of law and fact were referred to the master for Spartanburg, with directions to report his conclusions thereon to the court. At the reference before the master there was testimony introduced tending to show that $3,000 of the $4,060 note was to cover and protect $3,000 of the liability of the said F. M. Trimmier, deceased, as the surety on the guardianship bond of J. B. Liles as guardian of the estate of J. H. Fowler, a minor, which liability, it was proved, had been fully terminated by the payment of every dollar thereof. However, the master held that proof was not convincing to his mind that the contention of the defendant J. B. Liles was correct as to the $3,000; for he held that said $3,000 was still a subsisting part of the debt evidenced by the note for $4,060. When he came to pass upon the credits which J. B. Liles set up against the said note, he sustained sums which aggregated $1,824.05 as credits to which J. B. Liles was entitled. Plaintiff excepted to these credits. Defendant J. B. Liles excepted to the finding of the master as to the $3,000 being no liability of defendant growing out of the guardianship, but as to defendant's debt of F. M. Trimmier. When Judge Gage heard the cause he struck out the $1,175 of the credits allowed by the master, and when he came to pass on the exceptions relating to the $3,000 he declared he was unable to bring himself to a restful conclusion either to confirm or overrule. He therefore ordered that the following issue be referred for trial by a jury, and that defendant be the actor therein, to wit: "Was $3,000 of the note and mortgage for $4,060.51 by J. B. Liles to F. M. Trimmier save harmless F. M. Trimmier as the surety on the $14,000 bond of J. B. Liles to the probate judge? Let the verdict be 'Yes' or 'No,' as the jury find." Both sides to the controversy appeal from this decree.

The six exceptions of the plaintiff relate mainly to alleged errors of the circuit judge in not confirming master's finding as to the $3,000. These errors are alleged: (1) Because, the order of reference being consented to it was obligatory upon the circuit judge to confirm, modify, or reject, or recommit the same, and the circuit judge had no power to order an issue for trial before a jury. (2) In ruling certain testimony competent, which it is insisted by the appellants that such testimony tended to vary or contradict the terms of written instruments. (3) That the testimony of J. B. Liles and Henry Liles, objected to, was competent, when it was clearly incompetent, as in violation of section 400 of the Code. (4) Because the order framing an issue to be tried at some other term of court was incompetent; for, if the circuit judge could form an issue, it must have been tried before himself. (5) Because the circuit judge erred in not ruling as obnoxious to sec-

tion 400 of the Code certain testimony of J. B. Liles as to transactions and communications between said Liles and Trimmier. (6) Because his honor erred in making Liles the actor.

We will first dispose of the exceptions presented by plaintiff relating to the framing of an issue for trial before a jury. Such order was perfectly competent. When the exceptions to the master's report came on to be heard, the circuit judge declares that he was prepared neither to confirm nor to reject it. The difficulty suggested by the circuit judge was that he had no sight of the witnesses and that he had no knowledge how Trimmier or Liles were accustomed to transact business. Any other circuit judge would be subjected to the same difficulties if the report was recommitted to the master and a new report was made. Hence all that was left was to frame an issue to be tried by a jury, who could see the witnesses for themselves, and could be made to see how Liles and Trimmier transacted business together or by themselves. As early as the case of Gibson v. Broadfoot, 3 Desaus. 588, 589, it was held that a chancellor could recommit a report to the master for causes like the present. It has always been in the power of a chancellor to frame an issue out of chancery for trial by a jury, and in such cases he can name the party who is to uphold the affirmative of the issue. So far as framing an issue out of term time and without a motion therefor, we may say this action was heard at a regular term of the court, but the decree could not be framed by the chancellor. Wallace v. Railroad Co. (S. C.) 16 S. E. 35, is an apt illustration of decisions being made of causes heard during term time, but not actually rendered until after court has adjourned. In such cases the law refers the decision to the term at which heard. The circuit judge needed no motion for reference. It was within his own discretion. When the cause came before Judge Gage for a hearing, of course, the exceptions and the master's report were before him. The moment, however, he thus acquired jurisdiction of these issues raised by the exceptions to the master's report, it was perfectly competent for the circuit judge to confirm, modify, reverse, or recommit, or to frame an issue or issues, within the lines made by the exceptions made to the master's report, for trial by a jury. So far as the second exception is concerned, we may remark it is no longer an open question in this state that inquiry based upon testimony may be made as to the consideration of a written instrument. See Kaphan v. Ryan, 16 S. C. 352; Willis v. Hammond, 41 S. C. 153, 19 S. E. 310; Sloan v. Gibbes, 56 S. C. 480, 35 S. E. 408. The third exception, relating, as it does, to the testimony of J. B. Liles and Henry Liles as to alleged transactions or communications with F. M. Trimmier, now deceased, and thus being obnoxious to the 400 section of the Code, really calls for a slight notice by us; for, inasmuch as this testimony related to the $3,000, which matter is to be tried under an issue found by a jury, we cannot say that either one of the witnesses will be examined before the jury on this issue. We cannot say now whether section 400 will exclude such testimony or not. It depends upon circumstances. Of course, section 400 is sound law and must be enforced. This exception is overruled. We have already disposed of the fourth exception. It is overruled. The fifth exception is disposed of in our remarks in considering the third exception; and so, also, are the fifth and sixth exceptions.

It remains for us to consider the exceptions presented by the defendants. All of these exceptions relate to questions hinging upon the disallowance of $1,175 worth of items presented by J. B. Liles as credits to which he was entitled in his note. While this court must try anew all matters of fact at issue in an equity cause, yet we hold the appellant to the duty of showing us by the testimony that the circuit judge has erred in his findings of fact. We have studied the testimony closely, and the remarks of the defendant thereupon, and yet we are bound to admit, after that careful study, that our inclinations are in favor of the findings of the circuit judge. These exceptions must be overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

DORN v. GEORGIA, C. & N. RY. CO.

(Supreme Court of South Carolina. Aug. 1, 1900.)

RAILROAD—EXCAVATION—DUTY TO GUARD—ALLEGATIONS—CAUSE OF ACTION.

The complaint alleged that L. street and two railroads ran parallel through the town; that between the two railroads was a footpath, which the town's people had habitually used for years; that defendant's road passed under L. street and the other two roads in a deep cut, and that defendant bridged the cut at L. street; that it was defendant's duty to maintain a safeguard at the cut on the path between the two other railroads; that, to protect passers on the path between the said railroads, two posts were placed in the ground, and connected by planks or railings; that defendant allowed the guard to become rotten; that deceased, passing, leaned on said guard, when it broke, and deceased fell into the cut; that deceased's death was due to plaintiff's negligence in failing to keep said safeguard in repair. *Held*, that the complaint failed to state a cause of action, since it did not allege that the public had any legal right to use the path between the railroads, or that deceased was using the path when he was hurt, or that defendant had erected the safeguard, thereby assuming the duty of guarding the cut.

Appeal from common pleas circuit court of Greenwood county; R. C. Watts, Judge.

Action by James W. Dorn, as administrator, against the Georgia, Carolina & Northern Railway Company. From an order at the trial dismissing the complaint for failure to state a cause of action, plaintiff appeals. Affirmed.

Sheppards & Grier, for appellant. L. W. Perrin, for respondent.

JONES, J. This appeal is from an order sustaining a demurrer to the complaint for failure to state facts sufficient to constitute a cause of action. So much of the complaint as relates to the contention is as follows: "Third. That before and at the time of the construction of the said railroad by the defendant, and at the times mentioned hereinafter, the tracks and roadbeds of the Columbia & Greenville Railroad and the Charleston & Western Carolina Railroad passed through the said town of Greenwood, in said state, parallel with each other and with Logan street, therein, near a blacksmith shop known as 'Beaudrot's Shop,' and nearly opposite to the dwelling known as the 'Old Gibbs Place,' in said town, and are only a few feet apart, to wit, about ten feet; that ever since the construction of the said Columbia & Greenville and the Charleston & Western Carolina Railroads, and at the times mentioned hereinafter and prior thereto, and now, the people of the said town of Greenwood, in going from one part thereof to another, passed and repassed between the said roads without objection or hindrance, between which said roads thereat there was at the times hereinafter mentioned, and prior thereto, and now, a well-beaten and much-frequented footpath, along which, as aforesaid, the people of the said town walk, and along which they have walked for years, and at the times hereinafter mentioned. Fourth. That in the construction of their said railroad the defendant approached the said Columbia & Greenville and the said Charleston & Western Carolina roadbeds at right angles, approximately, and in the construction thereof the defendant made a long and deep cut or excavation, and thereby passed underneath the said Logan street, within the limits of the said town, and at a point near a small distance below the shop therein known as 'Beaudrot's Shop,' and in front of and nearly opposite to the dwelling known as the 'Old Gibbs Place.' Fifth. That the said defendant erected a bridge over the said cut where it intersected the said Logan street; that the distance between the said bridge and the roadbed of the said Columbia & Greenville Railroad is only a few feet, to wit, about 15 feet; that the distance between the said roadbed of the said Columbia & Greenville and the Charleston & Western Carolina Railroads, which thereat are parallel, is only a few feet, to wit, about ten feet; that it was the duty of the defendant to maintain and keep in good repair a safe and suitable safeguard at and along the space between the two said roadbeds thereat, to protect persons there passing from walking or falling into the said cut; that, to protect persons from walking or falling into the said cut between the roadbed of the said Columbia & Greenville and Charleston & Western Carolina Railroad, two posts were placed in the ground, in an upright position, which two posts were connected by two plank or railing; that the said defendant failed and neglected to keep and maintain in good repair the said posts and the said plank or railing; on the contrary, permitted them to become unsound and rotten, and utterly worthless as a safeguard against persons walking or falling into said cut. Sixth. That on or about the 12th day of April, 1898, Grover C. Dorn, late of said county and state, an infant about eleven years old, was sent on a mission by his mother, and had to pass by and near to the said cut and between the roadbed of said Carolina & Northern and the Charleston & Western Carolina Railroads in said town; that as he was passing some children on the other side of said cut knocked a ball which fell into the said cut; that the said child, Grover, went to the edge of the cut, to see the ball at the bottom, and, for support, rested his hand on the said plank or railing which connected the said post; the said plank or railing not being fastened or nailed to the said post, although it appeared to be nailed, gave way, and said post, being entirely rotten, also gave way, and he fell to the bottom of said cut, and was thereby so bruised and broken and injured internally that he died in a few hours. Seventh. That the death of the said boy, Grover C. Dorn, resulted from the negligence of the said defendant in failing to maintain and keep in good repair the said posts and the said plank or railing which connected them, as a safeguard against persons there passing from walking or falling into the said cut." The order of Judge Watts sustaining the demurrer does not specify in what particular the complaint was insufficient, but it appears in the "case" agreed upon for this hearing that Judge Watts, in his remarks upon the motion to dismiss the complaint, particularized upon this: "That it did not appear from the complaint that the public had acquired legally the right to use the alleged footpath in passing from one point of Greenwood to the other."

The first, second, third, sixth, and ninth exceptions, imputing error, assume that the complaint alleges that the defendant erected the posts and plank as a safeguard to said excavation, to protect persons from walking or falling therein. The complaint does allege the erection of said posts and plank, but it was not alleged by whom they were erected. It appears that said structure was with the 10-foot space between the parallel tracks of two other railroad companies. In the absence of a positive averment of the fact, it cannot be said that the defendant erected said alleged safeguards, and then argue therefrom that the defendant thereby recognized and assumed the duty to safeguard said excavation. The complaint was defective in not stating facts from which it could be inferred that it was the duty of the defendant to properly safeguard the excavation on its premises. A general allegation of duty, without a statement of facts from which such duty would arise, is insufficient.

In order to show that defendant owed plaintiff any duty to safeguard said excavation, it was essential for plaintiff to allege by what right he was on said premises where he was injured, so as to create a corresponding duty in defendant to use reasonable precautions to protect him from danger. The complaint alleged something about a well-beaten and much-frequented footpath, along which the people of Greenwood had for years been accustomed to pass and repass; but, as said by the circuit judge, it was not alleged that the public had acquired legally the right to use said path. Nor was it alleged that plaintiff was using said path at the time of the injury. Nor was it alleged how near the said excavation was to said path, so as to enable an inference whether the excavation was so dangerously near as to imperil persons rightfully using said path; for, as tersely stated by the same judge, "Precaution is a duty only so far as there is a reason for apprehension." The mere fact that defendant had made such excavation within the town of Greenwood, of itself, is not sufficient to impose the duty to safeguard it against all persons who might, from motives of curiosity, sport, or otherwise, venture too near. Finding no error therein, the judgment of the circuit court is affirmed, with leave to amend the complaint as plaintiff may be advised within 20 days after the filing of the remittitur herein.

ELMORE v. ELMORE.

(Supreme Court of South Carolina. July 26, 1900.)

EXECUTORS AND ADMINISTRATORS — CLAIM AND DELIVERY—PERSONAL PROPERTY—ACTIONS.

An action of claim and delivery cannot be maintained against an executor of an estate to recover possession of personal property unlawfully withheld by him. (By divided court.)

Appeal from common pleas circuit court of Laurens county; R. C. Watts, Judge.

Action of claim and delivery by L. C. Elmore against J. T. Elmore, executor of the last will and testament of George Elmore, deceased. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. R. Richey, for appellant. J. L. M. Irby, for respondent.

GARY, A. J. The record contains the following statement of facts: "On the 21st day of November, 1898, appellant, L. C. Elmore, named above, commenced this action in Magistrate J. M. Hudgens' court, in Laurens county, against J. T. Elmore, as executor of the last will and testament of George Elmore, deceased, the defendant (respondent) above named, to recover possession of a mule, alleged to be of value of seventy-five dollars. On the trial of the case, Magistrate Hudgens dismissed plaintiff's complaint upon the grounds that the action was prematurely brought, and that the plaintiff had not given any undertaking. The plaintiff appealed to the circuit court of common pleas for Laurens county, alleging error on the part of the magistrate. The appeal was heard at February, 1899, term of court, by Judge George W. Gage, who reversed the judgment of the magistrate, and remanded the case to the court of J. M. Hudgens, magistrate, or his successor in office, for trial. There was no appeal from Judge Gage's order. On the 8th day of July, 1899, the case was tried before J. W. Peterson, magistrate, who had succeeded J. M. Hudgens as magistrate, at Laurens, S. C. Before the plaintiff closed the testimony, and before he concluded the examination of his first witness, Magistrate Peterson granted a nonsuit. The plaintiff again appealed to the circuit court of common pleas for Laurens county, upon various grounds. The second appeal was heard at October, 1899, term of court by Judge R. C. Watts, who did not consider plaintiff's grounds of appeal, but dismissed plaintiff's appeal and confirmed the judgment of the magistrate on the ground that no action of claim and delivery of personal property could be sustained against a party, as executor, for an unlawful possession. The plaintiff appeals to this court, alleging error on the part of Judge Watts."

The practical question raised by the exceptions is whether there was error in the ruling of the circuit judge that "no action of claim and delivery of personal property could be sustained against a party, as executor, for an unlawful possession." There can be no question as to the manner in which the defendant came into possession of the property, for in his answer he alleges, as a fact which the plaintiff does not deny, that he came into possession of the mule as the executor of the will of George Elmore, deceased. In 7 Am. & Eng. Enc. Law (1st Ed.) 832, the doctrine is thus laid down: "At common law no action founded upon a tort committed by the deceased, for which damages only could be recovered as satisfaction, such as trespass, trover, false imprisonment, assault and battery, slander, deceit, * * * and the like, where the declaration imputed a tort to person or property, and the plea must be, 'Not guilty,' lay against his executor or administrator. But if by reason of the tort the estate has derived pecuniary advantage, the representative could be compelled to account to the injured party, in another form of action, for the benefit so obtained. Thus, if goods wrongfully taken away by the deceased remain in specie in the hands of the executor or administrator, the rightful owner might maintain replevin or detinue against such executor or administrator to recover them back; or trover, laying the conversion to have been by the representative; or, if sold, an action for money had and received to recover their value." In 3 Williams, Ex'rs, 1602, it is said: "In some, however, of the cases above mentioned, a remedy may be had against the executor or

administrator in another form. Thus, although at the common law an action of trover upon a conversion of the testator dies with him, yet if the goods, etc., taken away continue still in specie in the hands of the executor or administrator of the wrongdoer, replevin or detinue will lie against such executor or administrator to recover them back; or trover, laying the conversion to have been by the executor; or, in case they are sold, an action for money had and received, to recover their value." The following cases throw light upon this question: Jenkins v. Bennett, 40 S. C. 393, 18 S. E. 929; Huff v. Watkins, 20 S. C. 477; Chaplin v. Barrett, 12 Rich. Law, 284; Ford v. Caldwell, 3 Hill, 248; Middleton's Ex'rs v. Robinson, 1 Bay, 58. If the testator had sold the mule, the plaintiff could have sued the executor for the value thereof, and we see no reason why he should not be allowed to recover the specific property, if he can show that it belongs to him. Since there is no question that the mule came into the possession of the defendant as executor of the testator's will, I think the judgment of this court should be that the judgment of the circuit court be reversed, and the case remanded for a new trial; but, as two members of this court are of the contrary opinion, the judgment of the circuit court must stand affirmed.

POPE, J. (concurring). I am conscious that an example is to be set, but I am ready to assist in setting such example. I cannot conceive that a man who takes my mule, and then dies, having named an executor, which executor takes possession of my mule as assets of his testator's estate, to be by him administered, and upon my demand for my mule declines to surrender the mule to me, and, when I sue him to recover my mule in a magistrate's court, his reply is, "You cannot sue in claim and delivery," will be protected by law. If the executor surrenders the mule on my demand, without suit, will not he have to account for such surrender to the legatees of his testator? If the executor refuses to surrender, must I stand by and take no steps to recover my mule? If the executor had been the original tort feasor, I admit he could plead that his taking of the mule was his personal act, and in no manner connected with his testator's estate. But the testator took my mule, and died with said mule in his possession (which last, we have heard it said, was nine points out of a possible ten in the law). His executor succeeds to the testator's possession, in his representative character. When I demand my mule, and I am refused possession of him by such executor on the ground that the mule belonged to the estate of his testator, of course I must sue him as executor. I concur in the opinion of Justice GARY and the judgment of reversal.

McIVER, C. J. Being unable to concur in the conclusion reached by Mr. Justice GARY in the opinion which he has prepared in this case, I propose to state the grounds of my dissent. The appeal turns upon the single question whether the circuit judge erred in holding that an action of claim and delivery of personal property brought against the defendant as executor of the will of the testator, George Elmore, under the allegations that he, as such executor, is in the unlawful possession of such property, cannot be maintained, but that such action should have been brought against the defendant individually, and not as executor. This is an important question, far-reaching in its results, and, it is claimed, has never heretofore been distinctly decided in this state. It is not a mere question of pleading or of the proper parties to an action, but its decision vitally affects the interests of those who may be interested in the estates of decedents; for if this case is allowed to proceed in its present form, and the plaintiff shall succeed in establishing his right to the possession of the mule sued for, or damages in lieu thereof, then it is clear that a liability will be fastened upon the estate of the testator, not by reason of any act of his own (for it is distinctly declared that "no wrong is imputed to defendant's testator"), but solely because of a tort committed by the defendant, who has been appointed executor of the testator's will. So that it seems to me that the practical inquiry is whether one who has been intrusted by a decedent with the execution of his will can by any act or omission of his own fasten a legal liability upon the estate of his testator, in the absence of any provision in the will investing him with authority so to do; and it is not pretended that there is any such provision in the will in the case.

The doctrine is well settled that neither an executor, in the absence of authority in the will so to do, nor an administrator, can, by contract, either express or implied, impose any new debt upon the estate of the testator or intestate, as the case may be. McBeth v. Smith, 2 Tread. Const. 676 (reported, also, in 3 Brev. 511); Nehbe v. Price, 2 Nott & McC. 328, where Mr. Justice Huger, in delivering the opinion of the court, said that the point had been repeatedly decided; O'Neall v. Abney, 2 Baily, 317; Wilson v. Huggins, 11 Rich. Law, 410; Cook v. Cook, 24 S. C. 204. This rule is also recognized in the court of equity, as may be seen by reference to the case of Boggs v. Reid, which, though an equity case, is reported in the appendix to 3 Rich. Law, at page 450. So, also, it seems to be the well-settled rule elsewhere; for it is said in 11 Am. & Eng. Enc. Law (2d Ed.) at page 932 of that very valuable work: "The rule is well settled that an executory contract of an executor or administrator, if made on a new and independent consideration, moving between the promisee and the executor or administrator as promisor, is his personal contract, and does not, in the absence of authority given by statute or by the will of the decedent, bind the estate, though the consideration moving from the promisee is such

that the executor or administrator could properly have paid from the assets, and been allowed for on the settlement of his accounts. So inflexible is the rule denying to personal representatives the power to bind by any original contract the estates committed to their charge, that its application is not affected by the fact that the contract was made or the debt incurred for the benefit of the estate,"—citing quite an array of authorities. I may add, however, that notwithstanding this well-settled rule a court of equity, in a proper case, where an executor has paid an obligation contracted by him for the benefit of the estate, will allow him credit for the amount so paid, although no action could be maintained against him as executor to enforce the payment of such obligation, though this is scarcely pertinent to the present inquiry.

Now, if an executor or administrator has no power to fasten upon the estate which he represents any liability by contract, either express or implied, even though such contract may be entered into for the benefit of the estate, how much stronger is the reason for holding that an executor has no power to fix upon the estate placed in his charge any liability for any tort that he may commit, and hence that no action based upon a tort committed by him can be maintained against him as executor, for that would be imposing upon the estate a liability for his own wrongful act. This view is supported by authority. See 11 Am. & Eng. Enc. Law (2d Ed.) at page 942, where it is said: "Executors and administrators can create no liability against the estates represented by them by any tortious or wrongful act. Their torts are their individual acts, for which the only remedy of the person injured is against them individually, and the rule is the same whether the injury results from intentional wrong or negligence." On the next page of the same volume, under subdivision 17, treating of the liability of an executor or administrator for taking property of third persons, I find the following language: "If an executor or administrator, as such, receives money or takes possession of property to which the estate has no right, he is liable to an action by the real owner for its recovery. The authorities are uniform in holding this, and they generally hold that he incurs personal liability; but there is some diversity as to whether his liability is only personal, or whether he also becomes liable in his representative capacity. The English courts, adhering to the principle that an executor or administrator has no power to create any new liability on the estate, hold that he becomes liable in his individual capacity alone, though the money or property is applied to the purposes of the estate; and some of the decisions in the United States are to the same effect,"—citing cases from the states of Alabama, Arkansas, Iowa, Massachusetts, Mississippi, New Jersey, Pennsylvania, and Virginia. The writer of the article in the Encylopædia then proceeds to say: "But other authorities have adopted a more equitable rule, and hold that, if an executor or administrator has applied to the use of the estate money or proceeds of property belonging to third persons, he is liable in his representative capacity, and that the person injured may elect whether he will hold the executor or administrator liable personally or in his representative capacity." The cases of Ford v. Caldwell, 3 Hill, 248, and Huff v. Watkins, 20 S. C. 477, seem to indicate that the courts of this state are disposed to hold what the writer in the Encyclopædia calls the "more equitable doctrine,"—that, where the estate of a decedent has received benefit from the use of money or property not rightfully belonging to it, an action ex contractu, but not an action ex delicto, may be maintained against the executor or administrator, as the case may be, in his representative capacity, for the recovery of the amount to which the estate has thus been benefited. This, it seems to me, is the true and logical doctrine, but that in no case can an action ex delicto be maintained against executor or administrator in his representative character. If the tort upon which such an action is founded was committed by the decedent, then it dies with him. Chaplin v. Barrett, 12 Rich. Law, 284; Huff v. Watkins, 20 S. C. 477. But, if the tort was committed by the executor or administrator, then the action can only be brought against him in his individual, and not in his representative, capacity; for, as is said in the foregoing quotation from the Encyclopædia, "their torts are their individual acts, for which the only remedy of the person injured is against them individually." In this connection it may be noted that the case of Rose v. Cash, 58 Ind. 278, relied upon by the appellant, is one of the many cases from Indiana cited to sustain the doctrine laid down in the Encyclopædia, cited above, from which I infer that the action in that case was brought against the defendant in his individual, and not in his representative, capacity, and that what the court really held was that he would be liable, "whether he claim as owner, agent, administrator, trustee, custodian, or in any other capacity," if he tortiously withheld the possession of the property sued for from the real owner. But as I have not, at present, access to that case, this is a mere inference from the fact that I find it cited in the Encyclopædia to sustain a doctrine contrary to that for which it is cited in the argument of the counsel for appellant. The case of Middleton's Ex'rs v. Robinson, 1 Bay, 58, likewise cited by appellant's counsel, has no application to this case. That was a special action on the case, brought by the executors, for the value of certain cattle taken from the plantation of testator in his lifetime. There was also a count in the declaration for money had and received. The court sustained the action upon two grounds: First, because, by the terms of the statute of 4 Edw. III. c. 7, executors were expressly allowed to sue for trespass in taking away the property

of a testator in his lifetime; second, because the tort might be waived, and the action proceed in assumpsit, under the count for money had and received. But it will be observed that the statute of 4 Edw., now incorporated in Rev. St. 1893, as section 2319, only gives the right to executors to sue trespassers, but does not give any right to third persons to sue executors for trespasses or other torts, and we know of no statute which confers any such right. As to the second ground, it only proceeds upon the well-settled doctrine that there are cases in which the tort may be waived, and the action proceed, upon proper allegations, as an action ex contractu, as was properly allowed in that case, under the count in the declaration for money had and received, which rests upon an implied assumpsit. But in the case now under consideration the action is not brought by an executor against an alleged trespasser upon the property of his testator (which is the only case provided for by the statute of Edward), but the action is brought against an executor for an alleged tort committed by him, and there is no pretense that the tort has been waived. It is plain, therefore, that the case cited by appellant has no application to the present case. It seems to me that it would not only be anomalous, but illogical, to hold that while an administrator or executor cannot be sued in his representative capacity on a contract made by him, and not by his intestate or testator, as the case may be, whereby a new debt or liability may be fastened upon the estate which he represents, yet he may be sued in his representative capacity for a tort committed by him, with which his testator or intestate had nothing whatever to do and is in no way responsible for, and thus a new liability may be fixed upon the estate which he represents. Such a doctrine would not only be anomalous and illogical, but would tend to prejudice, perhaps to destroy, the interests of those beneficially interested—oftentimes minors—in the estates of decedents.

In the present case no wrong whatever is imputed to defendant's testator, and, on the contrary, appellant, in his argument, distinctly repudiates any intention to make such an imputation. The action is based upon a tort committed by the defendant since the death of his testator, in wrongfully withholding the possession of the chattel sued for from the alleged rightful owner; and for that he can only be held liable in his individual, and not in his representative, capacity. It is not difficult to conceive of a case in which no wrong could be imputed to the testator in taking and retaining the possession of the chattel in dispute, and yet the person who may unlawfully withhold the possession of such chattel from the rightful owner would be guilty of a wrong in so doing. For example, if the testator was entitled to a life interest in the chattel, with remainder over to the plaintiff, there could be no possible wrong on the part of the testator in taking and retaining the possession of such chattel during his lifetime. But if after his death any person, be he executor or administrator or a third person, should unlawfully withhold the possession of the chattel from the person entitled in remainder, then the wrong done is that of such person, for which he would be liable in his individual, and not in his representative, capacity. If it should be said that it would be a hard case upon the executor if he should be held individually responsible in a case like the one supposed, the answer is obvious. The court of equity would, in a proper case, and upon a proper showing that the executor had acted in good faith, allow him credit for whatever he had been required to pay in an honest effort to protect the interests of the estate committed to his charge. It is everyday practice to allow an executor, upon his accounting, credits for amounts paid out by him for counsel fees and other proper expenses incurred by him in the management of the estate, upon contracts for which he is responsible in his individual, and not in his representative, capacity, whenever the court is satisfied that such obligations have been incurred in good faith for the benefit of the estate. I think, therefore, that there was no error upon the part of the circuit court in holding that this action could not be maintained against the defendant in his representative capacity, but that the action should have been brought against the defendant individually. This view being conclusive of the case, there was no error in holding that it was not necessary to pass upon appellant's exceptions.

STATE v. ROSS.

(Supreme Court of South Carolina. Aug. 7, 1900.)

INTOXICATING LIQUORS—DISPENSARY LAW—VIOLATION—INSTRUCTIONS—QUESTION FOR JURY—PREJUDICIAL ERROR.

1. On a prosecution for violation of the dispensary law, whether defendant was a manufacturer of liquor was a question for the jury.
2. On a prosecution for violation of the dispensary law, an instruction that if defendant's place contained the paraphernalia for making liquor, and defendant was engaged in the manufacture of it, he was guilty, was proper.
3. An instruction in no respect prejudicial to defendant cannot be urged as ground for reversal on appeal.
4. An instruction leaving an inference to be drawn by the jury from facts undisputed and uncontradicted by evidence in the case is not prejudicial error.
5. On a prosecution for violation of the dispensary law, an instruction that the law says no man shall keep a place where liquor is to be manufactured is not erroneous, as misleading, since the words "is to be" would be understood to mean after the enactment of such law.

Appeal from general sessions circuit court of Spartanburg county; R. C. Watts, Judge.

Joseph Ross was convicted of a violation of the dispensary law, and he appeals. Affirmed.

Ralph Carson, for appellant. Mr. Sease, for the State.

GARY, A. J. The record contains the following statement of facts: "The appellant, Joseph Ross, and one James Ballard were indicted jointly for violation of the dispensary law. The indictment contained two counts. The first charged the sale of contraband liquor. The second count in the indictment, omitting the formal parts, was as follows: 'Did willfully and unlawfully keep and maintain a place where alcoholic liquors were sold, bartered, and given away, and where persons were permitted for the purpose of drinking alcoholic liquors as a beverage, and where alcoholic liquors were kept for sale, barter, and delivery, and where alcoholic liquors were manufactured; thereby then and there keeping and maintaining a common nuisance, against the form of the statute.'" Two witnesses testified in behalf of the state as to sales made to them by the defendant Ross at his dwelling. One of said witnesses testified as follows: "Q. Do you know the defendants, Ross and Ballard? A. Yes; I saw them that morning when we went up there. It was one morning in August. I don't remember what morning it was. Q. Tell us about all you saw that morning. A. I went up there in the night, and found the still place, with some eight or nine stands of beer (I think it was eight or nine stands), and we went back up the hill and lay there until daylight. Somebody came past about daylight and went down towards the still, and went on down there. We got there. We saw there wasn't anybody there at that time, but Mr. Howie and myself hid by the branch, and Mr. Floyd went down that branch, and it wasn't long until Mr. Ross and Mr. Ballard came. One of them had an ax on his shoulder, and the other a barrel, or keg, rather. One of them, my recollection is, went to making up some mud, and the other cleaning out an old furnace; and we closed in on them and arrested them, cut down the stands of beer, and brought them on to Spartanburg. Q. Do you know anything about the process of distilling liquor? A. No, sir; nothing only what I have learned since I have been a state constable. Q. In what stage of manufacture is it when you have got the beer there? A. They say when it gets real sour it is ready for making. Q. How far is that from the defendant Ross' dwelling house? A. It is, I suppose, two or three hundred yards." The other witness testified to having taken a still out of an old house 50 or 70 yards away from the still house where defendants were arrested. After his honor had charged the jury, the record shows that the following took place: "Mr. Carson: Will you let me state my request to charge? I stated it, but your honor did not charge it. By the Court: You ought to have handed it up beforehand. Mr. Carson: My request was this: That, in order to convict the defendants of maintaining a place where liquor was manufactured, the state must prove beyond a reasonable doubt that the liquor was manufactured there. By the Court: I charge you that, gentlemen. If you have any doubt in your minds, under the testimony in this case, that this was a place where liquor was manufactured, why, then, acquit the defendants. But, if you take all the facts and circumstances surrounding the case, and they satisfy you beyond a reasonable doubt that it was the place where the liquor was manufactured, then your verdict, if you think they are guilty, should be 'Guilty.' As I told you before, the facts and circumstances are entirely for you. If the necessary paraphernalia was there to make liquor, and you think those parties were the parties that had it there, and they were engaged in this business, then you can convict them. If you think there was sour mash there, and low middlings, and things of that sort, it is for you to say what they were there for,—whether to make liquor or what. That is for you." The jury found the defendant Ross guilty on both counts of the indictment, and he was sentenced to pay a fine of $250, or to labor for nine months on the public works of the county. The defendant appealed upon the following exceptions: "Because it is respectfully submitted that the presiding judge erred in charging the jury as follows: (1) 'It is for you to say whether or not, under the circumstances of this case, these parties were manufacturers of liquor.' (2) 'Was the paraphernalia there to make liquor? If you are satisfied in this case that at this place was the paraphernalia to make liquor, and satisfied under the testimony as to what the process for making liquor is, and satisfied that the defendants were engaged in the manufacture of it, then you can find them guilty.' (3) In that he charged upon the facts, in charging the jury as set out in exception 2 above. (4) Because his honor charged upon the facts, in charging the jury as follows: 'If the necessary paraphernalia was there to make liquor, and you think these parties were the parties that had it there, and they were engaged in this business, then you can convict them. If you think there was sour mash there, and low middlings, and things of that sort, it is for you to say what they were there for,—whether to make liquor or not.' (5) In charging that it was for the jury to determine the purpose to which the defendants intended to put the sour mash and low middlings found on the premises. (6) His honor erred in charging the jury as set out in exceptions 2 and 4, in that he made direct reference to the testimony, and stated to the jury, from the testimony they could draw inferences as to the guilt of the defendants. (7) His honor erred in charging the jury as follows: 'The law also says that no man shall keep a place where liquor is to be manufactured, bartered, exchanged, or given away.'"

The first exception is too general, but, waiving this objection, it cannot be sustained, as it cannot be contended for a moment that the

court could determine whether the parties were manufacturers of liquors. The second exception fails to specify any particular error, but, waiving this objection, it cannot be sustained, as all questions of fact were properly left to the consideration of the jury. The third exception cannot be sustained, as the question propounded by the presiding judge was in no respect prejudicial to the appellant, and all questions of fact were left to be determined by the jury. The fourth exception cannot be sustained, for the presiding judge left to the jury the inference to be drawn from facts about which there seemed to be no dispute, as the appellant offered no testimony, and also whether such facts existed. While a circuit judge may commit error of law in asking if certain facts existed, there is no prejudicial error in this case. The fifth exception cannot be sustained, for reasons hereinbefore mentioned. The same can be said of the sixth exception. The seventh exception must be overruled, as the presiding judge, in using the words "is to be," evidently meant after the enactment of the law under which the appellant was indicted. It is the judgment of this court that the judgment of the circuit court be affirmed.

BARKSDALE v. CITY OF LAURENS.

(Supreme Court of South Carolina. Aug. 4, 1900.)

MUNICIPAL CORPORATIONS — REPAIRING OF STREETS—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE — ACTION — TRIAL — EVIDENCE—SUFFICIENCY—NONSUIT.

1. Rev. St. § 1582, provides that: "Any person who shall receive bodily injury or damages in his person or property through a defect in any street, causeway, bridge or public way, or by reason of defect or mismanagement of anything under the control of the corporation within the limits of such town, may recover, in an action against the same, the amount of actual damages sustained by him by reason thereof. If any such defect in a street, causeway, or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured, if his load exceeded the ordinary weight: provided, that such corporation shall not be liable unless said defect was occasioned by its neglect or mismanagement: provided, further, such person has not in any way brought about such injury or damage by his or her own negligent act or negligently contributed thereto." *Held*, that these provisions are germane to the title, "An act providing for a right of action against a municipal corporation for damages sustained by reason of defects in the repair of streets, sidewalks and bridges within the limits of such municipal corporation;" and hence the act is not in conflict with Const. art. 3, § 17, providing that the subject of every act shall be expressed in the title.

2. Rev. St. § 1582, giving a right of action against cities for injuries sustained "by reason of defects or mismanagement of anything under control of the corporation," is broad enough to include an action for injuries sustained by an employé of the city by reason of defendant's mismanagement of a steam roller while repairing its streets.

3. The servants of defendant city were engaged in grading a road at the point of its intersection with Main street. A plow was attached in front of a steam roller, and the mouth of the road entering Main street was being plowed by starting some distance up the road, and drawing the plow by means of the steam roller backing down and partially across Main street, when the man holding the plow would signal the engineer to stop. Plaintiff, a boy 14 years of age, was employed to carry water to the workmen, and on the occasion of the accident mounted the steam roller from the rear, as he was in the habit of doing, gave the engineer some water, and was going down, when his foot was caught between the roller and the embankment and crushed. The roller had never before been driven against the embankment, but was accustomed to stop about 80 feet therefrom. The engineer knew that plaintiff had mounted from the rear and would descend there, and the man holding the plow had twice signaled the engineer to stop before the embankment was reached, but the latter had failed to do so. *Held* sufficient to make a prima facie case against defendant.

4. Under Rev. St. § 1582, giving an action to persons injured by reason of a city's mismanagement of anything under its control, providing such person has not in any way brought about such injury by his own negligent act or negligently contributed thereto, it was necessary for plaintiff in an action for injuries to show, as part of his case, that he had not been guilty of contributory negligence, and where he failed to do so it was proper to grant a nonsuit.

5. In an action for injuries, the evidence was that plaintiff, an intelligent boy, past 14 years of age, was employed by defendant to carry water to its workmen; that the workmen were engaged in grading a street with a steam roller, that plaintiff mounted the roller from the rear to furnish water to the engineer; that the roller was backing towards an embankment, and had already backed beyond its usual distance; that there were steps on the side of the roller by which plaintiff might have dismounted in safety, but instead he chose to dismount at the rear, and in doing so suffered the injuries for which damages were sought. *Held* sufficient to show contributory negligence barring plaintiff's recovery.

Appeal from common pleas circuit court of Laurens county; O. W. Buchanan, Judge.

Action by W. Oliver Barksdale, by guardian ad litem, against the city of Laurens, for personal injuries sustained by plaintiff, while in the employment of defendant, by reason of defendant's negligence in the management of a steam roller while repairing its streets. From a judgment of nonsuit, the plaintiff appeals. Affirmed.

N. B. Dial, for appellant. F. P. McGowan and W. R. Richey, for respondent.

JONES, J. This action was for damages for personal injuries sustained by plaintiff, a minor of the age of 14 years, while in the employment of defendant, by reason of alleged negligence in the management of a steam roller while repairing the streets of Laurens, whereby plaintiff's foot and leg were caught between the roller and an embankment on the side of the street, mashed, and injured. The appeal is from an order of nonsuit. The motion for nonsuit was based upon the following grounds: "(1) Because the legislature has not given such right of action as that relied on by the plaintiff. (2) Because there is no evidence showing or tending to show that the plaintiff's injury was caused by any negligence of the city of Laurens or of

its employés, or by reason of any defect in a street of the said city suffered to exist by any negligence of said city. (3) Because there is no evidence showing or tending to show that the plaintiff's injury was brought about not by his own negligence, or that he did not negligently contribute thereto. (4) Because, if the injury was caused by the negligence of any person other than the plaintiff himself, it was the negligence of a fellow servant, for which the defendant is in no way liable." The order of nonsuit does not indicate the ground upon which it is vested. The exceptions thereto assign error as follows: "(1) Because the circuit judge erred in holding that the act of 1892 under which this action was brought was unconstitutional. (2) Because he erred in not holding that said act was broad enough to cover cases such as the evidence made out in this case. (3) Because he erred in not holding that the defendant was guilty of neglect and mismanagement in repairing its streets, and of operating its machinery in repairing the same. (4) Because he erred in not holding that the plaintiff had made out his case, and that the injury was not brought about by his negligent act, or that he negligently contributed thereto. (5) Because he erred in holding that the injury was caused by plaintiff and his fellow servants. (6) Because he erred in not holding that contributory negligence was a question of defense. (7) Because he erred in granting the motion of nonsuit, and in not allowing the case to go to the jury."

The action was brought under the act of 1892 (21 St. at Large, p. 91), now section 1582 of the Revised Statutes, which provides: "Any person who shall receive bodily injury or damages in his person or property through a defect in any street, causeway, bridge or public way, or by reason of defect or mismanagement of anything under the control of the corporation within the limits of such town, may recover, in an action against the same, the amount of actual damages sustained by him by reason thereof. If any such defect in a street, causeway, or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured, if his load exceeded the ordinary weight: provided, that said corporation shall not be liable unless said defect was occasioned by its neglect or mismanagement: provided, further, such person has not in any way brought about such injury or damage by his or her own negligent act or negligently contributed thereto." The title of said act of 1892 is, "An act providing for a right of action against a municipal corporation for damages sustained by reason of defects in the repair of streets, sidewalks and bridges within the limits of such municipal corporation." This act was construed in the case of Dunn v. Town of Barnwell, 43 S. C. 401, 21 S. E. 315, wherein the court held that the term "mismanagement," as used in the clause, "or by reason of defect or mismanagement of anything under control of the corporation," meant mismanagement in making repairs on the street, so that the corporation should be held liable not only for neglect in making the repairs of the streets, but also for mismanagement of anything under the control of the corporation in making such repairs. Thus construed, the provisions in the body of the act are germane to the subject expressed in the title, and therefore the act is not in conflict with article 3, § 17, of the constitution, which provides that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." We are also of opinion that the terms of the act, "by reason of defect or mismanagement of anything under control of the corporation," are broad enough to include mismanagement of a steam roller under control of the municipality, and while being used in repairing its streets. The plaintiff's action being within the terms of a valid act, a nonsuit on the first ground would not be proper.

There was no evidence tending to show that plaintiff's injury was caused by any negligence of the city of Laurens, by reason of any defect in a street of said city, or by reason of any defect in the steam roller, or by reason of negligence in the selection of an engineer for said machine. The action, however, was not based on such negligence, but on the negligent management or the mismanagement of the steam roller. On this point we think there was some evidence tending to show mismanagement of the roller by the engineer in charge. It appears that at the time of the injury the city of Laurens, having partially graded down Main street, was grading down, also, a road or street entering Main, at the place of junction. Opposite this point was an embankment on Main street some four feet high. A large plow was attached to the front of the steam roller by a chain, and the mouth of the road entering Main street was being plowed down by starting the plow some distance up said road, and drawing the same by means of the steam roller backing partially across Main street and towards said embankment. The man holding the plow would signal the engineer in charge of the roller to stop when about to reach the place where the plow was to stop, and, after the roller was at a standstill, would loosen the plow and drag it back to the beginning point; and the roller would then return, to be again attached to the plow. The plaintiff, a lad of 14 years, was employed by the city to carry water to the men at work on the street, including the said engineer and plowman. On this occasion plaintiff mounted the steam roller from the rear, as he had done before with the knowledge of the engineer, gave the engineer some water, and was in the act of getting off when his foot was caught between the roller and the embankment, and crushed into the embankment and injured. The width of the street and the length of the roller, with the chain and plow attached, were not clearly shown; but there was evidence that the roller had never before been

driven against the embankment, but was accustomed to stop about 80 feet before reaching the embankment. The man holding the plow, although not seeing the plaintiff, signaled the engineer to stop at the usual stopping place, and, seeing the roller going further, signaled again, but the roller continued to back towards the embankment. There was some evidence that the engineer knew that plaintiff had mounted the roller from the rear, and would descend there. There was no evidence that the machine was defective and beyond control of the engineer. Assuming that there was some evidence tending to show mismanagement of the steam roller by the engineer in charge, it is contended by respondent, in support of the nonsuit, that under the statute it was incumbent on plaintiff not only to show injury through mismanagement of the steam roller, but it was also incumbent on him to show that such injury was not brought about in any way by his contributory negligence. In the contention we agree with respondent. While, in ordinary actions for negligence, contributory negligence by the plaintiff is a matter of defense, and is not available on a motion for nonsuit, yet in this action under the statute it is necessary for plaintiff, as a part of his case, to show that his own negligence did not contribute to the injury; for that is one of the conditions of his right of action against the municipality, which depends wholly upon the statute. Hence, if the evidence on the part of plaintiff does not tend to negative contributory negligence on his part, a nonsuit is proper. The undisputed evidence was that plaintiff, who was an intelligent youth, past 14 years, knew that the roller was provided with steps on the side, where he could have dismounted in safety, and that he saw the roller was backing beyond the usual place, towards the embankment, and nevertheless attempted to get off between the moving roller and the embankment, so near to the embankment that while his right foot was on the ground his left foot was caught between the roller and the embankment. The evidence, instead of negativing contributory negligence, established it. On this ground, we think the nonsuit sustainable. This conclusion renders it unnecessary to consider the fourth ground of the motion for nonsuit,—whether the doctrine of fellow servant, which exempts the master from liability when the injury results from the negligence of a fellow servant in the same general department of labor, has any application to this action, which is wholly statutory. The judgment of the circuit court is affirmed.

STATE v. COUNCIL.

(Supreme Court of South Carolina. Aug. 2, 1900.)

CRIMINAL LAW—LARCENY—FORMER JEOPARDY.

Where one is indicted for stealing property of W., and on trial it is proved that the property belonged to A., and under the direction of the court the jury renders a verdict of not guilty, defendant is not placed in jeopardy, so as to bar a prosecution under another indictment charging him with stealing the same property, belonging to A.

Appeal from general sessions circuit court of Sumter county; J. C. Klugh, Judge.

Robert Council was convicted of larceny, and appeals. Affirmed.

L. D. Jennings, for appellant. John S. Wilson, for the State.

POPE, J. The defendant was tried under an indictment containing two counts,—one for burglary, and the other for petit larceny. In the second count he was charged with stealing six fowls, valued at $1.50, the property of William T. Edens. At the trial it was proved that the six fowls were the property of Mrs. Annie J. Edens. Under the direction of his honor, Judge Benet, the jury rendered a verdict of not guilty. At another term of court an indictment was preferred charging the defendant with having been guilty of larceny in stealing six fowls, valued at $1.50, the property of Mrs. Annie J. Edens. The defendant interposed in his defense a formal plea of former acquittal of this charge, which was not allowed by the circuit judge. On his trial he was found guilty and sentenced. He now appeals to this court.

The sole question raised is that it was the same crime of which he had been acquitted that he was again put on trial for committing, and that, such being the case, he was constitutionally free from such second trial. Of course, if it was the same offense on both trials, it was reversible error. But was it the same crime? In the case of State v. Copeland, 46 S. C. 13, 23 S. E. 980, this court held that as the crime of arson was against possession, rather than ownership, of property, property which was subject to the charge of statutory arson might have been alleged in the indictment in the name of the owner himself, or the legal possessor of the property, and an indictment was good which had alleged the property destroyed as that of the man in possession. The defendant was acquitted because the name of the owner did not appear in the indictment. Afterwards a new indictment was framed, charging the crime as against the owner, to which a plea of former acquittal was interposed. This court sustained such plea. But in the case at bar the true owner's name must appear in the indictment, to sustain an indictment for larceny. When the name of another than the true owner is used, the prosecution must fail, as this case did in the first instance, because in law the defendant did not take, steal, and carry away William T. Edens' property. A verdict of not guilty was obliged to be rendered when it appeared in evidence that the property stolen was not of the goods and chattels of William T. Edens. However, when it appeared in the indictment that the defendant was indicted for stealing

Mrs. Annie Edens' property, then a new offense was presented. The circuit judge committed no error in overruling the plea of former acquittal. The conviction must stand. It is the judgment of this court that the judgment of the circuit court be affirmed.

JOHNSON v. FRANKLIN.

McGILL v. SAME.

(Supreme Court of South Carolina. Aug. 2, 1900.)

DEEDS—CANCELLATION—VALIDITY—FRAUD—FALSE REPRESENTATIONS.

A married woman, in whose name a deed to property had been placed on purchase thereof by her husband (she having furnished part of the purchase price), died intestate and childless. Plaintiffs, inheriting an interest in her property, after having fully explained to them the manner in which she acquired the property, each executed quitclaim deeds of their interest to her husband, after obtaining the advice of other relatives. *Held*, on proceedings to cancel the deeds, that the execution thereof was not obtained by the fraud or false representations of the husband, and hence they were not subject to cancellation on that ground.

Appeal from common pleas circuit court of Laurens county; R. C. Watts, Judge.

Suits by E. Olivia Johnson and R. E. McGill against Charles E. Franklin for the cancellation of deeds. From decrees entered on the report of a referee in favor of defendant, plaintiffs appeal. Affirmed.

Duncan & Sanders and Ferguson & Featherstone, for appellants. N. B. Dial, for respondent.

POPE, J. The complaint in the two cases above named, each for itself, set out that on the death of Mrs. Martha E. Franklin, intestate, about the year 1896, she was childless, and that her estate fell to her heirs at law, to wit, one-half to her husband, Charles E. Franklin, and the remaining one-half was divisible into five shares, to wit, one-fifth of one-half in James E. Davis, her brother; one-fifth of one-half in her sister Sallie McGill; one-fifth of one-half in Rachel McGill; one-fifth of one-half in the plaintiff E. Olivia Johnson, as the sub heir at law of Mrs. Margaret Moore, deceased, who was a sister of said Martha E. Franklin; and the remaining one-fifth of one-half in Johnnie White and Fannie White, as the sub heirs at law of Mrs. Caroline White, deceased, who was a sister of Mrs. Martha E. Franklin,—and that at the death of the said Mrs. Martha E. Franklin she was seised, as of fee, of 263 acres of land, known as the Underwood and part of the Mary Holland tracts, in Hunter's township, in Laurens county, S. C., and also 3½ acres of land in the town of Clinton, S. C., which said lands vested in the heirs at law previously named; that the defendant, Charles E. Franklin, by false and fraudulent representations induced each of these plaintiffs, without any consideration, to execute and deliver to the said defendant their respective deeds for, all and singular, the aforesaid real estate, by falsely and fraudulently representing to the plaintiffs that the land covered by the said deeds was not land in which the plaintiffs owned any interest, and that said defendant, Charles E. Franklin, kept from the knowledge of such plaintiff that each one of them did own an interest in said lands, thereby misleading and deceiving the plaintiffs, so that each one executed a deed of the said lands to the defendant. The prayer of the petition was that the defendant be required to deliver up said deeds for cancellation, and to account for the shares of any lands sold after the execution of this deed. The defendant, by his answer in each case, admitted all the allegations of the complaint, except as to the absolute ownership of said lands by his wife, Mrs. Martha E. Franklin, and also except any charge of fraud by him practiced or committed in obtaining a deed from each plaintiff to her interest in all the lands to which his wife had the legal title at her death. By an order of court, the testimony was taken by C. D. Barksdale, as special referee. When the cause came on for a hearing before Judge Watts, the testimony and pleadings were relied upon, but the circuit judge held in unqualified terms that Charles E. Franklin had practiced no fraud of any character whatsoever upon the two plaintiffs. On the contrary, he held that these plaintiffs were not minors, lunatics, or idiots, nor was Charles E. Franklin their trustee, and that he neither lied to them in obtaining the two deeds made to him by the plaintiffs, nor did he suppress any facts in reference to the matter. Further, the circuit judge found, and so held, that the plaintiffs were not entitled to have said deeds canceled, but he required, in the exercise of his discretion, sitting as a chancellor, that the defendant should pay a part of the costs. The plaintiffs now appeal on the following grounds: "(1) Because the circuit judge erred in finding as a fact that defendant, Franklin, did not obtain the quitclaim deeds by false and fraudulent representations. (2) Because he erred in finding as a fact that the plaintiffs parted with their interests in the lands described in the complaint after being fully informed as to their rights in the premises. (3) Because he erred in finding that all the property was paid for by the defendant, and that the plaintiffs, prompted by a generous impulse, after the matter was fully explained to them, readily gave him the quitclaim asked for, but were afterwards induced by their brother to bring these actions. (4) Because he erred in holding that Franklin did not lie to them in obtaining these deeds, nor suppress any facts. (5) Because he erred in holding that the said deeds were not obtained by defendant by false and fraudulent misrepresentations, without consideration, and therefore null and void."

The duty rests upon the appellants to show to us that the preponderance of the testimony

is in favor of the plaintiffs' version of these transactions. The money received by Mrs. Martha E. Franklin was just before the war of 1861 and 1865, during the war, and a little sum in the year 1867. At these dates all these moneys were covered by the marital rights of Charles E. Franklin. It is not shown that during the past 20 years Mrs. Martha E. Franklin had a dollar to pay for these lands. Nobody knew these facts better than Mrs. McGill, for she was Mrs. Franklin's sister. Her husband, the defendant, Charles E. Franklin, although not in debt, but openly before all the world, had the titles to these lands made out in his wife's name. They had but one child, a boy. The love of his mother for this her only child was shown in expending what money she had on his education, but five years ago he passed from this earth, and his mother endured the separation but for a few years, when she joined him. It was perfectly proper for these plaintiffs to execute these quitclaim deeds. No doubt, as the circuit judge suggests, these lawsuits were suggested by J. A. Davis, who required Franklin to pay him $300 before he would execute his quitclaim deed to these lands. Franklin's testimony is clear and explicit, showing that these ladies signed the deeds in question after a full explanation from him as to how Mrs. Martha E. Franklin had obtained a title to these lands in the first instance. It is apparent from the testimony that the deeds were not signed in a corner, so to speak, for Mrs. Johnson was living with her son-in-law, and he accompanied her to the magistrate's office where she signed the deed. Mrs. R. E. McGill and her husband, A. McGill, talked the matter over with Mrs. Franklin before she signed the deed. What haste there may have appeared on the part of Charles E. Franklin to obtain these deeds may be explained by his anxiety to hold Mr. Copeland to his offer of $3,000 for land that cost only $500 when purchased by Franklin. Fraud is a serious charge, it is a terrible charge, and all authorities concur in requiring proof before it is sustained. We are like the circuit judge; we cannot blast this man's character upon the testimony here adduced. These exceptions must be overruled. It is the judgment of this court that the judgment of the circuit court be affirmed in each of the actions here heard together, and that the clerk of this court do send down a remittitur in each of the causes.

WILLIAMS v. GRIFFIN et al.

(Supreme Court of South Carolina. Aug. 2, 1900.)

CLAIM AND DELIVERY—SALES—TITLE—BILL OF SALE—CHATTEL MORTGAGE—EVIDENCE—IMPEACHMENT.

Where, on trial in claim and delivery, defendant offered in evidence a bill of sale executed by plaintiff, conveying to him personal property claimed, it was error to exclude testimony that such bill of sale was in fact a mortgage executed to secure an agricultural lien which had been fully paid, since the title to the property was in issue, and such testimony was competent to impeach the title shown by the bill of sale.

Appeal from common pleas circuit court of Barnwell county; G. W. Gage, Judge.

Action by Jim Williams against J. O. Griffin and another. Cross appeals from an order directing a verdict in favor of the defendants, enjoining execution of the judgment thereon, and allowing plaintiff to file a reply. Reversed.

Davis & Best, for plaintiff. J. Ham Kirkland and Bates & Simms, for defendants.

POPE, J. Jim Williams, as plaintiff, brought his action in claim and delivery for certain personal property, which he alleged was his property, and which he alleged the defendants had wrongfully taken from his possession. The answer denied all the allegations of the complaint, and set up that the three mules in question, namely, "Jim," "Bill," and "Julia," became the property of the defendant J. O. Griffin under a bill of sale for said mules executed by the plaintiff, and which mules were taken from the possession of said Jim Williams by the defendant J. F. Breland through a power of attorney from said J. O. Griffin executed under the power contained in said bill of sale. The cause came on for trial before his honor, Judge Gage, and a jury. Plaintiff offered testimony of the allegations of his complaint. The defendant offered proof of the execution of the bill of sale, and then closed. Thereupon plaintiff offered testimony tending to show that the alleged bill of sale was really a mortgage written on the same day and on the same paper upon which a lien on crops to secure agricultural supplies, for $150, was given by the plaintiff to defendant J. O. Griffin. The circuit judge, upon the objection of the defendant to such testimony, ruled it incompetent, and, further, held that he would direct a verdict for defendant, but allow the plaintiff to file a reply setting up that the instrument introduced by the defendant, while on its face it appeared to be a bill of sale, was in fact a mortgage to secure the same $150 covered by the lien on plaintiff's crops, and which said mortgage was fully paid. All these things were embodied in an order. Thus the jury, directed by the circuit judge, rendered a verdict for defendant for $150. The plaintiff filed his reply, but both sides to the suit appealed from the order of Judge Gage.

If this court should hold the ruling of the circuit judge as to the admissibility of plaintiff's testimony directed to showing the bill of sale a mortgage, and that the debt it secured had been fully paid, to be error, then the whole order and verdict would be set aside, and a new trial ordered; thus rendering useless the other issues. Now, as to the action of claim and delivery, it is nothing but the old common-law action in replevin. It is, in its trial, sub-

ject to the same rules as to testimony as any other action. Of course, title to property is in issue. This being so, any testimony bearing directly on title of the property in question is competent. If the paper in question is a bill of sale, why the plaintiff must go out of court. If, however, the instrument, although in form a bill of sale, is really a mortgage, and that mortgage has been fully paid (we mean, of course, the debt intended to be secured by the mortgage has been fully paid), why should not this testimony to show this last state of facts be perfectly competent? Is it not the most natural mode of upsetting defendant's pretensive title? As was suggested by plaintiff (appellant) on his argument in this court in Amaker v. New, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687: "True, too, the action in the court below was not in terms to vacate defendant's deed; but still plaintiff's claim depends upon vacating that deed. It is set up by defendant in opposition to plaintiff's deed, and the plaintiff attacks it on the ground of fraud, and he must sustain his attack, or his claim fails." In the case at bar plaintiff claims that the defendant is endeavoring to practice a fraud upon him by relying upon an instrument as a subsisting bill of sale, when such instrument is only a mortgage, and the debt intended to be secured thereby has been fully paid. It would certainly seem, if testimony impugning a title deed to land on the ground of fraud, in reply to defendant's testimony setting up such deed, is admissible, such testimony, in reply to defendant's testimony setting up a bill of sale of three mules on the ground of fraud, should be competent also. When we use the word "fraud," it need not mean anything else than constructive fraud, and not moral fraud. We think, therefore, that the circuit judge was in error in excluding plaintiff's testimony tending to upset this bill of sale; and this, having caused the circuit judge to direct a verdict for defendant, will cause a new trial. It is the judgment of this court that the ruling of the circuit judge as to the testimony complained of as being excluded was erroneous, and that the verdict of the jury ordered by him, and also his order of injunction and for amendment of the pleadings, be vacated, and the action be remitted to the circuit court for a new trial.

WALTON v. GAIRDNER et al.
WEED v. SAME.

(Supreme Court of Georgia. July 12, 1900.)

EXECUTORS—COMMISSIONS—COMPENSATION.

1. An executor who, under authority given him in the will, discharges a general legacy by the delivery of stocks or bonds, is not entitled to commissions under section 3484 of the Civil Code, which provides that an executor shall have a commission "on all sums of money received by him on account of the estate," and "on all sums paid out by him, either to debts, legacies, or distributees."

2. The turning over by an executor of stocks and bonds in discharge of a general legacy is not a "delivering over of property in kind," within the meaning of section 3487 of the Civil Code, which authorizes the ordinary to allow compensation for the latter service.

3. Whether such a delivery of stocks and bonds by an executor is an "extraordinary service," for which the ordinary may allow compensation under the provisions of section 3489 of the Civil Code, is not now decided.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

In the matter of the discharge of general legacies to Gairdner and others in relation to commissions and compensation. Maurice Walton, executor, and E. G. Weed as executor and individually, bring error. Modified.

J. T. Olive and Hamilton Phinizy, for plaintiffs in error. Jos. B. & Bryan Cumming, for defendants in error.

COBB, J. When a will containing a large number of general legacies provides that the executors may "pay general legacies in money, or in stocks or bonds, as cash, at their fair market value," what compensation is allowed by law to the executors when they elect to pay general legacies in stocks or bonds? "At common law the rule is well settled, both in the courts of equity and in the courts of law, that an executor or an administrator is not entitled to any compensation for his personal trouble and loss of time in the performance of his duties." 11 Am. & Eng. Enc. Law (2d Ed.) 1277; Schouler, Ex'rs & Adm'rs, § 545. The reason given for this rule is that in England the executor or administrator was entitled to the residue of the estate, and was in this way supposed to be compensated for the time and labor of administration. Crossw. Ex'rs & Adm'rs, § 545. The right of the executor to be compensated for his "personal trouble and loss of time" in attending to the business of the estate represented by him is therefore to be determined by reference to the statutes of this state. He is entitled to compensation only to the extent that there are statutes in existence providing for such compensation. By section 3484 of the Civil Code it is provided that an executor or administrator "shall have a commission of two and one-half per cent. on all sums of money received by him on account of the estate (except money loaned by him and repaid to him), and a like commission on all sums paid out by him, either to debts, legacies, or distributees." This provision, as well as all provisions providing for compensation of executors or administrators, being in derogation of the common law, must be construed strictly; and therefore "stocks or bonds" which were in the possession of the testator at the time of his death, and thus came into possession of his executor, are in no sense "sums of money received by him on account of the estate," and such stocks or bonds, when delivered to a legatee under the will in discharge of a general legacy, are not "sums paid out by him."

2. While the Code declares that no commis-

sion shall be paid to any administrator or executor "for delivering over of any property in kind," it provides that the ordinary may allow reasonable compensation for such services, not exceeding 3 per cent. on the appraised value. Civ. Code, § 3487. The turning over by an executor of stocks or bonds in discharge of a general legacy is not a delivering over of property in kind, within the meaning of that provision of the law. Property of an estate, both personalty and realty, may be, under certain conditions, divided in kind between those entitled to it. Id. § 3479 et seq. When the property of an estate is so divided in kind, the value of each portion is appraised by persons appointed for that purpose, and the "appraised value" referred to in the section providing for compensation for delivering over of property in kind relates to such appraisement. Possibly, a delivery by an executor of a specific legacy, either of personal property or of real estate, might be a delivery in kind, within the meaning of this section, but it is not necessary in the present case to determine this question. The delivery by an executor of stocks or bonds in discharge of a general legacy is not a delivery in kind, within the meaning of the law declaring that the ordinary may allow reasonable compensation for that service.

3. Section 3489 of the Civil Code provides that, "in other cases of extraordinary services, extra compensation may be allowed by the ordinary." Whether the service for which in the present case the executors seek compensation is an "extraordinary" service, and whether the compensation provided for in the section just quoted is extra in the sense of being in addition to compensation for a service already provided for by law, or whether it is extra in the sense of being compensation for some service for which no compensation is provided, we will not now undertake to decide. If the executors in the present case are entitled to compensation at all, it is under the provisions of the section last referred to. The executors asked for commissions. The judge held that they were not entitled to commissions, but that they could apply to the ordinary for compensation for delivering property in kind. So far as the judge held that the executors were not entitled to commissions, his decision was correct; but his ruling that the payment by the executors of general legacies in stocks or bonds was a delivering over of property in kind, within the meaning of section 3487, Id., is, we think, erroneous, and to this extent his judgment is reversed. Judgment affirmed in part, and in part reversed. All the justices concurring.

ATLANTA CONSOL. ST. RY. CO. v. CITY OF ATLANTA.

(Supreme Court of Georgia. July 11, 1900.)

CITY IMPROVEMENTS—PAVING—LIABILITY OF STREET RAILWAY.

1. The act of October 10, 1891 (Acts 1890–91, vol. 2, p. 457), is the only source from which the mayor and general council of Atlanta can, in a case like the present one, derive power to charge a street-railroad company with a portion of the original cost of paving when it lays its tracks upon a street which has already been thus improved.

2. Under this act it is incumbent upon the mayor and general council, before granting a street-railroad company permission to lay its tracks on a paved street, to fix the amount of compensation which will be required of it; and, when no amount has been thus fixed, no demand can be made against the company after the tracks have been laid, either in behalf of the city or of abutting property owners, for the cost of pavement.

3. Where the mayor and general council granted such a railroad company permission to lay its tracks on a paved street, expressly stipulating that no charge for paving should be made against the company, the general council could not thereafter, under the provisions of the act above cited, enforce, by execution or otherwise, a claim against the company for any portion of the original cost of laying the paving in that street.

(Syllabus by the Court.)

Error from superior court, Fulton county; John C. Reed, Judge pro hac.

Action by the city of Atlanta against the Atlanta Consolidated Street-Railway Company. Judgment for plaintiff. On levy of execution, defendant filed an affidavit of illegality. Verdict for plaintiff in execution, and the street-railway company brings error. Reversed.

Geo. Westmoreland, for plaintiff in error. J. A. Anderson and J. T. Pendleton, for defendant in error.

COBB, J. In 1893 the street-railway company applied to the city council of Atlanta for permission to lay its tracks upon a portion of Smith street. At the date of this application, Smith street had been paved and improved under the provisions of the city charter authorizing streets to be improved, and a portion of the expense of such improvements to be assessed against abutting property owners. The city council granted the permission, in a resolution which, among other things, declared that no charge should be made against the street-railway company, on account of the city or abutting property owners, for the payment of any part of the expense of the improvements which had already been made on Smith street. After this permission had been granted, the street-railway company laid its tracks upon the street in question, and proceeded to operate its railway thereon. Subsequently the city council caused an execution to be issued against the street-railway company for a sum which was alleged to be the amount due to the abutting property owners for its pro rata of the expense of the improvements on Smith street. The street-railway company interposed an affidavit of illegality, setting up that the execution was proceeding against it illegally; and, the issue thus raised coming on for trial, the court directed a verdict in favor of the plaintiff in execution, and to this judgment the street-railway company excepted.

It was insisted in the argument here that the judgment was erroneous for the reason that the city of Atlanta had no authority to issue an execution to enforce a claim of the character involved in the present case. It was replied to this argument that no question was raised in the affidavit of illegality as to the authority of the city to issue the execution; the sole question therein raised being that the execution, no matter whether issued legally or illegally, was proceeding illegally. Under the view we take of the case, it is unnecessary to determine either whether the question is properly before us, or whether the city had the authority to enforce the claim by execution. We do not think the city had power to enforce the claim for which the execution was issued against the street-railway company either by execution or in any other way. In order to decide the controlling question involved in the present case, it becomes necessary to make a brief review of the different acts conferring upon the city of Atlanta the power to improve the streets of the city, so far as these acts have any bearing upon the authority of the city to make assessments against street-railway companies. The act of September 3, 1881 (Acts 1880–81, p. 258; Code Atlanta 1899, §§ 138–140), provided that the city council might, under certain conditions, improve the streets of the city, and assess a certain proportion of the expense of such improvements against the abutting property owners, and, if there was a street-railroad company having its tracks upon the street so improved, such company should be required to improve in the manner that the street was improved the width of its tracks, and for three feet on each side thereof. This act further provided that the assessment against abutting property owners should be collected by execution to be issued by the city clerk. The act of October 12, 1885 (Acts 1884–85, p. 416), provided that, if the street-railroad company should fail to improve the street in the time and manner prescribed, the city might cause the work to be done, and enforce the collection of the cost of such work against the street-railroad company in the manner prescribed in the act of 1881 for collections of assessments against abutting property. The act of December 24, 1886 (Acts 1886, p. 239), provided that, whenever the public interests may require, the city council may by ordinance "assess any railroad or street company * * * to improve the street," and do part or all of such work, as right and justice may dictate, whether such work be petitioned for or not, and the mode of procedure, and remedies to enforce the same, shall be those provided for street and sewer improvement in other cases provided by law and the ordinances of the city. The act of October 10, 1891 (Acts 1890–91, vol. 2, p. 457; Code Atlanta 1899, § 143 et seq.), provided that: "When street railroad tracks are laid in said city on a street which has already been paved or permanently improved, and upon which said company has no track, said city may require such contribution or payment to said city for said city and the owners of abutting property, at the time of laying such tracks, on account of the paving or pavement improvement of any such street, as the mayor and general council of said city may deem proper (but such amount shall not be greater than in cases provided for under section I of this act [which required street-railroad companies, under certain conditions, to pave between the rails of each line of track, and for four inches outside thereof]). Said city may regulate and enforce the payment or collection of such amount of contribution, and may require payment of same before consent granted to lay such tracks, and may grant consent conditional on such payment thereafter. Such street railroad company shall be liable for its pro rata of the costs to repave when the same is done according to law." The execution in the present case was issued for the purpose of enforcing a demand which the city claimed to have against the street-railway company for the benefit of the abutting property owners on Smith street under the provisions of the act of 1891, just quoted. An examination of the execution and the itemized bill attached thereto is all that is necessary to make it clear that the city council, in issuing the execution, was attempting to proceed under the act just referred to. That this was true was practically conceded in the argument here. Counsel for the railway company contended that, as that company had laid its tracks upon Smith street upon the faith of the statement in the resolution permitting it so to do without charge for any part of the improvement which had been made on the street, the city authorities were estopped from claiming anything against it. On the other hand, it was claimed by counsel for the city that so much of the ordinance as attempted to relieve the railway company from the payment of a proper proportion of the expense incurred by the property owners in improving the street was ultra vires and void, for the reason that, while the city authorities had a discretion as to the amount that should be charged the street-railway company for permission to lay its tracks upon the improved street, the law imperatively required that at least some amount should be charged. The city council either had authority to allow the railway company to lay its tracks upon the street without charge, or it had not that right. If it had the right, of course it had no power, after the railway company had acted upon the resolution granting it permission to lay its tracks without charge, to call upon the company for any amount, either as due itself or the abutting property owners. If it did not have the right to give the permission to lay its tracks without requiring that at least some part of the sum which had been expended by the property owners for paving that part of the street which the railway company sought to occupy should be paid, then the grant to the railway company of permission to lay its tracks without this requirement

would seem to be void. In either view, there was not in the present case any attempt on the part of the city, either before or at the time permission was given the company to lay its tracks, to fix an amount which should be paid to the abutting property owners, under the provisions of the act of 1891, as a condition precedent to the laying of the tracks of the company upon the street. If the city council had no right to grant the permission without demanding something, then it will not be pretended that the grant was made under the provisions of the act of 1891. The grant not having been made under authority of that act, of course, after the grant had been acted on, and the street occupied, it is not within the power of the council to retrace its steps, and make an assessment against the company for its occupation of the street, when the law requires that the assessment should be made before the right to occupy the street is granted. Construing the act of 1891 as contended for by counsel for the city,—that it requires that some amount should have been charged,—the act clearly requires that that amount shall be fixed and determined before the right to occupy the street is granted. It is true that payment of the amount so fixed may be deferred, but the act is imperative that the amount must be fixed before that privilege is granted. It is not pretended in the present case that this was done, and therefore the city council cannot enforce payment of the amount claimed by it, either by execution or in any other way. Whether the grant to occupy the street without the payment of any amount would be void for want of authority in the city council to make such grant, and what would be the rights of the city council or of the abutting property owners in that event, are questions not raised in the present record, and will not now be decided.

It was contended in the argument that, as the grant contained a provision that it should be subject to any ordinance that might be thereafter passed by the city council, the claim in the present case could be sustained as being one founded upon an ordinance, duly passed, requiring the street-railway company to pay the amount specified in the execution to the abutting property owners. This contention cannot be sustained, for two reasons: First, the claim sought to be enforced is, as has been seen, under a resolution purporting to be passed under authority of the act of 1891, and there is nothing in the record to indicate that in making the assessment in the present case the city council were attempting to carry into effect the authority reserved by them to pass other ordinances affecting the rights of the railway company in Smith street; and, second, for the reason that there is no authority in the charter of Atlanta for the city council to make an assessment against street-railway companies for the benefit of abutting property owners, except in the act of 1891. Although the right to pass ordinances referring to the railway company was expressly reserved, and the company expressly agreed to abide by the provision of such ordinances, this would not confer power to pass an ordinance which was not authorized by the charter. What has just been said distinguishes this case from that of City of Atlanta v. Gate City St. R. Co., 80 Ga. 276, 4 S. E. 269. In that case the agreement of the railroad company was to comply with ordinances then of force, or that might thereafter be adopted, relative to the company in question, and the ordinance passed in that case under authority of this stipulation was one which the city had charter power to pass.

Under the facts as they appeared at the trial, the judge should have dismissed the levy, and the direction of a verdict in favor of the plaintiff in execution was erroneous. Judgment reversed. All the justices concurring.

HUNNICUTT & BELLINGRATH CO. v. VAN HOOSE et al.

(Supreme Court of Georgia. July 13, 1900.)

BUILDING CONTRACT — DIVISIBILITY — ABANDONMENT — CONTRACT PRICE — RIGHTS OF OWNER—LIABILITY TO MATERIAL MAN.

1. When, by the terms of a contract, one agrees to furnish all material and labor for the construction of a building, and to turn over the same in a finished state to another, on payment of a stipulated price, such a contract is an entire one, and is not to be held as divisible because it contains a stipulation that when the building has arrived at a certain stage of completion the owner may suspend further work, and that if he elects to do so a stated sum is to be the compensation for the labor done and material furnished. When, in such a case, a building had progressed to the stage last indicated, and the contractor abandoned the work against the will of the owner, the gross sum fixed as the price for completing the entire work is the true "contract price," and not the sum contemplated to be paid in the event the owner suspended the work at a period before completion.

2. The statute which required the owner who gave out a contract for the erection of a building on his land to retain 25 per cent. of the contract price, for the benefit of laborers and material men, did not prevent such owner from making partial payments to the contractor from time to time as the work progressed, provided the aggregate of such payments did not exceed 75 per cent. of such contract price; and if, before the completion of the building according to the contract, the contractor abandoned the work and left the building uncompleted, it was the right of the owner to take possession of the same and complete it. If, in doing so, the amount required for completion, when added to the sums properly paid to the contractor, exceeded the original contract price, such owner was not liable to a material man for any part thereof.

Fish, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Hall county; R. B. Russell, Judge.

Action by the Hunnicutt & Bellingrath Company against A. W. Van Hoose and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Arnold & Arnold and Dean & Hobbs, for plaintiff in error. H. H. Perry, J. C. Boone, and G. H. Prior, for defendants in error.

LITTLE, J. The Hunnicutt & Bellingrath Company instituted an action against Van Hoose & Pearce, in which they allege that the defendants owned certain land in the city of Gainesville, and that in the spring of 1896 such owners entered into a contract with G. W. Foote, who was a contractor, to erect on said land a large building, to be known as an "auditorium," and agreed with Foote to pay him the sum of $14,200 for said building complete. It is further alleged that such contract was in two parts; that is, that when certain portions of the work were done the owners were to pay Foote $10,000, and if the remainder was completed the remaining sum of $4,200 was to be paid. The petitioner further alleged that it did certain work on, and furnished certain material for, the building, under a contract with Foote, to wit, that it furnished all the galvanized iron, tin, slate work, and skylight for the building, for which Foote agreed to pay it $1,148, which was a fair market price for the same; that $400 of said sum has been paid, leaving an indebtedness of $748 to the petitioner for said work and material. It is further alleged that, after the contract had been entered into between the owners and Foote, the latter commenced the work, and did finish the building substantially so far as to have the brick walls put up, and all stone, terra cotta, galvanized iron, etc., pertaining to the exterior work, so as to be entitled to the payment of the first-named amount of $10,000; and that thereupon the owners did pay to Foote the full amount of $10,000, without reserving 25 per cent. of said contract price, and without requiring any affidavit from the contractor, and without obtaining the consent of the petitioner; that at this point Foote abandoned his contract without completing the building according to the stipulations; and that the owners thereupon undertook to complete the building themselves, and did expend thereon the full sum of $14,200, including the sum paid to Foote, and did, therefore, use on said building and the completion thereof the full amount of the contract price, without reserving any sum whatever, and in this manner they obtained from petitioner said material and labor, and have now no sum of money held back and reserved to pay for the same. They pray a judgment against the owners of the property for the amount due them for labor performed and material furnished in the construction of the building as set out. Attached to the petition is a copy of the contract entered into between Van Hoose & Pearce (signing as the Georgia Female Seminary) and Foote for the construction of the building. It is dated April 1, 1896; and by its terms Foote undertook, in consideration of the sum of $14,200, to build, finish, and deliver on or before September 1, 1896, a building for a conservatory of music, according to specifications made a part of the contract, and to provide all labor and materials of every kind for the completion and finishing of said work. Van Hoose & Pearce undertook, on their part, for the faithful performance of the terms of the contract, to pay to Foote the sum of $14,200 in the following manner: To pay on Saturday of each week during construction a sufficient amount to meet the pay roll of the laborers for the week, and on the first day of each month a sufficient amount to cover 75 per cent. of the labor and material actually in the building. The last installment was to be paid in 30 days after the work was fully completed and accepted by the owner, free from all claims by lien or other attachments. It is further provided that if the contractor should at any time during the progress of the work refuse or neglect to supply and furnish a sufficiency of material or workmen, or cause any unreasonable neglect or suspense of the work, or fail or refuse to comply with any of the articles of this agreement, the owners should have the right and power to enter and take possession of the premises and provide material and workmen sufficient to finish the work, and the expense of so doing should be deducted from the amount of the contract. A stipulation is made in the following language: "It is mutually agreed between the parties of the first and second parts that in consideration of ten thousand dollars the party of the first part is to complete all brick walls; put in all stone, terra cotta, galvanized iron, all O. S. doors, all windows, sash, floor linings, iron columns, and all necessary partitions; to lay all floor linings; and everything pertaining to exterior work, except stone steps,—and that when this much of the building is completed the work may be suspended until such time as the party of the second part may decide to finish the building. If work is suspended for more than thirty days, the twenty-five per cent. held back by the party of the second part shall become payable by the party of the first part turning over above-described work free from lien or other attachment." To this petition the defendants filed a general demurrer, which on the hearing was sustained, and the petition dismissed. To this ruling of the court the plaintiff in error excepted.

1. This action was based on the provisions of sections 2802 and 2803 of the Civil Code, which, in effect, provide that every person who shall give out a contract for the construction of any house shall retain 25 per cent. of the contract price until the contractor shall submit to such person an affidavit that all debts incurred for material and labor in constructing the house have been paid, or that the persons to whom such debts are due have consented to the payment of said 25 per cent., and that, if any person shall pay said 25 per cent. of the contract price of the house without requiring the affidavit, he shall be liable, to the extent of 25 per cent. of said contract price, to any material man or la-

borer for material furnished or work done for said contractor in constructing said house. These sections were repealed by the act approved December 18, 1897, and are not now in force. The plaintiff claims that its rights accrued under their provisions before such repeal. Hence, it becomes necessary to pass on the questions made. It was contended for the plaintiff that, under the provisions of the Code which we have recited, it was the legal duty of the defendants in error to retain 25 per cent. of $10,000, because, under a proper construction of the contract, this sum was to be paid to the contractor, separate and apart, for the completion of certain particular parts of the building. It is also contended that inasmuch as the defendants in error paid to the contractor $10,000 of the contract price at a certain stage of the work, and, after the abandonment of his contract by Foote, used the remaining part of the full contract price in completing the building, they thereby became liable for labor and material on the building, to the extent of 25 per cent. of $14,200, because that sum was the entire contract price. Two questions, therefore, are material to be considered: First. Is the contract which was entered into by the parties an entire or divisible one? Second. What legal obligations, as to the retention of a part of the contract price, were imposed upon the owner who gave out a contract for the construction of a building on his land while these provisions of the Code were in force? And we shall address ourselves to these questions, in their order.

Section 3643 of the Civil Code, which is but a reaffirmation of the common law, declares that a contract may be either entire or severable; that, if it is entire, the whole contract stands or falls together; that, if it be severable, the failure of a distinct part does not void the remainder; and that the character of the contract is to be determined by the intention of the parties. Referring to the contract now under consideration, we find that it was the purpose and intention of the parties, as expressed by its terms, that an entire and completed building, to be known as an "auditorium," should be constructed, in a certain way and of specified materials, by a given day, and delivered to the owners; that this contract included all the work necessary for its completion, and the furnishing of all the material which entered into a finished building; and that the consideration to be paid for the building complete was $14,200. After clearly expressing the intention of the parties to have and make a completed building, and clearly stipulating what price should be paid for the same, it appears that they further agreed that for the construction and finishing of the building to a certain extent, which was clearly defined, the owners should only be obligated to pay the sum of $10,000, and that when "this much of the building is completed the work may be suspended until such time as the party of the second part may decide to finish the building." There is no stipulation that the work shall be suspended at that point in its construction, but that it may be; but in no event could it be suspended longer than the party of the second part (that is to say, the defendants in error) "may decide to finish it." So that it would seem, from a fair interpretation of the language used, that the right to have the work suspended at the point indicated rested with the owners, and that no option was given to the contractor to do less than to complete the building; and, unless the owners chose to suspend the work, the stipulation that $10,000 should be the agreed price for the particular parts of the work named did not go into effect. Clearly, this provision was incorporated for two purposes,—to give the owners the right to suspend the construction of the building when it had reached a certain stage, and to fix the compensation which the owners should pay to the contractor if they decided to suspend the work at that period of the construction. But in no event, fairly construed, does the contract contemplate that the contractor shall of his own volition stop the work until the building has been fully completed. It must follow, if this is the meaning of the contract, that it is an entire one,—that is, for a finished building,—with the right reserved to the owners to suspend further prosecution of the work, and accept and pay for the building, when it had been brought to a certain stage of completion. Unless such right was exercised, the stipulation granting it is without effect, and, in the absence of the exercise of this right, the agreement of the parties obligates the one to complete and turn over the building according to the plans and specifications, and the other to pay therefor the price of $14,200. The petition does not allege that the owners exercised the right they had to stop the erection of the building before its full completion, but, on the contrary, it explicitly alleges the fact to be that when the building reached a certain stage the contractor abandoned the work; and, as negativing that such was done with the consent of the owners, it alleges that they, after such abandonment, used the remainder of the contract price not paid over in finishing the building. So that, taken as a whole, the contract, under the allegations of the petition, bound the contractor to complete the building for a stipulated price of $14,200. See Freeman v. Campbell, 22 Ga. 184.

2. For the benefit of laborers doing work on, and persons furnishing materials for, buildings erected on the land of another, this statute rendered the owner of the land liable for 25 per cent. of the contract price, unless he should have first ascertained, in the manner prescribed by the statute, that the claims of laborers and material men for improving his property had been paid. But, while thus protecting the debt of the laborer and the person furnishing the material for his building, the statute, fairly construed, did not mean to entirely ignore the rights of the owner. This court, in the case of Gross v. But-

ler, 72 Ga. 187, and also in other cases, has ruled that the statute which created a lien on the property of an owner in favor of one who furnished materials to the contractor for the erection of a house thereon was in derogation of the common law, and its requirements must be strictly followed. It is true that there is no assertion of a lien in this case, but the object of the statute was to give an extraordinary right to laborers and material men in securing their debts, and the principle involved is practically the same. It must be borne in mind that there is no privity of contract, ordinarily, between the material man and the owner. The contractual relations which exist are between the owner and the one who undertakes to furnish all the necessary material at his own expense, and erect a building on the land of another for a stipulated price; but in order to protect the one, whose labor improves his land, and the other, whose material enters into the construction of permanent improvements thereon, the law placed a burden on the owner of the land, but it was not meant to work in an unreasonable or oppressive manner. It required that, of the contract price which he had agreed to pay for the work and material by which his building is constructed, he should retain 25 per cent. from the hands of the contractor until satisfied in a particular manner that the debts for labor and material had been paid. It does not mean that the owner might not from time to time, to meet the wants of the contractor and to suit his own convenience, make payments as the work progressed. Nor did the statute require that 25 per cent. of earnings for work actually done in the progress of the building should be withheld. This court, in the case of McAuliffe v. Bailie, 89 Ga. 856, 15 S. E. 474, ruled that under it partial payments might be made to a contractor engaged in the work of erecting a house, to any extent, provided that the amount of such partial payments made did not aggregate more than 75 per cent. of the total contract price. It is stipulated in the contract between the parties to this case that on Saturday of each week during the construction of the building the defendants should pay to the contractor a sufficient sum, as part of the contract price, to meet the pay roll of the laborers who were engaged in the work on the building for the week, and also that on the 1st day of each month they should pay an amount sufficient to cover 75 per cent. of the labor and material actually in the building. The petition alleges that the contractor commenced the work, and did finish the building, substantially, so far as to have the walls put up, and all stone, terra cotta, galvanized iron, etc., pertaining to the exterior work, done, and that the owners, when this much of the contract had been complied with, had paid to the contractor the sum of $10,000. This, we think, they were authorized to do; for, under the authority of the McAuliffe Case, supra, they were authorized to make partial payments in any manner they desired, and could not be held liable if such partial payments did not exceed 75 per cent. of the contract price. The statute did not contemplate that such payments might not be made, nor did it, in any event, require that any sum should be retained in excess of 25 per cent. of the contract price. It can make no difference how and to what extent advancements were made to the contractor, so that, on final settlement, the owner had in his hands 25 per cent. of the amount which he agreed to pay for the construction of the building. This court, in the case of Royal v. McPhail, 97 Ga. 457, 25 S. E. 512, in construing the statute under consideration, ruled that no owner of real estate, who contracts for the erection thereon of any building, is, in any event, liable, in the aggregate, to material men, laborers, or others furnishing material, labor, or other thing for any of the purposes mentioned, for more than 25 per cent. of the contract price which said owner has agreed to pay his contractor for the building in question. So that, taking the sum of $14,200 as being the contract price which the defendants in error agreed to pay to Foote for the construction of the building, the owners, without violating the provisions of the statute, were at liberty to pay, as the work progressed, so much and any part of the contract price, as they saw fit, provided such payments did not aggregate more than 75 per cent. of such price; and, as a matter of law, it must be ruled that the defendants in error, in such payments, aggregating $10,000, did not exceed the limit prescribed.

But it is contended that, inasmuch as the building was in fact completed, under a fair construction of the statute, notwithstanding the contractor abandoned the work, the owners must be held liable for labor and material to the extent of 25 per cent. of the amount originally agreed to be paid. We do not think so. Necessarily, to a certain extent, at least, the contract for the erection of the house must be considered, in fixing the rights, respectively, of the owners and the material men. When the statute provided that the owner should be liable, to the extent of 25 per cent. of the contract price, to material men and laborers, it necessarily meant that he was liable when the contractor had performed the work which he agreed to do; for otherwise the statute would become an instrument of oppression, and a means of working gross injustice. The words are that he shall retain 25 per cent. of the contract price, and it meant that he should retain it from the contractor; that is, that he should not pay him over the full contract price, when? Necessarily, when the work had been finished and the contract has been executed according to its terms by the contractor, because the contract price did not become due until the work was completed. The compilers of the American and English Encyclopedia of Law (volume 15, 1st Ed., p. 51) declare that a subcontractor's remedy is limited in its extent by the terms of the original contract be-

tween the owner and contractor; citing Dunn v. Rankin, 27 Ohio St. 132; Miller v. Whitelaw, 28 Mo. App. 639. And Mr. Boisot, in his work on Mechanics' Liens (section 85), says, "Where a contractor abandons the work at a time when there is nothing due him according to the contract, and the building is not completed under the contract, the subcontractors and material men in the second degree have, according to the majority of the decisions, no liens," for which proposition he cites Beecher v. Schuback, 4 Misc. Rep. 54, 23 N. Y. Supp. 604; Larkin v. McMullin (N. Y. App.) 24 N. E. 447; Hollister v. Mott, 132 N. Y. 18, 29 N. E. 1108; Fenno v. Hannan, 57 Hun, 585, 10 N. Y. Supp. 406; Dingley v. Greene, 54 Cal. 335. It is expressly stipulated in the contract under consideration that if the contractor shall fail or neglect to supply a sufficiency of material or workmen, or cause any unreasonable neglect or suspension of the work, or fail or refuse to comply with any of the articles of this agreement, the owner shall have the right to enter upon and take possession of the premises, and provide material and workmen sufficient to finish the work, and the expenses of the same shall be deducted from the amount of the contract; and it seems that was exactly what was done in this case. Foote, the contractor, abandoned the work, and at the time he abandoned it there was, under the facts shown, no amount due him; and such abandonment was without the consent of the owners, who afterwards, under the contract, took possession and finished the building. It has been ruled that, where such a provision was incorporated in a contract, the failure of the contractor to complete the work does not prevent the lien of a subcontractor from attaching to the balance due after the owner's completion of the work, because in that case the building is in fact completed under the contract. See Blakeslee v. Fisher (Sup.) 21 N. Y. Supp. 217; Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017. Mr. Boisot, however, further, in section 65, says that in such case the cost of completing the work is to be deducted from the contract price, in order to ascertain the amount up to which the subcontractors may claim liens, and if such deductions, together with payments previously made to the contractor, equal or exceed the entire contract price, then, of course, the subcontractors and material men have no lien, since there is nothing due under the contract; citing Ferguson v. Burk, 4 E. D. Smith, 760; Jewell v. Paron, 94 Mich. 83, 53 N. W. 951; Dudley v. Jones, 77 Tex. 69, 14 S. W. 335.

Taking, then, the allegations in the petition, and construing the contract according to the intention of the parties, and giving to the statute a fair construction, we must rule that no error was committed by the trial judge in sustaining the demurrer to the petition. In such a case the material man must be remitted to his remedy against the contractor with whom he originally dealt. Judgment affirmed. All the justices concurring, except FISH, J., dissenting.

FISH, J. (dissenting). Prior to the repeal of sections 2802 and 2803 of the Civil Code, one who gave out a contract for the construction of a building, and who failed to retain 25 per cent. of the contract price thereof until the contractor should submit to him an affidavit that all debts incurred for material in the construction of the building had been paid, or that the persons to whom the debts for material were owed had consented to the payment of such per cent., was liable, to the extent of 25 per cent. of the contract price, to a material man for material furnished to the contractor in constructing the building, although the contract contained a stipulation to the effect that, when the building should have progressed to a certain stage towards completion, the owner might suspend further work thereon, and, should he elect so to do, then a stated sum should be the compensation of the contractor for the work done and material furnished up to that time, and notwithstanding the fact that, when the work of construction had reached the stage mentioned, the contractor abandoned it without the consent of the owner

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MILLS v. GEER et al.

(Supreme Court of Georgia. July 12, 1900.)

EJECTMENT—IMPROVEMENTS—CONSTITUTIONAL LAW—MESNE PROFITS—SET-OFF—GUARDIAN—SALE OF WARD'S LAND.

1. Under the act of December 21, 1897 (Acts 1897, pp. 79–81), in a suit to recover land, the defendant, who has bona fide possession of such land under adverse claim of title, may plead as a set-off the value of all permanent improvements bona fide placed thereon by himself, or other bona fide claimants under whom he asserts title, notwithstanding such improvements may have been made before the passage of the act. In case the legal title is found to be in the plaintiff, and it should further be found that the value of such improvements at the time of the trial exceeds the mesne profits, while plaintiff is entitled to a verdict in his favor for the land, the defendant is also entitled to a recovery for the amount of excess of the value of such improvements over the mesne profits. The act, thus applied, is not unconstitutional on account of being retroactive or ex post facto, or on account of its interfering with any vested right of the owner of the land.

2. Where plaintiffs in such an action have been in possession of or enjoyed the rents, issues, and profits from lands of the defendant, which they had received in lieu of the lands involved in the suit, the latter has a right to plead such benefits derived by plaintiffs as a set-off to their claim for mesne profits against him.

3. Prior to the act of 1889, embodied in Civ. Code, § 2545, a judge of the superior court had no authority to pass an order in vacation authorizing a guardian to sell or exchange the lands of his ward for reinvestment; and a deed made by the guardian, in pursuance of such an order, to a purchaser, was void.

4. A defendant in an action for the recovery of land, who claims credit for improvements made by his predecessor, is likewise liable for all mesne profits chargeable to such predecessor;

otherwise, if the defendant claims credit only for such improvements as he himself placed upon the land since his possession.

Lumpkin, P. J., dissenting from ruling announced in first headnote.

(Syllabus by the Court.)

Error from superior court, Calhoun county; W. N. Spence, Judge.

Action by Claud W. and Steven B. Geer against Elijah Mills. Judgment for plaintiffs, and defendant brings error. Reversed.

J. J. Beck and W. C. Worrill, for plaintiff in error. R. H. Powell & Son, for defendants in error.

LEWIS, J. Claud W. and Steven B. Geer brought complaint for land in Calhoun superior court against Elijah Mills. The tract involved in the suit was 107¾ acres, known as the "Geer Home Place," and plaintiffs claimed a one-half undivided interest therein as heirs at law of P. F. and L. M. Geer. Suit was for the recovery of this interest, and mesne profits of the land, alleged to be of the yearly value of $400. To this petition the defendant filed an answer, the important portions of which are embodied in amendments, in substance, as follows: On August 19, 1886, R. R. Blocker, as guardian of plaintiffs and their four brothers (it seems, he was duly appointed guardian after the death of their parents), presented to Hon. B. B. Bower, judge of the superior courts of the Albany circuit, his petition asking leave to exchange certain lands in Calhoun county, Ga., embracing the land sued for in this case, belonging to his wards, and in his possession and control as such guardian, for certain lands in Early county, Ga., owned by A. S. Mills. Upon the hearing of this application, on September 14, 1886, the judge granted an order authorizing the exchange prayed for. It seems, this order was granted in vacation. On September 20, 1886, a conveyance was made by said guardian, by virtue of the order granted by the judge, of certain tracts of land, among which was the one involved in this suit. In pursuance of the same order, A. S. Mills on the same date conveyed to the guardian, for the use of his wards, certain lands in Early county, Ga., amounting to about 500 acres. After the execution of the deeds, A. S. Mills went into the possession of the lands conveyed to him; and Blocker, guardian for plaintiffs and his other wards, took possession of the lands in Early county conveyed to him by Mills, and held possession of the same for the use and benefit of his wards until he died, and during that time received and used the rents, profits, and income from the lands for the use and benefit of plaintiffs and the other wards. After the appointment of the guardian, two of the wards (Walter and Ralph Geer) died, which left but four remaining heirs of the estate. These, including plaintiffs, continued in possession of all the lands in Early county conveyed by Mills to Blocker, their guardian, for some time. Two of them (Charles and Willie) after becoming of age sold and transferred their interest in the lands in Early county to certain purchasers. A. S. Mills conveyed the land involved in this suit to the defendant, Elijah Mills, executing to him a warranty deed to the same, and put him in possession thereof. The lands conveyed by Mills to the guardian for the benefit of his wards are alleged in the answer to have been of more value than the lands conveyed by the guardian to Mills; that the defendant had paid the purchaser from the guardian full value of the land in controversy; that this purchaser, A. S. Mills, accepted the conveyance from the guardian in good faith, believing he was getting a good title thereto, and defendant purchased the land in dispute in the best of faith, believing he was getting the best of title thereto. After A. S. Mills got the land in Calhoun county, he made large and valuable improvements thereon, and enhanced its value in the sum of $1,000, and defendant made on it, since his purchase, improvements of the value of $300, so that the land embraced in the suit was by these improvements enhanced in value to the aggregate amount of $1,300. The land in Early county conveyed to the guardian for his wards was in good condition for cultivation at the time of the conveyance,—woodland, well timbered, and timber valuable; 250 to 300 acres in good condition for cultivation. It had on it a comfortable dwelling, good tenant house, a good crib and stables, and a gin house, and was worth for rent at the time it was delivered to the guardian $250 to $300 per year. After the conveyance to Mills, and especially since the death of the guardian, this land had been greatly neglected; the buildings and improvements had not been kept in repair; gin house and other buildings torn down and removed, and those remaining allowed by neglect to go to decay; a large part of the timber cut from the land and sold, plaintiffs and their two brothers having received the benefits of such sale. Plaintiffs, before filing their suit, never made any offer to A. S. Mills to restore to him the possession of his said lands, but continued to hold the same, that it was their purpose not only to try to recover from defendant the land sued for, but also to try to hold the land that was conveyed by said A. S. Mills to their guardian. By reason of the sale of a large part of the lands conveyed by Mills to Blocker, guardian, in trust for plaintiffs and their brothers, it was charged that plaintiffs could not restore Mills to his former position. Attached to the answer was an itemized statement of improvements placed by the defendant and his predecessor in title on the land conveyed to Mills by the guardian. The answer prayed, first, that the sale and conveyance of the land sued for by Blocker, guardian, to the plaintiffs and their brothers, be confirmed, and plaintiffs be enjoined from prosecuting suit against the defendant, Elijah Mills, or from recovering said land; that, should it be held that plaintiffs have a right to recover, they first be required to account

for the rents and profits from said lands in Early county conveyed by A. S. Mills to the guardian, and also that they be first required to pay to defendant the value of the improvements made upon the land sued for. Then follows a prayer for general relief. Plaintiffs below demurred to the above amended plea of the defendant upon general grounds, and this demurrer was sustained by the court, except as to the twelfth paragraph of the plea, reciting the fact that before filing the suit plaintiffs had made no offer to restore to A. S. Mills possession of his lands deeded by him to their guardian; and the court also struck the second prayer of the plea, in so far as it prayed that the value of improvements made by defendant in excess of the mesne profits be made a charge against the premises in dispute in the event it should be determined that plaintiffs had title to the land sued for. To this judgment of the court the defendant duly filed his exceptions pendente lite, and assigns error thereon in his bill of exceptions. The case then proceeded to trial before a jury, and they returned a verdict for the plaintiffs for the land in dispute, and for the sum of $93.75, rents and mesne profits therefrom. Defendant moved for a new trial, and assigns error on the judgment of the court overruling the same, on each and every ground.

1. There can be no question but that the act of December 21, 1897 (Acts 1897, pp. 79–81), was intended to apply not only to improvements that might thereafter be erected upon land by bona fide purchasers thereof, but also to all such improvements of the character contemplated by the act which might have been erected by such defendant, or those under whom he claims, prior to its passage. In fact, the very first section of the act refers in express words to "all cases where an action has been brought for the recovery of land." Its terms, therefore, were applicable not only to suits for the recovery of land thereafter brought, but also to such suits as were pending in court at the time of the passage of the act, and necessarily referred to past as well as future improvements. In the case we are now considering, however, the suit was brought after the passage of the act, and hence it is unnecessary to discuss what would have been the effect had the suit been pending at the time of the passage of the act. While some courts seem to have made distinctions in this particular, we must confess that we can see no difference in principle whether it was pending when the act was passed, or brought soon after its passage. The main question is whether the act is unconstitutional on account of its being an ex post facto or retroactive law. There is no question about the act being retroactive in its effect, and it may be contended that it is violative of article 1, par. 2, § 3, of the constitution of Georgia, embodied in Civ. Code, § 5730; and especially to that provision therein prohibiting the passage of retroactive laws. It cannot be said, however, on account of this provision in the constitution, that the general assembly of Georgia is utterly powerless to enact any valid retrospective legislation. Under repeated rulings of this court, made since the adoption of the constitution of 1877, and having direct reference to this provision in that constitution, validity has been given to legislation retroactive in its effect. We deem it important in this connection only to cite the case of Pritchard v. Railroad Co., 87 Ga. 294, 13 S. E. 493, 14 L. R. A. 721, where it was held that: "An action against a railroad company for personal injuries, pending when the act of November 12, 1889, amending section 2967 of the Code, was passed, was not abated by the death of the plaintiff; nor is that act, as applicable to actions pending at the time of its passage, unconstitutional." Justice Lumpkin, in his opinion in that case, on page 297, 87 Ga., page 494, 13 S. E., and page 723, 14 L. R. A., says: "The constitution of 1865 forbade the passage of 'retroactive laws, injuriously affecting any right of the citizen.' No provision against retroactive legislation appears in the constitution of 1868. That of 1877 forbids the passage of a 'retroactive law.' Construing together the above constitutional provisions in connection with the section of the Code cited, we take it that they all amount to substantially the same thing, and mean that retroactive laws which do not injuriously affect any right of the citizen (that is to say, laws curing defects in the remedy, or confirming rights already existing, or adding to the means of securing and enforcing the same) may be passed." Sustaining the views of the court in that case, Justice Lumpkin cites a number of authorities. It is not an open question, therefore, in this court, as to what is really meant by the constitutional inhibition against retroactive laws in Georgia. That instrument simply strikes at such retrospective legislation as injuriously affects some substantial right of the citizen. Bacon v. Mayor, etc., 105 Ga. 62, 31 S. E. 127.

But it is contended by counsel for defendants in error that the act of December 21, 1897 (Acts 1897, pp. 79–81), in so far as it applies to pre-existing causes of action, is invalid. It is insisted that plaintiffs' right to recover mesne profits with the land, and their rights to recover the land, without further offset on account of improvements than the extent of mesne profits, were at the time of the passage of the act vested rights. The controlling question, then, in this case, is whether the act in question deprives the plaintiffs seeking to recover land on a perfect title of any vested or substantial right by the defense therein allowed the defendant touching improvements placed by him or his predecessors in title, in good faith, upon the land. To determine this question, we will, in this connection, notice what provision the act makes. The first section of the act declares that, "in all cases where an action has been brought for the recovery of land, the defendant who has bona fide possession of such

land under adverse claim of title may set off the value of all permanent improvements bona fide placed thereon by himself or other bona fide claimants under whom he claims, and in case the legal title to the land is found to be in the plaintiff, if the value of such improvements at the time of the trial exceeds the mesne profits, the jury may render a verdict in favor of the plaintiff for the land and in favor of the defendant for the amount of the excess of the value of said improvements over the mesne profits." The act then goes on to provide that the verdict shall also find the value of the land itself at the time of the trial, and gives the plaintiff the right to recover the premises by paying the defendant the excess of the value of the improvements over the mesne profits, and, in the event that he fails to do so within the time fixed by the court, the defendant shall have the right to pay the plaintiff the value of the land and the mesne profits found by the jury. The act further provides other equitable and just remedies to guard against any wrong to either party, and, among them, a commissioner may be appointed by the court, and the proceeds of the sale of the land may be divided between plaintiff and defendant in the ratio that the value of the land bears to the excess in value of the improvements over the mesne profits. We simply recite some of these provisions of the act, with a view of showing in this connection its general scope and purpose. There can be no question, from reading and studying the entire act, that the purpose of the legislature was to do equal and exact justice between the parties in all cases contemplated by the provisions of the act. Now, what right of the owner of land is there that can be devested by enforcing the provisions of this law? It is a matter that may be regarded now as almost an elementary principle, in the construction of constitutional law upon the subject of retroactive legislation, that it does not refer to those remedies adopted by a legislative body for the purpose of providing a rule to secure for its citizens the enjoyment of some natural right, equitable and just in itself, but which they were not able to enforce on account of defects in the law, or its omission to provide the relief necessary to secure such right. It is true that this opens a broad field for the exercise of judicial discretion and power, for many cases may arise in which there is no positive written rule from the lawmaking power that can give the court any substantial aid in arriving at a just conclusion. But this is unavoidable. It is obliged to happen, in some instances, that in construing constitutional provisions, expressed in general terms, touching the rights of the citizen, there is no criterion to go by, except a natural sense of right and justice, and no relief can be had to redress a wong or to enforce a right, save to appeal to the enlightened conscience of an impartial judiciary. Courts cannot be too cautious to see that ex post facto or retroactive laws shall not devest any citizen of a real right, and they should be equally as cautious in declaring an act of the general assembly null and void when it seeks to redress a wrong, and to apply the remedy it presents not only to future, but to past, transactions. The relief provided by the act of 1897 was for those who held property in good faith, honestly believing that they had acquired a good title thereto, and who, upon the faith of such belief, had spent their money and labor in improving the property. Prior to the act of 1897, for want of remedial legislation in this particular, an innocent person might purchase a vacant piece of property, of scarcely any appreciable value, place thereon permanent and substantial improvements, enhancing its value a thousand fold,—yea, he might spend thereon his time and labor and means, and even the accumulated fortune of a lifetime in such improvements,—and yet the owner, who had delayed asserting his rights until the property had thus been enhanced in value, could reap the fortune placed upon it, and turn the purchaser out a pauper. Neither equity nor natural justice can recognize such a right in one to reap the reward of the labor, services, and fortune of another without paying therefor any compensation whatever. It would be revolting to educated reason and shocking to an enlightened conscience. We may have stated above an extreme case, but, in a sense, they are extreme cases to which the act was intended to apply. We are aware of nothing in the decisions of this court, or in the judicial opinions of any of its members, from which can be even inferred a denial of such a natural equity as that which this act of 1897 undertakes to protect.

For years the decisions of this court touching the right of a bona fide claimant to land, who did not have the legal title thereto, for compensation on account of valuable, permanent, and substantial improvements he had placed thereon, seemed to waver in the balance, not upon the idea of any want of such natural equity or of any natural right the owner had in such a case to take the improvements without paying for them, but upon the idea of a want of any remedy provided by the law for a defendant to recover for such improvements in ordinary suits at law for land. Finally, in the case of Dudley v. Johnson, 102 Ga. 1, 29 S. E. 50, the question was clearly and definitely settled by this court. It was there decided that: "Neither in an action of ejectment nor in complaint for land can a defendant set off the value of improvements placed thereon by him, to an amount beyond the sum which the plaintiff would be entitled to recover by way of mesne profits; nor can a defendant in such a case, upon an equitable answer, recover against a plaintiff the value of improvements in good faith placed upon the premises by such defendant, and have the same, by equitable decree against the owner, made a charge upon the premises on which they are placed, and from which the defendant is evicted under a judgment rendered against him in such

suit." There is no intimation, either in the decision or in the opinion of that case, against the natural equities of the defendant under the circumstances, nor is there any intimation that, if the action had been a proceeding in equity by the plaintiff, the defendant might not, under equitable principles, have obtained the relief sought. As Justice Atkinson says in the opinion on page 5, 102 Ga., and page 51, 29 S. E.: "The plaintiffs were not seeking the aid of a court of equity, but sued upon their strictly legal rights. They were, therefore, not required, upon equitable principles to make any concession to the defendants." On page 8, 102 Ga., and page 53, 29 S. E., at the conclusion of the opinion, he says: "The general assembly, by making provision upon this subject, will be presumed to have settled the policy of the state with respect to the allowance for improvements; and it should be left to the wisdom and discretion of that body to say whether rights, in addition to those stated in the sections of the Code above referred to, should be conferred upon persons who enter, whether in good or bad faith, upon the property of another, and make valuable improvements thereon." Upon this suggestion it would seem that the legislature has acted by the passage of the act of 1897; and we are now to determine whether we will give that act validity and force according to the true legislative intent when it was passed. An early case on this subject, touching the relative rights of the owner and tenant in relation to improvements put by the latter upon the premises, is the case of Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875. As that case has been relied on and cited to a considerable extent by courts of last resort in various states of the Union, we will be justified in quoting to some extent from the learned opinion of Justice Story therein. On page 494, 1 Story, he says: "The other question, as to the right of the purchaser, bona fide and for a valuable consideration, to compensation for permanent improvements made upon the estate, which have greatly enhanced its value under a title which turns out defective, he having no notice of the defect, is one upon which, looking to the authorities, I should be inclined to pause. Upon the general principle of courts of equity, acting ex æquo et bono, I own that there does not seem to me any just ground to doubt that compensation, under such circumstances, ought to be allowed to the full amount of the enhanced value, upon the maxim of the common law, 'Nemo debet locupletari ex alterius incommodo.'" Again, on page 495, seeming to recognize that there was no direct authority upon the subject, he says: "Now, if there be no authority against the doctrine, I confess that I should be most reluctant to be the first judge to lead to such a decision. It appears to me, speaking with all deference to other opinions, that the denial of all compensation to such a bona fide purchaser in such a case, where he has manifestly added to the permanent value of an estate by his meliorations and improvements, without the slightest suspicion of any infirmity in his own title, is contrary to the first principles of equity. Take the case of a vacant lot in a city, where a bona fide purchaser builds a house thereon, enhancing the value of the estate to ten times the original value of the land, under a title apparently perfect and complete; is it reasonable or just that in such a case the true owner should recover and possess the whole, without any compensation whatever to the bona fide purchaser? To me it seems manifestly unjust and inequitable thus to appropriate to one man the property and money of another, who is in no default. The argument, I am aware, is that the moment the house is built it belongs to the owner of the land, by mere operation of law, and that he may certainly possess and enjoy his own. But this is merely stating the technical rule of law by which the true owner seeks to hold what, in a just sense, he never had the slightest title to; that is, the house. It is not answering the objection, but merely and dryly stating that the law so holds. But then, admitting this to be so, does it not furnish a strong ground why equity should interpose and grant relief? I have ventured to suggest that the claim of the bona fide purchaser, under such circumstances, is founded in equity. I think it founded in the highest equity, and in this view of the matter I am supported by the positive dictates of the Roman law. The passage already cited shows it to be founded in the clearest natural equity. 'Jure naturæ æquum est.'" The writer goes on, in his learned opinion, to state that it was a grave mistake, sometimes made, that the Roman law merely confined its equity or remedial justice on this subject to a mere reduction from the amount of the rents and profits of the land; and he further states that the like principle has been embodied into the law of the modern nations which have derived their jurisprudence from the Roman law, and it was "recognized in France, and enforced by Pothier, with his accustomed strong sense of equity and general justice and urgent reasoning," and that it was also recognized in the law of Scotland. The supreme court of Missouri, in treating of the justice and validity of such laws, uses the following language, by Brace, J., in the case of Stump v. Hornback, 94 Mo. 80, 6 S. W. 358: "The object was not to deprive him [the owner] of his land, with or without his consent, or the possession of it, but simply to withhold the possession until he paid the occupying claimant the value such claimant had added to the land by his improvements. The law said to the owner: 'You have sought the assistance of the law to enable you to recover your land from another, who in good faith believed it was his, and in such faith has enhanced the value of your property. Now you shall have possession of it, but not until you yourself have done "that justice which the law loveth," and paid that enhanced value to him who hath earned it.'"

In the case of Saunders v. Wilson, 19 Tex. 194, it was decided that a statute of that state "which secures to possessors of real property, in good faith, reimbursement from the true owner for permanent and valuable improvements made on the property by the former, [is] consistent with equity and the civil law, and not inconsistent with the constitution." On page 196, in the opinion in that case, it is declared: "But the provision that a defendant, a possessor in good faith, through whose capital and toil the land has received a great accession in value, should receive full compensation for permanent and valuable improvements, is liable to no objection, either on constitutional grounds, or on those of sound policy or fair and honest dealing between man and man." On page 199 it is observed that this doctrine of reimbursement by the owner for expense of improvements made by the possessor in good faith "was recognized in Roman jurisprudence, the great fountain of most of the modern law of the civilized world; that it is sanctioned to a great extent in equity, and, in the opinion of Justice Story, should go the whole length of the remedial justice administered under our statute." See same subject thoroughly and ably discussed in Ross v. Irving, 14 Ill. 171, 177; Griswold v. Bragg, 48 Conn. 577–581. In the case of Pacquette v. Pickness, 19 Wis. 219, the constitutionality of a similar act of the legislature of that state was called in question. One ground of the attack made upon the act was that it was in conflict with section 10, art. 1, of the constitution of the United States, which, among other things, declares that no state shall pass any ex post facto law, and that it was also contrary to a provision in the constitution of the state of Wisconsin. Downer, J., in delivering the opinion of the court in that case, on page 222, says: "We are of opinion that the 'Improvement Act,' so called, is constitutional. It is based upon the broad principles of equity, and, if properly administered, will give to each party his rights. Similar acts have been in force in many of the states for more than half a century, and have been so uniformly held constitutional that we consider ourselves bound by the great weight of authority in their favor." In the case of Whitney v. Richardson, 31 Vt. 300–310, it appeared that a betterment act in that state which related to compensation for improvements placed in good faith upon land restricted its operation to those who entered before the passage of the act. That was a suit for betterments upon lands recovered by the defendants of the plaintiff in a previous action of ejectment. It appeared that at the time of the plaintiff's entry the existing act could not apply to him, on account of the restriction above referred to, and it was contended that he could not, therefore, avail himself of its benefits by virtue of the fact that the restriction had been removed after his entry. It was decided in that case that, though no law allowing a recovery for betterments existed at the time of his entry, yet the acts passed subsequently gave him a right to such recovery. There was an act in force in Massachusetts that provided, among other things, that "where any action has been or may be commenced for the recovery of lands, which the tenant holds by virtue of a possession and improvement, and of which he, or those under whom he claims, have had the actual possession for six years or more, the jury, at the request of the tenant, shall find the value of the improvements, and also, upon the requisition of the defendant, shall find the value of the tenements, if they have not been improved." The act in its other portions has provisions very similar to our act of 1897 touching the compensation of the defendant for such improvements. It will be observed that that act by its terms applied to any action, not only including suits thereafter to be brought, but such as were pending at the time of the passage of the act. The validity of that act was sustained in the case of Bacon v. Callender, 6 Mass. 303. For the terms of the act, see page 306. On page 308 of that volume the court says: "The demandant has not contested the constitutionality of this statute, so far as may affect actions sued after its passage, but denies it as affecting actions pending at that time. We see no ground for this distinction, and if it were competent for the legislature to make these provisions, to affect actions after to be commenced, the same provisions might apply with equal authority to actions then pending." Cooley, in his work on Constitutional Limitations, devotes considerable space to a discussion of this identical question. On page 475 he says: "But cases may sometimes present themselves in which improvements actually made by one man upon the land of another, even though against the will of the owner, ought, on grounds of strict equity, to constitute a charge upon the land improved. If they have been made in good faith, and under reasonable expectation on the part of the person making them that he was to reap the benefit of them, and if the owner has stood by and suffered them to be made, but afterwards has recovered the land and appropriated the improvements, it would seem that there must exist against him at least a strong equitable claim for reimbursement of the expenditures, and perhaps no sufficient reason why provision should not be made by law for their recovery." After a review of some of the decisions bearing upon the subject, the learned author reaches the following conclusion (page 478: "Betterment laws, then, recognize the existence of an equitable right, and give a remedy for its enforcement where none had existed before. It is true that they make a man pay for improvements which he has not directed to be made, but this legislation presents no feature of officious interference by the government with private property. The improvements have been made by one person in good faith, and are now to be appropriated by another. The parties cannot be placed in statu quo, and the

statute accomplishes justice, as nearly as the circumstances of the case will admit, when it compels the owner of the land, who, if he declines to sell, must necessarily appropriate the betterments made by another, to pay the value to the person at whose expense they have been made. The case is peculiar, but a statute cannot be void, as an unconstitutional interference with private property, which adjusts the equities of the parties as nearly as possible according to natural justice."

A number of authorities bearing upon this subject and trending in the same direction might be cited, for we have by no means above undertaken to exhaust authority on the subject. It is true that in all the cases cited the rules of law touching retroactive legislation are not involved, but all the authorities are directly in point on the proposition that the act of the general assembly under consideration does not affect any vested or substantial right of the owner of property, is not an interference with private property, and is remedial in its nature, for the purpose of enforcing natural right and equity; and under the construction of this court as to what is meant by "retroactive legislation," in our constitution, we think it clearly follows, both from reason and authority, that the act of 1897 does not fall within any inhibition prescribed by the organic law of this state. In some of the cases cited it will be seen that betterment acts similar to the Georgia law of 1897 have been considered and held valid, notwithstanding constitutional provisions touching retrospective or ex post facto laws, and have been held not to be unconstitutional because made applicable to suits pending at the time of their passage. In other cases cited that question is not directly involved. For instance, in Texas, it seems the act under consideration had been in force many years before the pendency of that suit. But it does not follow that even these authorities are not in point, though the states in which the decisions were rendered should have no constitutional inhibition against retroactive legislation; for, if the principle decided by those courts is correct, then the character of legislation we are now considering does not affect any right of the owner of land. If this be true, then, under previous decisions of this court, the act in question is not in any manner retroactive, in the constitutional sense of that word. It impairs the obligation of no contract. It destroys no vested right. It is not an unauthorized interference with private property. It seeks to do right and to prevent wrong. Our conclusion, therefore, is that the plaintiff in error is entitled to go before the jury on the question of the value of improvements placed upon the land by himself and predecessor in title, and that he is entitled to a verdict at least to the amount that such permanent improvements had really enhanced the value of the land. Should the jury find that this amount exceeds the mesne profits, then it would be their duty to find a verdict in favor of the defendant for the amount of such excess. If the pleadings of plaintiff in error in this case be true, not to apply above rule would be a peculiar hardship and injustice to him, and an unconscionable advantage to the other parties; for, after greatly deteriorating in value the land received, they purpose now to give it up, and take such land, greatly enhanced in value by permanent improvements, without contributing one cent for such increase in worth.

2. A part of the answer that seems to have been stricken by the order of the court in sustaining the demurrer related to the rents, issues, and profits realized by the plaintiffs from the lands they had acquired in lieu of the land sued for in this case; and it was prayed in the answer that, should it be held the plaintiffs had a right to recover, they should first be required to account for the rents and profits from the land in Early county, as well as for the value of the improvements upon the land in suit. We think there was error in sustaining the demurrer, also, to this portion of the answer. Whatever benefits the plaintiffs derived from the land exchanged for that involved in this suit, either though their guardian, or by themselves after his death, would clearly be a proper subject-matter of set-off against the rents and mesne profits which they claim in the land sued for, whether the profits they derived from the Mills land were rents, or proceeds of the sales of timber or turpentine upon the place. This right of the defendant would seem to be the more patent, if, as a result of their profits in timber, etc., a serious diminution in the value of the land had been caused. Much of the answer gives a detailed history of how the defendant acquired title to the premises in dispute. This is not improper in an answer in such a case, for the reason that it might throw light upon the bona fides of his possession and claim of title, and tend to show that he was in such a position as to claim the improvements under the act of 1897. We therefore think the demurrer should not have been sustained as to any of these allegations. That portion of the answer, however, asking for a confirmation of the conveyance made by plaintiffs' guardian to A. S. Mills, and the conveyance made by him to the guardian, was properly stricken, for the reasons which we will hereinafter assign. The above disposes of the questions raised by the exceptions filed pendente lite to the judgment of the court sustaining the demurrer to defendant's answer, and also disposes of some of the grounds in the motion for a new trial.

3. It is contended by counsel for plaintiff in error that the title under which he claims the land sued for originated from an exchange of lands between his grantor and the guardian of defendants in error, made in pursuance of an order of the judge of the superior court authorizing the exchange, and that it was rather in the nature of an investment than a sale of the ward's property. It is further contended

that at the time this order was granted the judge of the superior court had authority to authorize guardians to invest the funds of their wards in land, and to pass upon applications for such purpose either in term time or vacation. Civ. Code, § 3432, is cited as authority for this position. It provides: "Guardians, trustees, executors and administrators are authorized to invest any funds held by them as such guardians, trustees, executors and administrators, in lands: provided, an order to that effect be first obtained from the judge of the superior court who is authorized to consider and pass upon such applications, either in term time or vacation." Civ. Code, § 3180, which relates to investments by a trustee holding trust funds in stocks, bonds, or other securities issued by this state, is also cited. This section provides: "Any other investments of trust funds must be made under an order of the superior court, either in term, or granted by the judge in vacation, or else at the risk of the trustee." It is true, these sections of the Code were the law of this state before the guardian obtained his order to sell or exchange lands of his ward for the lands embraced in this suit. For the same sections, see Code 1882, §§ 2330, 2541, which are copied in the present Code. It appears in the record that, in the petition to the judge of the superior court to obtain this order, the guardian applied for a guardian ad litem to be appointed for the wards; that such a guardian was appointed, accepted the appointment, was directed to investigate and see if it was to the interest of the wards that the exchange should be made; and that he made a report thereon indorsing the same. While there is some force in the contention of counsel in claiming that this was not a sale, strictly speaking, of the wards' property, but was rather in the nature of an investment, as a matter of law, we do not think that either section applies to a case of this character. The sections relate to an investment of funds in the hands of guardians, etc., and do not, by their terms, have any reference to exchanging real estate belonging to minors for other realty. Such a disposition of property of minors is as much a sale thereof as it would be to convey the same for money to be invested in other land; the only difference being that in one case money is paid to the ward for land, and in the other case land is paid for land. But we do not think this an open question in this court. In Pughsley v. Pughsley, 75 Ga. 95, it appears that land was conveyed in fee simple to a woman and her children. It was held that upon application of the woman for herself and minor children, and upon the appointment of a guardian ad litem, the chancellor could not pass an order at chambers authorizing the sale of the land and reinvestment of the fund; that the decree in vacation ordering the sale was void, and the title of the children was not devested thereby. See, also, Rogers v. Pace, 75 Ga. 436–438, where it was decided, "The judges of the superior courts of this state can do no act nor grant any decree in vacation unless it be authorized by statute." In the case of McDonald v. McCall, 91 Ga. 304, 18 S. E. 157, it appears that a devise was made in 1858 to a named person and to a married granddaughter of testatrix; the share going to the granddaughter to be held by the husband in trust for her for life, and at her death to be divided between her children. It was decided in that case that a conveyance made by the trustee in 1860 under an order of the chancellor granted in vacation passed no title, save as to the life estate of the granddaughter, and would be no obstacle to a recovery of the premises by her children after her death. In Crawford v. Broomhead, 97 Ga. 614, 25 S. E. 487, it was decided, "Prior to the passage of the act of November 11, 1889, relating to sales of the estates of wards for reinvestment, * * * the ordinary had jurisdiction and authority to grant to a guardian of a minor child an order authorizing the guardian to sell unproductive real estate belonging to the ward, for the purpose of reinvesting the proceeds of the sale in other and productive property." Chief Justice Simmons, in his opinion, on page 617, 97 Ga., and page 489, 25 S. E., advances the idea that prior to the passage of the act of 1889 the power of authorizing the sale or disposition of a ward's real estate for the purpose of reinvestment was in the ordinary, exclusively; that applications for the sale of property of wards were uniformly made to the ordinary, and passed upon by him. He states: "By the act of 1889 the legislature, in its wisdom, took away from the ordinary the power to grant orders for the sale of the property of wards for this purpose, and conferred it upon the judges of the superior courts; being, doubtless, of the opinion that the latter would exercise better judgment and discretion than had been exercised by some of the ordinaries in regard to this matter. Whatever may have been the reason, it is clear that this power now rests exclusively in the judges of the superior courts, and it is also clear to our minds that prior to the act of 1889 the power was vested in the ordinaries." It is argued by counsel for plaintiff in error that the plaintiffs below were not in a position to repudiate the exchange of lands in this case that took place under the order of court; for the reason that they cannot put him in his former position as to the ownership of the land conveyed to their guardian, as two of plaintiffs' brothers have disposed of their interest in the lands to other parties. This cannot affect the rights of these plaintiffs, for it is not charged that they ever made any disposition of their interest for which they are suing in this action. It is unquestionably true that they, though minors, could not continue to hold their interest in the land purchased by their guardian from Mills, and at the same time recover their interest in the estate unlawfully sold by the guardian to Mills. It is also true

that the possession, use, and enjoyment of the property, bought by their guardian from Mills under the order of court, by these wards, after they arrived at age, could be construed into a ratification of the contract of exchange. But, under the record, these do not seem to be important questions to consider. While they were set up in the answer of the defendant below, yet it appears from the record that when the judge entered up judgment upon the verdict of the jury he recited therein that plaintiffs expressly disclaimed any intention to hold the lands in Early county deeded by A. S. Mills to R. R. Blocker, guardian, in 1886, and he ordered that that conveyance be canceled. We do not mean to say, however, that if, before this trial, either of the plaintiffs, after arriving of age, had gone into possession of this land, and used the same, or enjoyed the rents, issues, and profits therefrom, the jury could not have construed this into such a ratification of the exchange made by the guardian and Mills as would bind that plaintiff and prevent his recovery in this case.

4. One ground of complaint made in the motion for a new trial is that the court erred in charging the jury as follows: "Consider all the evidence in the case, both for the plaintiffs and defendant, and determine what would be a fair market value for the rents of that place from the time the defendant and his father, or from the time that A. S. Mills, went into possession of it. Determine what would be a fair average rental per year from the time they were actually in possession of the land,—occupied and used it." It is contended by counsel for plaintiff in error that that charge was erroneous, as defendant could be made chargeable with mesne profits only for such time as he held possession. This would be true if the defendant was claiming compensation only for such improvements as he placed upon the premises; for, as decided in Gardner v. Grannis, 57 Ga. 540: "A defendant in ejectment is not liable for mesne profits taken, prior to his own entry, by those under whom he claims; but if, in accounting for the profits chargeable to himself, he claims credit for improvements made by his predecessors, such improvements must first answer for the profits taken by those who erected them." See, also, Willimgham v. Long, 47 Ga. 540, where it was held: "A defendant in ejectment who has in good faith claimed title to the premises may set off against the rents not only his own improvements, but he may claim, also, the value of the improvements of those under whom he claims, with warranty, in so far as said improvements exceed in value the rents for which said warrantors were liable." It seems, in the present case, this defendant not only in his answer claimed compensation for improvements he placed upon the land after he purchased, but also for improvements placed there by his grantor. We think he had a right to do so; for the presumption is that when he bought there was also estimated in the valuation of the land the improvements that had been placed thereon, and that he paid for them also; but if he seeks to recover for improvements erected by others, of course, they are liable to be reduced by the profits realized by those who erected them, as decided in the case above cited. We think, therefore, there was no error in the charge of the court excepted to in the tenth ground of the amended motion for a new trial.

There are several grounds in the motion relating to newly-discovered evidence, which, of course, are unnecessary for us to consider, as the case goes back for a new trial, and the parties will have ample opportunity of procuring this testimony at another hearing. The above, we think, covers all the questions in the motion of any merit. Judgment reversed. All the justices concurring.

LUMPKIN, P. J. I concur in the judgment of reversal because of the error dealt with in the second headnote, and in the corresponding division of the preceding opinion. I also assent to the propositions laid down in the third and fourth headnotes, but dissent from the ruling announced in the first headnote. In so far as the improvement act of 1897 undertakes to deal with the subject of compensating bona fide purchasers of realty whose titles fail for improvements made after its passage, it may be wise, beneficial, and constitutional. To this extent, and to this extent only, so far as I have been able to ascertain, do most of the authorities, including some of those cited by Mr. Justice Lewis, go. In so far as this act relates to improvements made before its passage, I cannot help regarding it as retroactive legislation injuriously affecting vested rights. It cannot be questioned that before the enactment of this statute the owner of land could recover it from one who had made improvements thereon in the honest belief that his title was good, without becoming liable to the defendant on account of such improvements, further than to submit to his right to set off the value thereof against the plaintiff's claim for mesne profits. That this was the settled law and policy of this state is left absolutely free from doubt by the decision of this court in Dudley v. Johnson, 102 Ga. 1, 29 S. E. 50. It was there distinctly and unequivocally held that: "Neither in an action of ejectment nor in complaint for land can a defendant set off the value of improvements placed thereon by him, to an amount beyond the sum which the plaintiff would be entitled to recover by way of mesne profits; nor can a defendant in such a case, upon an equitable answer, recover against a plaintiff the value of improvements in good faith placed upon the premises by such defendant, and have the same, by equitable decree against the owner, made a charge upon the premises on which they are placed, and from which the defendant is evicted under a judgment rendered against him in such suit." The ruling announced in the language just quoted

would, but for the act of 1897, surely be decisive of the alleged right of the defendant to claim compensation for improvements "beyond the sum which the 'plaintiffs' would be entitled to recover by way of mesne profits." Indeed, with that act out of the way, it must be conceded that the point ruled on in the Dudley Case would be identically the same as that with which we are now dealing in the case before us. I cannot devest myself of the conviction that this act gives to defendants in actions for land a new cause of action,—one which they did not have before. It certainly gives them a right to recover of plaintiffs money which they could not have recovered but for the act. I say "recover," because allowing a set-off is, in substance, allowing a recovery. If subjecting one to a liability which could not previously be set up against him does not injuriously affect his rights, I am unable to see why it does not. This case belongs, I think, to an altogether different class from that of Pritchard v. Railroad Co., 87 Ga. 294, 13 S. E. 493, 14 L. R. A. 721. There it was held that a good existing right of action which would have abated upon the death of the plaintiff was saved by an act passed during the pendency of the suit, and that this act, even as applied to actions pending at the time of its passage, was not unconstitutional. The act under consideration in that case created no new cause of action. It merely kept alive good causes of action which would in certain contingencies have abated. The court, in effect, held that the defendant had no vested right to have a perfectly lawful demand against him destroyed, and an action therefor abated, merely by reason of the plaintiff's death before obtaining judgment. The act of 1889 discussed in that case was purely one relating to procedure, and I cited authorities to prove that "a law which merely alters the procedure may with perfect propriety be made applicable to past as well as future transactions." The act of 1897, as above stated, brought into existence a new class of demands, and provided for their enforcement. It went far beyond making mere changes in procedure and practice.

Want of time, arising from the great pressure of other official work, forbids that I should attempt to enter upon a more extended discussion of this very important question. I will therefore add nothing more, except to suggest that, in endeavoring to apply the "great principles of equity and natural justice" for the protection of purchasers who have made improvements on land not belonging to them, under the honest but mistaken belief that it did, there is danger of running contrary to these same great principles in permitting innocent defendants to "improve out of their property" plaintiffs equally innocent,—such, for example, as minors, who did not, by standing by and seeing the improvements made, or for any other reason, become, either in justice or equity, liable to such a loss.

RAGLAND v. STATE.

(Supreme Court of Georgia. July 11, 1900.)

CRIMINAL LAW—INSTRUCTIONS—MANSLAUGHTER—SELF-DEFENSE.

1. It is not, without a request to do so, obligatory on the judge presiding in the trial of a criminal case to give in charge to the jury the law applicable to a theory of the defense raised alone by the statement of the accused. Yet, when a given charge is directed to a theory raised by the defendant's statement, it should fully and distinctly cover the theory so raised. (a) Whether an advance by one man armed with a stick on another in the nighttime, and declining to stop when called on to do so, constitute circumstances equivalent to an assault, so as to authorize a homicide to be reduced to voluntary manslaughter, is a question for the jury.

2. One may lawfully kill another who is attempting by violence or surprise to commit a felony on his person, and this is true whatever may be the grade of the attempted felony. It is therefore error, after correctly charging that a bare fear of the offense is not sufficient to justify the killing, but that it must appear that the circumstances were sufficient to excite the fears of a reasonable man that a felony was about to be committed on his person, and that the party killing really acted under the influence of these fears, and not in a spirit of revenge, for the judge to add, "So, to a person killing in his defense, it must appear that the danger was so urgent and pressing at the time of the killing that in order to save his own life the killing of the other was absolutely necessary," etc. The language quoted is the law of justifiable homicide in cases of mutual combat only, and has no connection whatever with the law of homicide to prevent the commission of a felony on the person of the slayer.

(Syllabus by the Court.)

Error from superior court, Clayton county; J. S. Candler, Judge.

John Ragland was convicted of murder, and brings error. Reversed.

John B. Hutcheson and John D. Humphries, for plaintiff in error. W. T. Kimsey, Sol. Gen., and J. M. Terrell, Atty. Gen., for the State.

LITTLE, J. Ragland was indicted for the murder of Blessett by shooting him with a pistol, which, it is alleged, was committed in the county of Clayton on February 1, 1900. The accused was convicted and sentenced to be hanged. He made a motion for a new trial on a number of grounds, which was overruled, and he excepted. Such portions of the evidence as are necessary to be referred to are stated in the opinion. The first three grounds are those usually found in motions for new trial under the practice which has grown up in this state,—that is, "that the verdict is contrary to evidence, and without evidence to support it; that the verdict is decidedly and strongly against the weight of the evidence; that it is contrary to law and the principles of justice and equity." When the first of these grounds appears in a motion, it seems that the insertion of the two latter are certainly unnecessary and could readily be omitted. These stereotyped grounds appear, without any good reason, in almost

every motion for a new trial we are called on to consider. All others which seek to attack the verdict in a general way might well be omitted, without endangering the case of the plaintiff in error in this regard; and it may not be amiss, in this connection, to observe that, especially in a criminal case, a ground of the motion that a verdict "is contrary to the principles of justice and equity," is altogether superfluous. The justice which one charged with crime is entitled to invoke is the law of the land. He has no equity. His guilt or innocence must be determined by the evidence for and against him. So far as this record discloses, there was no eyewitness to the shooting which resulted in the death of Blessett; and as to what transpired at the time of the shooting the jury was left to determine from the statement made by the deceased after he was shot, and the statement and admissions of the accused. It appears from the testimony of the father of the deceased: That the younger members of his household had been out to a party that night, and had returned home, where he was. That about 1 o'clock the same night his deceased son came home and told him that he was shot. Witness sent for a physician. He had a conversation with his son before he went for the physician, and repeatedly during the week which he lived afterwards. The statement made in these conversations was that the accused shot deceased in the road, at or near a certain oak tree, as he was coming out of a gate; that the accused called to him and said, "Stop there," and in return he called, saying, "Hello, John;" that accused again said "Stop," and then shot him. The deceased further stated in his conversation to this witness that after he was shot he spoke to the accused, and the accused said to him, "God damn you! Why didn't you speak?" The tree and gate referred to in the statement of the deceased, the witness testified, were about 60 or 70 yards from his (the witness') house, and about 50 yards from Fannie McIntosh's house, in Clayton county. The statement made on his trial by the accused was to the effect that he was at a supper at a certain church; that the deceased and quite a number of other persons were there; that after the supper he went home with a girl named Fannie McIntosh; that after arriving at her house he pulled off his shoes and remained there some time; that he was induced to pull off his shoes by request of the McIntosh woman, she giving as a reason that deceased would speak about his presence at her house; that when he left he walked out of the house without his shoes, and, going down the steps on the west side of the house, he discovered a man in the corner of the chimney, about 15 feet from him; that he immediately called and asked who it was; that the person hailed did not speak, but walked directly towards him, and accused said that he again hailed him, and told the man walking towards him to stop and not come on him; that the man had a stick in his hand; that the accused walked back and called to him the third time, "If you don't stop, I will shoot you;" that he was going backwards at this time, and became entangled in the overhanging limb of a tree, and, not knowing the purpose of the advance on him, he shot "through fright and fear." Fannie McIntosh testified that the shooting did not occur where the accused said that it did; that she heard the report of a gun somewhere from 10 to 20 minutes after the accused left her house; that it was out towards the gate. Other evidence was introduced on the part of the state, which, because of the rulings we make on the charges of the court excepted to, it is not necessary should be set out in detail; and, as the plaintiff in error is to be tried again, we do not pass on the evidence.

1. It is alleged that the court, after charging the law of manslaughter as found in the Code, erred in giving the following charge: "In all cases where a homicide is proven, to reduce that homicide from murder to voluntary manslaughter there must be some actual assault upon the person killing; that is, there must be more than the mere walking towards the person. There must be some actual assault; that is, there must be some attack, some attempt to do a violent injury on the person of another. There must be some actual assault upon the person killing, or there must be an attempt by the person killed to commit a serious personal injury on the person killing, or other equivalent circumstances to justify the excitement of passion, and to exclude all idea of deliberation or malice, either express or implied." It is evident that the trial judge, in giving these instructions to the jury, had reference to the statement of the accused, when he used the words that "there must be more than the mere walking towards the person." We recognize the rule that, unless properly requested, a charge on the law raised alone by the statement of the prisoner is not obligatory on the part of the trial judge in giving instructions to the jury. In very many cases this should be done, and the present is, in our opinion, one of those cases, because the verdict was, in a great measure, to be based on the statements made by the deceased after he was shot, and the account that the accused gave of the facts of the homicide in his statement to the jury. Some of these statements of the deceased were at least of doubtful admissibility, either as dying declarations or as part of the res gestæ of the homicide, and at best the evidence as to the facts of the homicide consisted of statement against statement. While we have no disposition to criticise the rule above stated, yet, when the judge of his own motion undertakes to charge the law arising on a state of facts as given by the accused in his statement, the charge so given must be correct law, and applicable to the theory of the defense made by the accused in his statement. Under this view, it must be determined that the charge complained of was error, for the reasons:

First, it is not a sound legal proposition; second, it is not a correct application of the law to the theory of the defense raised by the statement. Under our Criminal Code (section 65), three different conditions are legally sufficient to authorize a jury to reduce a homicide from murder to voluntary manslaughter: If the deceased made an actual assault upon the accused, or if the deceased attempted to commit a serious personal injury on the accused, or when there are other equivalent circumstances to justify the excitement of passion, the grade of the homicide may be reduced to voluntary manslaughter. It will be noted that the instruction given was that there must be more than the mere walking towards the person, to reduce the homicide from murder to voluntary manslaughter. It is not necessary that there be some actual assault, some attack, some attempt to do a violent injury on the person killing, in order to reduce the offense. If there are other equivalent circumstances to justify the passion, the offense may be reduced. What these equivalent circumstances are is to be adjudged by the jury; and we apprehend that weight and significance would, or not, be attached to the fact of such walking towards the accused, according to the circumstances surrounding the parties at the time. For instance, if the jury were to believe that a rapid advance by one man, armed with a stick, upon another, indicated an intention to do the latter some serious bodily harm when he should have arrived at a point sufficiently near, they might well determine these circumstances to be the equivalent of an assault on the person being advanced upon. Certainly the jury would have been fully authorized, if they believed the statement of the accused, to find that the circumstances detailed were the equivalent of an assault, and indicated on the part of the person advancing an intention to commit a serious personal injury on the accused. The reference by the judge to the prisoner's statement, as set out in the motion, did not really present the defense outlined by him. The accused stated that in the darkness of the night he discovered a man within 15 feet of him, standing and (inferentially) waiting for his approach; that the person so waiting there advanced upon him with a stick, and would not stop when warned to do so. Such a state of facts would raise in the mind of a very reasonable man a belief that an attack was to be made upon him, and, when the person being advanced on shoots and kills the person advancing under these circumstances, a principle of law applies which is essentially distinct from that which is applicable where one shoots and kills another who is merely walking towards him. There may not be one word of truth in the statement. Whether there is not, we are not called on to say, but the point is that, when the trial judge instructed the jury that the mere walking by the deceased towards the accused was not sufficient to reduce the homicide from murder to voluntary manslaughter, he only partially covered the theory of the defense raised by the statement; and, in our opinion, if the charge on the subject of voluntary manslaughter was intended to meet the theory of the defendant, as it evidently was, it should have gone further, and given the accused the benefit of the law applicable to the theory as it was really raised by his statement.

2. Complaint is made that after charging the jury that it was justifiable homicide to kill another in self-defense, or in defense of habitation, property, or person against one who manifestly intends or endeavors by violence or surprise to commit a felony on either, and then charging the law in relation to the character of the fears of such felony sufficient to justify the killing, the court added in this connection the following: "So, to a person killing in his defense, it must appear that the danger was so urgent and pressing at the time of the killing that, in order to save his own life, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, and that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given." This charge is error. It is justifiable homicide, under our law, for one to kill another who is manifestly intending or endeavoring by violence or surprise to commit a felony on his person, and this is true without regard to the grade of felony; and it is not a correct proposition of law that, when one kills another to prevent the commission of a felony on his person, the danger must be so urgent and pressing at the time of the killing that in order to save his own life the killing of the other was necessary. On the contrary, it is only necessary to be shown that the circumstances were sufficient to excite the fears of a reasonable man that such felony was about to be committed upon him, in order to justify the homicide. Otherwise, a woman killed a man to prevent the rape of her person, or one who slew a burglar to prevent the burglary of his home, would not be justifiable. In neither of these cases is the life of the slayer involved, but in each a felony was about to be committed. A person in this state may kill another for other purposes than to save his own life, and be justified, if he do so to prevent any felony from being committed on his habitation, person, or property. His defense is complete when to a jury it appears that the circumstances were sufficient to excite the fears of a reasonable man that a felony was about to be committed, and that he killed to prevent its commission. The latter part of the charge, as given, applies only to cases of homicide where the parties had previously been engaged in mutual combat. Powell v. State, 101 Ga. 9, 29 S. E. 309; Stubbs v. State (Ga.) 36 S. E. 200. It is doubtless true that the presiding judge recognized these distinctions, but inasmuch as the two principles enunciated in his charge are directly coupled together, without a distinction having been

drawn, the jury might have understood from the charge as set out in the ground of the motion that, while it was justifiable for one to kill another to prevent the commission of a felony on his person, it must at the same time appear that the danger was so urgent and pressing at the time of the killing that it was necessary for the slayer to take the life of the deceased in order to save his own life. This is not, and has never been, the law. Judgment reversed. All the justices concurring.

SIMMONS v. THORNTON.

(Supreme Court of Georgia. July 11, 1900.)

PAYMENT—EVIDENCE.

That a particular and specified indebtedness to an administrator has been paid cannot be shown merely by introducing in evidence checks drawn by the debtor upon a bank, with its stamp of payment thereon, which were payable to the order of the person filling the office of administrator, in his own name and right, and indorsed by him both individually and in his representative capacity. Such checks, without some evidence connecting them with the indebtedness in question, would, at most, afford proof only of the fact that the debtor had made payments to the payee named in the checks, and would not show to what account they were applied or intended to be applied.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by E. H. Thornton, administrator, against C. J. Simmons. Judgment for plaintiff. Defendant brings error. Affirmed.

Arnold & Arnold and Simmons & Corrigan, for plaintiff in error. S. N. Evins and E. R. Black, for defendant in error.

LUMPKIN, P. J. The plaintiff in error, C. J. Simmons, became indebted to P. J. McNamara, as administrator of the estate of M. Lynch, deceased, for money which Simmons had collected as an attorney, and which McNamara permitted him to retain as a loan. McNamara died, and E. H. Thornton became administrator de bonis non of Lynch's estate. As such he brought an action against Simmons for the money above mentioned, and "upon the trial of said case the defendant admitted the plaintiff's account in evidence without proof, assuming the burden of showing that the debt had been paid off." For the purpose of so doing, Simmons tendered in evidence several checks, drawn by himself on the Exchange Bank of Atlanta, "payable to the order of P. J. McNamara." Each of these checks was indorsed: "P. J. McNamara. M. Lynch Estate, by P. J. McNamara, Administrator,"—and on each was a stamp showing that it had been paid by the bank. The plaintiff objected to the admission of these checks on the ground that they did not show that they were to be applied as payments on the alleged debt of the plaintiff. The court sustained the objection, excluded the checks from evidence, and directed a verdict in favor of the plaintiff; no proof being offered by the defendant "connecting these checks with the plaintiff's debt." The only error of which the bill of exceptions complains is the action of the court in not permitting the checks to be introduced in evidence.

The position of the plaintiff in error is that these checks, without more, afforded prima facie evidence of payments by him to McNamara upon the debt for the collection of which the present action was brought. There was, as above indicated, no evidence tending to show any connection between the checks and this debt, and it is manifest from the recitals in the bill of exceptions that Simmons had none to offer. He could not himself testify as a witness, because of the fact that McNamara was dead. The naked question therefore is, were these checks, in and of themselves and without further proof, admissible in evidence to show partial payments by Simmons on his particular debt to the estate of M. Lynch which Thornton as its representative is now seeking to collect? We think not. In the first place, the checks were made payable to the order of McNamara individually, which would seem to indicate that they were given in discharge of some obligation on the part of Simmons to McNamara in his own right. Without more, the natural inference would therefore be that the money which the latter received on these checks belonged to him, and not to the estate which he represented. The indorsement, "M. Lynch Estate, by P. J. McNamara, Administrator," which appeared on each of the checks, might well and plausibly be accounted for on the theory that McNamara, being himself indebted to the estate of Lynch, intended in this manner to transfer to it, in settlement of its demands against him, the funds belonging to him for which the checks called; but, even if the fact that he entered this indorsement upon them can be treated as an admission by him that he really received the checks in his representative capacity, such an indorsement certainly does not amount to an admission that the proceeds of the checks were to be applied to the satisfaction of the particular debt to compel payment of which the action was instituted. For aught that appears, Simmons may have been indebted to Lynch's estate upon divers other and entirely distinct demands, in satisfaction of one or more of which these checks may have been given.

It is insisted, however, that, as the plaintiff did not contend that Simmons ever owed McNamara or the estate of Lynch any debt other than that sued upon, the checks were admissible to show payment of that identical debt. The reply is that no obligation rested upon the plaintiff of presenting any such contention, or attempting to sustain it by proof; but it was incumbent on the defendant, he having assumed the burden of proof, to show affirmatively, by competent and satisfactory evidence, that he had, as matter of fact, paid the very demand which was the foundation

of the plaintiff's action. This, for the reasons above stated, Simmons could not accomplish by merely introducing evidence the only effect of which was to show that he had paid to the representative of Lynch's estate so much money. To this extent, and no further, the proof afforded by the checks went; and as there was no evidence connecting them in any way with the debt declared upon, and none offered for this purpose, excluding them was clearly not erroneous. Apparently, this is a very hard case on Simmons; but, as is obvious, the hardship arises simply by reason of the fact that, under the law, he was, on account of the death of McNamara, disqualified from testifying as a witness in his own behalf. Judgment affirmed. All the justices concurring.

TURNER v. STATE.

(Supreme Court of Georgia. July 11, 1900.)

CRIMINAL LAW—LARCENY—EVIDENCE—NEW TRIAL—JUROR—DISQUALIFICATION—RECENT POSSESSION—INSTRUCTIONS.

1. The evidence was amply sufficient to sustain the finding that the defendant was guilty of the larceny with which he was charged.

2. After a verdict of guilty has been rendered in a criminal case, and application made for a new trial, the verdict should not be set aside on the ground that one of the jurors who tried the case, and who qualified himself on his voir dire, was, because of bias or prejudice against the defendant, disqualified, when only one witness testifies to facts tending to show that the disqualification existed. In such a case the oath of the juror that he had no prejudice or bias is not overcome by the simple oath of one other person detailing facts from which such disqualification might be inferred. There must, in order to set aside a verdict on this ground, be other affirmative evidence, or at least extrinsic circumstances shown, before the falsity of the oath taken by the juror when he entered upon the consideration of the case is sufficiently shown to authorize the grant of a new trial on this ground.

3. In order that recent possession may be considered as a circumstance from which the guilt of one who is charged with a larceny may be inferred, it must be clearly shown that the goods found in the possession of the accused had been in fact stolen. But, when a larceny has been clearly shown to have been committed, a charge to the jury that "it would be necessary for you to find that the thing alleged to have been stolen was so recently in his possession immediately after the theft was alleged to have been committed, and was in his possession with his knowledge and consent," does not necessarily require that the verdict should be set aside. While the use of the word "alleged" was not, in this connection, strictly appropriate, the fact that the larceny was clearly proven was of itself sufficient to prevent the jury from being misled by the charge in question.

4. There was no error in the admission of evidence, nor in the charge or failure to charge, of which complaint is made.

(Syllabus by the Court.)

Error from superior court, Glynn county; Joseph W. Bennett, Judge.

Alfred Turner was convicted of larceny, and he brings error. Affirmed.

Courtland Symms and S. R. Atkinson, for plaintiff in error. John W. Bennett, Sol. Gen., and D. W. Krauss, for the State.

LITTLE, J. Turner was indicted for the offense of simple larceny; the property which he was charged with stealing being a brindle cow of the value of $50, belonging to Mrs. McCullough. He pleaded not guilty, and on the issue formed a verdict of guilty was rendered against him. He made a motion for a new trial, which was overruled, and he excepted. His conviction rested on circumstantial evidence, and for the purposes of this decision no part of the evidence adduced is necessary to be reported, in order that the points decided may be understood, except that which hereafter appears.

1. It is alleged that the verdict is contrary to law and without evidence to support it. While the evidence was circumstantial, it was very strong, well connected, and pointed with almost unerring certainty to the guilt of the accused. The larceny of the cow described in the bill of indictment was so clearly shown as to admit of no doubt. It was shown on the part of the state that the defendant was seen driving a cow, answering in all respects to the description of the stolen animal, from the direction of the place where she must have been stolen, and towards his slaughter pen. In addition, it was further shown that the hide and horns of the stolen cow were found at the slaughter pen of the accused within a short time after he was seen driving the cow. Other circumstances tended to strengthen the chain of evidence, which excluded every other hypothesis but that of the guilt of the defendant. The evidence fully warranted the verdict of guilty.

2. Another ground of the motion is that one of the jurors who qualified himself, and was sworn and acted on the trial of the case, was not, in truth and in fact, free from bias or prejudice against the defendant, and that the mind of this juror was not perfectly impartial between the state and the accused at the time when he qualified, and when, as a juror, he participated in the trial of the case and the return of the verdict, because the said juror, Parker, bore ill feeling against the defendant previous to the trial, and had openly stated and told one Strickland that the accused had stolen a cow from him in the year 1898, which prejudice and disqualification to serve as a juror were unknown to the accused and his counsel at the time he was accepted and sworn as a juror. This ground of the motion is supported by the affidavit of Strickland alone, and the question whether Parker was disqualified was left to be determined by the trial judge on this affidavit. He decided against the existence of the disqualification, and in doing so was amply supported, under the rule heretofore laid down by this court, which is, that after verdict, to disqualify a juror who tried the case, and who swore that he had not formed and expressed an opinion, and had no bias or prejudice, and was perfectly impartial, there should be the affidavit at least of two witnesses, or that which is the equivalent thereof, against such oath of the juror; otherwise, it is but oath against oath.

and the verdict will not be set aside on the ground of the incompetency of the juror. Hudgins v. State, 61 Ga. 182; Fogarty v. State, 80 Ga. 464, 5 S. E. 782. See, also, Hackett v. State, 108 Ga. 40, 33 S. E. 842. There was no error, therefore, in overruling the motion for new trial on this ground.

3. Error is alleged to that part of the charge which was given to the jury in the following language: "Among the other circumstances which the state claims that it has proved in this case, it contends that this defendant was found in the possession of the hide and horns of the animal alleged to have been stolen, and they have introduced in evidence what they contend is the hide and horns of cow alleged to have been stolen. The court charges you in reference to them that recent possession of a thing alleged to have been stolen may be considered by you along with other evidence in the case; but, before you would be authorized to consider such recent possession as an inculpating circumstance against the defendant, it would be necessary for you to find that the thing alleged to have been stolen was so recently in his possession immediately after the theft was alleged to have been committed, and was in his possession with his knowledge and consent." Among the objections urged to this charge, one is that it directed the jury that they might consider, as a circumstance of guilt, the recent possession of a thing alleged to have been stolen, whereas they should have been instructed that they might consider such possession of stolen property as a circumstance of guilt. It is freely conceded that the word "alleged," as used in the latter part of this charge, was not happy. This court, in the case of Brooks v. State, 96 Ga. 353, 23 S. E. 413, called attention to a well-recognized principle, when it said that no presumption of guilt arises from the mere possession by the accused of goods alleged to have been stolen from the premises at the time of the commission of a burglary, unless the goods were shown to have been in fact stolen therefrom, and the accused is found recently thereafter in the possession of them. In such a case two things must concur: It must be shown that at the time the alleged burglary was committed the goods were taken from the house which was broken, and it must be shown that recently thereafter they were found in the possession of the defendant. It is not the recent possession of goods that might have been in the storehouse, but the recent possession of goods shown to have been stolen therefrom at the time the burglary was committed, which affords the presumption upon which the guilt of the possessor of the stolen goods may be inferred. It was alleged in the bill of indictment in the present case that the accused stole a certain described cow. He denied the charge. It was therefore incumbent upon the state to prove by satisfactory evidence, as a starting point in its case, the fact that the cow was stolen. This fact was made to appear very clearly by the evidence, even if it was a contested fact during the trial of the case. The truth of the allegation that he stole the cow was the only point that he strenuously contested. The language of the charge may be open to the criticism that, by implication, the judge meant to convey to the jury the idea that they might consider the fact that a larceny was alleged, and the fact that the accused was in recent possession of property alleged to have been stolen, as an inculpating circumstance against him. It is to be noted, however, that the judge did not affirmatively say they might do this. What he did tell the jury was that they could not consider these things against the accused unless the possession was recent. It is evident that recent possession was the idea most prominent in the mind of the judge at the time the charge was given, and that his real purpose was to caution the jury that unless the possession was recent the fact of possession could not count against the accused. The evidence being conclusive that a larceny was committed by some one, we do not think that the jury could have been misled by the use of the word "alleged," in the concluding portion of the extract from the charge of which complaint was made, and therefore think that this inaccuracy should not be held as ground for a new trial.

4. After a careful examination of the other grounds of the motion, we are of the opinion that the court did not err in the admission of evidence as to which complaint is made, nor in his charge or failure to charge as set out in the other grounds of the motion. Judgment affirmed. All the justices concurring.

GEORGIA RAILROAD & BANKING CO. v. POUNDS.

(Supreme Court of Georgia. July 12, 1900.)

RAILROADS—KILLING STOCK—CONFLICTING EVIDENCE.

There being some conflict in the evidence as to whether the engineer on the locomotive which struck and killed the cow "exercised all ordinary and reasonable care and diligence" to prevent striking the animal, and the jury having returned a verdict in favor of the plaintiff for the proven value of the cow, there was no error committed in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Dekalb county; J. S. Candler, Judge.

Action by J. C. Pounds against the Georgia Railroad & Banking Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and M. A. Candler, for plaintiff in error. Alonzo Field, for defendant in error.

PER CURIAM. Judgment affirmed.

EAVES v. GARNER et al.

(Supreme Court of Georgia. July 12, 1900.)

FI. FA. FROM JUSTICE—RETURN—LEVY ON LAND.

An entry by a constable upon a fi. fa. issued from a justice's court in the following language: "I know of no personal property in the possession of the defendant on which to levy this fi. fa.,"—is not such a compliance with section 4167 of the Civil Code as will authorize a constable to levy the execution upon land.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Action by C. C. Eaves against J. F. Garner and others. Judgment for defendants, and plaintiff brings error. Affirmed.

E. S. & G. D. Griffith, for plaintiff in error. Price Edwards, for defendants in error.

FISH, J. C. C. Eaves brought his action against J. F. Garner, J. G. Weaver, and B. F. Morgan for damages which he alleged he had sustained by reason of the defendants having entered upon his land and cut and carried away certain timber. Upon the trial, to prove his title to the land, plaintiff offered in evidence a sheriff's deed thereto, made in pursuance of a sale under an execution issued from a justice's court. He also offered in evidence a copy of such execution, with the entries thereon; the original having been lost. The following entry appeared on the copy fi. fa.: "I know of no personal property in the possession of the defendant on which to levy this fi. fa. This 14th day of February, 1848. James S. Tribie, Cons." The court excluded the copy fi. fa., and the plaintiff excepted.

Section 4167 of the Civil Code, which is a codification of the act of 1811, provides that "no constable shall levy on any land unless there is no personal property to be found sufficient to satisfy the debt, which fact must appear by an entry on the execution, to be levied by a constable of the county where such execution was issued, or where the property to be levied upon may be found." The entry of the constable upon the fi. fa. in this case did not comply with this section of the Code. Instead of an entry of "no personal property to be found," which seems to imply that the constable should make some search for such property, he made an entry that he knew of no personal property in the possession of the defendant on which to levy the fi. fa. The defendant may have owned sufficient personalty to have satisfied the execution, which at the time of this entry was in possession of some one else, and the constable may have known this fact, and yet his entry would have been true. There was no error, therefore, in sustaining the objection to the introduction of the fi. fa. in evidence. There seems to have been no objection to sheriff's deed going in evidence; but, as the plaintiff offered no other evidence, the court did not err in granting a nonsuit. Judgment affirmed. All the justices concurring.

MORSE v. LOWE.

(Supreme Court of Georgia. July 12, 1900.)

CONTINUANCE—ABSENCE OF PARTY.

Where, upon a motion for a continuance made in behalf of a claimant, it appeared that the claimant was providentially prevented from attending the trial, and the claimant's counsel stated, in his place, that he could not go safely to trial without the presence of his client, and no counter showing was made, it was erroneous to overrule the motion, although the entry, "Continued for sickness of claimant's family," had been made upon the docket at a previous term.

(Syllabus by the Court.)

Error from superior court, Haralson county; C. G. Janes, Judge.

Claim case between J. A. Morse and William Lowe. Judgment for defendant. Claimant brings error. Reversed.

W. A. James, for plaintiff in error. J. S. James, for defendant in error.

FISH, J. This is a claim case. When it was called for trial in the court below, counsel for claimant made a motion for a continuance, upon the ground that the claimant was sick and unable to attend court; the counsel stating, in his place, that he could not go safely to trial without her presence, and that he needed her as a witness. The proof submitted in support of this motion was the affidavit of a physician and the testimony of the claimant's father. The physician testified that the claimant was ill, and would not be able to leave her home within the next two or three weeks, and that it would be impossible for her to attend court during that period of time. The claimant's father testified that she was sick, was wholly unable to attend court, and was under the treatment of a physician. No counter showing was made. The court overruled the motion, the case proceeded to trial, and there was a verdict finding the property levied upon subject. The claimant made a motion for a new trial, one of the grounds of which was that the court erred in overruling the motion for a continuance. The motion for a new trial being overruled, the claimant excepted.

There was no continuance charged against the claimant on the docket, unless the entry, "Continued for sickness of claimant's family, Nov. term, 96," can be so considered; but, as "continuances for providential causes are not to be charged against either party" (Printup v. Mitchell, 19 Ga. 587), this entry is to be considered, not as a charge of a continuance against the claimant, but as merely giving the reason for a general continuance of the case. So the question whether the claimant's continuances were exhausted does not arise. Counsel for claimant made a complete showing for a continuance. He proved that his client was confined at home by illness, and unable on that account to attend court, and stated, in his place, that he was unable to go safely to trial without her presence. Nothing more was needed. Civ. Code, § 5131;

Connel v. Sharpe, 82 Ga. 443; Mathews v. Willoughby, 85 Ga. 289, 11 S. E. 620. The law required a continuance, under the showing made, and it was, therefore, error to refuse it. Judgment reversed. All the justices concurring.

BRANNON v. BARNES, Sheriff.

(Supreme Court of Georgia. July 12, 1900.)

EXECUTION—LEVY—CLAIM—FAILURE TO SELL—CONTEMPT—EVIDENCE.

1. If, after a levy is made by a sheriff or other officer, a claim is interposed to the property, it is the duty of such officer to transmit the execution, with his entries thereon, to the court from which it issued, together with the claim papers. Code, § 4621. If he fails so to do, the officer may be compelled by rule to so transmit such papers. Cottle v. Dodson, 25 Ga. 633; Brannan v. Cheek, 29 S. E. 937, 103 Ga. 354.

2. While a sheriff, under the provisions of the Code, is liable to be attached as for a contempt for neglecting to sell property upon which he has made a levy, the measure of such liability is the actual injury which the plaintiff has sustained by reason of such failure; and it is, therefore, competent for a sheriff, in defense to a rule brought against him for such neglect, to show that the property levied on was not subject to the execution. Wilkin v. Mortgage Co., 82 S. E. 135, 106 Ga. 182.

3. There was no error in the rulings of the court of which complaint is made.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by J. F. Brannon against J. J. Barnes, sheriff. Judgment for defendant, and plaintiff brings error. Affirmed.

Robt. L. Rodgers and John D. Humphries, for plaintiff in error. Alex. C. King, for defendant in error.

PER CURIAM. Judgment affirmed.

DAVIS v. MIMS.

(Supreme Court of Georgia. July 12, 1900.)

ACTION ON NOTE—BONA FIDE HOLDER.

This case turned upon two questions of fact, viz.: (1) Whether or not the plaintiff took the promissory notes upon which his action was based with notice of the equities between the original parties; and (2) whether or not the consideration of these notes had failed. It being essential to the lawfulness of a general finding for the defendant that the first of these questions should be properly resolved in the affirmative, and there being no evidence to warrant the jury in so doing, the verdict against the plaintiff was contrary to law, and the trial judge erred in not setting it aside.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by Oscar Davis against J. F. Mims. Judgment for defendant. Plaintiff brings error. Reversed.

Smith, Hammond & Smith, for plaintiff in error. C. W. Smith and Fulton Colville, for defendant in error.

PER CURIAM. Judgment reversed

BLUTHENTHAL et al. v. MOORE.

(Supreme Court of Georgia. July 12, 1900.)

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER.

Where H. was indebted to B., and the debt secured by a mortgage, which had been foreclosed, and W. purchased the mortgaged goods from H., assumed the debt of H., and gave his promissory notes therefor to B., and M. orally agreed to see that W.'s notes were paid, and B. thereupon released H. and canceled the mortgage, *held*, that the promise of M. was within the statute of frauds and void, because not in writing. *Held*, further, that, in a suit by B. against W. on the notes and M. on his promise, it was proper to sustain a demurrer by M. to the petition, the plaintiff having set out the above facts.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Bluthenthal & Bickart against S. S. Moore. Judgment for defendant, and plaintiffs bring error. Affirmed.

Slaton & Phillips, for plaintiffs in error. R. J. Jordan, for defendant in error.

SIMMONS, C. J. It appears that Bluthenthal & Bickart filed a petition against Watkins and Moore, in which they alleged that plaintiffs had held a claim against Harp, secured by a mortgage on his stock of goods and fixtures; that they had foreclosed their mortgage, when Watkins purchased Harp's interest; that Watkins could not open the store on account of the foreclosure of the mortgage; that Moore orally "agreed with petitioners that if they would accept from said Watkins certain promissory notes in lieu of the mortgage which had been given them by said Harp on said property, and which was a superior lien thereon, and would release the foreclosure, and allow said Watkins to get possession of said property and dispose of the same free from the incumbrance of petitioners, he, the said S. S. Moore, would guaranty that the notes to be given by said Watkins would be promptly paid at maturity"; that the petitioners, acting on this promise and guaranty of Moore, accepted from Watkins the promissory notes, allowed him "to go in possession of the property, and relieved said property of the foreclosure of their mortgage." They prayed judgment against Moore and Watkins. Moore demurred to the petition on the ground that the agreement on his part was an oral promise to answer for the debt or default of another, and was therefore within the statute of frauds, and not enforceable. The court sustained this demurrer, and the plaintiffs excepted.

We think this judgment was clearly right.

While the petition alleges that Moore agreed to "guaranty" the payment of the notes of Watkins, we think that his liability, even if the promise had been in writing, would have been that of a surety, and not of a guarantor; for the consideration of his promise was not a benefit flowing to him, but to the principal debtor. Civ. Code, § 2966. As a surety, the oral promise did not bind him; nor was the undertaking of Moore an original one, which would bind him without its being in writing. The undertaking of Watkins to pay Harp's debt (Harp being discharged, and Watkins receiving the goods freed of the creditor's mortgage) was an original promise, and would have been binding although it had been oral. But the petition shows that Watkins assumed this debt in writing, by giving his promissory notes, and that Moore simply agreed to see that these notes were paid; the consideration for Moore's promise being the same as that of the notes, and not flowing as a benefit to him. No court, so far as we have been able to ascertain, has ever held that such a promise is an original one. It was claimed by counsel for the plaintiffs in error that Moore was liable because his promise came within the exception to the statute of frauds which was made by the act of February 20, 1854 (Acts 1853–54, p. 58). That act provided that the fourth section of the statute of frauds should not operate "in cases where there has been a performance of the agreement either in whole or in part." We would call attention to the fact, apparently overlooked by counsel, that the act was expressly repealed by the act of February 16, 1856 (Acts 1855–56, p. 240). It is true, the marginal annotation of the latter act indicates differently, but the annotation is erroneous. The provisions of the repealed act were, however, to some extent, adopted in the Code. Section 2694 of the Civil Code provides that the statute of frauds shall not extend to cases "where there has been performance on one side, accepted by the other in accordance with the contract," or "where there has been such part performance of the contract as would render it a fraud of the party refusing to comply if the court did not compel a performance." In the present case the plaintiffs have performed their part of the contract, but the acceptance has been by Watkins, and not by Moore; and this section of the Code, if applicable at all to this class of cases, does not apply to Moore, but would have applied to Watkins had his promise been oral. Counsel relied in the argument on the case of English v. Richards Co. (Ga.) 34 S. E. 1002. Even a cursory reading of the facts of that case will show that it is quite different from the present one. English and Venable operated two soda founts near the one owned by the plaintiff. The plaintiff's fount had been leased to Shropshire & Colyer. English and Venable agreed with plaintiff that if he would have his lessees surrender their lease, and would rent the fount to Williams, who was to run it in another neighborhood, and away from their founts, they would pay the rent, amounting to a certain sum, due by the lessees. This court held that the performance of this contract by the plaintiff was such performance as would make English and Venable liable for the rent which had been due by the lessees. The plaintiff had performed his part of the agreement, and it had been accepted by English and Venable, they being benefited by the removal of the fount to another locality. Further than this, they had assumed the debt of the lessees as part of the consideration of the contract. In the case now under consideration there was no acceptance on the part of Moore, nor did he receive any benefit, advantage, or consideration, and we cannot see how the principle of the above Code section can be applied to him. He simply promised, in consideration of credit given to his principal, to pay the debt in the event his principal failed to do so, and this is the very class of contracts which are by the statute required to be in writing in order to be binding on the promisor. We therefore think the court did not err in sustaining the demurrer to the petition. Judgment affirmed. All the justices concurring.

NATIONAL SURETY CO. OF NEW YORK v. MORRIS.

(Supreme Court of Georgia. July 12, 1900.)

GUARDIAN'S BOND—RELIEF OF SURETY—APPLICATION.

1. A surety on a guardian's bond may, under the provisions of section 2533 of the Civil Code, base an application "to be relieved as surety" upon reasons other than such as relate to the "misconduct of his principal in the discharge of his trust."

2. As the application in the present case not only alleged against the guardian an act amounting to such misconduct, but also set forth facts showing that he was not in all respects a proper person to be intrusted with the management of his wards' estate, the demurrer to the application was not well taken.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Application by the National Surety Company of New York for discharge from the bond of N. A. Morris, guardian. Demurrer to the application sustained. Judgment affirmed on certiorari, and the surety company brings error. Reversed.

Smith, Hammond & Smith, for plaintiff in error. J. T. Pendleton, for defendant in error.

LUMPKIN, P. J. Section 2533 of the Civil Code declares: "The surety of any guardian on his bond, or, if dead, his representative, may at any time make complaint to the ordinary of any misconduct of his principal in the discharge of his trust, or for any other reason show his desire to be relieved as surety. Thereupon the ordinary shall cite the guardian to appear at a regular term of the court

and show cause why such surety shall not be discharged." The words, "any misconduct of his principal in the discharge of his trust," are obviously exhaustive of all acts, whether of commission or omission, which pertain to the guardian's mismanagement of the estate or the nonperformance of any of the duties devolving upon him in his office. It follows that the words, "any other reason" which the surety may allege as constituting the basis of "his desire to be relieved" from the bond, must relate to some ground or grounds of relief not ejusdem generis with those which arise from the guardian's official misconduct. Want of personal integrity, lack of business capacity, extravagant or reckless living, indulgence in vicious or immoral habits, criminality, and scores of other things which might be suggested, would certainly afford good reasons for a "desire to be relieved as surety." The National Surety Company applied to the ordinary of Fulton county for a discharge from the bond of N. A. Morris as guardian of Gertrude and John Cooper, minors, and subsequently amended its application. The guardian filed a demurrer, containing both general and special grounds, which was sustained by the ordinary. On certiorari his judgment was affirmed.

Both the application and the amendment contain averments which are too loose and general to be treated as making any distinct charges against the guardian, and which, therefore, will not be noticed here; but some of the allegations are, as against the demurrer which was filed, sufficiently full and clear. They are, in substance: (1) That he refused to comply with a judgment allowing his wards specified sums per month out of the corpus of the estate in his hands; (2) that he had been convicted of a misdemeanor in the superior court of Cobb county; (3) that he had committed the offense of barratry as defined in section 326 of the Penal Code; and (4) that he had bought votes and used whisky to procure his election to a political office. The first of these charges related to misconduct in the management of the wards' estate. It was met by so much of the demurrer as was general, and by a feature thereof which was "speaking" in its character. Presumably, the judgment which the guardian refused to obey was rendered by the court of ordinary, though the application did not in terms so allege. The demurrer, instead of making the point that it failed to do so, alleges, in effect, that the judgment was rendered by that court, but that the guardian had entered an appeal from it. This allegation cannot, of course, be considered. So the application as it stands in substance charges the guardian with willfully disobeying a judgment with the terms of which he ought to comply; and this, if true, would be misconduct in the discharge of his trust. As to the remaining charges, we think they afford excellent reasons for the surety to "desire" to be relieved, and for retaining the application in court. If these charges are established, they are sufficient to show that the guardian is not a suitable man to manage the estate. Under such circumstances, a surety is not bound to wait till he becomes liable for actual waste or mismanagement. He may reasonably anticipate the same, and move for relief in time to get relief. It is true that the demurrer does specially raise the point that some of the charges made against the guardian are based on acts which occurred before the bond was signed. This fact, of itself alone, would not defeat the right of the surety to be discharged, however; certainly not, if it assumed liability upon the guardian's bond in ignorance of such previous acts on his part. Nothing alleged in the application warrants an inference to the contrary. It was, doubtless, open to special demurrer, in that it did not undertake to state what was the real truth in this regard; but no such point was presented. One who becomes surety for a guardian under the belief that he is in all respects a suitable man for executing the trust has the very best of reasons for desiring to be released from liability on the bond when he learns that his principal is not such a man. We must not be understood as intimating any opinion as to the real merits of this controversy. We are simply dealing with allegations which, on demurrer, must be taken as true.

Having dealt with every question thereby raised which was argued before us, our conclusion is that the demurrer should have been overruled. It will, of course, be incumbent on the company to prove its charge against the guardian. The superior court ought to have sustained the certiorari, and remanded the case, in order that the surety might have an opportunity so to do. Judgment reversed. All the justices concurring.

GEORGIA R. CO. v. GOUEDY.

(Supreme Court of Georgia. July 12, 1900.)

ACTION FOR SERVICES—DEFENSES—RECEIPT IN FULL.

1. In a suit by an employé against a railroad company for the balance of his wages, the company cannot legally defend by showing that the plaintiff had made a mistake whereby the company had suffered loss, which had been charged to an agent who was his superior, and under whom he was employed, and that in order to reimburse that agent it had stopped the wages of the plaintiff; such a course not being authorized by any rule of the company known to the employé, or agreed to by him.

2. The fact that the employé, when he received a part of his wages, gave a receipt in full for all demands, does not estop him to claim the balance, when it appears that he at the time protested against the "stoppage" of a portion of his wages.

3. It does not appear that the court committed error in any of the charges complained of, in refusing to charge as requested, or in the admission or exclusion of evidence, and the evidence fully warranted the verdict.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by J. H. Gouedy against the Georgia Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Jos. B. & Bryan Cumming and Alexander & Lambdin, for plaintiff in error. T. J. Ripley, for defendant in error.

SIMMONS, C. J. A merchant in Union, S. C., ordered a car load of corn from a dealer in Nashville, Tenn. It was shipped from Nashville, and arrived in Atlanta, Ga., to be forwarded by the Georgia Railroad Company to Union. Werner was the local agent of the company in Atlanta. Gouedy was employed by the company as Werner's billing clerk, and charged with the duty of rebilling cars of this description to their destinations. In rebilling this particular car, Gouedy marked it for Marion, S. C. When it arrived at that place there was no consignee to receive it. It was finally traced and sent to Union, its original destination, but the consignee refused to accept it because of the delay in delivery. The car was then sent to Greenville, S. C., and sold by the railroad company at a loss. The amount of the loss on the corn, and the additional freight charges incurred by reason of the error in shipping, were divided among the various railroad companies over whose lines the corn had passed, the amount assessed against the Georgia Railroad Company being $58.90. This amount the company charged to the local agent, Werner, whom it held responsible. He, in turn, charged it to Gouedy, and when the paymaster came to Atlanta to pay off the employés of the company the payroll showed that $10 of Gouedy's wages had been marked as "stopped." Subsequently similar amounts were deducted from his wages, the amounts being given to Werner by the paymaster, until the amount of $58.90 had been deducted from Gouedy's wages on this account. Gouedy upon each occasion signed the payroll, thus receipting in full for all demands, but he protested to the paymaster against the deductions from his salary; assigning as his reasons that he had not been negligent in rebilling the car, because the destination of the car, as originally written, was as easily read "Marion," as "Union," and that he had never agreed for Werner to "stop" any part of his wages on account of this car. The paymaster replied that he had nothing to do with the matter; that Gouedy must appeal to the officials of the company; that, so far as he (the paymaster) was concerned, Gouedy must take the amount offered him, or else get nothing. Gouedy was finally dismissed, and brought suit in a justice's court for the balance due him on account of wages. The magistrate gave a judgment in his favor, and the company appealed to the superior court, where upon the trial the jury returned a verdict in his favor. A motion for a new trial was made and overruled, and the company excepted.

1. It was contended by the counsel for the plaintiff in error that by reason of the negligence of Gouedy, its servant, it lost $58.90, and that it had a right to deduct this amount from his wages. Even if the company had power to do this, the record discloses that it did not do so, but charged the loss to Werner, who was responsible, under the rules of the company, and then stopped Gouedy's wages simply for the purpose of reimbursing Werner. From the record it would appear that the company had been paid by Werner for the loss, and its action in withholding from Gouedy these various amounts made it a mere collecting agent for Werner. Gouedy had never been notified, either by Werner or by the company, that these amounts were to be deducted. He had never agreed that the deduction should be made; nor does the record disclose that there was any rule of the company, agreed to by Gouedy or known to him, authorizing such a procedure. If the company had adopted a rule or regulation to the effect that the amount of any loss occasioned by the negligence of an employé should be charged to him, and Gouedy had expressly agreed to the rule, the case might be different. Railway Co. v. Davis, 95 Ga. 298, 22 S. E. 833; Wood, Mast. & S. (2d Ed.) p. 186. But as no such rule was shown, and no agreement of Gouedy to such an arrangement, the company was clearly without authority to make the deduction. By the action taken, Gouedy was fined for negligence, without his having any opportunity to make defense, and, indeed, without his knowing anything of the charge of negligence imputed to him.

2. It was also contended that Gouedy, having signed a receipt in full for all of his wages, was estopped to claim the amount deducted therefrom. Receipts are always open to explanation, and, where one signs a receipt purporting to be for all due him, he can explain the circumstances under which he signed it, and if it appear that he did not receive all that was due him, but was forced to take what he did receive, or get nothing, the receipt does not estop him to claim the balance. It will be remembered that Gouedy did not direct the amount deducted to be paid to Werner, but protested against such a course. Of course, if he, at the time he signed the receipt, agreed that the company should pay the money to Werner, or if he, knowing all the facts, by signing the receipt tacitly directed the payment to Werner, he could not recover. The facts of this case, however, do not justify any such finding.

3. The above are the controlling questions in the case. There are many grounds in the motion for new trial,—complaint being made of charges of the court, of refusals to charge as requested, and of the admission and exclusion of evidence,—but they involve no new or important question not covered by what has been said above. After a careful consideration of them, we find no error, the trial judge having taken the view of the case indicated above. The evidence fully warrant-

ed the verdict, and it was not error to refuse to grant a new trial. Judgment affirmed. All the justices concurring.

SOUTHERN AGRICULTURAL WORKS v. FRANKLIN.

(Supreme Court of Georgia. July 12, 1900.)

INJURY TO MINOR EMPLOYÉ—NEGLIGENCE OF SUPERINTENDENT—PLEADING.

1. Following the decision of this court in Cotton-Factory Co. v. Speer, 69 Ga. 137, which was approved and followed by a full bench in Augusta Factory v. Barnes, 72 Ga. 217, the general rule of law exempting a master from liability to one servant for the negligence of a co-employé does not apply to the case of a child who was injured or killed in consequence of the negligence of a superintendent under whose orders the child was at work, and which orders the child was bound to obey,—the more especially when the child was by its father hired to the common master of both the child and the superintendent to do a particular kind of work, which was not dangerous, and was by the superintendent, without the father's knowledge or consent, required to do other work, which was dangerous, and was in consequence injured or killed. (a) The foregoing disposes of the general demurrer filed in the present case.

2. The petition as amended set forth the plaintiff's cause of action with sufficient distinctness in all material particulars, and was good against the special grounds of the demurrer.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by R. B. Franklin against the Southern Agricultural Works. Judgment for plaintiff. Defendant brings error. Affirmed.

Slaton & Phillips and D. W. Rountree, for plaintiff in error. Geo. L. Bell and C. P. Goree, for defendant in error.

LEWIS, J. R. V. Franklin brought suit in the city court of Atlanta against the Southern Agricultural Works, and, for cause of action, substantially alleged that: The defendant was a corporation having its principal office in the city of Atlanta. The defendant at the time of committing the grievances mentioned, to wit, on January 17, 1899, and for several months prior thereto, was the owner and operator of a certain manufactory, situate on Marietta street, in said city, used in manufacturing agricultural implements, and was then engaged in that business. It had a steam engine, producing steam power of great force and pressure, which was used to move and work machinery, gearing, and belting, which said machinery, gearing, and belting were used in manufacturing said agricultural implements. There were certain other machinery, gearing, and belting, to wit, a large shaft or axle, moving, and was in motion and was kept in motion by means of the steam engine. There were also other machinery, gearing, belting, shafts, cogwheels, and shearers, used in the manufacturing of said implements, and while in operation extremely dangerous. On January 2, 1899, defendant employed petitioner's son, George W. Franklin, as an employé and servant to do and perform certain work and labor for it in its manufactory, for hire, wages, and reward, to wit, to put plows on the bench to the grinders at the emery wheels in said manufactory. George W. Franklin was petitioner's son, and at the time of his employment was a minor of tender years, being at the time between 13 and 14 years of age, and, although small in size for his age, he was sound and healthy, and of a strong constitution, and was sober, industrious, etc. Petitioner hired his son to defendant to do the specific work mentioned, and the character thereof was not dangerous, and was not connected with any of the machinery in the manufactory; and the duties of his work did not require him to have anything to do with the machinery, or to be acquainted with or have any knowledge of it. Petitioner was well acquainted with the machinery in defendant's manufactory, and knew of its dangerous character. His son was wholly inexperienced and unacquainted with it and its operation, and, knowing this, petitioner only consented to hire him to do the specific work mentioned, and would not, under any consideration, and did not, consent for his son to work at, with, or about any of said machinery. Defendant changed the work in which he was employed up to January 17, 1899, and on that day, while he was engaged in the performance of the duties of his employment, the defendant withdrew him from the specific duties for which he was employed, and assigned him to other duties, not connected with or embraced within his special employment. He was ordered by Robert Quinn, the foreman of the shearers and punchers in said manufactory, to leave his said work and go to another room, where a shearer was located, which was a dangerous machine, connected by shaft, cogwheels, pulleys, and belting with the main axle or shaft and steam engine, and was wrongfully, carelessly, and negligently put to work by said foreman on said shearer and near said cogwheels, which were revolving with great force and velocity, being propelled by a powerful steam engine, without instructing him as to the danger of said machinery or how to work at the same, and while engaged at the said shearer, under the express order of said foreman, and having been at work at the same only a short time, the said George W. Franklin was, by the wrongful conduct and negligence of defendant, caught in said machinery between the cogwheels, whereby he was mortally wounded, from the effect of which he died. Robert Quinn, foreman, was authorized to hire and discharge employés for the defendant, and did on January 2, 1899, hire said George W. Franklin from petitioner to work for defendant at the specified work aforesaid. Said Franklin was working under Quinn, foreman, and it was his duty to obey the orders of Quinn, who was placed in authority over him by defendant. Petitioner was entitled to the earnings of his son from

the date of his death to his majority, a period of 7 years and 21 days. At the time of his death his son was earning 35 cents a day, and his capacity to earn still more would have increased with his age; by reason of all of which he was damaged in a sum stated. To meet a special demurrer of defendant, plaintiff amended his petition by alleging that defendant was also guilty of negligence in putting his son, who was a minor of tender years and unacquainted with machinery and its operation, to work at, upon, and about said machinery. It then specified how he was hurt, while helping one Guerin change the blades on the shearer, in obedience to the order of Quinn, defendant's foreman; said machinery being provided with a loose pulley for stopping it and cogwheels in the room where Franklin was injured, without interfering with the operation of other machinery in other departments. The shearer was not in operation when Franklin was put to work at, upon, and about said machinery, and while he was working at, upon, and about it, and at the time he was injured, having been stopped by means of a clutch for that purpose; and said cogwheels were in close proximity to the shearer upon which Franklin was working, and were exceedingly dangerous, by reason of their close proximity to the shearer, and by reason of their revolving with great force; and it was defendant's duty to stop them from revolving before putting said minor son to work upon the machinery, yet defendant disregarded its duty, in that it did not stop the cogwheels from revolving, but put his son to work upon the machinery while the cogwheels were revolving with great force, which was negligence on defendant's part. Defendant was further guilty of negligence in putting his minor son to work upon said machinery without first having made it reasonably safe for him to work at, by boxing the cogwheels, which could have been done with ease, and at very little expense, and would have prevented the injuries aforesaid. It was defendant's duty to box its machinery, yet defendant disregarded its duty in this regard, and did not box the cogwheels and make the machinery reasonably safe, but put the minor to work upon it without making it safe by boxing the cogwheels or otherwise guarding them. By reason of the negligent conduct aforesaid the said Franklin was in some way, the precise manner of which is unknown to petitioner, caught between the cogwheels, and received the injuries aforesaid. To this petition the defendant demurred on various grounds, the special grounds of which were met by the amendment. The demurrer was overruled by the judge below, upon which judgment defendant assigns error.

1. The main contention which seems to be relied upon by counsel for plaintiff in error is that Quinn, the foreman of the shearers and punchers, was a fellow servant of the deceased, and that a workman engaged in the same establishment, and having superintendence over a few others, is not a vice principal. The general doctrine that a master is not liable for an injury of an employé resulting from the negligence of a fellow servant we do not think has any application to this case. Under previous decisions of this court, it has been definitely decided that this does not apply to the case of a child who is injured in consequence of the negligence of a superintendent under whose orders the child was at work, and which orders the child was obliged to obey. In the case of Cotton-Factory Co. v. Speer, 69 Ga. 137, the general principle was announced that the agent who represents the corporation as master over other employés occupies the position of the corporation, for such time, as to such subordinates; that the corporation is bound to appoint a skilled and prudent manager to such position, and is negligent if it employs an imprudent or incompetent person. This doctrine by that decision is especially applied to a case where the injured employé was a child, without access to the president or general superintendent, and who received his orders solely from the manager of the branch of the business in which he was engaged. It was further decided in that case that it made no difference that such subordinate manager violated the orders of his superior officer, in placing the employé in a position of danger; nor did it matter that at the time the entire factory where the injury occurred was under the general supervision of a watchman, and he had an altercation with the subordinate manager under whom the class of employés to which plaintiff belonged were at work. See the able opinion of Chief Justice Jackson on page 149. This case was approved by this court in Augusta Factory v. Barnes, 72 Ga. 228, where it was held that the defendant's agent, in the case of a minor employé, owed the child a higher degree of care and duty, which required its agents in authority over her to look after her safety while under its charge and engaged in the performance of her duties. The court then approves the ruling of this court in Cotton-Factory Co. v. Speer, 69 Ga. 137, and remarks that "we do not understand that there was anything in the opinion of Mr. Justice Crawford, who dissented from the majority, contravening this rule, so that to this extent the judgment may be considered unanimous." See, also, McIntyre v. Printing Co., 103 Ga. 288, 29 S. E. 923, where it appeared from the testimony that a child about 14 years of age was placed at work on a machine, and that she got her orders from one who was foreman in the room in which she worked, who told her to go to work on the machine. Justice Cobb, in his opinion, states: "Whether the character of the machine was such that the dangers in operating it were patent to a child of plaintiff's age and capacity, and whether she was guilty of negligence in the way in which she operated it, and thus brought her injuries upon herself, are questions which should have been submitted to a jury, under proper instructions from the court." We think that case impli-

edly recognizes the doctrine announced in the present instance. It was decided in Scudder v. Woodbridge, 1 Kelly, 195, that the doctrine that the principal is not liable to one agent or employé for damages occasioned by the negligence or misconduct of another agent or employé is not applicable to slaves. We do not see why the same doctrine would not with like force and reasoning be applied to minor children of tender age, who are subject to the orders and supervision of a person in whose charge they are placed. The cases of Hazlehurst v. Lumber Co., 94 Ga. 535, 19 S. E. 756; Hoyle v. Laundry Co., 95 Ga. 34, 21 S. E. 1001; Cates v. Ittner, 104 Ga. 679, 30 S. E. 884; and Daniel v. Forsyth, 106 Ga. 568, 32 S. E. 621,—have no application to this case, for they refer to adults. The case of Manufacturing Co. v. Taylor, 95 Ga. 615, 23 S. E. 188, does refer to an injury to a minor, but it appears there that the minor had been repeatedly and distinctly warned of the danger and told thereof, and it appears that it was a case where the overwhelming preponderance of the testimony showed full diligence of the defendant in all respects. Therefore it can have no application to the case as made by this petition. That case has no reference to the principle involved in a child acting under the orders of a sub-boss, and being injured in consequence of his negligence. So far as our research has extended, the Georgia cases, as above indicated, which rule that a sub-boss, though having power to employ and discharge hands and those working under him, is their fellow servant, when it appears that there is a master higher in authority, have been applied exclusively in cases where the injury was to an adult. The principle herein is announced in the case of Railroad Co. v. Fort, 17 Wall. 553, 21 L. Ed. 739, where it appears that a boy was engaged in a machine shop as a workman or helper, under the superintendence of C., and required to obey his orders. After being employed a few months in receiving and putting away moldings as they came from a molding machine, the boy, by order of C., ascended a ladder to a great height from the floor, among rapidly revolving and dangerous machinery, for the purpose of adjusting a belt by which a portion of the machinery was moved, and, while engaged in the endeavor to execute the order, had his arm torn from his body. The jury found that the order was not within the scope of the boy's duty and employment, but was within that of C.; and the court held that the company was liable in damages for the injury, and that the rule that the master is not liable to one of his servants for injuries resulting from the carelessness of another, when both are engaged in a common service, although the injured person was under the control and direction of the servant who caused the injury, whether a true rule or not, had no application to that case. See, also, Coal Co. v. Richmond, 7 C. C. A. 485, 58 Fed. 757–760, announcing the same principle; McKinney, Fel. Serv. p. 104. In the case at bar the minor who was killed is alleged to have been taken away from the discharge of the duties which he had been hired to perform by his father, and placed at work at a dangerous place, under the orders and directions of an agent of the defendant who had charge of this work, and superintended the laborers engaged thereon; and one of the vital questions in the case is whether or not this conduct of the defendant, through such a superintendent, was negligence. Under the allegations in the petition, and the authorities above cited, this is clearly a question for investigation by the jury. The court was therefore right in overruling the general demurrer filed by defendant to the petition.

2. The petition as amended, we think, set forth the plaintiff's cause of action with sufficient distinctness in all material particulars, and was good against the special grounds of the demurrer. Judgment affirmed. All the justices concurring.

KOCH et al. v. BROCKHAN.

(Supreme Court of Georgia. July 12, 1900.)

JUDGMENT — VALIDITY — EXECUTION — LEVY —TITLE TO LAND—INJUNCTION.

1. Even if a prayer for the establishment and enforcement of a specific lien upon land described in a deed given to secure the payment of an unconditional promissory note did not take an action thereon out of the rule that, in suits on unconditional written contracts, judgments are to be rendered by the judge without a jury, a judgment upon such a note, though based upon a verdict, was not for this reason void, when the judgment was signed by the judge, who thus adopted as his own judicial act the substance of the jury's finding.

2. When one who was a guardian signed a promissory note both individually and as guardian of another, and, to secure the payment of the same, in like manner executed a deed to realty owned in common by the two, such deed passed to the creditor at least the guardian's individual undivided interest in the land; and where in such a case the creditor, after obtaining on the note a general judgment embracing a special lien on the land, conveyed it to the grantee individually and as guardian, the ward at the time being dead, and the guardian his sole heir at law, it became lawful for the creditor to levy upon and sell the land in its entirety, as the individual property of the surviving guardian. The creditor's deed of reconveyance for the purpose of making such a sale revested in the guardian the latter's original undivided interest, and under the law of inheritance the remaining interest was vested in the guardian individually. Under these circumstances, the fact that the deed was made as indicated did not so cloud the title as to make it unlawful for the sheriff to seize and sell as the property of the guardian the entire fee in the land.

3. Where, on the hearing of an equitable petition to enjoin such a sale, there was evidence to warrant the judge in finding that the defendant in execution actually had in hand money belonging to the ward's estate more than sufficient to pay all lawful claims against the same, and had filed an application for a discharge, alleging therein that the ward's estate had been fully administered, it was proper to hold that the sale should not be enjoined on the theory that the guardian, as the legal rep-

resentative of the ward's estate, was first entitled to administer his original undivided interest in the land, and accordingly to an exemption of 12 months from legal interference with such estate.

4. The trial judge ruled correctly on all the questions involved in this case, except the one first above dealt with, and erred in granting the injunction on the ground that the plaintiff's judgment was void.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Suit by Annie D. Brockhan against Fred and William Koch. Judgment for plaintiff, and defendants bring error. Reversed.

Kontz & Austin, for plaintiffs in error. John L. Hopkins & Sons, for defendant in error.

LEWIS, J. Annie D. Brockhan filed her equitable petition in Fulton superior court against Fred and William Koch. She alleged, in substance, as follows: Petitioner is the sister of Willie Brockhan, who died in June, 1899, insane, intestate, and leaving petitioner as his sole heir at law. In November, 1890, petitioner was duly appointed Willie's guardian, who was thereafter formally and duly adjudged to be insane. In 1896 petitioner made and executed to Fred and William Koch a note, both as an individual and as guardian of Willie Brockhan, for the sum of $2,056.56, and at the request of defendants executed and delivered a deed, to secure the same, to certain tracts of land, which land at the time of the execution and delivery of the deed was jointly owned by petitioner and Willie, the interest of each being one-half, respectively. By executing the deed, petitioner attempted to create a lien upon Willie's one-half interest to secure one-half of the amount of the note. She averred that the attempt to create such a lien was illegal, and the deed was null and void. In February, 1898, suit was instituted by Fred and William Koch upon the note, and on March 8th a judgment was rendered against her individually and as guardian of Willie Brockhan. Under that judgment it was sought to assert a special lien, by virtue of the deed mentioned above upon the interest of Willie Brockhan. A fi. fa. was issued in conformity with the judgment, and a deed filed by Fred and William Koch purporting to reconvey the land to petitioner, and to her as guardian of Willie Brockhan. A levy was made in pursuance of the judgment and fi. fa., asserting a special lien against the interest of said Willie Brockhan, and the interest of both petitioner and Willie was advertised for sale by the sheriff on the first Tuesday in December, 1899. It was further alleged that the sale was proceeding illegally, because of Willie's death, and because no administration has been had upon his estate; that the deed is invalid, because there was no legal right or power in petitioner, as such guardian, to create such lien; that there were debts entitled to priority over the debts of Fred and William Koch, due by the estate of Willie Brockhan; that these debts were for funeral expenses of Willie, to the amount of $143.14, and some taxes. Petitioner has applied for letters of administration upon the estate of Willie Brockhan. She prayed that the sheriff be made a party to the petition, and be enjoined from proceeding with a levy and sale of the property under the fi. fa. until Willie's estate can be properly administered by the ordinary's court. An amendment was filed to the petition, attaching a copy of the note sued upon, a copy of the verdict found by the jury, and the judgment of the court, and alleging that Willie Brockhan died, leaving no child or children, father, brother, or sister, save only plaintiff, and that she was his sole heir at law. It further alleged that she was proceeding to administer the estate of Willie Brockhan, and that an inventory appraisement thereof had been duly filed with the ordinary. She charges that the estate is amply solvent, and that the property upon which the fi. fa. was levied is easily worth $25,000, and that Willie's interest therein is worth $9,000. In answer to this the defendants denied the material allegations of the petition, by paragraphs. They admitted that Annie D. Brockhan was the guardian of Willie Brockhan, that he was insane and had died in the asylum, and that plaintiff was his sole heir. They further set up in their answer that they are not seeking to subject any part of his estate under their fi. fa., but simply had the same levied upon the entire land as the property of the plaintiff, Annie D. Brockhan. They further say that whether or not the lien created by Annie D. Brockhan, individually and as guardian, is, in strict law, a lien on the ward's estate, is a matter they are not called on to admit or deny; but they assert that in equity they would have a right to establish their lien, inasmuch as the money advanced by them, which the deed purported to secure, was used to pay off and discharge legal and valid incumbrances and liens against the identical property described in the deed, and which existed against the same before and at the time it descended by inheritance to Willie Brockhan. Defendants, however, have levied the fi. fa. only against Annie D. Brockhan, and claim that she is now the sole heir, as shown by her returns as guardian of her deceased ward; that she has ample money in her hands to pay off the debts of that estate; that by virtue of their general judgment they have a lien upon the entire property; and that they have seized and levied on it as her property alone. They allege that the guardian, by operation of law, became the administratrix of his estate, and that it appears from her final returns made September 8, 1899, that the guardian has on hand $2,830.19 with which to pay the indebtedness of the estate of her ward, which indebtedness amounts to a much less sum, according to her allegations. Defendants deny that the sale of the property under their fi. fa. would defeat the proper administration of the estate of Willie Brockhan, or cause loss

to creditors, and they further aver that the property is not of such value as alleged by plaintiff; that the houses thereon are in bad condition and repair, and taxes thereon have not been paid for years; that Annie D. Brockhan had mortgaged the same to M. & J. Hirsh for $6,626.95, besides interest; and that consequently the levying of their fi. fa. on the property is not excessive. On the trial of the case below, plaintiff introduced the record of the suit in the city court of Atlanta; the same being an action instituted by Fred and William Koch against Annie D. Brockhan, and Annie D. Brockhan as guardian of Willie Brockhan, filed February 15, 1898. In this petition plaintiffs allege that Annie D. Brockhan, individually and as guardian of Willie, was indebted to them upon a certain promissory note, and coupons attached thereto, in the sum of $3,193.08, besides interest. The petition further alleged that there was a warranty deed given under the provisions of the Code by Annie D. Brockhan, and Annie D. as guardian of Willie, to secure the payment of the debt, to certain property in the city of Atlanta, and certain other land located in Fulton county, both of which tracts were fully described, and that they had received a bond to reconvey on payment of the debt. The petition prayed for a general judgment for the debt, and also that a special lien be set up on said tracts of land, to be enforced by levy and sale after filing quitclaim deed. To that petition there appears to have been no answer, and the jury rendered a verdict for the amount sued for, and further found that plaintiffs' special lien be set up, as prayed, upon the realty described in the petition. On this verdict a judgment signed by the judge was entered accordingly. It appears that an execution following this judgment was issued thereon, and levied upon the property therein described as the property of Annie D. Brockhan. A quitclaim deed from Fred and William Koch to Annie D. Brockhan individually, and to her as guardian of Willie Brockhan, was executed on October 31, 1899, and recited that the lands described were deeded by defendants to secure the payment of the debt sued on, and it was made for the purpose of levy and sale under the provisions of the Code. This deed was recorded in the clerk's office on November 9, 1899. The levy bore date the same day. Plaintiff also introduced various deeds showing title to the country property in question to be in Annie D. Brockhan, and title to the city property to be one half in her and the other half in Willie Brockhan. She further introduced proof showing the amount of funeral expenses and taxes due by the estate of Willie Brockhan, and offered evidence by her affidavit to the effect that her returns to the ordinary as guardian of Willie Brockhan did not, in point of fact, correctly state the cash she had on hand. On the other hand, evidence was introduced in behalf of defendants showing the annual returns of Annie D. Brockhan as guardian of Willie Brockhan to the court of ordinary of Fulton county for the years 1891, 1892, 1893, 1894, and 1895, allowed, approved, and recorded, and her final return on September 8, 1899, from which it appeared that there was in the hands of the guardian cash to the amount of $2,830.19. Defendants also introduced application for letters of dismissal filed by Annie D. Brockhan as guardian of Willie Brockhan, dated September 8, 1899. In the petition for dismissal, which was duly signed by the guardian, she recites that she has fully discharged the duties of her trust, and is legally entitled to a discharge therefrom. The above are, in substance, all the material facts in the record necessary to a thorough understanding of the issues involved in the present case. After hearing the evidence and the arguments of counsel, the judge granted an order enjoining the defendants from selling or proceeding to sell the property under the execution sought to be enjoined by the plaintiff in her petition, upon which judgment the defendants below assigned error in their bill of exceptions. In the opinion of the judge giving reasons for his judgment, it appears that he based the same solely upon the ground that the judgment upon which the fi. fa. issued was void, because that was a suit upon an unconditional contract in writing, in which the constitution requires a judgment to be rendered without the intervention of a jury.

1. We think the judge was wrong in his conclusion, and that the authorities which he cites to sustain his position have no application to this case. For instance, in Lester v. Insurance Co., 55 Ga. 475, it is announced in the headnote, "A verdict, in a civil case, founded on contract, where no issuable defense is filed on oath, is illegal." It will be seen from the opinion of Judge Bleckley in that case that the judgment was entered upon the verdict found by the jury, not by the judge, but was signed by counsel in the usual form of judgments upon verdicts. The case of Tippin v. Whitehead, 66 Ga. 688, was a suit under the constitution of 1868, which was brought on a contract. No defense was filed. It was simply held that where a verdict was taken, and judgment entered thereon by counsel, it was void, and that a judgment by default should have been entered by the court. The case of Mosely v. Walker, 84 Ga. 274, 10 S. E. 623, cited by counsel for defendant in error, is not at all in point. It was simply decided there that the suit was on an unconditional contract in writing, and, no issuable defense being filed under oath, a judgment rendered by the court without the intervention of a jury was legal and valid. The same is true of Stansell v. Corley, 81 Ga. 453, 454, 8 S. E. 868. In fact, our attention has been called to no case in this court where it was ever decided that, in a suit upon an unconditional contract in writing, the fact that a verdict was found would render a judgment therein signed by the judge himself a nullity. The court has simply ruled that a judgment entered by counsel on a verdict

in such a case is void. This principle is decided in Lockett v. Usry, 28 Ga. 345. It was there ruled that a verdict rendered in a case where there is no issue is a nullity, and may be treated as such. It was further held, "Although the judgment of the court purports to be founded upon a verdict, and the verdict is void, still the judgment can be executed, provided it be good without the verdict." In Coleman v. Slade, 75 Ga. 63, it was held, "The notes involved in this case were unconditional contracts in writing, and, no issuable plea having been filed, the verdict of a jury would have been a mere formality, and a judgment by the court was not valid." But we do not think it follows that the verdict in this case was necessarily a nullity. It is true, the note declared upon was an unconditional contract in writing, but the petition goes further, and seeks other relief besides a general judgment upon the note,—alleges that a deed was given to secure the same, and asks for a judgment creating a special lien upon the property described in that deed. That deed was not attached to the petition, nor was this particular relief sought founded upon any unconditional contract in writing. The case of Palmer v. Simpson, 69 Ga. 792, was one where a specific lien on certain property was claimed, and a judgment was sought to be so molded as to condemn such property. It was held that in that kind of a case the mode of procedure was as in equity, so far as verdicts and decrees were concerned, and such cases did not fall within the constitutional provision requiring the judge to render judgment by default, without a jury, on an unconditional contract in writing. Nor would a decree subjecting such property be void because founded on a verdict. The court further remarks that this decree was signed and entered by the court itself, and differs from the case of Lester v. Insurance Co., 55 Ga. 475. To say the least of it, the relief sought in the present petition leaves it very doubtful whether it could have been obtained without a verdict, and this court has repeatedly decided that in such cases the better practice is to obtain verdicts, and judgments entered upon them will not be treated as void or nullities. See Everett v. Westmoreland, 92 Ga. 673, 19 S. E. 37, and Crow v. Mortgage Co., 92 Ga. 815, 19 S. E. 31, affirming the decision in Railroad v. Pendleton, 87 Ga. 751, 13 S. E. 822, where it was decided, "In any case admitting of doubt, the question of rendering a judgment by the superior court without a jury is one not involving jurisdiction, but the proper exercise of jurisdiction; and an improper decision of it is mere error, and will not render the judgment void." We think that decision is directly applicable to this case, as the present instance involves sufficient doubt as to whether there should have been a verdict for the application of that rule. If it was an error, it might have been corrected upon proper motion, and, in the event of such motion being overruled, this proceeding could have been reviewed by direct bill of exceptions to this court. But no such steps were taken, no defense was then filed to the suit, or objection made to the granting of the special relief prayed for; and we think it was clearly too late, after the term of the court at which this judgment was rendered, even if there were any error in the rendition thereof, to make an attack on any such ground.

2. It is contended that, as the guardian had no right to thus create a lien on the estate of her ward, it was a nullity, and hence the judgment was void as a lien upon the property. There can be no question about the fact that when a guardian signed a promissory note both individually and as guardian of another, and, to secure the payment thereof, executed a deed to realty, one tract of which she owned in common with the ward, and the other tract she owned absolutely by herself, such deed passed to the creditor at least the guardian's undivided interest in the land; and where in such a case the creditor, after obtaining a general judgment which also embraced a special lien on the land, conveyed it to the grantee individually and as guardian, the ward at the time being dead, and the guardian his sole heir at law, it was lawful for the creditor to levy upon and sell the land in its entirety, as the individual property of the surviving guardian. There is nothing in the contention that a sale under such circumstances would have created a cloud upon the title, so as to make it unlawful for the sheriff to seize and sell the entire fee in the land; for the public could readily be put upon notice that while the insane ward had, in his lifetime, an interest in some of the property, yet he had died, leaving the remaining defendant in the case as his sole heir, thus vesting in her an absolute title to the same.

3, 4. The judge, in his opinion granting the injunction, expressly holds: "It will be noted that in this case there is a general judgment against Annie D. Brockhan as an individual, as well as the judgment against her as guardian. It appearing that the guardian and quasi administratrix is also the sole heir of the ward; that she has made a solemn admission in judicio that she has fully discharged the trust (necessarily involved, that she had delivered the property to herself as heir), and asked to be dismissed; that she either really has or ought to have ample funds in hand to pay the debts of the deceased ward set up by her as outstanding; that this proceeding is in equity, and is by her alone, and not by any creditors; and that she is in possession of the land,—I am of opinion that she cannot protect herself from levy under a general judgment against her by alleging that she holds as guardian and quasi administratrix of the deceased ward, and would be entitled to a year before suit could be brought. I therefore base my judgment on the grounds indicated, viz. that the verdict and judgment are void." We think there is sufficient evidence in the record to warrant the conclusion reached by the judge, that the

defendant in execution actually had in hand money belonging to the ward's estate, more than sufficient to pay all lawful claims against the same, and had filed an application for discharge, alleging therein that the ward's estate had been fully administered; and it was proper to hold that the sale should not be enjoined on the theory that the guardian, as the legal representative of the ward's estate, was entitled to administer the same, and accordingly entitled to an exemption of 12 months from legal interference.

The trial judge correctly ruled on all the questions involved in the present case, except the one first above dealt with, but erred in granting the injunction on the ground that the plaintiff's judgment was void. Judgment reversed. All the justices concurring.

DELANEY v. GEORGIA, C. & N. RY. CO. et al.

(Supreme Court of South Carolina. Aug. 1, 1900.)

RAILROADS—OBSTRUCTING WATER COURSE—ACTION—COMPLAINT—SUFFICIENCY.

In an action against a railroad company for obstructing a water course, the complaint alleged that defendant had negligently constructed a culvert too narrow to permit the water to pass through, as a result of which it was backed up on plaintiff's land. After alleging a lease of the railroad from said company to the other defendants, the complaint alleged that said lessees have "kept and maintained, with full knowledge of its unlawful and negligent construction, and without any effort to remedy it, the culvert before named, to the continuous damage of this plaintiff, as above alleged." *Held* bad on demurrer, in that it fails to allege that defendant lessees increased the obstruction made by the lessor, or that notice and demand for removal of the same had been made on the lessees.

Appeal from common pleas circuit court of Lancaster county; A. W. Buchanan, Judge.

Action by Robert H. Delaney against the Georgia, Carolina & Northern Railway Company, the Seaboard & Roanoke Railroad Company, and the Raleigh & Gaston Railway Company. From an order sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Green & Hines, for appellant. J. L. Gleen and T. Y. Williams, for respondents.

JONES, J. This appeal is from an order sustaining a demurrer to the complaint pleaded by the two last-named defendants, on the ground that as to them it failed to state facts sufficient to constitute the cause of action. The complaint alleged, in substance, that the Georgia, Carolina & Northern Railway Company, in building its roadbed over a water course on plaintiff's land, negligently constructed a culvert too narrow to permit the volume of water to pass through without flooding, and thereby flooded, plaintiff's land, injuring said land and destroying his crops. After alleging a lease of said railroad, etc., by the Georgia, Carolina & Northern Railway Company to the two last-named defendants, and stating particulars of damages, the complaint alleged that said lessees since said lease "kept and maintained, with full knowledge of its unlawful and negligent construction, and without any effort to remedy it, the culvert before named, to the continuous damage of this plaintiff, as above alleged." The complaint did not allege the placing of any obstruction over said stream by the demurrants, nor the increase by them of the obstruction alleged to have been made by their lessor; nor did the complaint allege any demand upon the lessees for the removal of said obstruction. The fundamental principle governing questions of this kind is that in order to constitute a cause of action the complaint must show a delict or breach of duty by defendant violative of plaintiff's right. Therefore, in Hammond v. Railroad Co., 16 S. C. 574, the complaint was not demurrable, because the allegations practically amounted to a statement "that the defendant had obstructed the drainage of plaintiff's land by closing up certain ditches necessary to secure that end," such positive acts constituting the delict alleged. Hence, with reference to such a complaint, the court held it error to charge the jury that defendant, the grantee, was liable for any damages caused by the failure to remove the obstruction caused by the acts of the former company, the grantor. So, as applied to the case before the court in that action, the principle was announced that the mere failure of the grantee to remove obstructions placed by the grantor affords no cause of action against the grantee, and the court stated that "the plaintiff must go further, and show that by some act of the defendant the plaintiff's system of drainage has been obstructed, or that the obstructions caused by the former company have been increased." But it should not be understood that Hammond's Case meant to assert that, in every action against the grantee for the continuance of a nuisance created by the grantor, it was essential to allege and show that the grantee increased the obstructions constituting the nuisance. That is merely one way by which the delict of defendant may be shown, and was a proper way, under the complaints in that case. We understand it, also, to be the law in this state that the grantee or lessee of the creator of an obstruction constituting a private nuisance has no duty to remove said obstruction until after notice and demand for removal; but after such notice and demand the continuance of the nuisance becomes a nuisance, and the duty to remove or compensate arises. Elliott v. Rhett, 5 Rich. Law, 420; Leitzsey v. Water-Power Co., 47 S. C. 476, 25 S. E. 744, 34 L. R. A. 215; Townes v. City Council, 52 S. C. 404, 29 S. E. 851. In such a case it would not be essential to allege the placing or the increasing of the obstruction by the grantee, since the delict could be shown by the continuance of the original nuisance after notice and demand for removal. But in the present

case it was alleged that the lessor or grantor placed or created the obstructions, and it was not alleged that notice was given to, and demand for removal was made upon, the grantee or lessee. Therefore it was not error to sustain the demurrer for failure to allege that the grantee or lessee increased the obstructions made by the grantor or lessor. The ruling of the circuit court is directly supported by the case of Privett v. Railroad Co., 54 S. C. 98, 32 S. E. 75, which was largely based upon the principles stated in Hammond v. Railroad Co., supra.

After the dismissal of the action against the two demurring defendants, the plaintiff chose to proceed with the case against the Georgia, Carolina & Northern Railway Company, and recovered a judgment for damages for the construction and maintenance of obstructions complained of, from which judgment there is no appeal. In such a case it would not be proper to remand the case with leave to amend. Judgment of the circuit court is affirmed.

RINAKE v. VICTOR MFG. CO.

(Supreme Court of South Carolina. Aug. 1, 1900.)

MASTER AND SERVANT—DEFECTIVE APPLIANCES — INJURY TO SERVANT — LIABILITY OF MASTER—INSTRUCTIONS—MATTERS OF FACT —ADOPTION OF STRUCTURES—DUTY TO REPAIR.

1. An instruction that where a master allowed an independent contractor to erect appliances on his premises for the use of the contractor, and the master adopted and used such appliances himself, or acquiesced in their use by his servants while engaged in his work, he was as responsible for his servants' safety as if he had erected the appliances himself, was proper, without submitting to the jury that such acquiescence must have been for such a period of time as would indicate an adoption by the master, since the word "acquiesced" was used by the court in the sense of "being satisfied with," and such acquiescence would amount to an adoption.

2. An instruction that if, after an independent contractor had quit a job and left the premises, the master adopted and used the structures he had erected, or acquiesced in their use by his servants, then such structures became those of the master, and if, by reason of his failure to keep them in good repair, a servant was injured, he was responsible for the injury, was not objectionable, as charging the jury in respect to matters of fact, since the court did not undertake to say what facts amounted to an adoption of the structures.

3. Where a master had provided several ways of approach to a building for the use of his servants, an instruction that, unless forbidden to do so, his servants might leave by any one of them which was most convenient, and if, in so doing, a servant was injured by the negligence of the master to keep it in a reasonably safe condition, the master was liable for the injury, was proper.

Appeal from common pleas circuit court of Spartanburg county; R. C. Watts, Judge.

Action by Fred Rinake against the Victor Manufacturing Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Haynsworth & Parker and Hydrick & Wilson, for appellant. Duncan & Sanders, for respondent.

JONES, J. The appeal in this case complains of the charge to the jury. So much of the charge as is relevant to the exceptions made is as follows: "(1) A master is bound to provide reasonably safe places and structures for his servants while they are in the performance of his work, and reasonably safe approaches for the purpose of enabling them to go to and to depart in safety from their place of work. (2) Where a master allows an independent contractor to erect and use appliances on his premises for the purpose of carrying on the work of such independent contractor, and adopts and uses such appliances and structures, or acquiesces in the use of such appliances and structures by his servants while they are engaged in his work, then such master makes such appliances and structures his own, and is just as responsible for their safety while they are being used by his servants as he would be if he had erected them himself. (3) Where an independent contractor erects certain appliances and structures on the premises of another for the purpose of carrying on the work he is engaged in, and a master who is also carrying on work there adopts and uses such appliances, or consents to and acquiesces in the use of them by his servants while they are engaged in his work, such master makes such appliances and structures his own while his servants are using them, and is just as responsible for their being kept in good repair while being so used as he would be had he erected them himself. (4) Where an independent contractor erects structures and appliances on the premises of another for the purpose of enabling him to carry on his work, and joins such appliances and structures to those of a master who is also engaged in carrying on work there, and such appliances and structures are used in common by this independent contractor and by this master and his servants, such master, while the appliances and structures which were built by the contractor are being used by him and his servants in his work, becomes responsible for their safety and good repair; and if he negligently fails to keep them in a reasonably safe condition, and by reason of this a servant of his, while in the performance of his work, is injured, such master is responsible for such injuries. (5) Where a master adopts and uses the structures and appliances which have been built for the use of another, or where he consents that his servants, while in the performance of his work, shall use them, then he makes himself responsible for such appliances being kept in a reasonably safe condition; and if he negligently fails to do so, and one of his servants, while engaged in the master's work, is on this account injured, such master is responsible for such injuries. (6) Where an independent contractor erects appliances and structures on the premises of another for the

purpose of enabling him to carry on his work, and, after his contract is over, goes away and leaves such appliances and structures on such premises, and one who is to carry on work there, as a master, adopts them as his own, or permits and consents and acquiesces in the use of such appliances and structures by his servants while they are engaged in his work, he thereby makes them his own, and is just as responsible for their being kept in a reasonably safe condition as he would be if he had erected them himself. (7) If, after an independent contractor has quit his job, and left the premises where he had been at work, a master adopts and uses the appliances and structures which this independent contractor had erected, or permits and acquiesces in the use of them by his servants while they are in the performance of his work, then such appliances and structures, to all intents and purposes, become the appliances and structures of the master; and if, after this, he negligently fails to keep and maintain them in a reasonably safe condition, and by reason of such failure one of his servants, while in the performance of his duties, is injured, such master is responsible for such injuries. Where a master has provided for the use of his servants several ways of approach to a building, or several ways of entering and leaving it, a servant, unless he is forbidden to do so, can, in going to and leaving his work, enter or leave by either of these ways that may be most convenient to him; and if, while he is using any of these ways, he is injured by reason of the neglect of the master to keep this way in a reasonably safe condition, such master is responsible for such injury."

The exceptions made to said charge are (1) that it was a charge in respect to matters of fact, in violation of the constitution; (2) that it was error to charge that acquiescence in the use by his servants of such appliances and structures erected by the independent contractor amounted to an adoption thereof by the master, unless the court qualified such charge as to duration and character of use, or unless it was submitted to the jury to determine whether or not such acquiescence was for such period of time or of such character as would indicate an adoption by the master, and that it should have been submitted to the jury to determine what extent and character of use with the knowledge of the master would be equivalent to the adoption. The exceptions are not well founded. The charge was not in respect to matters of fact, contrary to the constitution, but was nothing more than a hypothetical statement of facts as a necessary basis for the statement of a legal proposition. The court properly did not undertake to charge the jury what facts amounted to an adoption of, or consenting acquiescence in the use by the employés of, such appliances and structures, but left it to the jury to determine these matters. It is manifest from the connection that the court used the term "acquiesces" in the sense of "being satisfied with," involving the assent of the will, and such acquiescence would amount to an adoption of such appliances and structures; and it is not disputed that if the master adopts, for the use of his servants, appliances or structures erected by an independent contractor, he is responsible for their safety while being used by his servants in the discharge of their duties. The judgment of the circuit court is affirmed.

WILSON v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Aug. 2, 1900.)

REMOVAL OF CAUSES — FOREIGN CORPORATIONS—STATUTORY DOMESTICATION —EFFECT—RESIDENCE.

A railroad corporation, created under the laws of Virginia, which has complied with the requirements of Act March 19, 1896, providing that such foreign corporation shall thereupon become a domestic corporation, with all the rights and liabilities thereof, is still a nonresident of South Carolina, within the act of congress authorizing the removal of causes from state to federal courts on the ground of nonresidence, and hence is entitled to have a cause against it in a state court removed to the United States court.

Pope, J., dissenting.

Appeal from common pleas circuit court of Fairfield county; O. W. Buchanan, Judge.

Action by John Wilson, administrator of the estate of Noah Y. Wilson, deceased, against the Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

B. L. Abney, for appellant. G. T. Graham and Ragsdale & Ragsdale, for respondent.

JONES, J. This action was brought in the court of common pleas for Fairfield county for damages for the alleged negligent killing of plaintiff's intestate by the defendant corporation, and resulted in a judgment in favor of the plaintiff for $4,500. A petition and bond for the removal of the cause to the circuit court of the United States for the district of South Carolina on the ground of diverse citizenship was duly filed, and on the call of the case for trial the court (Hon. O. W. Buchanan, presiding) was asked to proceed no further, except to pass an order for removal. This was refused, and notice of appeal and exceptions was immediately served. After judgment on the verdict of the jury, exceptions were taken to the order refusing to remove, to the ruling compelling defendant to proceed to trial, and to the judgment and rulings of the court.

The first question presented is whether there was error in refusing to remove the cause to the United States court. The plaintiff was a citizen of South Carolina, and alleged in the complaint that the defendant was a corporation under the laws of this state. The petition for removal alleged that the defendant, at the commencement of the suit and at the filing of the petition, was a citizen and resident of the state of Virginia,

being a corporation created under the laws of that state. It is not disputed that the defendant was originally created a corporation under the laws of Virginia, and thereafter complied with the act of the general assembly of this state approved March 19, 1896, entitled "An act to provide the manner in which railroad companies incorporated under the laws of other states or countries may become incorporated in this state." This act was construed, in connection with section 8, art. 9, of the constitution, in the case of Railway Co. v. Tompkins, 48 S. C. 52, 25 S. E. 982, wherein the court, speaking by Judge J. D. Witherspoon, said: "A state, by its legislature, may impose upon foreign corporations, which seek to come within its limits to conduct their business, the condition that they shall be subjected to the duties and obligations of domestic corporations; in short, that they shall be, when so acting within the territorial limits of the state, domestic corporations, for the purpose of jurisdiction. The question whether the legislature of a state has adopted and domesticated a corporation created by another state is in any case purely a question of legislative intent. 6 Thomp. Corp. § 7890; Murfree, Foreign Corp. § 455. It was competent for the legislature of this state to provide by the act under consideration for the adoption of foreign corporations as domestic corporations, without violating the section of the constitution above quoted [section 8, art. 9]. The title of the act under consideration, and the third section thereof, clearly show that such was the intention of the legislature. Under the third section of said act, a foreign corporation complying with the provisions of said act ipso facto becomes a domestic corporation, enjoying the rights and subject to the liabilities of domestic corporations as fully as if it were originally created under the laws of this state." In that case it was also held that the Southern Railway Company had complied with said statute. Thereafter, in the case of Mathis v. Railway Co., 53 S. C. 257, 31 S. E. 240, this court held that the said Southern Railway Company, having become a domestic corporation by compliance with said act, was not entitled to the benefit of those provisions of the act of congress of the United States governing the removal of causes from the state courts to the United States circuit court because of diverse citizenship. We have been induced to review the case of Mathis v. Railway Co., supra, and, after careful consideration, have reached the conclusion that it is not in harmony with the recent decisions of the United States supreme court, by which this court must be controlled on questions of this kind. The Mathis Case was supposed to be in harmony with the decision in Memphis & C. R. Co. v. Alabama, 2 Sup. Ct. 432, 27 L. Ed. 518, wherein it seemed to hold that the Memphis & Charleston Railroad Company, previously incorporated in Tennessee, and afterwards made an Alabama corporation by the statutes of Alabama, could not remove into the circuit court of the United States a suit brought against it in Alabama by a citizen of Alabama. But this court failed to observe the distinction between the creation of a new corporation out of natural persons, and the mere adoption of a foreign corporation as a domestic corporation for local purposes. A corporation is indisputably presumed to be composed of citizens of the state creating it, and for purposes of federal jurisdiction the citizenship of its corporators is imputed to the corporation. In the case of Railway Co. v. James, 16 Sup. Ct. 627, 40 L. Ed. 808, the supreme court of the United States refused "to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of federal jurisdiction, to be composed of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed for local purposes with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the federal court at the suit of a citizen of the state of its original creation." As the right of removal depends upon diverse citizenship, we take it that the United States court, upon the principle announced above, would not extend the doctrine of indisputable citizenship to a corporation originally created in one state, and afterwards adopted as a domestic corporation in another state, so as to make such adopted corporation a citizen, also, of the second state. This we think is made clear by the following language of the court in the James Case, referring to an act by the legislature of Arkansas similar to the South Carolina act under which defendant became a domestic corporation: "It is true that by the subsequent act of 1889, by the proviso to the second section, it was provided that every railroad corporation of any other state which had theretofore leased or purchased any railroad in Arkansas should within 60 days from the passage of the act file a certified copy of its articles of incorporation or charter with the secretary of state, and shall thereupon become a corporation of Arkansas, anything in its articles of incorporation or charter to the contrary notwithstanding; and it appears that the defendant company did accordingly file a copy of its articles of incorporation with the secretary of the state. But whatever may be the effect of such legislation, in the way of subjecting foreign railroad companies to control and regulation by the local laws of Alabama, we cannot concede that it availed to create an Arkansas corporation out of a foreign corporation, in such a sense as to make it a citizen of Arkansas, within the meaning of the federal constitution, so as to subject it, as such, to a suit by a citizen of the state of its origin. In order to bring such an artificial body as a corporation within the spirit and letter of that constitution, as construed by the decisions of this court, it would be necessary to create it out of natural

persons, whose citizenship of the state creating it could be imputed to the corporation itself. But it is not pretended in the present case that natural persons, resident in and citizens of Alabama, were by the legislation in question created a corporation, and that therefore the citizenship of the individual corporators is imputable to the corporation." By reference to the South Carolina statute referred to, it will be seen that it did not undertake to create a new corporation out of natural persons, but merely provided a mode by which foreign corporations might become domestic corporations. Section 3 provides "that when a foreign corporation complies with the provisions and requirements of this act [by filing in the office of the secretary of state a copy of its charter, paying therefor such fees as may be required by law, and causing a copy of such charter to be recorded in the office of the register of mesne conveyances or clerk of the court of common pleas, in each county in which such company or corporation desires or proposes to carry on its business or acquire or own property], it [the foreign corporation] shall ipso facto become a domestic corporation, and shall enjoy the rights and be subject to the liabilities of such domestic corporation; it may sue and be sued in the courts of this state, and shall be subject to the jurisdiction of this state as fully as if it were originally created under the laws of the state of South Carolina." Inasmuch as this legislation and the proceedings thereunder created no new corporation out of natural persons, but merely domesticated or adopted an existing corporation, there can be no citizenship of corporators imputed to the corporation as adopted, except the indisputable citizenship of the original corporators. So, in the case of Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 19 Sup. Ct. 817, 43 L. Ed. 1081, the court, citing James' Case, supra, held that for purposes of federal jurisdiction a corporation remains a citizen of the state originally creating it, notwithstanding it be afterwards also made a corporation of another state.

In the argument of the case of McCabe v. Railway Co., 36 S. E. 1024, which was heard during the present term, and involved, also, the question of removal, counsel for appellant, Messrs. Andrew Crawford and J. S. Muller, raised a point not directly raised in the case at bar, but which we deem proper to be considered now, viz. whether the defendant can be considered a nonresident of this state, in the sense of the federal statute of 1887–88, governing removal of causes. In the first place, the petition for removal alleges that the defendant is a nonresident of this state. This allegation of fact was not traversed, and, as we understand, is not properly traversable, except in the circuit court of the United States after removal. Therefore, for the purposes of the present contention, it appears as a fact that the defendant is a nonresident of this state. In the second place, while "citizenship," and "residence" are not always synonymous, we are of opinion that a foreign corporation, though domesticated in this state, being a citizen of the state originally creating it, must be deemed to have its domicile or residence in the state of its creation, and so is a nonresident of this state, in the sense of the statute governing removals, whatever may be the view as relating to mere local matters not affecting federal jurisdiction. As stated in Ex parte Shaw, 12 Sup. Ct. 937, 36 L. Ed. 771, "The legal existence, the home, the domicile, the habitat, the residence, the citizenship, of a corporation, can only be in the state by which it was created, although it may do business in other states whose laws permit it."

We must therefore hold that the defendant was entitled to remove the cause to the circuit court of the United States, being a citizen and resident of Virginia, and that it was error to proceed with the trial in the state court. This conclusion renders it unnecessary to consider any other question presented. The judgment of the circuit court is reversed.

POPE, J., dissents.

JENKINS v. CHARLESTON ST. RY. CO.

(Supreme Court of South Carolina. Aug. 2, 1900.)

BUILDING CONTRACT—RESCISSION—DAMAGES—EVIDENCE—PROFITS—NONSUIT—INSTRUCTIONS.

1. In an action for damages for the wrongful rescission of plaintiff's contract to build defendant's power house and barns, it was not error to permit plaintiff, who was an experienced contractor, and had obtained reliable estimates on much of the work, to testify what was the difference between the cost of the work to him and his bid to the defendant, especially as other witnesses testified to the same point without objection.

2. In an action for the wrongful rescission of plaintiff's contract to erect defendant's power house and barns, the error, if any, of allowing an answer to the question when the buildings were completed by the one who did the work, was harmless.

3. In an action for the wrongful rescission of plaintiff's contract to erect defendant's power house and barns, where the making and breach of the contract and the damages were all in issue, and there was some evidence on all of them, a denial of a nonsuit was proper.

4. Where plaintiff, at defendant's request, bid on the erection of certain buildings for defendant, and his bid was accepted, and thereafter, without cause, defendant refused to allow plaintiff to do the work, it was not error for the court to charge that plaintiff's prospective profits on the contract might be considered in assessing damages, since the profits on a contract of this nature are susceptible of close approximation in advance.

5. Where the charge of the court states facts in hypothetical form, for the purpose of declaring the law thereon, it is not a violation of Const. art. 5, § 26, providing that the judge shall not charge the jury on matters of fact, but shall declare the law.

Appeal from common pleas circuit court of Charleston county; J. C. Klugh, Judge.

Action by Edward N. Jenkins against the Charleston Street-Railway Company. From

a judgment for plaintiff, defendant appeals. Affirmed.

Mordecai & Gadsden, for appellant. Trenholm, Rhett & Miller, for respondent.

POPE, J. In an action to recover damages for breach of contract, the plaintiff recovered a judgment against the defendant for the sum of $800. After judgment thereon, the defendant appealed to this court on three grounds: First, that the circuit judge erred in admitting certain testimony; second, that the circuit judge erred in overruling defendant's motion for a nonsuit; third, that the circuit judge erred in his charge, and also in his refusal to charge the jury. We will examine these grounds of appeal in their order.

The circuit judge allowed the plaintiff, Edward N. Jenkins, while on the witness stand, to detail the grounds upon which he had based his claim for damages, by stating how he reached his conclusion that the defendant railway company had damaged him in the sum of $1,000 in refusing to award him, or, rather, in canceling, the contract for the construction of the power house of defendant, and also in allowing the same witness to detail the grounds whereon he thought the defendant electric railway company had injured him in the sum of $1,750 in canceling the contract for building the car barn of defendant. In his complaint plaintiff had, in effect, alleged that he was a contractor in the city of Charleston, S. C., of experience, skill, and responsibility; that on the 13th day of February, 1897, the defendant electric car company, a corporation under the laws of this state, offered the contract of building the power house and the car barn of the defendant company according to certain plans and specifications; that the plaintiff, at its instance and request, put in his bid to do that work, along with four other separate contractors, and that, in the preparation of plaintiff's said bid, he was subjected to labor and expense therefor; that on Monday afternoon, the 15th day of February, 1897, at the hour of 6 o'clock, and in the presence of all of said five contractors, their respective bids were opened, and it was then discovered and announced that the plaintiff's bid for the construction of each of the two buildings was the lowest, and that the defendant then announced that in a few days it would communicate with the plaintiff touching said contract; that on the 17th day of February, 1897, the defendant, by letter, requested the plaintiff to call at its office on that day; that the plaintiff did call, and then and there arranged with the defendant that the 1st day of May, 1897, should be inserted in the contract as the day on which the plaintiff was to complete the two buildings, and also that the demurrage of $25 inserted in the contract should be changed to $50 per day after May 1, 1897, until contract should be completed; that afterwards, but in the same interview, the defendant insisted that plaintiff should obtain a bond of some solvent surety company, in the penal sum of $7,500, for the faithful performance of said contract by the plaintiff; that, although no such stipulation or condition had ever been mentioned before between these parties, yet he agreed, and went out to see if he could arrange with some said company, and soon returned to the defendant office with the information that the America Surety Company, a corporation located in New York City, and which only issued policies or bonds from the home office, in New York City, would sign his bond as his surety; that then this plaintiff's contract with the defendant was complete; that, notwithstanding it would take a reasonable time to complete the bond, the defendant through its attorney, F. Moultrie Mordecai, Esq., when the plaintiff had announced that he had made arrangements with the Charleston agents and attorneys of the America Surety Company for said bond, at once thereafter announced that said bond should be filed with the defendant by 12 m. o'clock on the next day, the 18th of February, 1897, though afterwards this arrangement was by the defendant extended to 6 o'clock of the afternoon of the 18th of February, 1897; that such condition being impossible of performance, for lack of reasonable time, the defendant, in disregard of plaintiff's rights, awarded the contract to the bidder next to the plaintiff in the lowest amount bid.

The first and second exceptions: The two questions admitted over defendant's objection were: (1) "What was the difference between the cost of completing the contract, to you, and the bid which you made to the company?" (2) "When was the work finished by Mr. Oliver?" Great care is observed in courts to prevent any testimony relating to breaches of contracts, when such testimony is speculative and uncertain in its character. And this is entirely proper. Witnesses should always, when they can do so, speak from direct knowledge. The very best that any witness can do is to detail facts. It seems to us that a man who has devoted his life in acquiring the mastery over those classes of knowledge which enter in to make a contractor may be said to have the power to make estimates of the cost of a proposed building, so that he can announce the cost of such building. This witness testified that he had estimates made by experienced subcontractors of much of the work. This being so, we do not see why his testimony was not admissible. Feaster v. Cotton Mills, 51 S. C. 143, 28 S. E. 301, is a very good illustration of this doctrine. So, too, Moorer v. Andrews, 39 S. C. 427, 17 S. E. 948, where a man was allowed to recover the difference between the market price of certain cords of wood (36 cords), and what those 36 cords would have cost to render them marketable. Is this not the same principle? But, apart from all this, in the case at bar the witness H. F. Zacharia testified, without any objection thereto, to the same matters covered by plaintiff's testimony on this point. Now, as to the sec-

ond question, relating, as it does, to the time employed by Mr. Oliver in completing these buildings, we can see no harm to the defendant from any answer to this question. Possibly it might seem to develop any hypocrisy in the defendant, if any such existed, as to the deep anxiety professed by the defendant to have the work finished by May 1, 1897, when it was shown that such work was not actually finished until July 1, 1897, and no complaint was ever made by it. These exceptions are overruled.

The third ground of complaint urged by the defendant against the rulings of his honor, the circuit judge, related to his declining to grant the defendant's motion for a nonsuit. The rule governing nonsuits is so well settled that no extended reference to the rule in the abstract is necessary. Was there any material testimony bearing on the issues developed by the pleadings in the case at bar? The circuit judge decided that there was some such testimony. We agree with him. The contract was in issue. There was testimony bearing on it. The breach of the contract was in issue, and there was testimony bearing on that issue. There was some testimony relating to the amount of damages resulting from the breach of the contract. These things being true, the nonsuit would have been highly improper by the circuit judge.

We will now pass upon the sixth and eighth grounds of appeal together, as they relate to the same matter: "Sixth. Because his honor erred in charging the jury as follows: 'Next you would consider the claim of the plaintiff that he lost the profits on his contract by reason of the breach by the defendant. When a man makes a contract with another, he is entitled to the benefits of that contract; and, if one of the benefits is a certain amount of profit, he is entitled to receive that benefit. If the other side violates the contract and deprives him of that benefit, along with others, he is entitled to recover the amount of such profits from the party violating the contract,'—but should have charged the jury that the profits, in an action of this kind, could not be recovered." "Eighth. Because his honor erred in refusing to charge the fifth request of the defendant, which reads as follows: 'The profits which might have resulted from a building contract upon which no work has been done cannot be considered as an element of damages, as the same are too vague and speculative.'" It seems to us, if the testimony established the existence of a contract between these litigants, and, further, that there was testimony that the defendant made a breach of said contract, and also that there was testimony that such a breach of said contract was the direct cause of damage to the plaintiff, which said damage could be estimated in dollars and cents, then it was proper for the circuit judge to submit such questions to the jury. We cannot, as a court, consider whether the jury allowed too much money to the plaintiff for defendant's alleged wrongdoing. The "case" shows that this question was not presented to the circuit judge in a motion for a new trial on the ground of excessive damages. For the circuit judge to have charged the fifth request, embodied in the eighth ground of appeal, would have required that he charge the jury that no work on the contract had been done by the plaintiff. As our views have been expressed on this matter in our consideration of the first and second grounds of appeal, we will not linger here. These exceptions are overruled.

We will next consider the remaining exceptions in one group, relating, as they do, to an alleged violation by the circuit judge of the constitution, which forbids a circuit judge to charge the jury upon the facts, namely: "Fourth. Because his honor erred in charging the jury as follows: 'And so if you find from the testimony that the defendant did impose upon him the additional condition that he should give bond in a surety company, and that he proposed to give a bond in a certain surety company, which was acceptable to the defendant, and with which proposition it signified its satisfaction and acceptance, then the plaintiff was entitled to a reasonable time within which to comply with the condition by giving bond; and if you should find from the testimony that the surety company in which he proposed to give his bond, and in which the defendant street-railway company agreed to accept his bond, was not in the city of Charleston, but was at a distance from the city, then it would be a matter for you to consider as to what would be a reasonable time within which the plaintiff could comply with the condition thus fixed, and give the bond in that company,—the company which had been tendered and accepted as his surety by the defendant,'—as, in so charging, his honor, the circuit judge, charged the jury in respect to a material question of fact in the case, in violation of section 26 of article 5 of the constitution of this state. Fifth. Because his honor erred in charging the jury as follows: 'And if you should find further, from the testimony, that the defendant itself prevented, by curtailing the time within which he was to give bond to such an extent as that it didn't allow him a reasonable time, and that it thus prevented his giving bond and complying with that condition, then the plaintiff would still have the right to insist that because of the wrongful interference of the defendant he had been prevented from complying with that condition, and to insist that his contract should be accepted and complied with on the other side, or that the other side should make him just compensation for its breach of contract,'—as, in so charging, his honor, the circuit judge, charged the jury in respect to a material question of fact in the case, in violation of section 26 of article 5 of the constitution of this state." "Seventh. Because his honor erred in charging the jury as follows: 'In other words, to express it more definite, Mr. foreman, that Mr. A., we will say, had agreed to furnish so many thousand

brick at certain figures, and that Mr. A. was a reliable man, able to perform his contract, or able to respond in damages for the breach of his contract, and that Mr. B. had promised to furnish lime and cement, or that Mr. A. and Mr. B. were selling these articles at that price, and that this plaintiff was able to buy these articles at the price himself,'—as, in so charging, his honor, the circuit judge, charged the jury in respect to a material question of fact in the case, in violation of section 26 of article 5 of the constitution of this state." "Ninth. Because his honor erred in charging the fourth request to charge of the defendant, —erred in qualifying same and charging the jury as follows: 'That must be qualified, Mr. foreman and gentlemen. A person who fails to do these things of his own motion or of his own fault cannot maintain such an action, but a person placed in that position, and who fails to perform these conditions, of executing or furnishing a bond and executing a contract, because of the unlawful and unreasonable interference of the other side, still has the right to insist either upon the performance of his contract, or to recover compensation from the other side for the breach of contract,'—as, in so charging, his honor, the circuit judge, charged the jury in respect to a material question of fact in the case, in violation of section 26 of article 5 of the constitution of this state."

We will first consider the fourth and fifth exceptions. Our constitution does state this negation of power in the circuit judge. Article 5, § 26: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." Here it is evident that the circuit judge can no longer state the testimony. In Norris v. Clinkscales, 47 S. C. 488, 25 S. E. 797, which was decided in October, 1896, the acting justice of this court (Judge Benet) with a great deal of care and ability reviewed most of the cases on the subject of the charge of the presiding judge to the jury with reference to the provision of the constitution of 1868 on this matter, and traced the results wrought by article 5, § 26, of the constitution of 1895. He deduced certain rules on this subject, in these words: "And any direct reference to the testimony in charging a jury, any expression as to what is in evidence, any remark that would amount to a stating of the testimony in whole or in part, is absolutely prohibited. At the same time, we cannot presume that it was the intention of the framers of the new constitution, many of whom were members of the bar, and learned in the law, and familiar with the decisions of this court, to require trial judges, in their charges, to declare the law, and yet forbid them to base that law upon any foundation, by which alone they can make it apply to a given case. The constitutional mandate is that 'they shall declare the law.' * * * Now, it must be found solely in the latter,—a *supposed state of facts.* [Italics ours.] We therefore conclude and hold that as it would be impossible to declare the law applicable to a case on trial, without connecting the legal principles involved with some state of facts, actual or hypothetical, it was the intention of the framers of the new constitution, in amending section 26 of article 4 [constitution of 1868], that the trial judge, in charging the law of the case, should lay before the jury that law as applicable to a supposed state of facts, but that in so doing he should carefully avoid repeating the evidence on the facts at issue, making no statement of the testimony either in whole or in part. We are clearly of the opinion that under section 26, as it now reads, a judge may, in declaring the law applicable to the case, base that law upon hypothetical findings of fact by the jury, and instruct the jury that, if they believe so and so from the evidence they have heard, then such and such will be the result. In so doing, if he be careful not to repeat any of the testimony, nor intimate directly or indirectly what is in evidence, he will be chargeable neither with stating the testimony, nor with charging in respect to matters of fact." There was no issue between these parties litigant that a bond was required by the defendant in a surety company, and that the American Surety Company was that company. The pleadings and correspondence on both sides show this. Then where was it illegal in the circuit judge declaring the law in the hypothetical case set up in these two grounds of appeal? Let the exceptions be overruled. We overrule the seventh ground of appeal, for the reason that upon its very face it appears that the law declared was based upon a purely hypothetical case.

As to the last exception (the ninth), we will say that the defendant had requested the presiding judge to charge as follows: "(4) The lowest bidder for the construction of a building, who fails to execute a bond or sign a contract therefor, as he understood he was to do, cannot maintain an action for damages for breach of contract based upon his bid." Now, the defendant, in its request to charge, embodied a hypothetical case. All that the circuit judge did was to properly modify the proposition of law submitted by the defendant. The circuit judge did not quote any testimony or state any testimony. This exception is overruled. It is the judgment of this court that the judgment of the circuit court be affirmed.

STATE v. LEE.

(Supreme Court of South Carolina. July 31, 1900.)

CRIMINAL LAW—HOMICIDE—TRIAL—CONTINUANCE—DYING DECLARATIONS—OPINION—ADMISSIBILITY—INSTRUCTIONS—FAILURE TO REQUEST—WAIVER—THREATS — ADMISSIBILITY —REMARKS OF COURT—HARMLESS ERROR.

1. Where defendant moved for a continuance, and produced a doctor's certificate that defendant's nervous system was disturbed and disordered and that he was in bad physical condition, but his appearance and manner did not indicate any nervous trouble or physical weakness, his motion was properly denied.

2. Where deceased was shot by defendant, who claimed the killing was accidental, the admission of a statement of deceased, as a dying declaration, that "he shot me for nothing," was not objectionable as a mere expression of opinion, since it constituted a statement of a fact.

3. Where deceased was shot by defendant, and there was evidence that they had engaged in quarrels frequently for several years prior to the shooting, the admission of a statement of deceased, as a dying declaration, that the shooting was willful and malicious, is not objectionable as the mere statement of an opinion, without facts on which to base it, since there was testimony which tended to show that there were facts within the knowledge of the deceased on which he might have based an opinion, and it was not necessary for him to state them.

4. Error based on the failure of the trial court to give an instruction in his preliminary charge is harmless, where such instruction was given on the final charge.

5. Where an instruction is proper when considered in connection with the whole charge, the fact that it was misleading when taken separately is harmless.

6. Where deceased was shot by defendant, who claimed the killing was accidental, an instruction that if the jury found that the killing was accidental homicide, but occurred when the defendant was in pursuance of an unlawful or felonious act, they should find him guilty of murder, was not objectionable as charging that the defendant should be found guilty of murder if he accidentally killed the deceased in pursuance of an unlawful act which was not felonious, since the instruction was correct as a general charge, and, if defendant desired a more specific one, he should have requested it.

7. Where deceased was shot by defendant, who claimed that the killing was accidental, evidence of threats made by defendant against deceased several years prior to the killing was not objectionable as too remote, since the length of time intervening is a circumstance to be considered by the jury in determining whether there was any connection between the threats and the deed.

8. Where deceased, who was a physician, was shot by defendant, and the statements made by deceased were admitted as dying declarations, a remark of the trial court in the presence of the jury that the testimony justified the opinion; that there was a continuous dying condition, of which the deceased was aware, bearing in mind that he was a medical man, and therefore able to form a more intelligent opinion of his condition than a layman,—was not so prejudicial to defendant, in indicating the opinion of the court as to the weight to be given the dying declarations by the jury, as to necessitate a reversal.

Appeal from general sessions circuit court of Darlington county; W. C. Benet, Judge.

Maxcy G. Lee was convicted of murder, and he appeals. Affirmed.

Woods & McFarlan, for appellant. J. M. Johnson, for the State.

GARY, A. J. A general statement of the facts herein is correctly set forth in the argument of the appellant's attorneys, as follows: 'October 5, 1899, Maxcy C. Lee, a young physician, was living with his aged father, Dr. Henry J. Lee, in Darlington county, near a little hamlet called 'Lydia.' The father and son had thus been living together for about five years, engaged in the practice of medicine in partnership. Dr. Henry Lee had lost his wife some three years before. His other children had married and settled around him at varying distances, and Maxcy, who was unmarried, was his sole companion; the only other inmate of his house being a white woman (a Mrs. Munn), employed as cook and housekeeper. Dr. Henry Lee had reached the age of seventy, and was held in high esteem and much beloved throughout the surrounding country. He was well to do, owning at least $25,000 in property,—mainly in money. As a general thing the relations between father and son were of the most cordial and affectionate character; and when the old man was unwell it was the practice of the son to sleep with him, so as to administer to his needs during the night. Both men, however, at times drank to excess, and at times quarreled violently, being both of passionate nature. These quarrels, as far as the testimony shows, were followed by speedy reconciliations. They occupied bedrooms in the rear part of the body of the house, fronting each other across a wide passage, and the doors of these rooms were in line, for the free circulation of air. As Maxcy Lee said, the house was built for ventilation. Dr. Henry Lee's room was on the right to one going down the passage from the front door of the house, and Maxcy Lee's on the left. Some two weeks or ten days before the fatal occurrence, Maxcy Lee had borrowed from a friend at Darlington C. H. (one Early) a double-barreled, hammerless, breech-loading gun, of superior make and value, for the purpose, he said, of killing some turkeys that had become wild, and had obtained, to go with it, No. 3 or 4 shot. This gun was regarded as a curiosity worth looking at by Maxcy Lee, and friends of his called in, or were called in, to examine it. There was some difficulty in unbreeching and working it, and, Maxcy being unskillful in so doing, his father handled the gun for inspection. The gun had its place in Maxcy's room, while the father had a gun that was kept in his own room. October 5th Maxcy Lee went to Darlington C. H., and while there obtained permission from Early to retain the gun a little longer. He returned home late in the day, riding with his brother Dickson Lee, who came with him. They had whisky with them, and on reaching home some hot water was obtained, and father and sons together took a toddy. As far as the testimony shows, they were on the best of terms, and were seated together in the bedroom of the father. No dinner had been put up or prepared for Maxcy, and he ordered an early supper, and was perhaps put out because he had nothing to eat. The father asked about the Early gun, and Maxcy said Early had sold it for $100. Sim Woods, a colored servant, was present, and asked to see the gun; and, being told to do so, he got the gun from Maxcy's room and handed it to Dr. Henry Lee, who unbreeched it. Sim said it was unloaded, but he failed to put himself in a position to ascertain this fact. The old man was seated when he handled the gun, and Sim

and Maxcy were standing; and, unless Sim had been standing just behind the stock of the gun, he could not have seen whether or not it was loaded. One barrel certainly was unloaded. After the gun had been replaced, Sim was told to go after the mail. It was raining, and, looking for an umbrella, Sim found that Maxcy's was broken. Upon this, Maxcy spoke very roughly and angrily to Mrs. Munn, reproaching her for not taking better care of his property. As far as the testimony shows, this roughness of the son did not offend the father. They were apparently sitting there, in the father's bedroom, on the friendliest of terms; the one imparting the news of the court house to the other. The 2d of October had been the father's birthday, and as a birthday present the son had given him a gold watch chain. Dickson had left, and Dr. Henry Lee had walked out to the road to meet Sim and receive his mail. While there, Mrs. Munn, doubtless offended by Maxcy's rough talk, came out of the house with a bundle. The old doctor directed her to go back, but, saying that she could not, she went her way. The old man got his mail (papers and letters) and went to the house. Sim and another negro were at the well, near the road. They saw him enter the house, and directly afterwards, as they say, they heard the report of the gun. Dr. Henry Lee said: 'As I came down the passage, Maxcy shot me from his door. He was in eight feet of me.' If Sim heard aright, he said further that Maxcy was standing in his (Maxcy's) room door, and shot him as he turned to go into his (Dr. Henry Lee's) room door. Maxcy Lee said that he was still in his father's room when the old man returned with the mail; that he (Maxcy) took his letters and went into his own room and sat on his bed, working with the gun in his lap; that his father came out in the passage and stood in front of him, eating an apple, when the gun fired." The defendant was found guilty, with a recommendation to mercy, and sentenced to life imprisonment in the state penitentiary. He appealed upon the following exceptions:

"(1) That his honor abused his discretion in refusing to continue the case in accordance with the motion of the defendant made on the 25th and 26th days of October, as it is respectfully submitted that said case should have been continued upon the physician's certificate presented for that purpose on said days.

"(2) That his honor abused his discretion in refusing to continue the case under the physician's certificate presented of date November 6, 1899, to which day he had postponed the trial of the case from the 26th day of October; it being respectfully submitted that under said certificate the defendant was not in any condition to undergo the strain of a serious trial, and the case should have accordingly been continued.

"(3) Because it is respectfully submitted that his honor, the circuit judge, abused his discretion in refusing, when said certificate of date November 6th was presented, and motion made for continuance, to allow defendant's counsel to call into court the physician, to more abundantly and fully show that defendant was not in fit physical condition to stand the trial.

"(4) His honor erred in charging the jury, in his preliminary charge, as follows: 'If you come to the conclusion by the preponderance of the evidence that the killing was accidental, you will then have to determine whether it was such an accidental killing as should be allowed to go unpunished, or whether it belongs to another class of accidental killing, that requires to be punished. If you come to the conclusion that it was not accidental, then you will have to determine whether it was unlawful homicide, and, if so, whether it was murder or manslaughter.' His honor thus, it is respectfully submitted, making the conclusion of the jury as to the guilt or innocence of the defendant dependent upon a preponderance of the evidence, thus throwing the burden upon the defendant of establishing his innocence, and not upon the state to prove his guilt beyond a reasonable doubt upon the whole case, thereby misleading the jury in laying down the rules of law by which they were to consider the testimony, inasmuch as in his entire preliminary charge he failed to instruct the jury to the effect that upon the whole case, including the evidence as to the special defense, the jury must be satisfied of the guilt of the defendant beyond a reasonable doubt.

"(5) If some accidental homicides are punishable in law, as his honor instructed the jury, his honor erred in charging the jury in his said preliminary charge, 'The defendant, as I understand from his counsel, does not deny the fact of the killing, but sets up a plea that it was accidental;' and again in charging, 'But he pleads that it was an accidental killing,'—thus indicating to the jury that the defendant had set up a plea which furnished no excuse in law, and misstating what the defendant's plea was; the defendant having pleaded not guilty to the indictment, and set up the plea of excusable homicide, by reason of the fact that the killing was done accidentally, without criminal carelessness on his part.

"(6) His honor erred in instructing the jury in his said preliminary charge as follows: 'The defendant who sets up the plea of accidental killing takes upon himself the burden of proving that the killing was accidental. He is not required to prove that beyond a reasonable doubt, but the law requires him to establish that plea by the preponderance of the evidence, by the greater weight of the testimony,'—inasmuch as he failed in his said preliminary charge also to instruct the jury that the defendant must have the benefit of every reasonable doubt upon a consideration of the entire testimony in the case; the jury thus being under a misapprehension as to the rules of law by which they

were to be governed while they were hearing the evidence in the case.

"(7) His honor erred in instructing the jury as follows: 'The jury must gather from the testimony four requisites of the plea of accidental homicide, which I hope the jury will bear in mind: First. The jury must be satisfied by the preponderance of the evidence that the killing was indeed and in truth accidental; that no element of intention entered into the act. Second. That at the time of the killing the defendant was not engaged in any unlawful occupation or doing any unlawful act. Third. That, if he was engaged in a lawful occupation or doing a lawful act, that he was doing so with a due regard to the lives and persons of the bystanders or those in the range of the danger; and the jury is to be the judge of the amount of care and caution to be exercised under the various circumstances. Fourth. It should be shown to the satisfaction of the jury, by the preponderance of the evidence, that the defendant at the time of the killing had no intention to kill or injure the deceased or any one else;' the said charge, it is respectfully submitted, being incomplete, to the disadvantage of the defendant, and not in accordance with law. It was incomplete, and so calculated to mislead the jury: (1) In that it failed to add that, whatever the conclusion as to the preponderance of the testimony in respect to the special plea, the defendant could be convicted only in case, upon the whole testimony, the jury should become satisfied of his guilt beyond a reasonable doubt; (2) in that it failed to instruct the jury, in the case of unlawful occupation at the time of the killing, as to the difference in the character of the offense, and the degree of crime, dependent on whether the defendant was engaged in the commission of a felony or in the commission of a misdemeanor; (3) and that, in matter of negligent killing, it failed to instruct the jury that the negligence must be more than would be sufficient as a basis for a civil action for damages, and must be so gross as to become culpable and afford a reasonable ground for the implication of malice. The charge was not in accordance with law, in that it made the jury sole judge of the amount of care and caution to be observed, when it is submitted that the negligence in such case presents a mixed question of law and fact, and the jury should have been instructed as to what constitutes criminal negligence in law.

"(8) His honor erred, in his said preliminary charge, in instructing the jury that they must gather from the testimony, as one of the requisites of accidental homicide, 'that at the time of the killing the defendant was not engaged in any unlawful occupation or doing any unlawful act,' without also explaining to or instructing the jury that said unlawful act must be one out of which the killing arose.

"(9) His honor erred, in his said preliminary charge, in utterly failing to charge the jury that the defendant must be acquitted unless the jury should be satisfied from a consideration of the whole testimony adduced that the defendant was guilty beyond a reasonable doubt, and that it was the duty of the state to make out its case accordingly, thus leaving it to the jury to reason upon and weigh the testimony while they were hearing it upon the mere preponderance of the evidence, and placing the burden upon the defendant to prove his innocence on his special defense.

"(10) His honor erred in admitting in the testimony a statement of the witness Sim Woods as to what he said occurred between the deceased and defendant a week or two before the killing, and a conversation which took place between them; the same having no relevancy to the issue, involving no threat applicable to the killing, indicating in no way the relations between the defendant and the deceased on the 5th of October, 1899, and preceding a friendly living together and harmonious intercourse that had been put in testimony by the state.

"(11) His honor erred in admitting the statement of the witness Sim Woods as to the alleged conversation between the defendant and deceased, and the abusive language used by him to Mrs. Munn, the evening of the killing; the said testimony being irrelevant to the issue, and not a part of the res gestæ, and tending simply to prejudice the minds of the jury against the defendant.

"(12) His honor erred in admitting the alleged dying declarations of Dr. H. J. Lee, testified to by the said witness Sim Woods, because it did not appear that at the time the alleged dying declarations were made the deceased believed, or expressed his belief, that death was imminent or impending, and because said alleged dying declarations did not relate to the circumstances of the killing, but the deceased was merely characterizing the act and expressing his opinion, unsupported by circumstances, and which he would not have been allowed to testify to under oath, had he survived.

"(13) His honor erred in permitting the witness Dr. Wallace to testify to alleged dying declarations of the deceased, because it was not made to appear that the deceased believed or was informed that death was imminent or impending at the time said alleged declarations were made, and because they involved a mere opinion of the deceased, unsupported by any circumstances.

"(14) Even if the alleged dying declarations stated by Dr. Wallace were otherwise competent testimony, his honor erred, it is respectfully submitted, in refusing defendant's motion to strike out that part of the so-called dying declarations which clearly related to the matter of opinion expressed by the deceased.

"(15) His honor erred in permitting the witness Dr. Wallace to state in the presence of the jury what the defendant said about his father five or six years or more before the

killing, to the effect that one or the other of them would have to die before nine o'clock that night; said testimony being utterly irrelevant to the issue, and being entirely remote from any proof of threats or motive to take the life of the deceased years thereafter, and tending only to prejudice the jury against the defendant.

"(16) His honor erred in admitting in evidence the alleged dying declaration of the deceased, testified to by Mrs. M. V. Galloway, there not being sufficient evidence that the deceased, at the time the alleged declarations were made to her, considered that death was imminent or impending; and, if otherwise competent, said alleged dying declarations should have been excluded because they did not relate to the circumstances of the killing, and were utterly incompetent to go to the jury as dying declarations of the deceased.

"(17) His honor erred in permitting the witness W. K. Thomas to testify as to what the deceased said about his chances for living or dying, for the purpose of determining the admissibility of the alleged dying declarations of the deceased, which his honor had already ruled to be admissible as such.

"(18) His honor erred in interrogating the witness W. K. Thomas, when recalled, for the purpose of showing what the deceased said as to living or dying, and undertaking himself to extract from the witness testimony which the solicitor had failed to bring out, inasmuch as by so doing he invaded the province of the jury, and indicated his opinion as to the value of the alleged dying declarations, and stepped beyond the province of the judge in jury trials, contrary to the spirit, if not the letter, of article 5, § 26, of the constitution.

"(19) His honor erred in permitting the witness Mrs. S. E. Hay to testify to alleged dying declarations of the deceased; there being no sufficient evidence to show that the deceased considered or believed that death was imminent or impending at the time said alleged declarations were made by him, and because, if otherwise competent, the said alleged dying declarations did not relate to the circumstances of the killing, but involved a mere opinion of the deceased, unsupported by circumstances.

"(20) His honor erred, during the examination of the witness Mrs. S. E. Hay, in stating in the presence of the jury: 'I hold that the testimony justifies the opinion that there was a continuous dying condition, of which the deceased was aware; bearing in mind that he was a medical man, and able, therefore, to form a more intelligent opinion of his condition than a layman,'—thereby indicating his opinion as to the value or weight to be given to the alleged dying declarations by the jury; his honor's duty being simply to pass upon the admissibility of the testimony.

"(21) His honor erred in questioning the witness Dr. Wallace, when recalled by the solicitor, as to the belief of the deceased as to whether he would live or die, asking the witness a series of questions thereon, and endeavoring thereby to bring out by his examination testimony which the solicitor had failed to bring out by asking the witness leading questions tending to elicit the testimony desired for the state, and, by the form and manner of his examination of said witness, indicating to the jury his opinion upon a material question of fact for their consideration, and thereby violating article 5, § 26, of the constitution of this state.

"(22) His honor erred, it is respectfully submitted, in admitting in testimony the alleged dying declarations of the deceased testified to by the witness Henry Thomas, because there was no sufficient evidence that at the time the alleged dying declarations were made the deceased believed or was told that death was imminent or impending, and because, even if said alleged declarations were otherwise competent, they were inadmissible and incompetent because the statement by the deceased that he was willfully shot by the defendant was a mere expression of opinion from him, unsupported by circumstances.

"(23) His honor erred in directing, of his own motion, that Dr. Wallace be recalled when Henry Thomas was upon the stand, for the purpose of undertaking to prove by the former that the deceased was in a dying condition at the time the alleged declarations testified to by Henry Thomas were made, and himself examining Dr. Wallace, and putting to him such leading questions, and in such form and manner, as to indicate to the witness and to the jury his opinion upon a question of fact for the consideration of the jury, to wit, the value of the alleged dying declarations as testimony, and whether death was imminent and impending at the time; the sole province of the judge on that question being to pass upon the admissibility of the testimony offered by the state.

"(24) His honor erred, when passing upon the defendant's objection to the witness Henry Thomas stating what the deceased said to him as to the killing, by clearly indicating to the jury, in his remarks thereon, his opinion as to the force and value of the alleged dying declarations; the same being a question of fact for the jury. Especially did his honor err herein in his remarks as to admitting such testimony, by using the following language in the presence of the jury: 'A statement made by a dying person, warned to state all the circumstances for the purpose of being used as evidence, sometimes comes with a questionable coloring, because even a dying person may have a desire for vengeance on the person who kills him; but, where statements are made without any warning that they are going to be used as testimony, they come into court as dying declarations if the court is satisfied that the person was really in a dying condition and had no hope of recovery.'

"(25) His honor erred, when the witness

Henry Thomas was being examined for the state by the solicitor, and objection was interposed by the defendant to his testimony, in directing, of his own motion, that the witness Dr. Wallace be recalled, and in taking out of the hands of the solicitor the examination of said witness, to bring out all the facts as to witness' knowledge as to the condition of the deceased, and what he said, there being involved in his honor's questions and in the witness' answers a very material inquiry for the jury, to wit, whether the deceased was in a dying condition, and as to the worth and value of the alleged dying declarations; it being respectfully submitted that such examination upon material and vital questions of fact for the consideration by the jury should be inquired from witnesses by the solicitor, and not by the presiding judge.

"(26) His honor erred, when defendant objected to certain testimony about to be elicited from the witness O. D. Lee, in making the following remarks thereon: 'This, I apprehend, will relate to what was testified by Dr. Wallace as to a threat alleged to have been made four or five years ago;' his honor thus stating in the presence of the jury that the remarks alleged to have been made about his father by the defendant years before the killing, and previously testified to by Dr. Wallace, constituted a threat by the defendant against his father, the same being a question of fact entirely for the jury; and thereby his honor invaded the province of the jury in relation to the said question of fact, as to which they should have been left to reach their own conclusions without any intimation of opinion by the circuit judge.

"(27) His honor erred in permitting the witness Willie Warr to testify to an alleged difficulty between deceased and defendant, and to go into the particulars thereof, which was alleged to have occurred a week before the killing, and which, it is submitted, was irrevelant to the issue; and it being further submitted that the state should have been confined to the proof of hostile relations that existed, if any, between the parties at the time of the killing, and not allowed to go into the particular instances of disputes or difficulties, and the details thereof.

"(28) His honor erred, in his final charge to the jury, in urging upon them to reach an agreement and to change their individual conclusions upon the evidence; thus, it is submitted, leaving the members of the jury to conclude that the exercise of their separate independent judgments, if it should result in a disagreement, would be displeasing to the court and abhorrent to the law, whereas the exercise of such independent judgment by every juror is the basis of jury trial.

"(29) His honor erred, it is respectfully submitted, in his said final charge, in that, although he instructed the jury that the burden of proof was on the defendant throughout to establish a special defense, yet he failed also to make it clearly evident to the jury that it was the duty of the state to prove the defendant's guilt, upon the whole case, beyond a reasonable doubt.

"(30) His honor erred in charging the jury as follows: 'You will therefore take the evidence and determine for yourselves whether the defendant has satisfied you by the greater weight of testimony that he should be allowed to go free and unpunished; thus leaving the jury to acquit or convict accordingly as the defendant had satisfied them that he was guilty or innocent.

"(31) His honor erred in instructing the jury in his said final charge that before they could acquit the defendant they must be satisfied by the preponderance of the evidence that the four requisites which he laid down were complied with and fully met, whereas he should have instructed them that, although it rested upon the defendant to establish a special defense, yet before they could convict they must be satisfied of the guilt of the defendant, upon the whole case, beyond a reasonable doubt; his honor's instructions herein being, it is submitted, especially misleading to the jury, although he did afterwards charge that the failure of the defendant to establish such special plea did not relieve the state of the burden of proving his guilt beyond a reasonable doubt.

"(32) His honor erred in charging the jury in respect to matters of fact, in violation of article 5, § 26, of the constitution of this state, as follows: 'In this case the state argues to you that murder has been proved by the dying declarations of the deceased, and by circumstantial evidence, and by evidence of the admissions of the defendant. You will recall that in the course of the trial the court was required repeatedly to pass upon the admissibility or inadmissibility of certain evidence; and if there is before you evidence of any statement made by the deceased before he died, but after the mortal stroke was given or the mortal shot was fired, such evidence has been admitted, if it be in the case, after the court was satisfied that the dying man knew that he was a dying man and had no hope of recovery, and made a statement under the expectation of impending death. If there is such evidence in the case for you to consider, all that my decision as to that evidence amounted to was that it was admissible as evidence,—not that you are to take it as absolutely true, but that you are to consider it just as you take evidence taken on the stand from a witness that has been sworn to tell the truth, the whole truth, and nothing but the truth. It comes before you without being cross-examined. You are to weigh it, and say from its internal evidence and from the other evidence in the case whether, in your opinion, it is true or not. Such evidence is admissible under the theory that a person who is on the verge of the grave, looking into the face of death, having given up hope of life, is free from any temptation to tell what is not true, and that his circumstances take the

place of the oath administered to the witness in court; and although such statements made by the dying person are, from their very nature, hearsay, and although generally hearsay is not admitted in court as evidence, that is an exception to the rule, and such statements are admitted in evidence, and are to be considered by the jury.

"(33) His honor erred in charging the jury as follows: 'If there is circumstantial evidence in the case, you will weigh it and ascertain what facts the state has proved. If the state has proved one or more facts by circumstantial evidence, then you will say what presumptions arise out of those facts. In the majority of cases that come into the criminal court, the state is bound to rely wholly or in part on circumstantial evidence, in contradistinction from the evidence of eyewitnesses, which is spoken of as positive testimony;' his honor thus charging the jury as to matters of fact, in violation of article 5, § 26, of the constitution of this state.

"(34) His honor erred in charging the jury as follows: 'If there are admissions of the defendant himself in evidence, you will consider them. They are admitted in evidence, being an exception to hearsay. They are admitted in evidence, and you are to determine whether or not they are true, and, if true, what is their effect as indicating, or not, the guilt of the defendant;' his honor thus charging the jury with respect to matters of fact, and thus violating the provisions of article 5, § 26, of the constitution of this state.

"(35) His honor erred in charging the jury 'that the defendant in this case is not to be acquitted on the ground of accidental homicide unless he has satisfied you by the greater weight of the testimony that he is entitled to be excused and go unpunished,' whereas he should have charged that the defendant must be acquitted unless the state proved his guilt upon the whole case, including any special plea, beyond a reasonable doubt.

"(36) His honor erred throughout his said final charge, whenever charging the jury upon the matter of proof of a special defense, in failing to clearly state to the jury that the defendant must be convicted, if at all, upon the proof by the state of his guilt upon the whole case, including the testimony as to a special defense, beyond a reasonable doubt."

It will not be necessary to consider these exceptions in detail, as all the questions presented by them can be disposed of under the heads arranged by the appellant's attorneys in their arguments. The first question to be considered is whether there was error on the part of the presiding judge in refusing the motion of the defendant for a continuance, made on the grounds fully set forth in the record. After a careful consideration of the facts, we fail to discover any error in refusing the motion.

The next question for consideration is whether there was error in allowing the state to introduce in evidence the statements of the deceased as dying declarations. The appellant's attorneys interposed two objections to the admissibility of said testimony. It was objected first that the conditions required for the admission of the testimony were not present, and next that the declaration was an inadmissible expression of opinion. We will first consider whether the requisite conditions existed for the introduction of the said testimony. In 10 Am. & Eng. Enc. Law (2d Ed.) p. 382, it is said: "As to their relevancy, dying declarations are governed by the same rules as testimony, except that they are restricted to the act of killing and the circumstances immediately attending it, as forming part of the res gestæ." In the same volume (page 364) it said: "In order that the dying declarations of a deceased person may be admissible under the dying-declarations rule, the declarant must at the time of making them have been in extremis, and fully conscious of his impending dissolution. Both of these conditions must exist. Thus it has been said that it is not alone sufficient that the declarant believe that he is about to die. To be admissible under the dying-declarations rule, his declarations must have been made while he was in extremis. And, even though the declarant was in extremis, his declarations are not admissible unless they were made by him while he was under a sense of impending death. To render his declarations admissible, the declarant must not only believe that he is about to die, but must be without any expectation of recovery. * * * According to the clear preponderance of authority, if the deceased had the slightest hope of recovery when the declarations were made, they are inadmissible." The rules are stated in State v. Bradley, 34 S. C. 139, 13 S. E. 316, as follows: "(1) Death must be imminent at the time the declaration was made. (2) The declarant must be so fully aware of this as to be without hope of life. (3) The subject of the charge must be the death of the declarant, and circumstances of the death must be the subject of the declaration." In State v. Johnson, 26 S. C. 155, 1 S. E. 511, it was said: "We are aware that cases have been cited, and others might be, decided elsewhere, in which courts have gone to extreme lengths in excluding dying declarations as not coming fully up to the rule; but we do not think any set form of words should be required to show that the declarant was in such a condition as to render his declarations competent, but that the court must draw a rational conclusion from all that was said, taken in connection with such surrounding circumstances as must have been known to the declarant, as to whether the declarant was in such a condition of mind as would render his declarations competent. None of the cases in this state have gone to such lengths as we find in some of the cases elsewhere, and we are not disposed to follow such cases." We have not undertaken to reproduce the testimony relevant to this question, as it would not be of any practical benefit. We are, however,

fully satisfied that there was a compliance with all the requirements of law, and that there was no error in this respect in allowing said testimony to be introduced.

We will next consider whether said testimony was inadmissible on the ground that it was the expression of an opinion. When the state offered to introduce in evidence the statement hereinafter mentioned, the following took place: "Mr. Woods: If your honor please, my position is this: That that is a declaration on the part of the deceased of inferences from a state of circumstances which is not stated, and that the court has laid down the rule that it must relate to the circumstances themselves, not to inferences or conclusions from these circumstances. The general doctrine is that nothing can be stated by this witness in regard to the alleged dying declarations which the deceased, if living, would not be allowed to testify to in an action of assault and battery. Q. (By the court to the witness). Was what he said about a drunken fool part of the same conversation? A. Yes, sir. The Court: I cannot hold that the expression 'He shot me for nothing,' or 'He killed me for nothing,' is purely an expression of opinion. It might be and it might not be, just as an expression 'He shot me accidentally' may or may not be a matter of opinion. It may be a matter of fact stated in that manner. It certainly is as much a matter of fact as if a dying person were to say 'He shot me from anger,' or 'from jealousy,' or 'from revenge,' or 'because I struck him.' If the deceased knew of no cause for the shooting, it is difficult to see how he could have expressed that better than to say 'He shot me for nothing.' But my ruling is not as to the expression, 'He shot me for nothing,' alone. The statement is one statement, as I understand it from the witness, and concludes with the statement, 'To be killed by a drunken fool.' Mr. Woods: I think I had better put my objection in this form: I object to the whole statement. Does your honor rule the whole statement in? The Court: If it is one statement. Mr. Woods: Then I move to strike out the objectionable part and leave the unobjectionable part in, even though it is one statement. The Court: I must let the whole statement in. (Exception noted. The jury were now overruled.) Q. Now state plainly, so that the jury can hear it, just what the old doctor said about the killing to his daughter Mrs. Josey. A. He said: 'Fannie, Max has shot me.' He said: 'An old man, three score and ten, to raise up a son to kill him in his own house for nothing,—a drunken fool.' He said, 'Don't you think this is a high state of civilization?'" The declarant also stated that the shooting was willful and malicious. The appellant's attorneys admit there are authorities to the effect that testimony that the deceased was shot "for nothing" is admissible as a dying declaration, and cite the case of Boyle v. State, 105 Ind. 469, 5 N. E. 203, 55 Am. Rep. 218, in which the court uses this language: "The declaration does not assume to be the expression of an opinion, but it professes to be, and in truth is, the statement of a fact; for, if there was no reason or cause whatever, no opinion could be given for its sufficiency or insufficiency. Whether there is any cause for an act must be a fact, but, if it be conceded that there is a cause, then whether it was or was not adequate might well be deemed matter of opinion." The court further says: "There is an essential difference between a statement denying a thing, and one admitting the existence of a thing and qualifying its character. Thus, to declare that liquor was sold, but not illegally, or that a man was struck, but not unlawfully, would, so far as the qualifying words are concerned, be a conclusion. If, however, these words should be struck out, facts only would remain." The words, "He shot me for nothing," are not merely the expression of an opinion, but the statement of a fact, and there was no error in admitting such testimony. There is another reason why not only this declaration, but testimony that he was shot willfully and maliciously, was admissible in evidence. In the case of Jones v. Fuller, 19 S. C. 70, the rule is thus stated: "From these authorities we deduce the following conclusions: First, that the exception to the general rule that the opinions of witnesses are not competent evidence is not confined to the case of expert testimony; second, that while it is necessary that the witness should first state facts upon which he bases his opinion, where facts are such as are capable of being produced in language, it is not necessary to do so where the facts are not capable of reproduction in such a way as to bring before the mind of the jury the condition of things upon which the witness bases his opinion; third, that such evidence is competent from the necessity of the case." Although the deceased did not state the facts and circumstances that induced him to believe that the shooting was willful and malicious, nevertheless there was testimony tending to show facts and circumstances within his knowledge upon which his opinion might have been based. Under such circumstances, the testimony was properly submitted for the consideration of the jury.

The next question to be disposed of is whether there was error in the preliminary charge. The only error assigned is that the presiding judge failed to charge certain propositions of law mentioned in the exceptions. These propositions were afterwards charged, and, even if there was error in the first instance, it was thereafter remedied.

The next question that will be considered is whether the presiding judge committed error of law in charging on the facts. The exception raising this question is too general, but, waiving this objection, it cannot be sustained, as we fail to discover wherein the defendant was prejudiced.

Under the head of "Alleged Errors of Law in Final Charge," the appellant's attorneys

argue as follows: "In his final charge the circuit judge made the guilt or innocence of the accused to depend upon a preponderance of the testimony as to a special defense. Notably, he said to the jury, 'I charge you that the defendant in this case is not to be acquitted on the ground of accidental homicide unless he has satisfied you by the greater weight of the testimony that he is entitled to be excused and go unpunished.' And again in charging: 'If, however, you are satisfied by the preponderance of the evidence that the homicide was such an accidental homicide as should not be excused, but that it was an accidental homicide which should be punished as involuntary manslaughter (I think you will remember what I explained to you in that connection), you will say, "Guilty of involuntary slaughter;"' thus instructing that, unless the jury was satisfied that the homicide was excusable because accidental, conviction followed." These words should be considered in connection with the other parts of the charge, and when so construed we are satisfied that there was no prejudicial error. They also say in their argument: "Again, his honor erred in charging: 'Or if, after the definition I have given you, you come to the conclusion that, even if an accidental homicide, it was such an accidental homicide as takes place when a defendant is doing an unlawful or felonious act, you will in that case have to find him guilty of murder,'—because, even if the homicide was committed while the defendant was in pursuance of an unlawful act, not felonious, the jury could at most only find him guilty of manslaughter." The presiding judge substantially charged the law applicable to the case, and, if the appellant's attorneys desired a more specific charge, requests to that effect should have been presented. They say likewise: "His honor governed the jury, with respect to the amount of care, caution, and prudence that the defendant should have exercised, as would be required in a civil case, and failed to charge them as to what was criminal carelessness, at the same time making the jury sole judges of both the facts and the law on this subject." As has just been stated, the presiding judge charged the law substantially, and, if a more specific charge was desired, requests should have been presented.

The appellant contends that there was error in admitting evidence of other disputes and quarrels in which the defendant used threats against the deceased. In the case of State v. Campbell, 35 S. C. 32, 14 S. E. 294, the court says: "We are not aware of any rule of law which fixes any definite time within which a threat must be made, before the perpetration of the act to which it is supposed to refer, in order to render testimony as to the making of the threat competent evidence. Of course, where a great or even a considerable length of time has elapsed between the making of the threat and the perpetration of the deed to which it is supposed to point, such length of time is a circumstance to be considered by the jury in determining whether there is any connection between the threat and the deed, but there is no rule of law, and, in the nature of things, it would be practically impossible to prescribe any rule, fixing the limit beyond which a threat would not be competent evidence." The testimony was therefore admissible.

The appellant lastly contends that there was error on the part of the circuit judge in intimating his opinion on the facts during the progress of the case, but we fail to discover any error in this respect necessitating a reversal of the sentence. It is the judgment of this court that the judgment of the circuit court be affirmed.

ROUNDS et al. v. AIKEN MFG. CO.

(Supreme Court of South Carolina. July 27, 1900.)

ARBITRATION AND AWARD—BUILDING CONTRACTS—SUBMISSION—PROCEEDINGS—PUBLICATION—REVIEW.

1. Where the terms of a building contract called for a gross sum for all the work to be performed thereunder, for the submission of differences to the arbitration of designated persons, and that payment for extra work should be governed by the contract price, it was proper for the arbitrators to determine the value of such extra work by the current market price thereof.

2. Where one of the arbitrators testified that he gave plaintiff notice that the umpire agreed on would sit with the board at a certain meeting, and it appeared that at the meeting plaintiff's arbitrator, in response to a question, announced that plaintiff would not be present, owing to doubts as to his ability to establish his claim, this was sufficient to establish that plaintiff had notice of the meeting.

3. Where the action of the board of arbitrators at a certain meeting was communicated to plaintiff the following day, and plaintiff attended several meetings of the board thereafter, and never made objection to the work of the board, he cannot complain that he was not notified of the meeting.

4. Where, under the terms of a contract providing for the submission of certain differences to arbitration, it was provided that, in case of a disagreement between the two arbitrators appointed, they should call in a designated person as umpire, it was not necessary for the umpire, when called in, to hear the testimony of witnesses, but it was proper for him to arrive at his conclusion from the findings of the other two arbitrators.

5. It is no objection to an award of arbitrators that it was not signed by the umpire until the morning after the other two had signed it, where the terms of the submission make the finding of two sufficient, and do not require any formal publication thereof, and it appears that the parties were duly served with a copy of the award.

6. In the absence of a statutory requirement, it is not necessary that witnesses before a board of arbitrators should be sworn.

7. Where matters of dispute have been submitted to arbitrators, and they have heard evidence in good faith, and after full consideration determined the matters, their finding will not be reviewed because of mere errors of judgment.

8. Where in the findings of a board of arbitrators there was an allowance made for extra

woodwork complete, and it appeared that the woodwork was painted, an objection that no allowance was made for extra painting was not well taken.

9. Where a submission to arbitration was for the purpose of determining "the price to be paid for such extra work, * * * or the amount to be deducted for omissions by the contractors in the erection of the building," etc., and the evidence before the board showed that certain ventilators were of an inferior quality, an objection that they were allowed at only $10, whereas they cost $35, was not well taken, since the deficiency in quality constituted an omission, within the meaning of the terms of the contract, and the finding of the arbitrators thereon is conclusive.

10. Where it appeared that plaintiffs, in their bid for the erection of a building, had estimated 928,339 brick for a wheel pit, but had put in only 519,020, the difference constituted an "omission," within the meaning of the contract, providing for the submission to arbitration of questions as to the amounts to be deducted for "omissions in the erection of the building," and was therefore within the jurisdiction of the board of arbitrators.

11. The fact that defendant in a case before arbitrators had admitted certain allowances to plaintiff for brick did not preclude the board from allowing a smaller amount, since a board of arbitration is not governed by the technical rules of law as to the admission of evidence, etc., but is intended to arrive at a just determination of the matters in dispute.

12. The fact that an agent of defendant was present at the sittings of the board of arbitration while determining matters in controversy between plaintiff and defendant, and acted as its clerk in figuring amounts, is not ground for setting aside the award, where plaintiff was also permitted to be present, and made no objection to the conduct of the agent or to his presence, and it did not appear that any harm was done thereby.

13. Where it appeared that defendants had paid for four cords of wood as material to be used by plaintiff in constructing a mill house under a contract, the latter had no right to dispose of it; and, having done so, the item became a proper charge against plaintiff before a board of arbitration sitting for the settlement of differences between plaintiff and defendant.

Appeal from common pleas circuit court of Aiken county; W. C. Benet, Judge.

Action by Charles L. Rounds and J. C. Hagler, co-partners, against the Aiken Manufacturing Company, to set aside an award of arbitrators. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

W. T. Gary and G. W. Croft & Son, for appellants. Henderson Bros. and Joseph R. Lamar, for respondent.

POPE, J. This action was commenced on the 1st day of June, 1898. I do not know that any words of mine would more accurately describe how the action was, in the opinion of the plaintiffs, rendered necessary, with the grounds for that opinion, than by adopting those employed by the circuit judge (Judge Benet) in his well-considered opinion. Hence I will reproduce the text of that decree:

"Decree.

"The defendant, the Aiken Manufacturing Company, a corporation by and under the laws of this state, having organized to do business as manufacturers of cotton goods at Bath, in the county and state aforesaid, determined to erect a brick structure or cotton factory at said place; and, having advertised for competitive bids for the erection of said buildings and appurtenances, the plaintiffs on March 11, 1895, filed with the defendant's agent a bid, in writing, to do the work according to the plans and specifications that had been previously prepared by an architect, and which had been examined by the plaintiffs. Said bid, together with the pencil memorandum known in the case as the "Barrett Memorandum," and which will be herein referred to, shows that the plaintiffs undertook to do the work required on the original mill and appurtenances for the lump sum of $53,198; and said bid, so modified by the Barrett memorandum, passed into a written agreement, which was made and executed by the parties on March 16, 1895, which paper is the contract in the case. It is noteworthy that there is not a thing set forth in the contract going to show at what price the plaintiffs were to furnish lumber or material of any kind, except as set forth in the nineteenth section of said article,—that the brick were to be at $4.25 per M., on an estimate that it took 2,000,000 of brick to complete the work. There is nothing in the contract going to show on what basis the plaintiffs estimated that they should be paid for laying brick, either in Portland or Rosendale cement or lime. It is further agreed that all extra work should be paid for in proportion to the work in the original contract, and section 26 provides that no payment on account by the owners shall be deemed a waiver of the right to object to defective material or imperfect work. The work under the contract progressed, and as it progressed extra additions were agreed to be made to the mill and to the work, all under the same contract, and the builders, or plaintiffs, went on to carry out the same. Payments were made to them from time to time, and it is unquestioned that much more than the original contract price was paid to them. After the work was completed, dispute arose as to the amounts due to the plaintiffs by the defendant, and in order to settle said disputes without litigation an agreement in writing was entered into by the parties to submit the same to arbitration. The terms of said agreement are important. The preamble recites that whereas, the contract aforesaid provides 'that any dispute or difference concerning the meaning and construction of the plans, drawings, or specifications, as to what is extra work, shall be decided by the architect'; and whereas, in the specifications it is provided that 'in case any dispute arises respecting the true value of the extra work, or of work omitted at the request of the owner, the same shall be valued by two competent persons, one employed by the owner and the other by the contractor, and those to have the power to name an umpire, whose decision shall be binding upon all parties'; and whereas, a controversy is pending 'in relation to the price to be paid

by said company to said Rounds & Hagler for certain extra work done and performed by said Rounds & Hagler for said company upon their mill and canal and other structures at Bath, and also for material furnished by said Rounds & Hagler in doing such work, and deductions for work omitted.' Then the matter in dispute is submitted to the arbitrament and award of arbitrators, to determine 'the price to be paid for such extra and additional work and material furnished, or of the amount to be deducted for omissions by them in the erection and building of the Aiken Manufacturing Company's mill and canal and other structures at Bath, South Carolina.' It is agreed, further, that the builders shall nominate one of said arbitrators, and the owners another. Those are called, in the submission, 'arbitrators,' and they are given 'power to nominate an umpire.' He is called an 'umpire' in the submission. It is further provided, 'The award of any two shall be final and binding upon the parties.' And there is no provision in the submission as to when the award is to be made, as to how it is to be published, or what notice, if any, is to be given to the parties that the award is reached. There is a provision to this effect: 'That the schedule of measurements as made by Rounds & Hagler and A. H. McCarrell, and contained in their respective books, shall be produced and delivered to the board of arbitrators, and, as far as said measurements coincide and agree, they shall be accepted as correct; and, whenever said measurements do not agree, then the board of arbitrators shall take such course as they may deem proper to ascertain such measurements as they need.' There is no provision in the submission as to the acceptance by the arbitrators of any price that may have been placed upon material or work by the contractors or by McCarrell. Under this submission the corporation appointed, as their arbitrator, Joseph B. Storey; the plaintiffs appointed, as theirs, Charles B. Allen; and those two appointed, as the umpire, T. O. Brown; and on the 15th day of September, 1896, the three parties took an oath to carry out the terms of the submission. The evidence in the case shows that these three gentlemen are competent men, and stand well in the city of Augusta, where they live; and, in fact, in the argument of the case counsel on both sides paid proper tribute to all of them. The two arbitrators, Storey and Allen, met. McCarrell appeared before them as representing the company, and Mr. Rounds the firm of Rounds & Hagler. It is unquestioned that a rule or regulation was agreed on, which was notified both to McCarrell and Rounds, that the arbitrators would meet every afternoon at the office of the Aiken Manufacturing Company, in Augusta, Georgia, at three o'clock, and sit a reasonable time to consider the matters in question. This place was chosen without any objection on the part of Mr. Rounds, and at the suggestion of Mr. Allen, because he said it was more commodious and suitable than his own private place of business. Both McCarrell and Rounds were present at many meetings. The arbitrators made calculations in the presence of both of them, questioned them, examined other witnesses, and went into all documents presented. Rounds made no objection either to the place of meeting, the mode of procedure, or the fact that McCarrell was present, or to the fact that sometimes he was called upon to do figuring for the arbitrators. These meetings continued through many days. Mr. Rounds testifies that he did not attend a good many of these meetings, for the reason that he had business elsewhere that called him, and he could not attend. Mr. Allen testifies that quite frequently, after the arbitrators had their afternoon sittings, he told Mr. Rounds of what was going on, and of the decisions which were reached by the arbitrators. It is established that the mode of procedure adopted by the arbitrators was this: That Rounds presented a claim or estimate of his account, which had been previously prepared by Mr. Allen for him, and from his statements; that McCarrell presented a paper, on the one side of which was stated his claim or estimate of the company's version of what was due, and on the other side his statement of the Allen estimate. The arbitrators compared the Allen estimate with its revision by McCarrell, and found it correct, and then proceeded to gather all the facts they could on the various estimates, considering them item by item. It seems that none of the witnesses who were examined (and they were very few) were sworn, nor did any person present ask that they should be sworn. The estimate of McCarrell claimed that the company was due to the builders $2,219.39, but, as the arbitrators proceeded, it is shown that when he made that estimate he was not aware of the facts and figures set forth in the bid of Rounds & Hagler and the Barrett memorandum, or that the ventilators put upon the mill were not Star ventilators, as required by the specifications, or of the size required. It appears that Storey and Allen differed very little, and that, whilst on the item of how many brick Rounds & Hagler bid should be placed on the wheel house and wheel pit they differed, yet there was no contrary decision by them; but Allen preferred that the umpire should be called in to verify his work, as the umpire, Mr. Brown, was very familiar with brick work. He was called in on this matter, and a few other minor matters. What took place then will be considered hereafter. On the 10th of November, 1896, an award was made, signed by both arbitrators and the umpire. All of them swear that they signed the award. It seems that Storey and Allen signed together, and called in Mr. Brown, at Allen's office, and Brown signed in their presence. This award gave to the plaintiffs $1,002.86. This action is brought by the plaintiffs to set aside said award, and the allegations of the complaint will be considered seriatim, together with

the facts applicable pro and con to each allegation. There is no allegation of actual fraud on the part of the arbitrators, nor is there any proof that shows any fraud. The specifications of error alleged in the complaint against the award, and upon which it is claimed the award should be set aside, and this matter, which took forty-odd days to be settled by the arbitrators, should be sent to the court for settlement, are set forth in the seventh paragraph of the complaint.

"(1) The first specification of error is as follows: 'That the arbitrators exceeded the authority given them under articles of submission, for they proceeded to readjust, assess, and value the work done and material furnished by the plaintiffs under the original contract, instead of confining their investigation, as they were bound to do under the agreement of submission, to extra material and extra work furnished and performed in doing the additional extra work.' This allegation should be considered along with what is alleged in the fifth paragraph of the complaint,—that it was 'agreed to pay the plaintiffs for and at the same rate and proportion as similar work which the plaintiffs had agreed to do under the original contract'; that is, that the extra work was to be paid at the same rate and proportion as similar work under the original contract. The submission not only provides that the arbitrators should ascertain the price to be paid for such extra and additional work and material furnished, but that they should also ascertain 'the amount to be deducted for omissions in the erection and building of the Aiken Manufacturing Company's mill, its canal, and other structures.' The facts in the case go to show that a gross award was made. The process of procedure adopted by the arbitrators in reaching that result are set forth in what is called the 'O. K. Paper,' in evidence; and that indicated clearly that in order to arrive at the price of the extra work, and the omissions which were made in the original work, the arbitrators were obliged to consider what was done in the original work, and what they did was simply to make, from the evidence and facts before them, upon their best judgments, a statement of the accounts between the parties, setting forth on one side, in the beginning of the contract, price of the original work, $53,198, and following up that credit to Rounds & Hagler by credits of the value of work which they actually did, as found by calculations and measurements, and by placing on the opposite side of the accounts the charges which they considered proper against Rounds & Hagler for omissions, and deductions for omissions which they should pay, and also the money which had been paid to them; and, by this process being followed up to the end, they ascertained that the original work and the extra work were worth, according to the bids of the original work and the value of the extra work, based upon the value of the original work, $78,121.89, and that there had been paid to Rounds & Hagler in cash, and due by them to the company for omissions and deductions, $77,119.03, leaving a balance due them of $1,002.86. If we deduct from $78,121.89, the whole amount estimated as the value of the original contract, and the extra work, the sum of $53,198, the contract price, it will be seen the arbitrators estimated the value of the extra work at $24,923.89. By Paper K, put in evidence, dated November 4, 1896, it will be found that, in reaching their conclusions of the value or price to be paid for laying of brick, Storey and Allen decided 'that the proper and fair prices to be allowed Rounds & Hagler for extra brick work are as follows: $10 per M. for brick in Portland cement; $9 per M. for brick in Rosendale cement; $8 per M. for brick in lime.' The submission required them, where the 'schedule of measurements' between the parties agreed, to take those schedules; but there is nothing in the submission that binds them to take the prices, nor is there anything in the contract fixing the prices. After hearing Rounds & Hagler, and investigating their notebook as to what they claim they bid for this work, and considering the fair price of such work, they decided as stated aforesaid. Mr. Brown, when on the stand, testified that such figures fixed by the arbitrators were fair, and the market prices.

"(2) The second specification of error in the award is that, the umpire having been called to act with the arbitrators, it was necessary that the plaintiffs should have been notified of his sitting with the board, and given an opportunity before the board thus composed, before it acted upon any matter submitted to it, but that no such notice or opportunity was given to the plaintiffs, and hence the award is null and void. The facts on this specification are that Mr. Allen says, in so many words, positively, that he notified Mr. Rounds of the meeting at which Mr. Brown was to appear as umpire. Mr. Storey swears that at the meetings just previous to the night meeting in question, when Mr. Brown was present, and at which previous meeting Storey, Allen, and McCarrell were present, it was agreed that Brown should be called in at that night meeting. This Rounds does not deny, and did not deny when on the stand. He testifies, however, that he knew that Brown was to be called in, and requested Allen to notify him of the meeting. Why Allen should decline to have him present is not explained. Brown testifies that when he reached the meeting place he asked if Rounds was to be present, and Allen said, 'No,' because he told him that his claim would not stand. Allen swears positively that he notified Rounds of the meetings, for the umpire. From this testimony, considering the burden on the plaintiffs to show that there was no notice or opportunity given, it is clear, as a matter of fact, that Rounds had full notice that Brown was to be at that meeting, and, of his own accord, did not attend. He says that Allen told him of the result of the

meeting the next morning, and yet he made no objection, and no request for a rehearing; and that decision of Brown reached at the night meeting was on October 16, 1896, and the award was never made until the 10th November, thereafter. He was actually present at the subsequent meeting, where Brown acted. The only date of subsequent meeting given in the evidence was October 30, 1896.

"(3) The third specification of error is that, the arbitrators having called in the umpire to act with them, the board thus composed could only hear any disputed matter by calling and swearing and examining witnesses before them, but that the said board, in disregard of the law and the plaintiffs' rights, proceeded to settle such differences without swearing or examining any witnesses upon such differences, simply by each of the two arbitrators making his statement or report to the umpire, who then announced his conclusions, which the board adopted. The facts which the testimony show under this head are substantially these: That when Brown met the arbitrators he took no evidence from witnesses, by swearing the witnesses or by examining any witnesses, but that, as the questions which he was called in merely to pass upon were measurements of the plans and the inspection of the books, he examined the plans and the books, and drew his conclusions from them, and from what the two arbitrators said of them as to their investigations. On the question whether Rounds & Hagler, when they bid for the work on the wheel pit and the wheel house, bid on 928 M. brick, or 650 M., he decided in favor of the first number, after his own personal inspection of the book of Rounds & Hagler, and the figures thereon corresponding with the figures on the plans, and after making calculations thereon. He rendered his decision that night in writing. If, as stated in the second head, above, Rounds had actual notice, then he cannot complain; but, even if he did not have actual notice of the meeting, still he says that on the next day Allen informed him of the decision. That was many days before the final result was reached. He went before the board again, with Brown present, and, though he knew that Brown had not examined him, yet he did not demand that either he or other witnesses should be examined on that ground, and thereby he waived his right.

"(4) The fourth specification of error is that, even if the umpire had heard the cause and evidence upon the disputed issue, the award is null and void, for the reason that he did not join in the findings and execute the same with the two arbitrators. The facts on this head are that a tissue copy is produced by the plaintiffs, which they claim is the award, only signed by Storey and Allen. The defendant produced the written award, which is unquestionably signed by all three of the arbitrators; and the evidence shows that Allen and Storey signed it one night, in the presence of each other, and the next morning Brown signed it in the presence of both Allen and Storey. The submission does not require any formal publication of the award. Mr. Winter swears that he, as clerk of the defendant company, on the 14th of November served a copy of the award on Mr. Rounds. Even if the tissue copy was the original award, it is signed by the two arbitrators; and, if that is the conclusion of two, it is binding.

"(5) The fifth specification of error is that none of the witnesses were sworn. As a matter of fact, that is the case; but it is also a matter of fact that none of the parties required that the witnesses should be sworn, and the law on the subject is stated elsewhere.

"(6) The sixth specification of error is 'that through a mistake or oversight on the part of said arbitrators the plaintiffs were charged with the value of upward of 900 M. brick, as furnished to them by the defendants, and they were given no corresponding credit for using or laying the brick, and the work done by them, thus depriving the plaintiffs of a large sum of money that was justly due them.' At the hearing Mr. Rounds reduced this item by his figuring to some 555 M., but it does not appear in the testimony that whatever was done about the brick was done 'through a mistake or oversight on the part of said arbitrators.' It is admitted on both sides that the item of the brick question was in discussion before the arbitration, many days, and that was the very item that the umpire was called on, and that whatever was done about these brick was done, not by an oversight or miscalculation, but after formal consideration. Further, page 3 of the O. K. statement shows that whilst on the one side charges are made against Rounds & Hagler for brick as upon the basis of work not done, though bid for, yet on the other hand they are given full credit for work actually done, both in the original contract and the extra work.

"(7) The seventh specification of error is that by an oversight the plaintiffs were not allowed any compensation for extra painting done on the extra work. The facts here show, by reference to item 7 of the O. K. paper, that claimants are allowed pay for woodwork complete, and by reference to the yellow paper in evidence and an examination of the claim in Allen's statement of item 7 painting was claimed, and in the McCarrell statement an estimate of the woodwork complete was claimed. This matter was considered, it seems, by the finding of the arbitrators, and decided as stated in item 7.

"(8) The eighth specification of error is that the arbitrators failed to allow the plaintiffs payment for such extra work in the proportion that similar work was paid for under the original agreement. The facts show that there were no figures in the original agreement to show the price of any specific work, but that a gross sum was agreed on: nothing fixed as to the price of laying brick in Portland or Rosendale cement or lime;

nothing fixed in the contract as to the price of woodwork or ironwork, or anything else, except the price of $4.25 per M. for brick laid down at Bath. This being the case, and the arbitrators being called on to fix the price of extra work, they had to consider what they thought was the price of these species of work in the original contract; and, taking into consideration all the facts and circumstances, they decided themselves, and that ought to be conclusive.

"(9) The ninth specification of error is that the arbitrators have deducted from the price of material furnished for work done by the plaintiffs coming under the original agreement, and have thereby wronged the plaintiffs. The facts in this case show that it was submitted specifically and distinctly by the submission to the arbitrators to make all necessary deductions for omissions in materials not put in or work not done.

"(10) The tenth specification of error is that the board irregularly and contrary to law suffered A. H. McCarrell to be constantly in attendance upon them, 'and that, without giving the plaintiffs notice or opportunity to be present, the said A. H. McCarrell was, in the absence of plaintiffs, questioned, and allowed to make certain statements,' etc., to the board, and that this conduct was enough to set aside the award. The facts show that McCarrell was present, as representing the company, and so was Rounds, as representing his firm; and the facts further show that Rounds knew McCarrell was present (was present with him), knew that McCarrell did figuring for the board at their request, and that he did so when Rounds was present, and yet he never objected to the same. Mr. Hagler distinctly testified that he told Rounds that McCarrell ought not to be present, but yet Rounds testified that he never at any time objected to McCarrell being present or figuring for the board. All of the arbitrators say that they reached their conclusion, not from any figuring that McCarrell did, but from their own consideration and own work, and simply had McCarrell to write out their conclusions for them,—such, for instance, as to multiply the amounts found by them by the prices fixed by them,—and that afterwards they verified all these statements for themselves. Mr. Storey says that, though McCarrell wrote the award which was signed by the arbitrators, he wrote the original draft in pencil, and that is produced to the court; and just here it is very plain, on the contention that was made that the red figures which appear on the O. K. statement were put there after the conclusion was reached, that they must have been put there before, because the aggregate amount in red figures at the end of each column is stated in the black figures below in exactly the same amounts by which the conclusion reached was arrived at.

"The aforesaid condensed statement of facts are found by me to be the facts in this interesting case, as the basis of the conclusion to be reached herein. Said facts are ascertained after a careful consideration of the pleadings and the testimony, oral and documentary, presented to me in open court; the witnesses having been sworn and examined and cross-examined before me at the hearing at Aiken during the winter term, 1899, and afterwards at a day agreed on between counsel, as the hearing could not be concluded at the regular term. We will now consider the law which is applicable to the facts and circumstances surrounding the various transactions of this contract, as found by the court. Arbitrations ought to be encouraged by the courts, and awards not set aside unless some established principle of law has been violated or some gross injustice done by the arbitrators, or where it is clearly established that fraud has crept into the action of the arbitrators. It is clearly laid down in 1 Am. & Eng. Enc. Law, p. 706, that 'all reasonable presumptions will be made in their aid [that is, in aid of awards]. No intendment will be indulged to overturn them, but every reasonable intendment allowed to uphold them. To warrant a court in reviewing an award upon its merits, something more than error in the decision must be shown.' In our own case of Cohen v. Habenicht, 14 Rich. Eq. 49, Chancellor Inglis states the matter tersely as follows: 'Every controversy touching civil rights necessarily involves questions both of law and of fact, and the ordinary tribunals are not so organized as to provide for determining each according to strict rules of right. Arbitration is a method for settling their disputes which parties choose to substitute for the regular tribunals. By submission of matters in controversy, which does not clearly provide otherwise, arbitrators are therefore invested with at least as large powers of investigation and determination as are possessed by the tribunals which they supplant. But, more than this, the very purpose in transferring the controversy to such private forum is that its fair adjustment may not be obstructed or trammeled by the technical rules of legal science; that consideration may be admitted as elements both in the matter and mode of composition which could not find access to the judgments of the regular courts. The aim is that substantial justice between the parties may be effected. To reach this result, uncertainties and doubts of law are to be solved by the arbitrators, and their conclusions herein became law of the parties pro hac vice. The rigor of extreme rules may be moderated by the requirements of fair dealing and good conscience.' The written submission signed by the parties having a controversy gives to the arbitrators jurisdiction to determine the question in controversy, and jurisdiction of the parties concerned; and much latitude is given to the arbitrators in their mode of procedure, the kind of notice they may give of the hearings, and the form in which the award may be made. It is unquestioned that if a hearing is had entirely ex parte by the arbitrators,

without notice or opportunity to the other side to be present, such an award should be set aside, as was done in the case relied on by plaintiffs' counsel, decided by our court of appeals, and set forth in Shinnie v. Coil, 1 McCord, Eq. 475; but where the parties have notice of a hearing and opportunity to be heard, and are present and make no objection to the mode of procedure, they are deemed to waive all irregularities as to the procedure, and the award is valid and binding, unless assailable on the grounds of fraud, or, in some cases, of mistake such as is relievable in equity. With these general remarks applicable to the general aspect of the case, we will now proceed to consider the specific questions of law that arise:

"(a) It is claimed that the award is not valid, for that the same was reached by the arbitrators exceeding the authority given them by the submission. It is unquestioned that if the arbitrators exceed the submission the award may be avoided, but, as found by me in this case, as a matter of fact the arbitrators did not exceed the submission in this case, and acted fully within the submission; and I so find as a matter of law. This award, as promulgated by the arbitrators, is contained on one sheet of paper, and awards a gross sum to be paid by the defendant to the plaintiffs; and whilst a great deal of testimony in the shape of documents was placed before the court, as to the process by which the arbitrators reached that award, that final award is the document to be considered. It is stated by Mr. Morse, in his excellent work on Arbitration (page 165), 'that the process by which arbitrators came to an agreement is of no consequence, and cannot be inquired into by the court, neither be made a basis to vacate their award.' This quotation seems to be based upon reason and good sense, but, after careful examination of all documents and proceedings showing the process by which the arbitrators reached the award finally promulgated, I find nothing herein to invalidate the award.

"(b) As a matter of fact, it has been found that the plaintiffs had full notice of the various meetings held by the arbitrators, and full opportunity to attend; but, beyond that, it is very clear, as established law, that all irregularities as to the mode of procedure can be waived. See Morse, Arb. pp. 116–118; Wats. Arb. *296. It is well settled that, unless called upon to do so, it is not necessary for the validity of the award that the witnesses should be sworn (see Morse, Arb., p. 131); and in fact it has been held by our own court, in the case of State v. McCrosky, 3 McCord, 308, that arbitrators have no power to swear witnesses, and that witnesses sworn before arbitrators could not be indicted for perjury, because the arbitrators had no power to administer the oath. In this case, though the plaintiffs knew that the witnesses examined were not being sworn, they proceeded with the arbitration without asking that they should be sworn.

"(c) The award in this case was signed by all three of the arbitrators. The submission provided that 'the award of any two shall be final and binding upon the parties.' Mr. Brown, the umpire, was only called in to verify calculations; and it is insisted that he should have reheard the witnesses, and not made the conclusions without rehearing the witnesses. The plaintiffs had notice and opportunity to appear before him, and did not appear at one of the meetings before him; and the court cannot perceive the violation of any principle of law by the conduct of the hearing after the umpire was called in. Our own supreme court, in the case of Finney v. Miller, 1 Bailey, 81, after careful consideration of the English authorities upon the subject, held distinctly that where the arbitrators had disagreed upon the facts the umpire could be called in, and that he could take the facts already found by the arbitrators, and consider the disputed questions, and decide them, and that the umpire need not hear all the testimony anew, from the mouths of the witnesses, unless the parties require that he should do so. This case is followed in the case of Sharp v. Lipset, 2 Bailey, 113, and the general principles upon which these adjudications are based are sustained by other respectable authorities, such as Graham v. Graham, 49 Am. Dec. 559; Morse, Arb. p. 264; Wats. Awards, *296; Kid, Awards, 103. And the court concludes, as a matter of law, based upon the facts already found, that there was nothing in the conduct of the arbitration, either in omission or commission, after the umpire was brought in, that violates any principle of law or would vitiate the award.

"(d) It is to be noticed that there is nothing in the submission providing how the award shall be published or notified to the parties, and, this being the case, it is settled law that no particular form or kind of notice is required. Mr. Morse, in his work already referred to, at page 285, says, 'Publication of an award is necessary only where the submission expressly stipulated that it shall be published or notified to the parties.' There is no question, from the facts already found, that the plaintiffs knew that the award had been made, and that a copy was delivered to them, and the court sees no grounds to set aside the award because of any nondelivery or nonpublication thereof. It is satisfied that everything was done that it was necessary to do to bring the information contained in the award before the plaintiffs, and 1 Am. & Eng. Enc. Law, 704, states the doctrine as follows: 'It is impossible to give a stated rule by which to determine what is a sufficient publication. Anything done which enables the parties to receive a knowledge of its contents may be called a publication.' Certainly the plaintiffs in this case received knowledge of the contents of this award.

"(e) It is next to be considered what is the law on the subject of setting aside an award in a court of equity on the grounds of

mistake. It is very certain that there is quite a difference in the idea of 'mistake,' as a principle upon which awards can be vacated, and the idea of 'mere error of judgment' on the part of the arbitrators. The doctrine seems to be well stated by the supreme court of the United States in the case of Burchell v. Marsh, 17 How. 550, 15 L. Ed. 99, as follows: 'Courts should be careful to avoid a wrong use of the word "mistake," and, by making it synonymous with mere error, assume to themselves an arbitrary power over awards. The same result would follow if the court should treat the arbitrators as guilty of corrupt partiality merely because the award is not such a one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in our opinion.' And to the same effect will be found our case of Mitchell v. De Schamps, 13 Rich. Eq. 21. See, also, 2 Story, Eq. Jur. §§ 1453–1456, and Pom. Eq. Jur. § 839. In not a single item brought before the court, in the claim that the award is erroneous, is there the slightest resemblance to what is called 'mistake' in equity. Every item which has been claimed to amount to a mistake relievable in equity was considered and contested before the arbitrators, and passed on by them; and, no matter how glaring may be the errors in the results reached, unless such results are tantamount to fraud, yet they are the results of the court of the choosing of the parties in this matter, and they are bound by them. This is applicable to the brick item, to the painting item, to the Lombard iron bill, and to the various other matters claimed as mistakes committed by the arbitrators. It may be that if I had been sitting upon the board of arbitrators I might have allowed some of the items disallowed by the arbitrators; but if they, as they seem to have done, gave their honest judgments upon these matters, and considered all of these matters, as they seem to have done, carefully, and have arrived at a deliberate conclusion, I can see nothing in the evidence which would warrant me, in the exercise of the equitable jurisdiction of the court, to set aside this award on the ground of mistake.

"(f) Nor can the court find any legal ground, arising out of the alleged conduct of McCarrell, to vacate the award. It has already been shown, as matter of fact, that his attending on the meetings of the board of arbitrators had no effect upon their conclusions, that what he did was merely ministerial, and that each of the arbitrators, for himself, verified all calculations made by him, before reaching a conclusion. Besides this, Mr. Rounds knew that McCarrell was present from beginning to end, and though, on one occasion, Mr. Hagler told Rounds that he objected to McCarrell's being present, never once did Rounds raise that objection before the arbitrators; and now, after the result has been reached, it seems clear to the court that any objection he could have made on that score is waived by the plaintiffs, with full knowledge of the facts before them, and it is so held. The case of Small v. Trickey, 66 Am. Dec. 256, is a well-considered case on this subject. The English doctrine is therein stated and sustained as follows: 'It was held in the house of lords in the case of Drew v. Drew, 33 Eng. Law & Eq. 9, that, where an arbitrator examined witnesses behind the back of one of the parties, such party is justified in at once abandoning the reference and applying to a judge to rescind the submission; but if he continue, after the fact came to his knowledge, to attend the subsequent proceedings, this will be a waiver of the irregularity, and he cannot afterwards set aside the award on that ground.'

"As a matter of law and fact, it is held that the award made between the parties in question on November 10, 1896, by J. B. Storey, Charles B. Allen, and T. O. Brown, is valid and binding on the parties. Wherefore it is ordered, adjudged, and decreed that the said award be, and the same is hereby, confirmed, and that the complaint in this action be dismissed, with costs to be paid by the plaintiffs.

"W. C. Benet, Presiding Judge."

The plaintiffs have appealed from this decree, and set forth their objections thereto in 24 grounds of appeal. I may remark, before setting out to give them consideration, that I greatly regret that I cannot, in my view of what is due to the parties litigant, reproduce the testimony, as I would like to do; for it would require, to do so, several hundred pages. This testimony is both oral and documentary. The former is not so extended, but the latter is quite voluminous, including as it does the following: The plans and specifications of the architects for the original cotton mill. The contract for executing the said plans and specifications. The book containing sundry calculations of Rounds & Hagler in reference to this contract to build the mill under the plans and specifications, which latter expressly provided for any additions or alterations of the original plan and specifications. Testimony that certain alterations were made in the plan of the building, showing that where, under the original plan, a part of the building was to be one story in height, by the alteration of said plan all of the building was three stories in height; that a disagreement between the contractors and the owners of the mill led to an arbitration, which was duly provided for by an agreement in writing for such submission to two arbitrators, one to be chosen by Rounds & Hagler, and one by the Aiken Manufacturing Company, with the right to the two arbitrators to choose an umpire; that in the submission of this controversy it was expressly provided that Rounds & Hagler should present their schedule of measurement as contained in their books, and that A. H. McCarrell, for the Ai-

ken Manufacturing Company, should present its schedule of measurement as contained in its books, and that accordingly these schedules of measurements of each party were presented in writing, accompanied by their books, respectively; that such schedules were entered in writing on the opposite sheets of what was known as the "Yellow Paper," wherein 144 items were set out; that the two arbitrators passed upon each one of these 144 items, and allowed or disallowed or modified the same said 144 items; that 2 items were passed upon by Mr. Brown, an experienced and highly respected contractor for brickwork, as the umpire, whose judgment was placed in writing, signed by himself. Settlement sheets of the arbitrators. The memorandum book of Rounds & Hagler. The memorandum made by Mr. Barrett for the mill. Calculations by Mr. Estes for the mill. The original award, signed by the two arbitrators and umpire, dated November 10, 1896. Copy thereof on tissue paper given by Mr. Allen to Rounds & Hagler on the night of November 9, 1896. Also copy of the original award served upon Rounds & Hagler on November 14, 1896. The foregoing list of papers are embodied in the "case for appeal," except that the plans and specifications for the cotton-mill building, in all their many details, are not reproduced in this appeal, though enough is introduced in the "case" to enable this court to understand the issues. After the award, plaintiffs brought an action to annul the award. I have spent days in my endeavor to understand the differences of these parties, as these differences are represented by the documentary evidence, together with the explanations thereof by the testimony of the witnesses on each side. And I shall now, as briefly as may be, respond to the questions raised by the grounds of appeal.

I will consider the first and nineteenth grounds of appeal together. Here the appellants claim that the arbitrators and umpire have, in their award, exceeded the power stipulated for their exercise in the articles of submission. Enough of the contents of this paper is embodied in the decree of Judge Benet to excuse me for not inserting the same at this point. The very terms of the plans and specifications of the architect for the building of the Aiken Cotton Mill at Bath, S. C., required any changes in the plan of that building to be governed by the remuneration the builders, Rounds & Hagler, received for their work and material in building the original mill. In the contract of Rounds & Hagler the gross sum of $53,198 is contracted for by them in payment for all their work and the materials they should furnish in building the mill under their bid in writing. This being a sum in gross, how could any one determine what any particular price of the work or material in said mill building would cost? To determine the value of labor or material was only necessary in order to ascertain the value of similar labor or material in the alterations made outside of the original mill building. These exceptions are overruled.

I will next pass upon the second, third, fourth, fifteenth, sixteenth, seventeenth, and the eighteenth grounds of appeal, relating as they do to kindred subjects. These exceptions are as follows: "(2) It is submitted that the award is null and void because, the umpire having been called in to sit with the arbitrators to pass upon differences existing between them, he failed to have the plaintiffs before him at such hearing, or to give the plaintiffs notice of the time of such hearing, so that they might have had an opportunity to be heard; and his honor, the circuit judge, erred in not so deciding. (3) It is submitted that the award is null and void because after the arbitrators had called in the umpire to sit with them to pass upon the number of brick estimated by the plaintiffs in their original bid, as necessary for the wheel pit, which was in dispute between them, such matters could only be passed upon by calling and examining witnesses before the board as so composed, but that the board, in disregard of law and the plaintiffs' rights, allowed such disputed matters to be passed upon and decided by the umpire upon each of the arbitrators making a report of their respective views to him; and his honor, the circuit judge, erred in not so deciding. (4) Because the award was reached as the judgment of the umpire from statements made to him by the two arbitrators; that the same was not signed by the umpire when declared and published, and for that reason it is null and void, and the same could not be cured by the umpire subsequently signing the same; and his honor, the circuit judge, erred in not so deciding." "(15) Because his honor, the circuit judge, erred in finding that the arbitrators and umpire signed the award on November 10, 1896, for it plainly appears from the evidence that the award was signed only by the arbitrators on that day, and not until after it had been announced and served on the plaintiffs was it signed by the umpire. (16) Because his honor, the circuit judge, erred in finding as a matter of fact that Rounds had notice of the night meeting at which the umpire, Brown, was to attend to pass on the number of brick estimated in the bid for the wheel pit; for it plainly appears by the testimony that Rounds had no notice of such meeting. (17) Because his honor, the circuit judge, erred in holding that because Rounds appeared before the umpire after he had rendered his decision concerning the number of brick estimated to be placed in the wheel pit, and did not then object to such finding of the umpire, or then demand that he should be heard upon such question, he had thereby waived his right to be notified of such meeting. (18) Because his honor, the circuit judge, erred in holding that the award is good if signed only by the two arbitrators; for, it is submitted, while such is the rule when the arbitrators themselves agree, yet

when the agreement is brought about by the decision of the umpire, as in this case, then the award is not valid unless signed by the umpire."

(a) I agree with the circuit judge that the testimony of C. D. Allen is convincing that Rounds & Hagler were satisfied that Brown was the umpire, and that he would sit at the time he did with the arbitrators; but, even if this was not so, Rounds was notified that night or the next morning, October 16, 1896, of the particular decision of Brown as umpire, and that he never communicated any objection to the finding, and that he afterwards was present with the arbitrators when Brown, the umpire, was with them, at which time he made no request to be heard by himself or through his witnesses. It is admitted that under the authority of the case of Small v. Courtney, 1 Brev. 205, some notice of the umpire's being present to hear and determine any of the issues included in the submission should have been extended to Rounds or Hagler. I am satisfied he received the notice of the hearing by the umpire, and that it was his own fault that he was not present. It is significant that his own arbitrator, Allen, who was afterwards his own witness, stated to Brown, the umpire, upon his inquiring as to where Mr. Rounds was, and if he would be present, replied in the negative, giving as his reason Brown's doubts of his case.

(b) Full testimony had been offered by Rounds & Hagler to the dispute as to 928,339 brick or 650,000 brick. This little book was in evidence. But the walls and their thickness were disclosed by the plans and specifications, as well as practical ocular demonstration. An allowance of 21 brick to the cubic foot was admitted. The two arbitrators and the umpire had all these things before them. The umpire said he could demonstrate by calculations that 928,339 brick were used, and not 650,000. This last proposition of the umpire, while on the witness stand, was not contradicted by the plaintiffs, so far as requiring him to actually make the calculation as he claimed he could. Experts generally know what they are swearing to in matters of this kind, such as the quantity of brick to be necessary in building walls of well-determined dimensions. I agree with the circuit judge in this matter, also.

(c) As to the fourth ground of appeal: The cases of Finney v. Bailey, 1 Bailey, 81, and Gibson v. Broadfoot, 3 Desaus. 534, are ample authority for the conclusion of the circuit judge on this point.

(d) It was a question of fact as to on what date the umpire actually signed the award. There was some testimony on the subject looking to an uncertainty as to whether the umpire signed on the same day as the arbitrators; that is, some testimony that the arbitrators signed at night, on November 9, 1896, and that the umpire signed next day (November 10, 1896), in their presence. By the special agreement in the submission, the finding of two of the board of arbitration was sufficient. Certainly two signed, even if the 9th is fixed, but all three on the 10th, if that was the date in November, 1896. What difference ought it to make if the umpire, Brown, only signed the award on November 10th, and the other two on November 9th? Had not Brown, the umpire, already in writing signed his name to the two findings he was called in to pass on? I desire my response at this point to be limited to the facts in proof in the case at bar. I would not desire any looseness in the signing of awards generally to be recognized by me. The circuit judge was right.

(e) As to the sixteenth ground of appeal, I have already indicated my opinion that Rounds, as a matter of fact, had notice of the night meeting at which the umpire, Brown, was to pass on the question of 928,000 brick or 650,000. I sustain the circuit judge.

(f) I conceive that this the eighteenth ground of appeal is not well taken, for the reasons set out in "d," and it is overruled.

I will next pass on the fifth ground of appeal, which is as follows: "(5) Because it appears from the evidence that the testimony of all the witnesses was taken without having them sworn, and for that reason the award is rendered null and void; and it was error in his honor, the circuit judge, in not so deciding." This submission to arbitration is under no statute of this state, nor under any order of court. It is a submission under the common law. In 2 Am. & Eng. Enc. Law (2d Ed.) 659, it is stated: "At the common law an arbitrator has no power to administer an oath to the witnesses who are brought before him. But the administration of an oath by him does not invalidate the proceedings." This is no longer an open question in this state. State v. McCrosky, 3 McCord, 308, which goes to the full length to which the Encyclopædia, just above quoted, goes. This ground of appeal is overruled.

I will next consider in one group the sixth, seventh, and eighth grounds of appeal: "(6) Because it appears from the evidence that through a mistake and oversight the plaintiffs were charged with 928,339 brick, as being their estimate, as contained in their original bid for building the wheel pit, whereas it appears by the weight of the evidence the plaintiffs' estimate for doing such work was only 650,000 brick, and the plaintiffs have thereby been deprived of $2,783.39 in money on that account alone; and the circuit judge erred in not so deciding. (7) Because it appears by the evidence that by mistake or oversight the plaintiffs were not allowed any compensation for the painting on extra work, and the circuit judge erred in not so deciding. (8) Because it appears from the evidence that the plaintiffs furnished iron for the extra work to the amount of $547.43, and, by mistake or oversight on the part of the arbitrators, were only credited with $390; that such iron was worth $547.43, at the rate

such work was charged for in the original contract. And it further appears that no amount whatever was allowed the plaintiffs as compensation for placing and putting up such extra ironwork, and that the plaintiffs thereby have been unjustly deprived of a considerable sum of money; and his honor, the circuit judge, erred in not so deciding."

(a) I have already announced my full concession with the finding of the circuit judge on this subject. It has always seemed to me that when three practical, bright-minded brick experts join in an agreement of this character, it is entitled to great weight. The sixth exception is overruled.

(b) The witnesses who were arbitrators testified that they allowed for the painting by taking the wood or iron work when painted, thereby affording full compensation for the painting as an item. This exception is overruled.

(c) So far as concerns the Lombard Iron Company's account, which the plaintiffs claimed they have paid, it may be remarked that this account, in its entirety, was certainly before the arbitrators. The plaintiffs claimed $547.43. The defendant (respondent) claimed that only $260 was due. After hearing all sides, an award for $390 was made to Rounds & Hagler. In 2 Am. & Eng. Enc. Law, 661, it is said: "In the United States the arbitrator is not bound by the strict rules of law as to the admission or rejection of evidence. He may receive the evidence of witnesses who are legally incompetent, if he thinks proper." That great liberality is allowed arbitrators when their findings of law and fact are canvassed in this state, see Mulder v. Cravat, 2 Bay, 370; Mitchell v. De Schamps, 13 Rich. Eq. 9. This exception is overruled.

I will next consider the ninth ground, which is as follows: "(9) Because it appears from the evidence that the plaintiffs had paid $35 apiece for the three ventilators placed, as called for by the original contract, and that they had paid the same price for the ventilators used in the extra work; that under the terms of the contract they were entitled to be paid for the extra ventilators at the price of the ventilators used under the original contract, but that the arbitrators, without right, reduced the price of the ventilators put up under the original contract to $10 apiece, and they also without right fixed the price of the extra ventilators at the same price; and his honor, the circuit judge, erred in not so finding." In the original contract Rounds & Hagler had contracted to furnish two Star ventilators. Instead of these, they furnished a cheap imitation of the Star ventilators, only 30 inches in diameter, while the Star ventilators were 36 inches in diameter. Rounds & Hagler wanted to charge $35 each for the ventilators furnished by them, when their own witnesses said $10 was a fair price. Under the submission, it was agreed that the arbitrators should pass upon any omission by Rounds & Hagler. This was such a palpable omission that the award contained only an allowance for $10 each for these ventilators. This exception is overruled.

I will next consider the tenth ground of appeal, which is as follows: "(10) Because it appears from the evidence that the plaintiffs were allowed for building the wheel pit and tail race a credit of $5,190.39, and charged back for the same items $10,025.20, thus wrongfully causing a loss to the plaintiffs on this item of $4,834.99, whereas, the work not being omitted, the plaintiffs should have only been charged back the amount which they were credited for the same. In fact, such items were not extra work at all, and should not have been taken in account by the arbitrators; and the circuit judge erred in not so deciding." The wheel pit and tail race, in this controversy, have certainly occupied an important position. In respondents' argument, in answer to this exception, they say:

"It will be seen, by reading this exception, that the counsel who prepared it based his allegation of error upon the idea that the work out of which these charges arose was not omitted work. That statement in the exception that it was not omitted work is a most violent presumption; for the fact is, as we will submit under the testimony, that that is exactly the category in which it is, and that the arbitrators so found, and properly found. Let us look to the yellow paper. We will find in italics the decision of the arbitrators: 'It is decided that Rounds & Hagler estimated 928,339 brick in Portland cement; that the company paid them $742 for the tail-race walls; and further decided: Wheel house and tail-race wall, as built, 24,715¼ cubic feet, at twenty-one per foot, equaled 519,020 brick in Portland cement.' That was their decision. What does it mean? That in the contract price, for the lump sum of $53,198, Rounds & Hagler undertook to put in the wheel house and its appurtenances 928,339 brick, and that, in accordance with the figures set forth in the Barrett memorandum and bid, included in that $53,198 was $742 for the tail-race walls. Let the court, if they wish any explanation of that matter and of the figures contained therein, look to the explanation of Mr. Estes * * * and his testimony. The arbitrators then decided that Rounds & Hagler, for the pay which they received in that lump sum, contracted to put in 928,339 brick in the wheel house and wheel pit, and to build the tail-race walls for $742; but the arbitrators decided, as will be seen by the other part of the decision, that the value of what was done, namely, 'the wheel house and tail-race wall, as built, 24,715¼ cubic feet, at twenty-one per foot, equals 519,020 brick in Portland cement,' was less than the amount of brickwork which they contracted to do, and hence the difference which they did not do was omitted work, to be paid for at the price of omitted work. Now let us look at the O. K. statement, and see the price at which they

stated this omitted work. They gave Rounds & Hagler credit for what? A. They thus express it: 'The wheel house and tail-race wall, as built, 24,715¼ cubic feet, at twenty-one per foot, equals 519,020 brick in Portland cement, at $10, equals $5,190.20.' That is, they gave him credit for the wheel house and tail-race wall as built. Now, then, there was more work, more brick, which they should have put in those same structures, and hence they charged against them the total which they had contracted to build, and the difference between which they did build and what they had contracted to build was omitted work, which must be charged against them. What, now, do they charge against Rounds & Hagler?

It is decided that Rounds & Hagler based their bid on 928,339 brick in Portland cement, at $10 equals	$ 9,283 39
Also, that for tail race, as per original plan, Messrs. R. & H. charged the company	742 00
	$10,025 39

"Hence, if we deduct from $10,025.39, which is the value of the work they contracted to do, and for which they were paid in the $53,198, the lump price for the contract, the amount $5,190.20, which is the price of the wheel house and tail-race wall as built, there will be left the sum of $4,835.19, not $4,834.99, as the price of the omitted work, which, under the submission heretofore called to the attention of the court, the arbitrators had a right to require that Rounds & Hagler should pay. In this connection we desire to submit to the court the following figures, to show that in item 30 the amount, $9,283.39, charged by the arbitrators against Rounds & Hagler, is not excessive or too much. If the court will look at the bid (Barrett memorandum), it will see that the following figures are correct:

They bid for foundation work	$ 7,500 00
For wheel house	8,472 00
	$15,972 00
They were allowed per Barrett memorandum	17,100 00
Excess allowance	$ 1,128 00
Add to this the amount of actual bid for wheel house, etc.	8,472 00
Total which contract called for	$ 9,600 00
But arbitrators only charged them with	9,283 39
Difference in their favor	$ 316 61"

From the views thus presented, it would seem that the circuit judge had committed no error as here pointed out, and the exception is overruled.

I will next notice the eleventh, twelfth, thirteenth, and fourteenth grounds of appeal: "(11) Because it appears from the evidence that the plaintiffs' bid upon the original work was upon the basis of the following prices for brick, namely: Brick laid in lime mortar, per thousand, $9: brick laid in Rosendale cement, per thousand, $10; brick laid in Portland cement, per thousand, $11.50, —and the arbitrators were therefore bound to allow the plaintiffs the same prices for laying the brick in the extra work; and they also erred in fixing prices of the brick laid in mortar at $8 per thousand, laid in Rosendale cement at $9 per thousand, and laid in Portland cement at $10 per thousand, for such finding was arbitrary and without any evidence to support the same; and the circuit judge erred in not so finding. (12) Because it appears from the evidence that the defendants did not object to, but had themselves allowed, $8.75 per thousand for brick laid in lime mortar, and $9.50 per thousand for brick laid in Rosendale cement, and therefore the arbitrators had no authority to reduce said amounts; and it was error in the circuit judge in not so deciding. (13) Because it appears from the evidence that the arbitrators have reassessed the entire brickwork in the defendant's mill as valued at $8 per thousand for brick laid in lime mortar, $9 per thousand for brick laid in Rosendale cement, and $10 per thousand for brick laid in Portland cement, instead of at $9, $10, and $11.50, respectively, and have thereby, unjustly and without right, caused the plaintiffs a loss of one dollar to one dollar and a half on every thousand of brick laid in said mill. (14) Because it appears from the evidence, while the arbitrators have allowed the plaintiffs the price of $10 per thousand for brick laid in Portland cement, they have in several instances, as appears upon the O. K. account, charged the plaintiffs $10.75 per thousand for brick omitted to be laid in Portland cement, thus showing that the arbitrators, either through mistake or partiality, deprived the plaintiffs of a considerable sum of money; and his honor, the circuit judge, erred in not so deciding."

(a) It was in a lump sum that Rounds & Hagler made their bid, $53,198. They now contend that such bid was upon the basis set out in the exception. This is a part of their testimony. As I remarked a short while ago, under the decisions of this state great liberality is allowed arbitrators in reaching their conclusions. There was nothing in the submission which would compel them to adopt Rounds & Hagler's views. They did adopt their views in a vast majority of the 144 items considered by them. In some instances the arbitrators and the umpire declined to accept their suggestions. I cannot say they were in error. The matter was confided to them by Rounds & Hagler. Now that they have lost, they must bear themselves with equanimity. This exception is overruled.

(b) The arbitrators were not bound to accept the suggestions of the Aiken Manufacturing Company. The truth is, they knew more about these matters than did the defendant (respondent). This exception is overruled.

(c) As to the thirteenth exception, I may say that it was perfectly competent, under the terms of this submission, to ascertain what similiar work under the original con-

tract was worth, so as to apply such values to the same kinds of work under the alterations and additions which were made to the mill building. This exception is overruled.

(d) The facts do not bear out the allegations made in the fourteenth exception, and it is overruled.

I will next consider ground of appeal 14½, which is as follows: "(14½) Because the circuit judge found, as matter of fact, 'that whilst, on the item of how many brick Rounds & Hagler's bid should be placed in the wheel house and wheel pit, they differed, yet there was no contrary decisions by them; but Allen preferred that the umpire should be called in to verify his word, as the umpire, Mr. Brown, was very familiar with brick work.' In such finding his honor erred, for it plainly appears from the evidence that the umpire, Brown, was not called in to verify Allen's work, but, to the contrary, to decide the differences between the arbitrators concerning the number of brick which should be charged against the plaintiffs for such work." I do not consider that the phraseology of the circuit judge was quite as happy in the connection as it usually is, but nevertheless it is patent that he is referring to the fact that the arbitrators did unite in calling in Mr. Brown as umpire, though it was primarily at the request of Mr. Allen. The exception is overruled.

I will now pass upon the twentieth and twenty-first grounds of appeal: "(20) Because it appears from the evidence that A. H. McCarrell, the representative of the defendant, was in constant attendance upon the arbitrators; that he sat with them at every meeting of the board, in the absence of the plaintiffs as well as when they were present; that he was constantly called by the arbitrators to do their calculations, and ever present in their consultations, and when they were deciding differences between the parties, and was really the clerk of the board. It is submitted that it is improper that the triors of issues between contending parties should be so attended by one of the parties, in the absence of the other, that his influence in making the calculations for the board tends to bias their judgment to the prejudice of the other party, and in this case did so influence the board of arbitrators, and under such circumstances the said McCarrell's so sitting with the board of arbitrators was improper, and rendered the award null and void; and it was error in the circuit judge in not so deciding. (21) Because it appears that the red lettering and figures on the O. K. statement was placed there by McCarrell after the said statement had been signed by the arbitrators, and that the same was the work of said McCarrell, and not of the arbitrators; and it was error in the circuit judge in not so deciding." I cannot regard Mr. McCarrell's presence with the arbitrators as any ground for setting the award aside. Mr. Rounds was invited to be present. He was for a week or 10 days. Then his other business called him away to attend to it. Mr. McCarrell was admittedly the employé or agent of the Aiken Manufacturing Company. His presence with the board was stipulated for in the submission for at least a part of the time. No harm has been pointed out as the result of his presence before the board. It must always be remembered that he was the representative of a deaf and dumb creature,—a corporation,—an artificial person. This exception is overruled. I do not admit that the allegations of fact set up in the twenty-first exception are well grounded. Everything was regular. The findings were those of arbitrators. Let this exception be overruled.

I will next consider the twenty-second, twenty-third, and twenty-fourth exceptions: "(22) The circuit judge holds: 'Every item which has been claimed to amount to a mistake relievable in equity was considered and contested before the board of arbitrators, and passed on by them; and, no matter how glaring there may be errors in the result reached, unless such are tantamount to fraud, yet they are the result of the court of the choosing of the parties in this matter, and they are bound by them,' in such finding and conclusion. It is submitted that the circuit judge erred, for a glaring or gross mistake in the findings of a board of arbitrators is not above the law, but is subject to the jurisdiction of equity, to the end that justice may be done. (23) It appears from the evidence that the defendants themselves stated the account between themselves and plaintiffs, by which they admitted an indebtedness of $2,219.39, and to that extent there was no dispute on the part of the defendants of the plaintiffs' account; and it was therefore error in the board going behind such admissions, and reducing the defendants' liability to an amount less than what they admitted, and it was error in the circuit judge in not so deciding. (24) It is admitted that no such question as what might be due by the plaintiffs to the defendant on account of wood or lumber taken away by A. J. Twiggs was submitted to the arbitrators, and that they had no authority or right in making any award concerning the same; and the circuit judge erred in not so deciding."

(a) The circuit judge did not intend to assert that no glaring or gross mistake in the findings of a board of arbitrators is above the law; that is, beyond the jurisdiction of a court of equity to relieve against. His honor, the circuit judge, had before him the case of Aiken v. Bolan, 1 Brev. 239, when the court said: "The court (all the judges present except Grimke) said all rewards are entitled to great favor and indulgence, and ought not to be too rigidly examined and construed; that it was made a mode of deciding controversies which ought not to be discouraged, and therefore the courts had never set aside awards, except for misbehavior of arbitrators, as on account of gross partiality, collusion, or fraud, or else on account of some mistake which arbitrators may fall into with-

out design, by which their award is made to operate in a way they did not intend, or for some mistake apparent on the award. "What he meant to express was the spirit of Aiken v. Bolan, supra. He was not in error. The circuit judge had before him the case of Mulder v. Cravat, 2 Bay, 372.

(b) If the arbitrators were clothed, as they were, under the submission, to do substantial justice to the plaintiff and defendant in regard to the transaction involved in the labor and material furnished by the appellants to the respondent in the construction of the cotton mill and its ways, and among those transactions the board of arbitrators found that the respondent, under a mistake of fact, had been willing to concede to the appellants more than they were entitled to receive, it was in the power of said board to adjust these matters as required by truth, right, and justice. See, also, Cohen v. Habenicht, 14 Rich. Eq. 31. This exception is overruled.

(c) Lastly, as to the twenty-fourth exception, wherein the appellants suggest that the four cords of wood belonging to the Aiken Manufacturing Company, and which were given by the appellants to one Mr. Twiggs, and which four cords of wood were valued at $10, were not included in the submission, and therefore the board of arbitrators were in error in considering and disposing of the same: First. I may say, if this had been error, it would not have invalidated the award, except as to the $10 itself. Mitchell v. De Schamps, 13 Rich. Eq. 23, 24, where the court sustained the award, but, as $426.50 in Confederate money had not been included in the award, the court referred it to the commissioners to ascertain and report its value. Second. I remark that it was no mistake in the board of arbitrators to include it. This four cords of wood was part of the material paid for by the respondent to the appellants as material in constructing the mill house. Having been paid for by the respondent, the appellants had no right to dispose of it. Having done so, they should respond to the respondent for the $10, its value. This ground of appeal is dismissed. It is the judgment of this court that the judgment of the circuit court be affirmed.

CITY COUNCIL OF GREENVILLE v. KEMMIS.

(Supreme Court of South Carolina. Aug. 7, 1900.)

GAMING—CITY ORDINANCE—INTERPRETATION—SENTENCE.

1. Greenville City Charter (19 St. at Large, p. 109) authorized the city council to make all ordinances necessary for the welfare of said city, and for the peace and good government thereof, and to impose fines and penalties for the violation of such ordinances. The city council passed an ordinance prohibiting any person from permitting his inclosure, place, or house to be used as a place for gaming with cards for money or other stake, and imposing a fine and imprisonment as penalty for its violation. *Held*, that such ordinance was not in conflict with Cr. St. § 391, making it a penal offense to play in public places, or to keep any tavern, store, public house, or house used as a place for gaming, but was a valid exercise of the city's charter power.

2. A furnished room in a hotel, which defendant rented and occupied, and permitted others to use to play cards for money in, was his "place," within a city ordinance forbidding any one to permit his inclosure, place, or house to be used as a place for gaming with cards for money or other stake.

3. Where the sentence imposed for violation of a city ordinance is within the limits of the ordinance and the city charter, no error of law is committed; the severity of the sentence, within those limits, being discretionary with the trial court.

Appeal from common pleas circuit court of Greenville county; R. C. Watts, Judge.

Roy Kemmis was convicted, under an ordinance of the city of Greenville, of permitting his place to be used as a place for gaming, and he appeals. Affirmed.

The following are the grounds of defendant's appeal: "(1) That his honor erred in confirming the decision of the mayor in finding the defendant guilty, when there was no testimony to show that the alleged gaming took place in a house, place, or inclosure belonging to defendant, or in a place used for gaming, or that there was any evidence of any gaming on the day of arrest, when defendant had no notice of the charge that gaming had taken place on another day. (2) His honor erred in confirming the finding of the mayor in finding the defendant guilty of keeping a gaming house, when the testimony, even if competent, showed no more than that defendant had engaged in a single game of cards, which did not constitute the offense charged. (3) His honor erred in confirming the judgment of the mayor, when he should have held that the maximum fine allowed by ordinance was in this case excessive and unjust. (4) His honor erred in confirming the decision and judgment of the mayor, when he should have held that as defendant was not guilty of the charge under the laws of South Carolina, which laws have defined gaming houses, and defendant not being the keeper of a public house as defined by the said laws of the state, defendant could not be guilty under an ordinance which enlarges the offense beyond the limit set by the legislature. (5) Because his honor erred in holding that the city ordinance under which the defendant was convicted was constitutional and valid, and that the mayor had jurisdiction of an offense created by said ordinance, when his honor should have held that the ordinance was void, inoperative, and unconstitutional, and the mayor had no jurisdiction of the offense created thereby; and his honor should have held that when the law of gaming is defined, and the punishment prescribed, by the laws of the state, a municipal corporation is not authorized to suppress any gaming not pro-

hibited by said state laws, but it is confined to the use of such means as may be within its power to enforce within its limits the law as defined and specifically laid down by the legislature."

W. G. Sirrine, for appellant. B. A. Morgan, for respondent.

McIVER, C. J. The defendant was tried and convicted before the mayor's court for the city of Greenville for a violation of one of the ordinances of said city, and sentenced to pay a fine of $50, or be imprisoned for the term of 30 days. He paid the fine under protest, and gave notice of appeal to the circuit court,—upon what grounds does not appear in the "case." That appeal was heard by his honor, Judge Watts, who passed the following order dismissing the appeal: "The above-stated case came up before me for hearing upon appeal from the mayor's court of the city of Greenville upon exceptions stated, matter written and oral; the oral being as to matters jurisdictional. Upon hearing said case upon said appeal, and after the argument of appellant's counsel, it is ordered that the exceptions or grounds of appeal be overruled, the appeal dismissed, and the judgment of the court below confirmed." From this order the defendant has appealed to this court upon the several grounds set out in the record, which will be incorporated by the reporter in his report of this case. So far as these grounds raise any question of fact, they may be passed by with the simple remark that this court has no jurisdiction to review decisions of questions of fact in such a case as this. We do not, therefore, propose to consider these grounds seriatim, but will confine our attention to the questions discussed in the argument of counsel for appellant.

The first point made is thus stated in the argument for appellant: "The ordinance is unconstitutional and invalid because it enlarges the offense of keeping a gaming house as already defined by the law of the state." The first remark we have to make in regard to this point is that it seems to have been made under a misapprehension of the true nature of the case. It assumes that the offense with which appellant was charged, and of which he was convicted, was "keeping a gaming house," whereas the "case" shows that "the charge upon which defendant was tried was permitting his place, house, or room to be used as a place for gaming with cards for money or other stakes," in violation of one of the ordinances of the city, set out in the "case," the terms of which will hereinafter be more particularly referred to. And the mayor, in his return, which is set out in the "case," states the offense charged in the same language. The mayor nowhere says what he is quoted by counsel for appellant as saying,—that the charge was "for keeping a gambling house." So that the first point made by appellant cannot, for this reason, be sustained. But as we understand from the argument that the real ground taken by appellant is that inasmuch as the state has, by section 391 of the criminal statutes, undertaken to legislate upon the subject of gaming, and after making it a penal offense for any person to play "at any tavern, inn, store for the retailing of spirituous liquors, or in any house used as a place for gaming, or in any barn, kitchen, stable, or other outhouse, or in any street, highway, open wood, racefield, or open place, at any game or games with cards or dice," etc., and making it the duty of any trial justice (now magistrate) to prosecute such offenders, also made it his duty to prosecute "the keeper or keepers of taverns, inns, stores for the retailing of spirituous liquors, public places, or house used as a place for gaming or other public house," and declared "that every person so keeping such tavern, inn, retail store, public house, or house used as a place for gaming, or such other public house," shall, upon conviction, be imprisoned, etc., showing that the offenses thus denounced must be committed in some public place, it is not competent for the municipal corporation of the city of Greenville to pass an ordinance going beyond this, and making it a penal offense for a person to permit his private room in the city of Greenville to be used as a place for gaming. In the first place, it may be questioned whether the statute referred to is confined to those who have done any of the acts therein forbidden in a public place. Certainly the acts denounced as criminal offenses in the succeeding section (392), are not confined to those done in some public place. But, waiving this, we think that, even if the criminal statutes referred to can be so construed as to relate only to acts done in some public place, still there is no reason why this alone can be regarded as sufficient to prevent the municipal corporation of the city of Greenville from passing the ordinance under which appellant has been convicted. It is quite true that a municipal corporation derives all of its powers from its charter, and can exercise no power which is not therein granted, either expressly or by necessary implication. But by the act to charter the city of Greenville (Acts 1885; 19 St. at Large, 109) the city council of Greenville is expressly vested with full power and authority to pass all such ordinances "as shall appear to them necessary and requisite for the security, welfare and convenience of said city, for preserving health, life and property therein, and securing the peace and good government of the same, and may fix and impose fines and penalties for the violation thereof: provided, nevertheless, that * * * no fine shall exceed the sum of fifty dollars, or imprisonment extend for a period longer than thirty days, or either, or both, for the same offense." In pursuance of this authority the city council passed the ordinance here in question, entitled "An ordinance to prevent the pernicious practice of, and engaging in, gaming for money within the city of Greenville, S. C.," one of the provisions of which is that "it shall

not be lawful for any person or persons to * * * permit his, her or their enclosure or place or house to be used as a place for gaming with cards * * * for money or other stake"; and the punishment to be imposed for such offense is a fine not exceeding $50, or imprisonment for not more than 30 days.

It was admitted at the trial that the room in which the offense was alleged to have been committed was occupied by the defendant; it being a furnished room in the building known as the "Central Hotel," rented by defendant. There was testimony tending to show that when the sergeant of police entered the room he found the defendant sitting at the head of the table, on which there were three packs of cards, and a pack of poker chips near the defendant, and in a bureau drawer the sergeant found a quantity of poker chips. On the right of the defendant two other persons were sitting, one of whom had money in his hands. There was also testimony that on a previous occasion persons were seen playing cards in that room, for money, in the presence of the defendant. The contention on the part of the appellant is that this was a private room occupied by defendant, and that, inasmuch as the law-making power of the state had not seen fit to make it a criminal offense for a person to permit his private room to be used as a place for gaming with cards for money, the city council had no authority to do so. Granting, for the sake of argument only, that the legislature has not seen fit to make it a criminal offense for a person to permit his room in a building formerly used as a hotel, which he rents and occupies, to be used as a place for gaming with cards, we see no reason whatever why that should operate as a prohibition to the city council from passing such an ordinance as that here in question. Common experience shows that city corporations find it necessary, for the peace and good order of the city, to forbid the doing of many acts, under penalty, as to which the legislature has not found it necessary to legislate. The ordinance is certainly not in conflict with any act of the legislature. The state legislation upon the subject, even if construed as contended for by appellant, and the municipal legislation here in question, can both stand together, and there is no conflict whatever. The utmost that can be said is that the municipal corporation, under the authority vested in it by its charter, has seen fit to make an act done within the corporate limits a criminal offense, which the legislature has not seen fit to constitute such an offense. Indeed, it is well settled in this state, at least, that the same act may be made an offense both against the state and the municipal law. As that great jurist, Judge Cooley, expresses it in his work on Constitutional Limitations, at page 199 of the second edition: "Indeed, the same act may constitute an offense both against the state and the municipal corporation, and both may punish it without violation of any constitutional principle." And in a note he says, "Such is the clear weight of authority, though the decisions are not uniform," and proceeds to cite the cases. In one of the cases which he cites (Rogers v. Jones, 1 Wend. 261), we find the following language, which is so appropriate to the case in hand that we quote it: "If the legislature have passed a law regulating as to certain things in a city, I apprehend the corporation are not thereby restricted from making further regulations." To the authorities cited by this distinguished author we may add the case of Cross v. North Carolina, 132 U. S. 132, 10 Sup. Ct. 47, 33 L. Ed. 287, especially at page 139, 132 U. S., page 49, 10 Sup. Ct., and page 290, 33 L. Ed., decided since Judge Cooley wrote. This doctrine has been expressly recognized and approved in this state (see State v. Williams, 11 S. C. 288, and the cases therein cited), and has again been approved in the comparatively recent case of City Council v. O'Donnell, 29 S. C. 368, 369, 7 S. E. 528, 529, 1 L. R. A. 636, 637. If this be so, then it is clear that even though the legislature may have passed a statute in reference to the offense against the state of gaming, the municipal corporation of Greenville is not thereby restricted from making further regulations upon the same subject, which, of course, have no operation except within the corporate limits of Greenville. See, also, the cases of City Council v. Heisembrittle, 2 McMul. 233, and City Council v. Aherns, 4 Strob. 241. The case of Heise v. Town Council, 6 Rich. Law, 404, cited by counsel for appellant, has no application to this case. There the case turned upon the fact that the town council had no power, under its charter, to impose a forfeiture as a penalty for a violation of its ordinances. Here, however, the city council of Greenville are expressly invested by its charter with the power to pass such ordinances as shall appear to them necessary for securing the peace and good government of the said city; and, if we were at liberty to inquire into the propriety of the means which they saw fit to adopt to suppress the pernicious vice of gaming, we would be inclined to agree with them that in order to effect the laudable purpose a very efficient means would be that which they adopted, for if persons who rent furnished rooms for lodging in a city like Greenville are permitted, with impunity, to use their rooms as places for gaming, the vice would flourish, even if every public gaming house in the city were entirely suppressed. We are satisfied, therefore, that appellant's first position cannot be sustained.

The second point made by counsel for appellant is thus stated in his argument: "Even if the ordinance is valid, the defendant is not guilty of the offense charged." This point, as developed by the argument, seems to rest, first, upon the theory that the charge made against defendant was "keeping a gambling house," which, as we have shown above, was not the charge made against the defendant,

and therefore more need not be said as to that. The real ground, however, upon which this second point made by appellant seems to rest, is that the room which it is alleged the defendant permitted other persons to use as a place for gaming was neither his "inclosure," nor "place," nor "house," and, as the ordinance used those terms in describing the offense denounced, he could not legally be convicted. This is quite technical, but still defendant has a right to make the point, and it must be considered. But the question is whether the point is well taken. We do not think so, for two reasons: (1) The room which defendant rented and occupied was certainly his "place" as long as he continued to occupy it. He could lawfully forbid any person who was objectionable to him from entering his room or "place" of abode. Even his landlord had no right to enter upon it without the consent of the tenant, except under circumstances not necessary to be stated here. It was his castle, as much as the poor man's hut in the wilderness. But (2) we have very high authority for saying that the room was his "house." See 2 Bish. Cr. Law, §§ 107, 108. And as was said by O'Neall, J., in State v. McDowell, Dud., at page 347, in speaking of bawdy houses: "Without concert between defendants occupying different rooms for purposes of prostitution in a lodging house, the offenses are just as distinct as when they occupy different houses; for, in the case supposed, each room is a bawdy house and its inmate the keeper." The second point cannot, therefore, be sustained.

The third and last point made is that the fine imposed "was excessive and unjust." It certainly was within the limits prescribed both by the charter and the ordinance, and therefore there was no error of law in imposing a fine within those limits. This being so, the amount of the fine was a matter exclusively within the discretion of the mayor, and in his return he gives a very good reason for going to the limit of the law in this instance, as he had found that the imposition of a smaller fine had proved to be inefficacious in suppressing the evil. The judgment of this court is that the order or judgment of the circuit court be affirmed.

DUCKWORTH v. McKINNEY.

(Supreme Court of South Carolina. Aug. 7, 1900.)

MORTGAGES—FORECLOSURE—PLAINTIFF NOT OWNER—ANSWER—DEFENSE—SUFFICIENCY.

The complaint in foreclosure did not allege plaintiff's ownership of the note and mortgage. Defendant's answer admitted all the allegations of the complaint, except the one that the amount claimed was due to plaintiff, and further alleged that she made a note and mortgage to the firm of A. & C.; that subsequently such firm dissolved, C. taking the assets to wind up; that thereafter A. obtained a receiver for the firm on the ground that C. was wasting the assets; that defendant's mortgage to the firm was transferred to plaintiff after the appointment of the receiver, though the assignment was antedated; that such transfer to plaintiff was fraudulent; that defendant, in ignorance of the truth, gave plaintiff the note and mortgage in suit in renewal of those formerly given to the firm; and that plaintiff was not the owner of the note and mortgage in suit, nor of the ones of which these were a renewal. Plaintiff demurred to the answer for failure to state a defense. Defendant received leave to amend by setting up a demand by the receiver for payment of the amount of the mortgage to A. & C., and that the note and mortgage in suit were void for want of consideration. *Held*, that the leave to amend was harmless, since the answer alleged facts which constituted the defense of failure of consideration, and denied the material fact of plaintiff's ownership of the note and mortgage sued on.

Appeal from common pleas circuit court of Abbeville county; R. C. Watts, Judge.

Action by S. J. Duckworth against Jane E. McKinney. From an order allowing defendant to amend, plaintiff appeals. Affirmed.

The following is the report of the master: "Pursuant to the order of the court, I held a reference in this cause and took testimony, a copy of which is appended hereto. This is a suit brought by the plaintiff to foreclose a note and mortgage. The allegations usual in a case of this kind are found in the complaint. The defendant answered the complaint, and the plaintiff demurred to the answer, except the first paragraph thereof. At the trial the defendant asked leave to amend her answer. For convenience I will consider the demurrer and the motion to amend together. Ought the demurrer to be sustained? The plaintiff contends that defendant in her answer has admitted all the allegations of the complaint, and that the only defense which she has attempted to set up is an irrelevant one, namely, that somebody else is interested, and should have been made a party; and then, as to the amendment of the answer, plaintiff contends that it cannot be allowed, in that it comes too late and is not in the proper form, that it should be before answer and by affidavit, and that to allow it would be substantially to change the defense. Defendant contends that demurrer should not be sustained; that the plaintiff has no right to the money, and that the answer is therefore not demurrable; that, even if it is demurrable, it can be amended; that the amendment is within the power and discretion of the court; and that the amendment proposed does not materially change the defense. I should have stated that the plaintiff contends that the defendant in her answer admits all the allegations of the complaint except one, and that she denies that in the very words of the complaint, which is bad pleading and cannot be allowed. I agree with the plaintiff that the defendant has admitted all the allegations of the complaint, and I sustain his contention that it is not allowable to deny the allegations of the complaint in the very words thereof,—that that is what the law books call a 'negative pregnant,' and is not

good pleading. So far as I can see, the only defense which the defendant really puts up in her first answer is that another person is interested in the proceedings, and she does not even ask that this third person be made a party. It seems to me that the defense set up is irrelevant and frivolous. Even if what the defendant contends for is true, what difference does it make to her? Who constituted her the protector and guardian of Tennent? Nor do I think the answer can be amended as requested. It would change substantially the entire defense. Surely to allow the defendant to plead failure of consideration would be a radical change of the defense. I find, as conclusions of law, that the motion to amend the answer should be disallowed, the demurrer sustained, and the answer, except the first paragraph thereof, stricken out, and that the plaintiff should have judgment against the defendant for the sum of $340.83, and a foreclosure of the premises mentioned in the complaint."

To the above report of the master the defendant filed the following exceptions:

"(1) Because it was error on the part of the said master to hold that the first paragraph of the defendant's answer is in form a negative pregnant, and therefore should be disregarded. It is respectfully submitted that the said paragraph is a specific denial, and should not be disregarded. (2) Because the said master erred in sustaining the demurrer to the defendant's answer, and in holding the same to be frivolous and irrelevant. It is respectfully submitted that the allegations of the answer make a valid defense of failure of consideration. (3) Because it was an abuse of discretion on the part of the said master to refuse to allow the said defendant to amend the said answer, and in holding that the said proposed amendment would substantially change the defense. It is respectfully submitted that the proposed amendment did not change substantially the defense, but tended to make more definite and certain the specific defense relied on, to wit, failure of consideration. (4) Because the said master misunderstood and misconstrued the whole scope of the defendant's answer, in holding and stating that the 'defendant contends that the demurrer should not be sustained, that the plaintiff has no right to the money, and that the answer is therefore not demurrable, and, even if it is demurrable, it can be amended.' It is respectfully submitted that the defendant's attorneys took no such position, but took the position that the answer in effect showed that the sole consideration for the mortgage sued on was that the old mortgage would be canceled; that the old mortgage had not been canceled, but that Tennent, the receiver, was threatening to sue this defendant, by order of the court of common pleas, to foreclose said old mortgage; and that therefore there had been a failure of consideration for the mortgage sued on in this action. (5) Because the said master erred in holding that plaintiff should have judgment against the defendant for the sum of $340.83 and a foreclosure of the premises mentioned in the complaint. (6) Because the said master erred in not considering the testimony taken by him, and reporting to the court his conclusions of law and fact therefrom."

The case was argued before Judge Watts upon the exceptions to the master's report and all the papers and proceedings in the cause, and Judge Watts passed the following order:

"This case came before me upon exceptions to the master's report. I hold that the master was in error in holding that the defendant's answer put in issue none of the allegations of the complaint, and the exception to such holding by the master is sustained. I hold that the special matter set forth does not, by itself, constitute a defense, and should have been stricken out on demurrer; but it was error on the part of the master to refuse to allow the defendant so to amend her answer as to set up the defense of want of consideration. Defendant should be allowed to deny that the plaintiff is the owner and holder of the mortgage sued on. It is therefore, on motion of defendant's attorneys, ordered that the exceptions to the master's report, as indicated above, be sustained; that the cause be remanded to Walter L. Miller, Esq., master, to take testimony and decide all questions of law and fact involved in said cause, and that he report his findings to this court; that the defendant be, and she is hereby, allowed 20 days from the rising of this court in which to amend her answer as indicated above."

The following are the exceptions of the plaintiff to the order of Judge Watts:

"(1) Because his honor erred in holding that the master erred in holding that defendant's answer put in issue none of the allegations of the complaint, when the first paragraph of defendant's answer is in these words: 'That the defendant admits all the allegations of the complaint, except so much of paragraph 5 as alleges the whole sum of said note and mortgage is now due and owing to the plaintiff, which she denies,'—said answer being an express admission of the complaint being true, except as to the amount, which, being denied by a negative pregnant, was no denial at all. (2) Because his honor erred in holding that the master was in error in refusing leave to the defendant to so amend her answer as to plead want of consideration, it being respectfully insisted that the master was right for three reasons, viz.: (a) That want of consideration can never be pleaded to a sealed instrument. (b) That it was proper to refuse to allow the amendment during the trial. (c) Because the master properly held that it would change substantially the defense set up by the defendant. (3) Because the pre-

siding judge erred in holding that the defendant should be allowed to deny that the plaintiff was the legal owner and holder of the mortgage, the defendant having admitted by her answer the title of the plaintiff to the papers sued on. (4) Because his honor erred in remanding the case to the master to take the testimony and report all issues of law and fact, the master having already taken the testimony as if the answer had been amended, and there being nothing for the court to do but to consider the case as it was and render judgment. (5) Because it is respectfully submitted that the master was right in holding the first paragraph of defendant's answer to be a negative pregnant, and in reporting in favor of the plaintiff, and it was error in the presiding judge to set aside said report; the answer raising no relevant issues. (6) Because the motion to amend the answer, as made before the master, being to amend so as to set up the defense that some third person was claiming the debt, and said claim not being made as provided in section 143 of the Code of Civil Procedure, the master was right in refusing to allow the amendment, and the presiding judge was in error in reversing the master's report on that point."

Wm. N. Graydon, for appellant. F. B. Gary and M. P. De Bruhl, for respondent.

McIVER, C. J. This was an action to foreclose a mortgage of real estate given to secure the payment of a promissory note executed by defendant to the plaintiff. The allegations of the complaint were in the usual form appropriate to such an action, except that there was no allegation that the plaintiff was the owner and holder of the note and mortgage. The defendant answered, in the first paragraph saying: "That the defendant admits all the allegations of the complaint, except so much of the paragraph 5 as alleges the whole sum of said note and mortgage is now due and owing to the plaintiff, which she denies." In the other paragraphs of her answer she makes substantially the following allegations: (2) On the 3d of February, 1896, she gave a note and mortgage to the firm of Allen & Cooley, and that upon the dissolution of said firm her said note and mortgage were turned over to D. K. Cooley, one of the members of said firm, for the purpose of paying the debts of said firm of Allen & Cooley. (3) That some time during the month of February, 1898, B. B. Allen, the other member of the firm of Allen & Cooley, commenced an action against said D. K. Cooley and T. D. Cooley, alleging, among other things, that D. K. Cooley had fraudulently transferred a large part of the assets of Allen & Cooley, which had been turned over to him in order that he might pay the debts of said firm, and was wasting and squandering said assets, and asking that a receiver be appointed to take charge of said assets. (4) That a receiver was appointed, and D. K. Cooley was required to turn over the assets to such receiver. (5) That the said D. K. Cooley transferred defendant's note and mortgage to Allen & Cooley, mentioned herein, after the order appointing the receiver was granted, although the assignment thereof was antedated. (6) That the defendant, in ignorance of the foregoing facts, and being then under the belief that the plaintiff was the owner of the note and mortgage previously given by her to Allen & Cooley, gave the note and mortgage in suit to plaintiff in renewal of the former one to Allen & Cooley. (7) That the transfer of the note and mortgage, given by defendant to Allen & Cooley, to the plaintiff, was fraudulent, and made for the purpose of evading the order of the court above referred to; that there was no consideration given by the plaintiff; and that he took the same well knowing the purpose of the transfer, and that his demand on the defendant for the note and mortgage sued on in this case was a part of the scheme to put the assets of Allen & Cooley beyond the reach of the court. The eighth paragraph of the answer is in the following language: "That the defendant is informed and believes that the plaintiff is not the owner of the note and mortgage sued on in this action, nor was he the owner of the note and mortgage alleged to have been assigned to him by the said D. K. Cooley, and for which these now in suit were given, and that the said defendant [obviously a misprint for plaintiff] has no right to bring this action."

The case was referred to the master "to hear and decide all issues of law and fact." At the reference the counsel for plaintiff interposed a demurrer to the answer, except the first paragraph thereof, on the ground that it failed to state facts sufficient to constitute a defense, in this: that said answer shows on its face that the defendant admits all the allegations of the complaint, and sets up an affirmative defense which is irrelevant to the issues raised by the complaint, and also that the answer fails to state that any other person has made or is making any claim against her for the same debt, which allegation is absolutely necessary in a case of this kind. The master stated that he would pass upon the demurrer at a later stage of the case, and would allow testimony to be introduced, subject, of course, to his action on the demurrer. Counsel for defendant then moved to amend the answer by stating that, after the execution of the note and mortgage in suit, the defendant received notice from W. C. Tennent, receiver, of the order of the court above referred to, and demanding payment to him, as receiver, of the money due by the defendant on the note and mortgage to Allen & Cooley, and that the note and mortgage in suit were without consideration and void. The master said that he would allow the amendment for "the present," but that, if he saw fit to disallow it afterwards, he would do so, and that he would allow testimony to be introduced in support of the allegations in the answer as amended, but

that, if he finally determined to disallow the amendment, he would strike out any testimony that would not have been received if the answer had not been amended. The master then proceeded to take the testimony as set out in the "case," which tended to sustain the allegations contained in the answer which were demurred to. The master made his report, in which he sustained the plaintiff's demurrer to the answer, and refused the motion to amend, and, holding that there was no denial of the allegations of the complaint, rendered judgment as prayed for therein in favor of the plaintiff. A copy of this report should be incorporated by the reporter in his report of the case. To this report the defendant filed exceptions, and the case was heard by his honor, Judge Watts, upon the report and exceptions thereto, who rendered judgment sustaining some of the exceptions, and remanded the case to master to hear and decide all questions of law and fact in the case, allowing the defendant 20 days to amend her answer so as to set up the defense of want of consideration. From this judgment the plaintiff appeals upon the several grounds stated in the record. Let the decree of the circuit judge and the exceptions thereto be also embraced in the report of this case by the reporter.

It seems to us that the scope and effect of the answer as originally filed has been wholly misconceived. While it may be true that the first paragraph of the answer presents a negative pregnant, amounting to no denial at all, inasmuch as the form in which it is presented may be regarded as admitting that there is something due on the note and mortgage sued on (1 Enc. Pl. & Prac. 796; Curnow v. Insurance Co., 46 S. C. 93, 94, 24 S. E. 76, 77), yet, under the view which we take of this case, this matter becomes immaterial. It seems to us that the other paragraphs of the answer, properly construed, set up at least three defenses: (1) Fraud in obtaining the note and mortgage sued on; (2) failure of consideration; and (3) a denial that the plaintiff is the owner and holder of the note and mortgage upon which he bases his action. If the facts alleged in the second, third, fourth, fifth, sixth, and seventh paragraphs of the answer be true (and they must be taken to be so on demurrer), then it is clear that a case of fraud on the part of the plaintiff in obtaining the assignment of the mortgage given by defendant to Allen & Cooley, and also in obtaining the note and mortgage sued on, is presented, which should defeat plaintiff's right to a recovery in this action. If the facts there alleged be true, especially those stated in the sixth paragraph of the answer, taken in connection with the other allegations, then the defense of want of consideration or of failure of consideration (and in this case it matters not which) is certainly presented; for if the note and mortgage sued on were given in consideration of the payment and satisfaction of the note and mortgage to Allen & Cooley, and this last-mentioned note and mortgage have not been paid and extinguished (as they have not been, if the other facts alleged in the answer be true), then certainly there was want of consideration, or at least failure of consideration, for the note and mortgage sued upon. The contention on the part of the appellant that while failure of consideration of an obligation under seal may be set up as a defense to an action on such an instrument, yet want of consideration cannot, as the seal imports a consideration, avail the appellant in this case, for two reasons: (1) Because the note, which constitutes the substratum of plaintiff's action was not an instrument under seal, the allegation in the complaint being that the note sued on is a "promissory note"; and if the note was without consideration, then there was no debt, and if no debt, then there could be no valid mortgage. (2) Because the defense was really a failure, rather than a want, of consideration; for if the transaction between the plaintiff and the defendant was, as it is alleged in the answer to have been, then it amounted to this: that the plaintiff agreed that, if the defendant would give him the note and mortgage sued on, he would, in consideration thereof, pay and extinguish her note and mortgage to Allen & Cooley, and this he not only has not done, but cannot do, if the allegations in the answer be true, and thus the consideration upon which he obtained the note and mortgage sued on has failed.

The allegations in the eighth paragraph of the answer were clearly sufficient to raise the issue as to whether the plaintiff was the owner and holder of the mortgage sued on, which was certainly a material issue in the case. It seems to us, therefore, that the master erred in sustaining the demurrer to all the paragraphs of the answer except the first, as those paragraphs of the answer did set up the defenses above indicated, and, if not clearly and sufficiently set up, then the plaintiff's remedy was by motion to make the answer more definite. It is true that the answer does not set up in so many words that there was a "want of consideration" for the note sued on, or that there was a "failure of consideration"; but it does set up facts which go to sustain such a defense, and that is sufficient. The view taken by the master, as well as by appellant, that the defendant, by her answer, attempted to set up as a defense that the debt sued on was due, not to the plaintiff, but to another person (the receiver), is based upon an entire misconception of the answer. The defense is not that the defendant admits that she owes the debt evidenced by the note and mortgage sued on, but claims that she owes such debt to a third person, and not to the plaintiff; but, on the contrary, she practically denies that she owes the debt evidenced by the note and mortgage sued on to any one, and therefore the provisions of section 143 of the Code, cited by counsel for appellant, have no application to this case.

While we see no real necessity for any amendment to the defendant's answer, inasmuch as, according to our construction of the original answer, she has already set up the defense of a want of consideration, or a failure of consideration, and also denied that the plaintiff is the owner and holder of the note and mortgage sued on, we see no objection to allowing the defendant to amend her answer, if she be so advised, as allowed by the circuit judge. We see no error, therefore, in the judgment rendered by the circuit judge, although there might be some difference of opinion as to the reasons given for such judgment. The judgment of this court is that the judgment of the circuit court be affirmed.

HUNTER et al. v. HUNTER et al.

(Supreme Court of South Carolina. Aug. 2, 1900.)

EXECUTORS AND ADMINISTRATORS—SALE OF REAL ESTATE — POWER OF EXECUTRIX — TRUSTS—LIFE ESTATE—IMPLIED POWER TO SELL — PROBATE PROCEEDINGS — ORDER OF SALE—NECESSITY—PREMATURE ACTION—APPEAL AND ERROR—SUBROGATION—FAILURE TO PLEAD—EFFECT.

1. Where testator, after directing his wife, as his executrix, to pay all his debts and funeral expenses out of his personal estate, devised the residue of his estate to her for life, to support herself and to support and educate testator's children, the life estate given the wife was incumbered with a trust for the support and education of testator's children, and she had no power to sell her life interest in the estate.

2. Where testator's property consisted in part of things consumable in use, as provisions, farming produce, etc., and he devised his property to his wife for life, for the support of herself and to support and educate his children, the fact that he directed that, at the death of his wife, all of his property "that might be left" after the support of the family and education of his children should be equally divided among the children, did not give the wife the implied power to sell her life interest in the estate, since the words "that might be left" referred to the property that had not been consumed.

3. Where testator's executrix applied to the probate court for an order to sell his real estate to pay his debts, but the probate proceedings contained no order of sale, they did not confer on executrix any power to convey the real estate.

4. Where by the terms of a will a devise of a life estate to testator's wife was burdened with the trust for the support and education of testator's children, an action brought by the children during the lifetime of the wife to set aside a sale of her life interests was not premature.

5. Where an executrix, under a mistake as to her powers under testator's will, sold her life interest in the estate to defendants, and testator's children filed a bill to set it aside, and the money paid by defendants had been used to discharge testator's debts, but defendants' answer did not in terms raise the question of their right to be subrogated to the creditors' rights, and that question was not passed on by the trial court, it will not be decided by the court on appeal, but the cause will be remanded, with leave to defendants to amend their answer by formally pleading subrogation.

Appeal from common pleas circuit court of Laurens county; R. C. Watts, Judge.

Action by Eugene S. Hunter and others against Nannie W. Hunter and other. From an order dismissing the complaint, plaintiffs appeal. Reversed.

The following is the will referred to in the opinion:

"The State of South Carolina, Laurens County. I, Samuel M. Hunter, of the county and state aforesaid, do make and ordain this, my last will and testament, in manner and form as follows, to wit: (1) I direct my executrix to pay my just debts and funeral expenses, and to erect a suitable monument over my grave, out of the proceeds of any of my personal property that she can best spare. (2) I will all the rest and residue of my estate, both real and personal, to my wife, Nannie W. Hunter, for and during her lifetime, to support herself and my children and to educate my children. (3) I hereby authorize my wife to give to my children, as they may severally go to housekeeping, such of my property as she may deem proper for them to have, and such as she may think she can spare, and to keep an account of it, so as to make all my children equal in the final division of my estate at the death of my said wife. (4) At the death of my wife I will that all my property then left, after supporting and educating the family and children, shall be equally divided among my children living at the death of my wife. If any of my children should die in the lifetime of my wife, leaving a child or children living at her death, such child or children shall take the share of the deceased parent in my estate. At the death of my wife I direct that all of my estate, both real and personal, that may be left after supporting the family and educating my children, shall be divided among my children living at my wife's death and the children of any of my children that may die in the lifetime of my wife, by four disinterested and competent men, to be selected by my children, without the aid or interference of any court; the children of a deceased child to take the parent's share. (5) I appoint my wife, Nannie W. Hunter, executrix of this, my will, during her lifetime. At her death I appoint my sons, Eugene, Samuel, Stokes, and William Mills, executors of this, my last will; also my son, Melmoth Leander. S. M. Hunter. [L. S.]

"Signed, sealed, and acknowledged in our presence this 28th day of August, A. D. 1875, as witnesses. J. P. Miller. John W. Stokes. W. L. Wait."

Ball, Simkins & Ball and Haynsworth, Parker & Patterson, for appellants. N. B. Dial and W. H. Martin, for respondents.

McIVER, C. J. On the 25th day of April, 1883, S. M. Hunter, having first duly made and executed his last will and testament, departed this life, leaving surviving him his wife, the defendant Nannie W. Hunter, and his children, who are the plaintiffs in this case. The said Nannie W. Hunter was the

duly appointed and qualified executrix of the will of her deceased husband, and as such she made deeds to S. M. Nabors, A. Y. Thompson, and E. J. Fleming, purporting to convey to these persons, in the different proportions mentioned in the complaint, a tract of land lying in the county of Laurens, which deeds bear date, respectively, as follows: That to S. M. Nabors on the 9th of May, 1885; that to A. Y. Thompson on the 8th of August, 1885; and that to E. J. Fleming on the 18th of November, 1885. It seems that some proceeding was instituted in the court of probate for Greenville county,—exactly when does not appear, though, from such portions of the record of that proceeding as were introduced in evidence, it was probably early in January, 1885,—the object of which seemed to be to obtain an order for the sale of the real estate of the testator, in aid of the personalty, to pay his debts, and also for the purpose of enjoining creditors from suing the executrix at law, and requiring them to prove their claims under that proceeding; for there is an order to that effect, but there is no order for the sale of the real estate, and there is no evidence that any order of sale was ever granted. The present action was brought by the plaintiffs, comprising all of the children of the testator, against the said Nannie W. Hunter and the other defendants, who claim title to the land in question under the sales made by the said Nannie W. Hunter as aforesaid, in which the plaintiffs claim that the said Nannie W. Hunter had no authority, either as executrix or otherwise, to sell any of the real estate of the testator; that the life estate given to her by the will was given to her in trust for the support of herself and the children of testator, and also for the education of said children; that the said Nannie W. Hunter has never performed the trust imposed upon her, but, on the contrary, has deprived herself of the means of doing so by selling the land as aforesaid, which constituted the principal part of the testator's estate. Wherefore the plaintiffs demand judgment "that the said Nannie W. Hunter may be removed as trustee of the said life estate, and that the will be construed by this court, and that it be declared that the said life estate is subject to the support of these plaintiffs, and that the rents and profits thereof be apportioned between the said Nannie W. Hunter, or her grantees, and these plaintiffs, and that the said Nannie W. Hunter and her grantees do account to these plaintiffs for all rents and profits heretofore derived from said land, and that it be declared that after the termination of said life estate these plaintiffs are the owners in fee simple of the said lands, and for the costs of this action." To this complaint the defendant Nannie W. Hunter filed no answer, but the other defendants, who are in possession of the land, claiming under the sales above mentioned, answered, setting up, among other things, the claim that Nannie W. Hunter had authority as executrix to sell the land, or that, at least, she took a life estate therein, unincumbered with any trust, which estate she had a right to sell, and has sold; and as a further defense they claim that said Nannie W. Hunter had the right to sell the land under the proceedings in the court of probate above mentioned, that the lands were purchased at their full value, and that the proceeds of the sale were applied to the payment of the debts of the testator and to the support and education of his children, the plaintiffs herein. They also claim that said sales were made with the knowledge, consent, and approval of the plaintiffs. Finally, they plead the statute of limitations; the action, it appears, not having been commenced until 30th of June, 1899.

Upon the pleadings, thus briefly stated, the case came on for trial before his honor, Judge R. C. Watts, when the testimony set out in the "case" was introduced. The only portion of the testimony which, under the view we take of the case, we deem it necessary to state, is that portion of Mrs. Nannie W. Hunter's testimony, in which she states that the entire proceeds of the sale of the land were applied by her to the payment of the debts of the testator; and this testimony does not anywhere appear to have been denied. The circuit judge, took the view that as Nannie W. Hunter, under the will, took a life estate unincumbered with any trust, she had a right to sell that estate; and hence, without considering any of the other questions in the case, he held that the action was prematurely commenced, and therefore rendered judgment dismissing the complaint with costs. From this judgment plaintiffs appeal upon the several exceptions set out in the record, and, in accordance with the proper practice, respondents have given notice that, if this court finds itself unable to sustain the judgment of the circuit judge upon the ground upon which he rested it, they would ask this court to sustain such judgment upon the grounds set out in the record. We do not deem it necessary to set out these exceptions and these additional grounds in hæc verba, but think it will be sufficient to state the questions which these exceptions and grounds raise: (1) Is there anything in the will which justifies the inference that the testator intended to invest his executrix with the power to sell his real estate? (2) Was the life estate given to the wife incumbered with any trust in favor of the children? And, if so, is there anything in the will which justifies the inference that the testator intended to invest his wife with the power to sell such life estate? (3) Did the executrix derive any power to sell the land in question from the proceedings in the court of probate of Greenville county? (4) If the sale was made without authority, does the fact that the proceeds of such sale were applied to the payment of the debts of the testator entitle the defendants to be subrogated to the rights of the creditors whose claims were satisfied by their money? And have they the right to retain possession of

the property so purchased until they have been repaid the amounts so paid by them?

1. The first of these questions depends upon the construction of the will as a whole, and for this reason a copy of the same should be incorporated by the reporter in his report of the case. It is quite certain that the will contains no express authority to the executrix to sell any portion of his estate, though the terms of the first clause might be sufficient to warrant the inference that the testator intended to invest his personal property, if the same became necessary to effect the purposes therein indicated; but there is not a word in the will, so far as we can discover, which indicates an intention on the part of the testator to invest his executrix with power to sell his real estate. Indeed, this question was not seriously discussed at the hearing, and may be dismissed without further remark.

2. This question is more important, and is, in fact, one of the turning points in the case; and, as we differ with the circuit judge in the view which he has taken as to this point, we have examined this question with great care. The question naturally divides itself into two branches: (a) Was the life estate given to the wife incumbered with any trust? (b) If so, was there any power conferred upon the executrix to sell such life estate thus held by her in trust?

As to the first branch of the inquiry, it seems to us that the case of Wylie v. White, 10 Rich. Eq. 294, cited by counsel for appellants, is conclusive. The testator, after providing, in the first clause of his will, for the payment of his debts and funeral expenses, and for the erection of a monument over his grave, "out of the proceeds of any of my personal property that she [the executrix] can best spare," proceeds, in the second clause of his will, as follows: "I will all the rest and residue of my estate, both real and personal, to my wife, Nannie W. Hunter, for and during her lifetime, to support herself and my children and to educate my children." It will thus be seen that the testator not only expressly declared the quantity of estate which he gave to his wife, but also the purposes for which it was given to her. It was not given to her in such terms as would import that he intended his wife to take the bounty provided for her, as her own absolutely, to dispose of as she should think fit; but, on the contrary, the purposes for which it was given were distinctly declared. There are no words used in this or in any other clause of the will which indicate that the testator merely hoped or expected, or had a confident belief, that his wife would use the property for the support of herself and the children and for the education of the children, which expressions have sometimes been construed to be mere precatory words. On the contrary, the words used expressly declare the purposes for which the property was given to her for her life; and to those purposes it must be devoted. If so, then the language used is not only quite sufficient to create a trust, but must be so construed, even though the word "trust" is not used, in order to insure the accomplishment of the purposes for which the property is declared to have been given. For, as was said, in Wylie v. White, supra: "To create a trust it is not necessary that the word should be employed in the instrument. It was said by Lord Eldon in Rex v. Denison, 1 Ves. & B. 273, that the word 'trust' not being made use of 'is a circumstance to be attended to, but nothing more; and if the whole frame of the will creates a trust, for the particular purpose of satisfying which the estate is devised, the law is the same, though the word "trust" is not used.'" And, again, quoting from Hill, Trustees, 65: "Thus, when a gift in a will is expressed to be for the benefit of others, or to be at the disposal of the donee for herself and children or towards her support and her family, or to enable the donee to provide for or maintain his children, * * * or where the gift is expressed to be made to the end or to the intent that the donee should apply it to certain purposes, in all these cases the terms employed have been held sufficient to fasten a trust upon conscience of the donee,"—showing that in every case the general purpose and intention of the donor, and not the use of one particular term or another, will decide the question whether a party does or does not take in a fiduciary character. These authorities, based as they are upon sound reason and common sense, satisfy us that this will should be construed as creating a trust in the wife for the accomplishment of the purpose declared by the testator. If so, it is clear, then, that the life tenant could not sell even her life interest, unless something can be found in the instrument creating the trust which would invest the life tenant with power to sell the life estate.

This renders it necessary to consider the second branch of the inquiry: (b) Is there anything in the will which invests the life tenant with power to sell the life estate? It is quite certain that there is no such express grant of power in the will; and, if such power is conferred at all, it must be by implication. The contention, as we understand it, is that such power may be implied from the following language, used in the fourth clause of the will: "At the death of my wife, I direct that all of my estate, both real and personal, *that may be left* after supporting the family and educating my children, shall be divided among my children." Stress is laid upon the words which we have italicized, as implying that the testator intended and expected that some, at least, of the property should be sold. In view of the undisputed fact that some of the property left by the testator consisted of such things as would be consumable in the use, such as provisions, farming produce, horses, mules, and farming implements, it seems to us that the most natural inference to be drawn from these words is that the testator meant all of his property,

except such as might be consumed in the use for which it was given (all that may be left or all that remained after it had been applied to the use for which it was intended), rather than that the testator intended by those words, by implication, to invest the life tenant with the power of sale,—rather a remote and strained implication by which to create so important a power as that of sale. This view is supported by the authorities cited in the argument, which need not be dwelt upon here; for, even if it could be assumed that the testator intended, by the words relied upon, to invest the life tenant with power to sell, yet it is very obvious that, if such a power was conferred, it was conferred solely for the purpose of effecting the primary object of the testator,—the support of the family and the education of the children. As there is no pretense that the sale was made for any such purpose, but, on the contrary, the undisputed fact is that it was made for the payment of the debts of the testator, and that every dollar of the proceeds of such sale was applied to such debts, we need not consider this point further. It was also contended that, if the life estate was originally incumbered with a trust, it terminated when the children attained their majority. We are unable to discover in the terms of the will any warrant for such a contention, and it may therefore be dismissed without further consideration.

3. The next general inquiry is whether the sales of the land in question can be supported by the proceedings of the court of probate for Greenville county. Passing by any other questions raised, or that might be raised, in reference to the effect of those proceedings, a conclusive answer to this question is found in the fact that those proceedings do not show that any judgment or order of sale was ever made by that court; and there is no evidence aliunde tending to show that any order of sale was ever made. The record of those proceedings, as offered in evidence, was manifestly not complete; and while it may be true that where a partial record does show that a final judgment was rendered by a court of competent jurisdiction, and the only defect in the record is the absence of certain steps leading up to the judgment, the court may infer from such judgment that the necessary steps to be taken before such judgment could be properly rendered had been taken, yet where there is no final judgment, and the record only shows that certain steps leading up to the judgment had been taken, the fact that a judgment had been rendered cannot be inferred. Brown v. Coney, 12 S. C. 144. Indeed, the testimony aliunde in this case rather tends to show that no order of sale was ever granted by the court of probate, but that Mrs. Nannie W. Hunter, being advised by her father, who is characterized in the circuit decree as a lawyer of high character and many years experience at the bar, that she had authority as executrix to make the sales, abandoned the proceeding in the court of probate before it culminated in any final judgment, and made the sales as executrix; for the deeds on their face so show, and they are signed by her as executrix, and no allusion whatever is made in these deeds to any proceeding in the court of probate. It is clear, therefore, that she derived no authority to sell this land from such proceedings. Holding these views, we cannot concur in the view taken by the circuit judge that the action was prematurely brought, and for that reason only the complaint should be dismissed; for if, as we have seen, the life estate was given to Mrs. Hunter burdened with a trust for the support of herself and the children, and if, as we have also seen, she has violated such trust by selling the land without lawful authority, then it seems clear that the plaintiffs, who are the children of the testator, have now a status in court to assert and preserve such rights as they may be found to have in the premises.

4. This leads us to the fourth and last inquiry in the case,—the question of subrogation. In the outset the appellants raise the point that, as no such question is raised by the pleadings, it cannot be raised now. While, under the judgment which we decide to render in this case, this point becomes immaterial, yet we may say that, while the word "subrogation" does not appear to have been used in the answer, yet the essential facts out of which the right of subrogation arises, to wit, that the lands were sold by the executrix under a supposed authority so to do, and the proceeds of such sale were applied to the debts of the testator, and the further fact that Nannie W. Hunter was permitted to testify, without objection, that she had sold the lands and had applied the entire proceeds of such sale to the payment of the debts of the testator, might be sufficient to show that such point is not well taken. We will therefore proceed to consider the question of subrogation upon its merits. In 24 Am. & Eng. Enc. Law (1st Ed.), at page 258, where the writer is discussing the doctrine of subrogation, we find, as an illustration of one of the instances in which the right of subrogation arises, the following language: "So, where an executor sells real estate and uses the proceeds in the payment of debts, under a mistake of his powers, and the purchaser is ousted by the devisee, the land, in equity, will be subjected to indemnify the purchaser to the extent to which his money was applied to the debts over and above the personal estate." See, also, 3 Pom. Eq. Jur. § 1300. But we need not go beyond the limits of our own state for authority upon this point. In Cathcart v. Sugenheimer, 18 S. C. 123, the property of a lunatic had been sold under an order of the court of common pleas, made in a proceeding instituted by the committee of the lunatic, to which the lunatic was not made a party. Subsequently the commission of lunacy was superseded, and Cathcart, the person who had been declared a lunatic, having been restored to his rights as a person sui juris,

brought an action to recover certain property bought by the defendant Sugenheimer at the sale above mentioned. One of the defenses set up was that, the defendant's money having gone to pay debts of the lunatic, she had the right to be subrogated to the rights of the creditors whose debts had thus been paid by the defendant's money. The court sustained the right of subrogation. In delivering the opinion of the court Mr. Justice McGowan uses this language: "Wherein did this sale differ from that of the property of a decedent for the same purpose?"—and then quotes with approval the following passage from Freem. Jud. Sales, 51: "If by a sale of the lands of a decedent his debts are paid, and it turns out that the sale is void, the purchaser has the right to be subrogated to the claims which he has by his purchase paid, and he has also the right to retain possession of the property as security for the repayment of the sums to which he is entitled." That has been recognized and followed the recent case of Bailey v. Bailey, 41 S. C. 337, 19 S. E. 669, 728. But, inasmuch as the question of the defendant's right of subrogation was not in terms made in the pleadings, and was not considered or decided by the circuit judge, it seems to us proper to pursue the course which was adopted in the case of Bailey v. Bailey, supra, and remand the case to the circuit court, for the purpose of enabling that court to pass upon the question of the defendants' right to subrogation, with leave to the defendants, if they shall be so advised, to amend their answer by setting up formally their right to subrogation.

The judgment of this court is that the judgment of the circuit court be reversed solely upon the ground of error in holding that the complaint should be dismissed for the reason that the action was prematurely brought, and that the case be remanded to that court for the purpose hereinabove announced.

GRIFFITH et al. v. CROMLEY et al.

(Supreme Court of South Carolina. Aug. 10, 1900.)

GUARDIAN AD LITEM—WITHDRAWAL OF COMPLAINT — NECESSITY FOR NEW APPOINTMENT—COMPLAINT — SUFFICIENCY — OBJECTIONS—WAIVER—PREJUDICIAL ERROR—TRIAL BY JURY—WAIVER—TRIAL—DECISION—FILING—TIME.

1. A guardian ad litem was appointed for certain minors, who were about to sue for the partition of land. Thereafter a summons and complaint were lodged with the sheriff for service, but were withdrawn without being served. A second action was then commenced, but no new order appointing a guardian ad litem was obtained. *Held*, that the power conferred on the guardian appointed had not been exhausted, since the first complaint was not dismissed on its merits, but was withdrawn before service of the summons accompanying it, and that therefore the second action was properly commenced without a new appointment.

2. In an action by minors for the partition of lands, an objection that the complaint did not state sufficient facts, in that their guardian ad litem was illegally appointed, and was not a fit and competent person for the position, because privy in interest and relationship with parties whose interest was adverse to that of the minors, was insufficient, since it failed to show prejudicial error.

3. In an action for the partition of lands, an objection in the answer that the complaint did not allege that plaintiffs were seised of the premises within 10 years was insufficient, since the defect appeared on the face of the complaint, and therefore could only be interposed by demurrer.

4. Under Const. 1895, art. 5, § 17, providing that it shall be the duty of judges of the circuit court to file their decisions within 60 days from the rising of the last court of the circuit then being held, a decision filed after the expiration of the 60 days will not be invalid, if the delay be caused by act of the court, and not by the laches of the parties.

5. Code, § 274, provides that issues of fact for the recovery of money only, or of specific real or personal property, must be tried by jury, unless a jury be waived or a reference be ordered. In an action for partition of lands, defendants consented that the case be referred to the master of the county to take testimony and report the same to the court. *Held*, that defendants' consent to the reference to take testimony constituted a waiver of the right to a trial by jury.

Gary, A. J., dissenting.

Appeal from common pleas circuit court of Saluda county; O. W. Buchanan, Judge.

Suit for partition by Lula Griffith and others against A. B. Cromley and others. From the decree for plaintiff defendant A. B. Cromley appeals. Affirmed.

C. J. Ramage and Eugene W. Able, for appellant. Croft, Tillman & Peurifoy, for respondents.

GARY, A. J. In order to understand the questions that are raised by the pleadings and presented by the exceptions, it is necessary to refer to the complaint and answer, which are as follows:

Complaint: "(1) That Mary G. Cromley, late of the county of Edgefield, died intestate, on or about 5th day of August, 1885, being possessed in fee at the time of her death of the following described real estate, to wit: All of that tract, piece, or parcel of land situate, lying, and being then in the county of Edgefield, but now the county of Saluda, in the state of South Carolina, and containing 102 acres, more or less, and bounded on the north by the lands of Amanda Peterson, on the east by lands of J. A. Griffith, on the south by lands of W. T. Cromley, and on the west by lands of Mrs. Crawford. (2) That the said Mary G. Cromley left as her heirs at law and distributees the defendant A. B. Cromley, her husband, and the defendant Hardy Griffith, a brother, Fannie G. Cromley, a sister, who had intermarried with W. T. Cromley, and Lulu Griffith, a sister. That on the 17th day of July, 1887, the said Fannie G. Cromley departed this life intestate, leaving as her heirs at law the plaintiff W. T. Cromley, her husband, the plaintiff H. J. Cromley, a son, and Fannie B. Cromley, a daughter. (3) That the plaintiffs and defendants own and possess the above-described premises as tenants in com-

mon, in the following proportions; that is to say: The plaintiff Lulu Griffith is entitled to the undivided one-sixth part in fee in said premises, and the plaintiffs W. T. Cromley, H. J. Cromley, and Fannie B. Cromley are each entitled to the undivided one-sixth part in fee thereof, and the defendant Hardy Griffith is entitled to the undivided one-sixth part in fee thereof, and the defendant A. B. Cromley is entitled to the undivided one-half part thereof in fee; and the plaintiffs are desirous that partition of the same be had. (4) The plaintiffs further allege that the defendant A. B. Cromley has enjoyed the rents and profits of said premises ever since the death of the said Mary G. Cromley, and also committed waste thereon by cutting and removing timber to the value of $400 therefrom, and that he should be required to account to these plaintiffs for their share of the same. (5) That by an order of B. W. Crouch, clerk of the court of common pleas for the county of Saluda aforesaid, bearing date 6th day of August, 1897, William Griffith was appointed the guardian ad litem for the plaintiffs H. J. Cromley and Fannie B. Cromley, who are infants, with a power and authority to bring this action in their behalf, and he is now such guardian ad litem."

Answer of A. B. Cromley (the only answer in the case): "(1) That he denies each and every allegation contained in the complaint of the plaintiffs, and demands strict proof of the same and every part thereof. (2) As a further and separate defense this defendant avers that he is informed, and believes his information to be true, that the plaintiffs have no legal capacity to sue herein; that there is a defect in the parties plaintiff hereto; that the complaint of these plaintiffs does not allege facts sufficient to constitute a cause of action, in that the guardian ad litem herein for H. J. and Fannie Cromley was irregularly and illegally appointed, and is not a fit and competent person to be their guardian ad litem, being privy in interest and relationship with those whose interest is inconsistent with and adverse to the interest of H. J. and Fannie Cromley; and, further, in that the complaint of the plaintiffs herein does not allege that the plaintiffs herein for themselves, or either of them for himself, or any one in their interest or through whom they may claim, were seised of the premises described in the complaint within 10 years of the time of the commencement of this action. (3) As a further and separate defense the defendant A. B. Cromley avers that he is the owner in his own right absolutely in fee simple of the tract of land described in the complaint. (4) As a further and separate defense the defendant A. B. Cromley avers that more than 10 years have elapsed since the plaintiffs' right of action accrued, and the defendant has been in adverse possession of said land for more than ten years. (5) As a further and separate defense the defendant A. B. Cromley avers that during the time he has been in possession of the land described in the complaint he has erected on the land various improvements and betterments, which are now on said land, and he has caused the land to be variously otherwise improved, believing all the while that his claim in and to the land was good and valid; that the betterments and improvements on the lands described were all made in good faith and upon the belief aforementioned, and are of the value of $300; and in case these plaintiffs should recover the said premises, or any part thereof, for any reason whatsoever, this defendant begs that he be allowed the value of these improvements before the prayer of the complaint be allowed."

The following facts are stated in the record: "At the August, 1899, term of court for Saluda county this case was called for trial by Judge O. W. Buchanan. Motion was made to continue by the defendant on the ground that leading counsel was absent from the court. This motion was overruled. Defendant's counsel then urged the court to be allowed a trial by a jury upon the issues raised by defendant's answer. This request was promptly overruled by the court, and a hearing on the merits ordered. After argument of the attorneys for the plaintiffs and defendant had been heard, the court took the case under advisement. On Saturday, December 9, 1899, the following order was filed in the office of the clerk of the court of Saluda county: 'After reading the pleadings, evidence, and papers herein, and after hearing arguments for and against the matters and things contained within the complaint, it is ordered, decided, and adjudged that the relief prayed for shall be allowed, that the allegations of the complaint are sustained by the evidence and the law, and that the contentions of the defense are not made out by the evidence herein. It is further ordered that the usual writ in such cases do issue from the clerk of this court, directed to commissioners, who will be directed to make partition of the premises as required by law, or if, in such commissioners' opinion, such land cannot be divided with due regard to the interest of all parties concerned, then with power to make the usual recommendation in such cases; that all parties have leave to apply at the foot of this order for any further order to carry out the provisions hereof. [Signed] O. W. Buchanan, Presiding Judge. November 5, 1899.'"

The defendant appealed upon numerous exceptions, some of which relate to findings of fact upon the questions of title to the land, while others present questions that do not properly arise under the pleadings. Furthermore, the conclusion which this court has reached renders unnecessary the consideration of some of the other exceptions, as the questions raised by them become speculative.

The objections to the sufficiency of the complaint on the grounds "that the plaintiffs

have no legal capacity to sue herein," and "that there is a defect in the parties plaintiff hereto," are based upon the following state of facts: In 1897 W. T. Cromley filed a petition for the appointment of a guardian ad litem for the infants H. J. Cromley and Fannie B. Cromley, then under 14 years of age, alleging "that the said infants, together with Lulu Griffith and W. T. Cromley, were about to commence an action in the court of common pleas in and for the said county and state for the partition of a tract of land in said county and state and for other purposes, and that the said infants had an interest in the result of the said action." The clerk of the court appointed William Griffith guardian ad litem for said infants on the 6th of August, 1897. The appellant's attorney, in his argument, states the facts as follows: "H. J. Cromley and Fannie B. Cromley, infants under the age of 21 years, by their guardian ad litem, William Griffith, and W. T. Cromley and Lula Griffith, plaintiffs, caused to be issued against Hardy Griffith, Joseph Griffith, A. B. Cromley, and Samuel Crawford and John Crawford, copartners doing business under the firm name and style of Crawford Brothers, defendants, a summons and complaint. The summons and complaint in this action was signed by Edwin F. Strother, Jr., plaintiffs' attorney, and verified by W. T. Cromley on August 6, 1897. The complaint stated, among other things, that plaintiffs desired partition of certain lands, described, and an injunction prohibiting wastes. * * * Afterwards this summons and complaint was lodged with the sheriff of Saluda county for service, and the following indorsement made thereon: 'Filed this 19th of August, 1897. Entered page 22. M. A. Whittle, Sheriff of Saluda County, S. C.' It does not appear that this summons and complaint was served. It seems that it was afterwards withdrawn from the hands of the sheriff. Thereafter, on February 2, 1898, the summons and complaint in the present action was prepared and signed: 'Croft, Tillman & Peurifoy, Plaintiffs' Attorneys.' On February 11, 1898, this summons and complaint was served on the defendant. The infant plaintiffs, H. J. and Fannie Cromley, appeared in the action brought by Messrs. Croft, Tillman & Peurifoy by William Griffith as their guardian ad litem, by virtue of the appointment made upon motion of Mr. Edwin F. Strother, J., on August 6, 1897, in the action, the summons and complaint of which had been withdrawn after being filed with the sheriff of the county for service." As the first complaint was not dismissed upon the merits, but was withdrawn before service of the summons accompanying it, the power conferred upon the guardian ad litem to bring the action for partition was not exhausted, and the second action was properly commenced without another order appointing a guardian ad litem for the infants.

The next objection interposed by the appellant was "that the complaint did not allege facts sufficient to constitute a cause of action, in that the guardian ad litem herein for H. J. and Fannie Cromley was irregularly and illegally appointed, and is not a fit and competent person to be the guardian ad litem, being privy in interest and relationship with those whose interest is inconsistent with and adverse to the interest of H. J. and Fannie Cromley." Even if there was error, the appellant failed to show that it was prejudicial to him. He therefore has no right to raise this question.

The last objection interposed to the sufficiency of the complaint by the appellant in his answer was "that the complaint did not allege that the plaintiffs herein for themselves, or either of them for himself, or any one in their interest or through whom they may claim, were seised of the premises described in the complaint within ten years of the time of the commencement of this action." The ground urged by the appellant appeared upon the face of the complaint. This objection could not, therefore, be set up as a defense in the answer, but could only be interposed by demurrer. Even, however, if the appellant had demurred, it could not have been sustained.

We will next consider the question raised by the exception whether the judgment was null and void by reason of the fact that it was not filed within the time required by law. Section 17, art. 5, of the constitution of 1895 is as follows: "It shall be the duty of the * * * judges of the circuit courts to file their decisions within sixty days from the rising of the last court of the circuit then being held." No penalty is therein provided, and it was intended to affect the validity of a judgment filed after the time specified, though a judge disregarding such requirement without good reason for so doing would be subject to impeachment. The rule is thus stated in Mitchell v. Overman, 103 U. S. 62, 26 L. Ed. 369, to wit: "The adjudged cases are very numerous in which have been considered the circumstances under which courts may properly enter a judgment or a decree as of a date anterior to that on which it was in fact rendered. * * * We content ourselves with saying that the rule established by the general concurrence of the American and English courts is that where the delay in rendering a judgment or a decree arises from the act of the court—that is, where the delay has been caused either for its convenience, by the multiplicity or press of business, the intricacy of the question involved, or of any other cause not attributable to the laches of the parties—the judgment or decree may be entered retrospectively as of a time when it should or might have been entered up. In such cases, upon the maxim, 'Actus curiæ neminem gravabit,' which has well been said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice, it is the duty of the

court to see that the parties shall not suffer by the delay." This language is quoted with approval in the case of State v. Fullmore, 47 S. C. 34, 24 S. E. 1026.

Another question presented by the exceptions is whether the defendant was entitled to a trial by jury upon the issue of title raised by the pleadings. The record contains the following statement, to wit:

"Upon issue joined thus the following order was made:

" 'On motion of Croft, Tillman & Peurifoy, plaintiffs' attorneys, with the consent of Eugene W. Able, defendants' attorney, it is ordered that the case be referred to the master of this county to take the testimony herein and report the same to this court. Ernest Gary, Presiding Judge. December 12, 1898.'

" 'We consent to the above order. Croft, Tillman & Peurifoy, Plaintiffs' Attorneys. Eugene W. Abel, Defendants' Attorney.' "

As hereinbefore stated, the defendant demanded a trial by jury when the case was called for trial before his honor, Judge Buchanan, which was refused. Section 288 of the Code is as follows: "Trial by jury in the court of common pleas may be waived by the several parties to an issue of fact in actions on contract, and with the assent of the court in other actions, in the manner following: (1) By failing to appear at the trial. (2) By written consent, in person or by attorney, filed with the clerk. (3) By oral consent in open court, entered in the minutes." Section 274 of the Code contains this provision: "An issue of fact in action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury be waived, as provided in section 288, *or a reference be ordered.*" The words which we have italicized refer to references ordered by consent of the parties to the action for the purpose of trying the issue of fact. The defendant's consent that the testimony should be taken by the master was not a waiver of his right to demand a trial by jury, any more than if he had consented that the testimony should be taken de bene esse or before the clerk of the court. The testimony could have been read to the jury, and there is no inconsistency between the foregoing order of reference and a trial of the issue of title by a jury. The circuit judge erred, therefore, in ruling otherwise.

It is my opinion that the judgment of the circuit court should be reversed, and the case remanded to that court for a new trial; but, as the majority of this court think otherwise, the judgment of the circuit court is affirmed.

McIVER, C. J. (dissenting). While I concur in the conclusions reached by Mr. Justice GARY upon all the other points considered by him in his opinion, I cannot agree with him in regard to his last conclusion, to wit, that the circuit judge erred in refusing the motion of appellants for a trial by jury of the issue of title raised by the answer. On the contrary, I think there was no error in refusing the motion, made at the time and under the circumstances when it was made. The action was brought for partition, and was, therefore, cognizable in equity. When, however, the appellant by his answer raised an issue of title to real estate, he had a right to have such issue tried by a jury, unless such right was waived; and the practical question presented here was whether there was such waiver. While it is true that there was no express waiver, yet it seems to me that such waiver can, and should, be implied from his conduct. In the first place, after issue joined, the appellant consented to an order "that the case be referred to the master of this county to take the testimony herein and report the same to this court." In section 274 of the Code it is provided that an issue of fact in an action for the recovery of real property must be tried by a jury unless a "jury trial be waived, as provided in section 288, or a reference be ordered." As it cannot be claimed that a jury trial was waived in any of the modes designated in section 288 of the Code, the inquiry is narrowed down to the question whether such mode of trial was waived by the consent to the order of reference above stated. What was the nature and scope of that order? It was a reference of "the case"; not of any particular issue in the case, but the whole case. For what purpose? "To take the testimony herein and report the same to this court." Now, as the pleadings show that there were other issues in the case, which were not triable by a jury as a matter of right, besides the issue of title, and as a whole case was referred to the master to take the testimony on all these issues and report the same to the court, the necessary inference seems to be that the testimony was to be reported to the court for the purpose of enabling the court to pass upon all the issues; that is, for the trial of the whole case by the court. As was said in Meetze v. Railroad Co., 23 S. C., at page 25, when a party consents to an order of reference, "he must be regarded as consenting to the necessary incidents to a reference." Again, as there were other issues in the case besides that of title, and as the testimony in the whole case was to be taken and reported by the master, how was that relating only to the issue of title to be separated from that relating to the other issues, not triable by a jury, if appellant's demand for a trial by jury had been granted? Could the court, under the stringent provisions of the constitution, venture to instruct the jury what portion of the testimony reported by the master was applicable to the issue of title, which alone they were authorized to try, and what was not? And, if this was not done, would not the case be left in inextricable confusion before the jury? But, in addition to this, it is provided in section 294 that, "when the reference is to report the facts, the report shall have the effect of a special verdict." If so, then, if the demand

for a trial by jury had been granted, the court would then have been confronted with two verdicts,—one the special verdict found in the report of the master, and the other the verdict of the jury,—and under such a state of things it would be difficult to say how the court should deal with these two verdicts. In view of the practical difficulties thus suggested, it seems to me that the safest conclusion to adopt is that, when a party consents to such an order of reference as was granted in this case, he must be regarded as consenting to the necessary incidents to such an order of reference, one of which is that the whole case is to be tried by the court upon the testimony reported by the master.

Again, it will be noticed that no demand for a trial by jury was ever made by appellant until after his motion to continue the case was made and refused, and this was at the August term of 1899, when, as I understand it, jury trials in civil cases cannot be had; and the fact that he made his motion to continue his case at that term was an implied admission that it was triable by the court, and not by a jury, which could only be by reason of the fact that he had waived his right to the latter mode of trial. It will also be observed that the appellant's motion was not for a trial by jury of the issue of title, but for a trial by jury "upon issues raised by defendant's answer"; and, as there were other issues raised by the answer upon which he was clearly not entitled to a trial by jury, there was no error in refusing the motion as made. This may seem somewhat technical, but as I am satisfied that all parties, in the outset, at least, intended and expected that the order of reference would bring about a trial of the whole case by the court, I feel less hesitation in presenting this technical ground.

As I do not think any of the other exceptions—not considered by Mr. Justice GARY, and not necessary to be considered under the view which he took—can be sustained, I think the judgment of the circuit court should be affirmed.

POPE and JONES, JJ., concur.

BAKER et al. v. IRVINE (three cases).

(Supreme Court of South Carolina. Aug. 7, 1900.)

APPEAL FROM MAGISTRATE—SERVICE OF NOTICE—ACCEPTANCE—JURISDICTION.

1. The requirement of Code Civ. Proc. § 360, that there be personal service of notice and grounds of appeal on the magistrate who tried the case, is satisfied, where acceptance of service thereof is signed in the magistrate's name by one authorized by him to do so, though the magistrate is not present.

2. The circuit court, after dismissing an appeal from a magistrate on the ground that the magistrate was not served with notice and grounds of appeal, has not jurisdiction to entertain a motion to reverse the judgment appealed from on the ground that the magistrate had no jurisdiction to try the case, there being no longer any case before the circuit court.

Appeal from common pleas circuit court of Greenville county; R. C. Watts, Judge.

Three actions,—the first by J. A. Baker and W. C. Baker, the second by J. A. Baker, the third by W. C. Baker,—all against W. H. Irvine. From judgments of a magistrate for plaintiffs, defendant appealed to the circuit court, which granted plaintiffs' motion to dismiss said appeal, and refused defendant's motion to reverse the magistrate's judgment on the ground that he had no jurisdiction. Defendant appeals. Reversed.

Carey & McCollough and Shuman & Mooney, for appellant. Blythe & Blythe, for respondents.

McIVER, C. J. These three cases were heard and will be considered together. In each case the defendant took two appeals, both of which may, and, as we think, should, be considered together, as the second appeal depends largely upon the effect of the order from which the first appeal was taken. Each of the cases was tried by a magistrate, who rendered judgment in each case in favor of the plaintiff and against the defendant, who undertook to appeal therefrom to the circuit court, and the sole question raised by the first appeal is whether the notice of appeal in each of the three cases was given in time. In discussing this question we shall, for convenience, speak as if they were but a single case, though our language must be regarded as applying to each of the cases. It seems that the judgment of the magistrate was rendered on the 7th day of December, 1899, and the notice of appeal accompanying the grounds of appeal has upon it the following indorsement: "We hereby accept service of the within notice and grounds of appeal, as of each case herein, this 12th day of December, 1899. Blythe & Blythe, Plaintiffs' Attorneys. G. W. Nichols, Magistrate." On the 23d of March, 1900, plaintiffs' attorneys gave notice to the attorneys for defendant that, upon the call of the case for trial at the next term of the court of common pleas, they would move to dismiss the appeal upon the following grounds: "Because no notice of appeal in either of said cases was ever personally served upon G. W. Nichols, Esq., the magistrate who tried said cases and rendered judgment therein. This court has, therefore, no jurisdiction to hear said appeals, or either of them." The attorneys for defendants were also notified that upon the hearing of said motion they would use the affidavits of G. W. Nichols, Esq., the said magistrate, and of E. M. Blythe, Esq., copies of which were served with the notice, as well as the indorsement of acceptance of service above set out, purporting to have been made by G. W. Nichols, Esq., magistrate. The affidavits thus referred to as set out in the "case," and that of the magistrate contains the following language: "No notice and grounds of appeal were ever per

ionally served upon me, but on the 12th of December, 1899, on the last day allowed for he service of said notice and grounds of ppeal, I was called to the telephone at Athens, S. C., by some one at Greenville, S. ., whose voice I identified as that of J. A. IcCollough, Esq., one of the defendant's atorneys, who asked me if I would authorize Miss Lola Turner, a stenographer in his ofice, to accept service for me of the notice nd grounds of appeal. I replied I would do o if there was nothing wrong about it. Mr. IcCollough replied that he would be responsible for that. I was then spoken to over the elephone by some one with a feminine voice, whom I believe to have been Miss Turner; nd I authorized her, over the telephone, to ccept service for me of the notice and rounds of appeal. No papers of any kind were served upon or delivered to me by defendant or his attorneys until the 13th day of December, 1899, the day after the time for ppealing had expired, when I received hrough the mail at Athens, S. C., a package ontaining the notice and grounds of appeal." The other affidavits used at the hearing of he motion to dismiss the appeal are set out n the "case," but need not be stated here, s they are simply confirmatory of the statements made by the magistrate, Nichols, in his ffidavit above copied, and state the further acts that Miss Turner, in pursuance of the uthority conferred upon her by the telehone message from the magistrate, did sign he name of G. W. Nichols, magistrate, to the cceptance of service of the notice and rounds of appeal indorsed thereon, and that Messrs. Blythe & Blythe, attorneys for plainffs, also signed said acceptance, all on the 2th of December, 1899, within five days aft- the judgments appealed from were rendered. At the call of the case for hearing, his motion to dismiss the appeal was heard y his honor, Judge Watts, who passed an rder that the appeal be dismissed, basing his onclusion upon the ground that, "from the acts stated in the aforesaid affidavits, I conude, as a matter of law, that said facts do ot constitute personal service on the magisate, as demanded by section 360 of the Code ! Civil Procedure." From this order defendnt appeals, upon the grounds set out in the ecord, which need not be stated here, as they ractically raise but two questions: (1) Whether, under the facts stated, there was a fficient and substantial compliance with the w requiring personal service of the magisate with the notice and grounds of appeal ithin five days after the judgment was rendered. (2) If not, whether the magistrate, eing the only person who could object to the ant of service, has not waived such objecon by making his return within the time escribed, in which no objection was made any want of personal service of the notice nd grounds of appeal, as appears by his reurn, made January 3, 1900, as set out in the ase."

As to the first question, there is no doubt that acceptance of service or acknowledgment thereof in writing is equivalent to personal service. Benson v. Carrier, 28 S. C., at pages 122, 123, 5 S. E. 272; Whetstone v. Livingston, 54 S. C., at page 543, 32 S. E. 562, where it is said that a statement made in the magistrate's return that "'notice of appeal was served on March 2nd, 1898,' *while sufficient, as an admission, to show that the magistrate was served with the notice of appeal*, does not show, or even purport to show, that either the respondent or his attorney was ever served with any notice of appeal." (Italics ours.) If, therefore, the magistrate had with his own hand signed his name to the acceptance of service indorsed upon the notice and grounds of appeal, there can be no doubt the service would have been sufficient. Now, while it is true that Nichols, the magistrate, did not with his own hand sign his name to the notice and grounds of appeal in this case, yet, as it seems to us, he did what was equivalent thereto. The undisputed facts are that the magistrate was asked, over the telephone, by the defendant's attorneys, to authorize Miss Turner to accept service of the notice and grounds of appeal, which he consented to do; that he was then spoken to over the telephone by a lady whose voice he recognized as that of Miss Turner; and that he authorized her, over the telephone, to accept service for him of the notice and grounds of appeal in this case, whereupon Miss Turner immediately signed the name of the magistrate to the indorsement on the back of the notice and grounds of appeal, as hereinabove set out, as authorized by him to do. This, it seems to us, amounted in law to the same thing as if the magistrate had with his own hand signed his name to the acceptance of service. If the magistrate had been personally present, and, owing to some temporary disability, was incapacitated from writing, and had for that reason requested Miss Turner to sign his name to the paper, and she had done so, there cannot be a shadow of doubt that the signature so made would in law be regarded as the signature of the magistrate. Indeed, the case of In re Strong's Will (Sur.) 16 N. Y. Supp. 104, which is cited with approval by this court in Smythe v. Irick, 46 S. C., at page 315, 24 S. E. 69, 32 L. R. A. 77, affords an instance of this kind. There one of the subscribing witnesses to a will, being temporarily incapacitated from writing "by reason of a felon on her hand," asked a bystander to sign her name, which was done, and the court held it to be sufficient. Take another case. Suppose these parties had been upon opposite sides of an impassable stream, and the magistrate had called to Miss Turner, requesting her to sign his name to the acceptance of service, and she had done so; could there be a doubt that in law such signature would be regarded as that of the magistrate? The point made by counsel for appellant, that, while this may be true where the person who authorizes another to sign

his name is personally present, and sees the agent sign his name, it is not true where the person whose name is signed by another is not present, cannot be sustained in this case. The only object of requiring the presence of the person whose name is signed by another is for the purpose of identifying the paper which is signed, and that the signature was made by the person who was authorized or requested to make it. But here no question has been or could be made to either of these identities; for the undisputed facts are that the magistrate knew the voice of Miss Turner, and knew that she was the person whom he authorized to sign his name; that she was the person who did sign the magistrate's name by his authority; and that the magistrate knew that the paper which he authorized her to sign was the acceptance of service of the notice and grounds of appeal. All these facts he knew just as well as if he had been personally present when she signed his name. Under this view, it becomes unnecessary to consider the second question above stated. We think, therefore, that the circuit judge erred in granting the motion to dismiss the appeal, and his action in that respect must be reversed.

The second appeal arises out of the following facts: On the day after the plaintiffs had served the notice of their motion to dismiss the appeal, to wit, on the 24th of March, 1900, the defendant's attorneys served attorneys for plaintiffs with notice of a motion to reverse the judgment appealed from, upon the ground that the magistrate had no jurisdiction to try the case, inasmuch as the defendant was a resident of Greenville township, and that the said G. W. Nichols, the magistrate, did not reside in the township of Greenville, and had no jurisdiction therein. This motion was based on certain affidavits served with the notice of the motion, and set out in the "case," and also upon the record in the case. The motion was called up after the motion to dismiss the appeal had been heard, and after the circuit judge had announced his decision that he would dismiss the appeal. After hearing argument on the motion of defendant to reverse the judgment for lack of jurisdiction, the circuit judge granted an order refusing the motion upon the ground that after having dismissed the appeal there was nothing before him, and he could not, therefore, hear or determine the defendant's motion, and for that reason defendant's motion must be dismissed. From this order the second appeal is taken, upon the several grounds set out in the record, which, under the view we take, need not be stated here. As soon as the circuit judge rendered judgment dismissing the appeal, there was no longer any case before him in which any order of any kind could be passed. His judgment dismissing the appeal must be regarded as the law of the case until it is reversed by proper authority. The fact that this court has now reversed the order dismissing the appeal cannot affect the question. In the attitude which the case then occupied, there was no error on the part of the circuit judge in refusing defendant's motion to reverse the magistrate's judgment for lack of jurisdiction, for the reason that there was then no case before him in which he could grant any order or take any other action. He could only acquire jurisdiction of the case by appeal, and if, as he had decided, there was no appeal, he never acquired jurisdiction of the case. It is quite true that a question of jurisdiction can be raised at any stage of a case, but there must be a case before the court before that or any other question can be raised or determined. So soon, however, as the order of the circuit judge dismissing the appeal is reversed by this court, the way will then be open for the defendant to raise the question presented by his motion, in such form as he may be advised, and have the same considered and determined upon the merits, which have not yet been considered or decided either by this or the circuit court. In affirming the order brought before us by the second appeal, we must not, therefore, be considered as concluding the defendant from hereafter raising the question of jurisdiction presented by his motion, and having the same considered and determined on its merits, first by the circuit court, and by appeal to this court if desired.

The judgment of this court on the first appeal is that the orders dismissing the appeals from the judgments of the magistrate in each of the three cases named in the title be reversed, and that the said cases be remanded to the circuit court for the purpose of hearing and determining the questions presented by the several appeals from the judgments of the magistrate. In the second appeal the judgment of this court is that the order appealed from be affirmed, solely on the ground that, as long as the orders dismissing the appeals from the judgments rendered by the magistrate stood unreversed, there was no case before the circuit court in which he could pass any order; but without prejudice to the right of the defendant to raise the same question of jurisdiction presented by his motion, in such form as he may be advised, and have the same considered and determined upon the merits, first by the circuit court, and then by this court, if he shall so desire.

FERST et al. v. POWERS et al.

(Supreme Court of South Carolina. Aug. 2, 1900.)

ATTACHMENT — COMPLAINT — SUFFICIENCY—LEGAL AND EQUITABLE ACTIONS—JOINDER—AFFIDAVITS—TIME OF FILING—UNDERTAKING—EXECUTION BY AGENT.

1. Where a complaint sought to obtain judgment for moneys alleged to be due for goods sold and delivered to a defendant, and to set aside his alleged void assignment or transfer of a stock of goods, it was error to set aside an attachment because such action was for equitable relief only, since, under the Code, legal and equitable causes of action may be united

in the same complaint; and such complaint stated a cause of action at law for goods sold and delivered, on which judgment could be rendered independent of the equitable relief sought, and hence was sufficient to justify a resort to attachment.

2. Under 23 St. at Large, p. 30, amending Code, § 250, and requiring attachment affidavits to be filed at the time of the issuing of the warrant, within 48 hours thereafter, such an affidavit may be filed within 48 hours after issuance of the attachment, since it was the manifest object of the amendment to reduce the time within which affidavits could be filed from 10 days to 48 hours, and the apparent conflict therein is reconciled, and its object attained, by construing it to require filing at the time of issuing the warrant, or within 48 hours thereafter.

3. Since an undertaking in attachment need not be under seal, the names of attachment plaintiffs may be signed thereto by agents; and an undertaking so signed under authority of telegrams, which are attached thereto, is sufficient.

4. Since a verified complaint may be used as an affidavit in an application for attachment, such a complaint, stating a cause of action at law against a defendant whose property was sought to be attached, to recover for goods sold and delivered, and affidavits reciting his insolvency, and his assignment to his co-defendant, who probably knew of his insolvency, a few days after receipt of a considerable stock of goods, and that he represented the debts to be protected by the assignment as greater than they actually were, and other facts and circumstances in support of the general statement that the assignment was in fraud of creditors, sufficiently stated facts showing a cause of action against such defendant, with the amount and grounds thereof, and that he had assigned his property with intent to defraud his creditors, as required by Code, § 250.

Appeal from common pleas circuit court of Laurens county; O. W. Buchanan, Judge.

Action by M. Ferst's Sons & Co. and others against John H. Powers and another to recover for goods sold, and to set aside an assignment, as in fraud of creditors. An attachment was issued in aid of the action, and from an order setting the same aside the plaintiffs appeal. Reversed.

The following is the complaint referred to in the opinion:

"The State of South Carolina, County of Laurens. Court of Common Pleas. Joseph Ferst, Aaron Ferst, and Leon Ferst, partners doing business under the firm name of M. Ferst's Sons & Co., and J. J. Maddox and J. E. Maddox, partners doing business under the firm name of J. J. & J. E. Maddox, Plaintiffs, against John H. Powers and John W. Fowler, Defendants. The plaintiffs above named, by Irby & Babb and Graydon & Giles, their attorneys, complaining of John H. Powers and John W. Fowler, the defendants aforesaid, allege: (1) That the said plaintiffs, Joseph Ferst, Aaron Ferst, and Leon Ferst, are, and were at the times hereinafter set forth, partners doing business under the firm name of M. Ferst's Sons & Co. (2) That the plaintiffs J. J. Maddox and J. E. Maddox are, and were at the times hereinafter set forth, partners doing business under the firm name of J. J. & J. E. Maddox. (3) That the defendant John H. Powers was until about the 13th day of December, A. D. 1899, engaged in the mercantile business in the city of Laurens, in the county and state aforesaid. (4) That at divers times during the years 1898 and 1899 the said firm of M. Ferst's Sons & Co. sold and delivered to the said John H. Powers sundry articles of goods, wares, and merchandise, by open account, on which there is now due and unpaid the sum of nine hundred and sixty-seven dollars and seventy-five cents. (5) That at divers times during the years 1898 and 1899 the said firm of J. J. & J. E. Maddox sold and delivered to the said John H. Powers sundry articles of goods, wares, and merchandise, by open account, on which there is now due and unpaid a balance of four hundred and fifty-six dollars and seventy cents. (6) That on or about the 13th day of December, A. D. 1899, the said John H. Powers transferred and delivered to the defendant John W. Fowler his entire stock of goods in his store in the said city of Laurens, consisting of staple and fancy groceries and other articles. (7) That the plaintiffs are informed and believe that the pretended consideration for the said transfer and delivery of the said stock of goods was an agreement by the said John W. Fowler that he would satisfy a claim of four hundred dollars alleged to be due and owing him, the said John W. Fowler, by the said John H. Powers for rent of the store lately occupied by him in the said city of Laurens, and that he, the said John W. Fowler, would pay sundry claims alleged to be due by the said John H. Powers to the following named parties, to wit: To one W. A. Todd, lately a clerk in the store of the said John H. Powers, the sum of five hundred dollars, alleged to be due to him by the said John H. Powers on his salary as such clerk; to the People's Bank of Laurens, a certain promissory note, the amount of which is not known to the plaintiffs; to Bailey's Bank of Clinton, a certain promissory note, the amount of which is not known to the plaintiffs; and to the Bank of Laurens a certain other note, the amount of which is not known to the plaintiffs. (8) That the plaintiffs are informed and believe that the said stock of goods was worth, at cost price, the sum of eighteen hundred or two thousand dollars, and that the said John H. Powers claims to have sold the said stock of goods to the said John W. Fowler at eighty per cent. of their said cost price. (9) That the plaintiffs are informed and believe that at the time of the said alleged sale the said John H. Powers was totally insolvent, and had not enough property to pay the debts due and owing by him. (10) That the plaintiffs are informed and believe that the amount now claimed to be due and owing to the said John W. Fowler by the said John H. Powers for rent is larger than the amount actually due, and that the amount actually due is only about two hundred dollars; and the plaintiffs also are informed and believe that the amount alleged

to be due to the said W. A. Todd by the said John H. Powers is much greater than the sum actually due to him. (11) That the plaintiffs are informed and believe that the said alleged sale was made for a consideration much less than the real value of the said stock of goods, that it was in part voluntary and pretensive, and that it was made and accepted with the intent and purpose to hinder, delay, defeat, and defraud the creditors of the said John H. Powers, and especially these plaintiffs, who are the largest creditors of the said John H. Powers, as they are informed and believe. (12) That the plaintiffs are informed and believe that the said alleged sale was made and accepted with the intent and purpose to give to the said John W. Fowler, W. A. Todd, the People's Bank, Bailey's Bank, and the Bank of Laurens a fraudulent and unlawful preference over the other creditors of the said John H. Powers; and they are advised by their counsel that the same is in effect an assignment with preferences, and is contrary to the assignment acts of this state. Wherefore the plaintiffs demand judgment against the defendants: First. That the plaintiffs M. Ferst's Sons & Co. have judgment against the defendant John H. Powers for the sum of nine hundred and sixty-seven and $^{26}/_{100}$ dollars. Second. That the plaintiffs J. J. & J. E. Maddox have judgment against the defendant John H. Powers for the sum of four hundred and fifty-six and $^{70}/_{100}$ dollars. Third. That the said alleged sale of the said stock of goods be set aside and be declared to be fraudulent and void. Fourth. That the plaintiffs may have such other and further relief as to the court may seem to be just and proper. Irby & Babb, Graydon & Giles, Plaintiffs' Attorneys."

The following is the order of the circuit judge setting aside the attachment:

"This cause came before me on a motion at chambers to set aside an attachment given by the clerk of court for Laurens county. The motion is made on several grounds. The allegations of fraud in the affidavits make out a prima facie case, so far as such a claim could well be made such by conclusion. If unrebutted, the inference of improper conduct would be strong. The grounds for setting aside are based upon several objections, growing out of alleged defects in filing the affidavits, making up the undertaking, alleged insufficiency of the matters stated in the affidavits, and in failing to state facts showing fraudulent disposal of property or a fraudulent assignment of the same, and lastly because attachment will not lie under such an alleged cause of action. To understand the effect of this last objection, the complaint must be referred to. There are two plaintiffs, it will be noticed,—Ferst's Sons & Co. and J. J. & J. E. Maddox; two independent claims for goods sold, or alleged to have been sold, and delivered to John H. Powers, who was until about 13th December, 1899, engaged in mercantile business in the city of Laurens. That on that day (the said 13th day of December, 1899) the defendant Powers transferred and delivered over to Fowler, his codefendant, his entire stock of goods under an agreement(?) whereby the said Fowler, it was claimed, was to satisfy a claim of four hundred dollars alleged to be due and owing to said Fowler for the rent of the store lately occupied by him, and in addition the said Fowler was to pay sundry claims alleged to be due by Powers to the clerk, W. A. Todd, to the People's Bank of Laurens, to Bailey's Bank of Clinton. It is charged that the goods so conveyed were worth the sum of eighteen hundred or two thousand dollars, and the said Powers claimed to have sold the stock to Fowler at eighty per cent. of the cost price. That the said John Powers was totally insolvent, and had not any property to pay the debts due and owing. They further say that the amount due to Fowler and to Todd was not as much as was claimed by Powers; that it was, in fact, voluntary and pretensive; and that it was made and accepted with the intent and purpose to hinder, delay, defeat, and defraud the creditors of Powers, and especially these two firms, plaintiffs, who are the largest creditors of the said John Powers. It was charged that the said sale was made and accepted with the intent and purpose to give to the said John W. Fowler, W. A. Todd, the People's Bank, Bailey's Bank, and the Bank of Laurens a fraudulent and unlawful preference over the other creditors of the said John H. Powers, and they are advised by their counsel that the same is in effect an assignment and preference, and contrary to the assignment acts of this state; and after demanding judgment for the amounts claimed to be due each of the plaintiffs, respectively, it is further demanded that the said alleged sale of the said stock of goods be set aside and declared to be fraudulent and void, and that the plaintiffs may have such other and further relief as to the court may seem just and proper. It is to be observed that W. A. Todd, Bank of Laurens, Bailey's Bank, and People's Bank are not made parties.

"The objection to the form of the complaint and its character is material here; for if there was no cause of action, or an appropriate cause of action, there could not be a proper attachment under it. It may be observed that, giving the complaint the most liberal construction, it is rather to be construed as demanding an equitable relief than any relief at common law. By giving it the effect of an equitable proceeding, the joinder of two independent demands in the same complaint may not appear so unusual, though it is contrary to the rule in that character of cases. Evidently the purpose was to make a creditors' bill, and to create an equity thereby, and a lien upon the property of the debtor, Powers, and thus to hold it by the hands of the court to respond to the demands of plaintiffs and all creditors equally. This much it has been thought best to say with reference to its character. Fraud and collusion are charged, whereby it was intended to defeat,

hinder, delay, and defraud the other creditors. This being the character of the complaint, will attachment lie? I do not think that attachment is the proper remedy in actions of an equitable nature. I do not think that the usual equitable verdict should be displaced by so stringent, rigid, and harsh a proceeding as that by attachment in the first instance. 'An attachment can only be considered in the light of an action at law.' Havis v. Trapp, 2 Nott & McC. 132. See, also, 1 Wait, Act. & Def. 441; Drake, Attachm. 40; 3 Am. & Eng. Enc. Law (2d Ed.) 184. I do not construe Bank v. Stelling, 31 S. C. 371, 9 S. E. 1028, as contradicting this view. Here the defendants are both residents of the state. The nominal ownership, at least, is in Fowler. It is true, the creditor has the choice of remedies. See Miller v. Hughes, 33 S. C. 542, 12 S. E. 419; Burch v. Brantley, 20 S. C. 503; Amaker v. New, 33 S. C. 28, 11 S. E. 386. I do not think he can exercise the common law (or statutory) and equitable at the same time, by using one cause of action and a remedy appropriate to another at the same time. The sale is alleged to be in part, at least, fraudulent. If the attachment is issued, it must be issued for all the matters and things charged in the complaint in this case,—as well for the matters charged to have been done honestly as for those done fraudulently,—whereas it should issue, if at all here, only by reason of the fraud done. I do not think attachment was ever intended to supply the place of any equitable process, injunction, etc. By referring to the character of the complaint, I am by no means satisfied that in its statement of an equitable cause of action it is sufficient; but I do not pass on its insufficiency, however, inasmuch as the objection made is not that the statement is insufficient in not showing any cause, but that, being the statement of an equitable cause of action, attachment cannot issue in its enforcement, or as an aid or remedy for, or dependent(?) upon, such equitable action. Having decided that an attachment will not lie under such a complaint, the other grounds become of no avail, and need not be considered. Wherefore it is ordered that the writ heretofore issued by the clerk of court be set aside, vacated, and declared vacated, and that the attachment or action based upon such writ be set aside and be considered released."

Irby & Babb and Graydon & Giles, for appellants. Ferguson & Featherstone and W. H. Martin, for respondents.

McIVER, C. J. The two plaintiffs in this case, being separate and distinct mercantile firms, claiming to be creditors of the defendant John H. Powers, who up to the 13th of December, 1899, was engaged in the mercantile business in the city of Laurens, united in this action, which was commenced on the 20th of December, 1899, for the purposes hereinafter stated. No question seems to have been raised as to the propriety of these two plaintiffs thus uniting in this action, and hence we say nothing as to that. The object of the action will be best disclosed by a copy of the complaint, which was verified, as set out in the "case," and for this reason the reporter will incorporate the same in his report of the case. It will be convenient, however, to state, in general terms, that the action seems to have been for a twofold purpose: (1) To obtain judgment against the defendant Powers in favor of the several plaintiffs for the amounts alleged to be due them, respectively; (2) to set aside an assignment or transfer by the defendant Powers to his co-defendant, Fowler, of his entire stock of goods, for the purpose of applying the same to the payment of certain other specified persons, by the said Powers, because such assignment or transfer was void under the assignment act, as well as under the statute of Elizabeth. At the time of commencing the action a warrant of attachment was obtained from the clerk, which "was duly served on both Powers and Fowler at the time of the serving of the summons and complaint. Copies of the affidavits on which the warrant was issued were also served on said parties, and the originals filed in the clerk's office." In this quotation from the "case" it is not stated when these copy affidavits were served, or when the originals were filed in the clerk's office; but those facts, it is claimed, will appear in the affidavit of the clerk, which will hereinafter be referred to. Soon thereafter the defendants moved before his honor, Judge Buchanan, to vacate said attachment upon the following grounds: (1) Because the original affidavits upon which the warrant of attachment is based were not filed in the clerk's office at the time of the issuing of the warrant, as required by law; (2) because the bond is not signed by plaintiffs; (3) because the affidavits are insufficient, in that they fail to state any facts going to show a fraudulent disposal of property, or a fraudulent assignment of property, such as is contemplated by the assignment act; (4) because the affidavits fail to state facts showing any fraud at all on the part of defendants; (5) because an attachment will not lie in this action. On the 8th of January, 1900, the circuit judge granted an order setting aside the attachment, a copy of which is set out in the "case," which should likewise be incorporated in the report of the case. From this order, plaintiffs appeal, upon the several grounds set out in the record, which need not be stated here, as they make, substantially, but two questions: (1) Whether the action in aid of which the attachment was issued was for equitable relief only; (2) whether in such an action a warrant of attachment can be issued. The defendants, in accordance with the proper practice, have given notice that, in case this court should be unable to sustain the order of Judge Buchanan on the ground upon which he rested his conclusion, they would ask this court to sustain said order upon the first four grounds

upon which they rested their motion to vacate the attachment, which are set out above.

Our first inquiry, therefore, is whether this was an action for equitable relief only. It is well settled, under the Code of Procedure, that a plaintiff may unite in the same complaint both legal and equitable causes of action, and that is exactly what was done in this case. The complaint sets out a cause of action for goods sold and delivered by the plaintiffs to the defendant Powers, and demands judgment against him for the amount thereof; and this is, surely, nothing but a legal cause of action, pure and simple, without any feature of equitable cognizance. It is true that there is another cause of action set out in the complaint, against both of the defendants, which is of an equitable character, to wit, that upon which the relief demanded is that the assignment by John H. Powers to his co-defendant, John W. Powers, of his entire stock of goods, should be set aside. But that does not invest the whole action with the character of an equitable action; for if, upon the trial, the plaintiffs shall fail to establish their equitable cause of action, that would not prevent them from obtaining judgment against Powers, if they shall establish their claims for goods sold and delivered. In the case of Magruder v. Clayton, 29 S. C. 407, 7 S. E. 844, that was the result of such a case as this. See, also, Adler v. Cloud, 42 S. C. 272, 20 S. E. 393, to the same effect. In both of those cases the actions were brought for the double purpose of setting aside certain assignments and transfers of property, and at the same time for the purpose of obtaining judgments against the debtor on the claims alleged to be due to the plaintiffs; and in both of the cases, after the plaintiffs had failed to establish their equitable cause of action their right to establish their legal cause of action was distinctly and fully recognized. See, also, to the same effect, Bank v. Stelling, 31 S. C. 360, 9 S. E. 1028. It seems to us, therefore, that the circuit judge was in error in holding that this was an action for equitable relief only, and therefore not such an action as would enable the plaintiffs to resort to the remedy by attachment; for, as we have seen, the action was founded upon two causes of action, one of a purely legal character, and the other equitable in its character, and hence there was error in setting aside the attachment on that ground only. Under this view, it becomes unnecessary to consider the question whether an attachment can be resorted to in an action of purely equitable cognizance, as this is not such an action, and therefore no such question can arise in this case.

We will next proceed to consider the additional grounds relied upon by the defendants to sustain the order appealed from:

The first ground is based upon the theory that the law requires that the original affidavits upon which the warrant of attachment shall be filed in the clerk's office at the time of issuing the warrant. The law upon the subject is to be found in section 250 of the Code, as amended by the act of 1899 (23 Stat. at Large, p. 30), and the particular language relied upon seems to be the following: "It shall be the duty of the plaintiff procuring such warrant, at the time of the issuing thereof, to cause the affidavits upon which the same was granted to be filed in the office of the clerk of the court of common pleas, or with the magistrate, in which or before whom the action is to be tried, within forty-eight hours after the issuance of the attachment." While there is an apparent conflict in two of the clauses of the sentence just quoted from the statute, as the first clause seems to require the filing the affidavits at the time of issuing the warrant, while the last clause requires that the affidavits be filed within 48 hours after the issuance of the attachment, yet it is the duty of the court to reconcile such conflict, if possible, and this may be done by reading the sentence somewhat in this way: Declaring that these papers must be filed at the time of issuing the warrant, or within 48 hours thereafter. This would give effect to every part of the sentence, while that contended for by respondents would completely ignore the provision that these papers should be filed within 48 hours after the issuance of the attachment. Besides, the manifest object of the act of 1899, in which the words relied upon are found, was to amend section 250 of the Code by reducing the time within which the affidavits were required to be filed from 10 days after issuing the warrant to 48 hours; and to adopt the construction contended for would defeat that object. But if there is a clear and absolute repugnancy, which cannot be reconciled, between two sections of a statute, or between two clauses of the same section, the last must be preferred to the first. Potter, Dwar. St. 132; End. Interp. St. § 183. And, if we are forced to resort to this rule, it follows that, if the affidavits are filed within 48 hours after the issuance of the warrant of attachment, the statute will be complied with. This being the law, it seems to us that the two affidavits of the clerk set out in the "case" are sufficient to show that this requirement was complied with. The first ground upon which the motion to vacate the attachment was based cannot, therefore, be sustained.

The second ground upon which the motion was based means, no doubt, the undertaking required was not signed by the plaintiffs. It appears from the statements made in the "case" that this undertaking was signed as follows: "Joseph Ferst, Aaron Ferst, Leon Ferst, as M. Ferst's Sons & Co. by T. D. Darlington, Agent. J. J. Maddox, J. E. Maddox, as J. J. & J. E. Maddox, by Ellis Graydon. W. C. Irby." These signatures of the plaintiffs were made by T. D. Darlington and Ellis G. Graydon, respectively, under the authority of telegrams to these gentlemen, respectively, which were attached to the undertaking; and Mr. W.

C. Irby signed his own name, doubtless as surety. This, we think, was a sufficient compliance with the statute. The undertaking in the attachment need not be under seal. Grollman v. Lipsitz, 43 S. C. 339, 21 S. E. 272. And therefore we see no reason why the names of the plaintiffs could not be signed by the gentlemen named as agents, under the authority of telegrams from the plaintiffs which were attached to the undertaking. See what is said on this point in Bank v. Stelling, 31 S. C. 371, 9 S. E. 1028. The second ground of the motion cannot, therefore, be sustained.

The third and fourth grounds of the motion may be considered together, as they both raise the question whether the affidavits set forth the facts showing such a fraudulent disposition of the property of the defendants as is contemplated by the attachment act. In section 250 of the Code it is provided that a warrant of attachment may be issued "whenever it shall appear by affidavit that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof, and that the defendant * * * has assigned, disposed of or secreted any of his or its property with the like intent"; that is, with an intent to defraud his creditors. It seems to us that a casual reading of the affidavits will be quite sufficient to show that all these things are fully set forth therein. There can be no doubt that the complaint, which is verified, and may therefore be used as an affidavit in an application for an attachment, fully sets forth the facts sufficient to constitute a cause of action at law against the defendant John W. Powers, the defendant whose property was sought to be attached, and in the affidavits the following facts were stated: That John H. Powers was insolvent (a fact probably known to his co-defendant, Fowler, from the circumstances); that the assignment was made but a very few days after Powers had received a considerable portion of his stock of goods; that the amount of the debts which were to be protected by the assignment was smaller than as represented by Powers,—besides various facts and circumstances going to sustain the general statement that the assignment was made with intent to defraud the creditors of Powers. Indeed, the circuit judge, in his decree, says, "The allegations of fraud in the affidavits make out a prima facie case," from which, "if unrebutted, the inference of improper conduct would be strong"; and it does not appear that any counter affidavits were submitted. It seems to us, therefore, that neither the third nor the fourth ground of motion can be sustained; and, as the fifth ground has already been disposed of, we must hold that there was error in granting the order vacating the attachment. It is the judgment of this court that the order appealed from be reversed.

FERST et al. v. POWERS.

MADDOX et al. v. SAME.

(Supreme Court of South Carolina. Aug. 2, 1900.)

ACTION — ANOTHER ACTION PENDING — DISMISSAL—MOTION.

1. An action will be dismissed, and an attachment issued therein set aside, where another action is pending for the same cause, since both cannot be maintained.

2. The question whether another action is pending for the same cause need not be set up by plea or answer, but may be raised by a motion to dismiss.

Appeal from common pleas circuit court of Laurens county; O. W. Buchanan, Judge.

Actions by M. Ferst's Sons & Co. and J. J. & J. E. Maddox against John H. Powers. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Irby & Babb and Graydon & Giles, for appellants. Ferguson & Featherstone and W. H. Martin, for respondent.

McIVER, C. J. These two cases, being identical, except as to names and amounts, were heard and will be considered together. Indeed, these two cases were heard in connection with the case of M. Ferst's Sons & Co. and J. J. & J. E. Maddox against John H. Powers and John W. Fowler (see 36 S. E. 744), in which the opinion of this court has been prepared, and should be filed at the same time as this opinion is filed. For convenience, the case just named will be designated as "Appeal No. 1," while the present case (embracing the two cases named in the title of this opinion) will be designated as "Appeal No. 2."

It appears that very soon after his honor, Judge Buchanan, had granted his order vacating the attachment, which was the subject-matter for consideration in appeal No. 1, these plaintiffs commenced separate actions against John H. Powers for the sole purpose of recovering the amounts alleged to be due them, respectively, for goods sold and delivered, and at the same time sued out warrants of attachment. Thereupon the defendant in each of the cases made a motion before his honor, Judge Buchanan, to vacate the attachments on the several grounds set out in the "case." It was stated in the notice of the motion that it would be based upon the pleadings and affidavits in these actions, and also upon the pleadings and affidavits in the action which we have designated as appeal No. 1. The motion was granted upon the single ground that, there being another action pending for the same cause, these actions cannot be maintained, and therefore the attachments must be set aside. The present appeal presents the single question whether there was error in such ruling.

We agree with the circuit judge. As will be seen by reference to our opinion in appeal No. 1, it is clear that the action in that case, so far as one of the causes of action there stated is concerned, was the same as the

cause of action set forth in the pleadings in these cases. That case, unquestionably, is still pending, and the plaintiffs cannot be permitted to pursue the defendant Powers on the same cause of action in two cases at the same time; for if, as was shown in the opinion prepared in appeal No. 1, the plaintiffs in these two cases may, if they prove their claims, obtain judgment for the amount of their claims for goods sold and delivered, they certainly cannot maintain these actions, based upon the very same claims, as long as that case is pending; and, if they have no cause of action in these two cases, then they are not entitled to the attachments. Central Railroad & Banking Co. v. Georgia Const. & Inv. Co., 32 S. C. 319, 11 S. E. 192.

The contention on the part of the appellant that the question whether another action is pending for the same cause cannot be raised by a motion, but that it must be set up by plea or answer, cannot be sustained. One of the facts necessary to be shown by affidavit in order to obtain a warrant of attachment is that a cause of action exists; and if that is not only not shown, but is negatived, by the affidavits on the motion papers, then the attachment cannot stand. See Baum v. Bell, 28 S. C. 201, 5 S. E. 485. The judgment of this court is that the order appealed from be affirmed.

CALVERT v. SOUTHERN RY. CO.

(Supreme Court of South Carolina. Aug. 10, 1900.)

REMOVAL OF CAUSES—FOREIGN CORPORATIONS.

A railroad company incorporated under the laws of another state is a nonresident of South Carolina, for the purpose of removal of causes to a federal court, though it has complied with the requirements of Act March 19, 1896, providing that thereupon such corporation shall become a domestic corporation, with all the rights and liabilities thereof.

Pope, J., dissenting.

Appeal from common pleas circuit court of Abbeville county; Ernest Gary, Judge.

Action by W. H. Calvert, administrator of D. C. Calvert, deceased, against the Southern Railway Company. Defendant's petition to remove the cause to the federal court was refused, plaintiff had judgment, and defendant appeals. Reversed.

T. P. Cothran, for appellant. W. N. Graydon, for respondent.

JONES, J. This action was for $10,000 damages for the alleged negligent killing of plaintiff's intestate by the defendant company on its line of railway in Abbeville county, in this state. Before entering upon trial the defendant interposed an objection to the jurisdiction of the court, on the ground of defendant's right to remove said cause to the circuit court of the United States, based upon the following agreed statement of facts: "(1) That the Southern Railway Company on the 18th of June, 1894, became a corporation under the laws of the state of Virginia. (2) That said Southern Railway Company has complied with the constitution (article 9, § 8), and with the acts of assembly of said state in reference to foreign corporations doing business in this state, by filing with the secretary of state a certified copy of its charter, on the —— day of January, 1897, and by filing the same with the register of mesne conveyance of Abbeville county on April ——, 1896. (3) That on the —— day of July, 1899, the defendant filed with the clerk of the court of common pleas of Abbeville county its petition for removal of this cause to the circuit court of the United States for the district of South Carolina, and accompanied said petition with a properly executed bond, as required by law. Said petition and bond were filed within the time required by the statutes of South Carolina for answering the complaint herein. (4) That thereafter, on the —— day of July, 1899, the defendant served upon plaintiff's attorneys its answer in this case. (5) That within the time required by law the defendant filed with the clerk of the United States circuit court for the district of South Carolina a certified copy of the record in said cause, and procured the said cause to be docketed in said last-named court. The plaintiff does not waive the objection that such filing and docketing cannot be made until the state court signs an order allowing removal of said cause to the U. S. court. (6) That, notwithstanding said proceedings for removal, the plaintiff has procured said cause to be docketed upon calendar 1 of the court of common pleas for Abbeville county." The circuit court overruled the objection, on the authority of Mathis v. Railway Co., 53 S. C. 257, 31 S. E. 240, and from the order in the premises is this appeal.

The question of the right of the defendant company to remove a similar cause, on substantially the same state of facts, was considered in the recent case of Wilson v. Railway Co. (filed on the 2d day of August, 1900) 36 S. E. 701, wherein the case of Mathis v. Railway Co., supra, was overruled, and the right of defendant to remove on the ground of diverse citizenship and nonresidence was sustained. That decision controls this case. Upon the filing of the required petition and bond for removal, the state court has no jurisdiction to proceed further. Marshall v. Holmes, 141 U. S. 505, 12 Sup. Ct. 62, 35 L. Ed. 870; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 213, 15 S. E. 562; Dunham v. Carson, 37 S. C. 279, 15 S. E. 960. The judgment of the circuit court is reversed.

POPE, J., dissenting.

OUSLEY et al. v. BAILEY et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

RECEIVERS—JUDICIAL SALE—PURCHASER'S TITLE—UNRECORDED CONVEYANCE.

A purchaser of land at judicial sale, acting in good faith and without notice, acquires

title as against a prior conveyance by the owner, unrecorded at the time of the making and confirmation of such sale.

(Syllabus by the Court.)

Error from superior court, Coffee county; Joseph W. Bennet, Judge.

Action by R. F. Ousley & Bro. against J. S. Bailey & Co. From a judgment in favor of defendants, plaintiffs bring error. Affirmed.

Leon A. Wilson, for plaintiffs in error. Toomer & Reynolds, for defendants in error.

LITTLE, J. Ousley & Bro. filed a petition in the superior court of Coffee county by which they sought to enjoin Bailey & Co. from entering and cutting the timber on lot of land No. 438, in the Sixth district of said county, alleging that they had a perfect title to the same. The defendants, admitting that it was their purpose to cut such of the timber on said lot as was suitable for sawmill purposes, denied that petitioners had any title to the same, but averred that the defendants had a full legal title to said land and the timber thereon. At the hearing the following agreed statement of facts was submitted, in connection with the pleadings: "On March 29, 1842, the state of Georgia granted to Abraham Hargraves lot of land 438, in the Sixth district of Appling, now Coffee, county. On December 30, 1853, Abraham Hargraves, for a proper consideration, conveyed said lot to Christopher Hargraves. This deed is regular, and was properly recorded. On December 4, 1877, John Fussell, the duly-qualified administrator on the estate of C. C. Hargraves, for a proper consideration, conveyed this lot to Hardy Summerlin, and the deed is regular, and has been properly recorded. On May 4, 1887, Hardy Summerlin made a deed for a proper consideration, conveying to James McDonald all of the timber on said lot of land suitable for sawmill purposes. This deed is properly witnessed, and is duly recorded. On June 20, 1890, James McDonald, who was at that time solvent, made a deed, in consideration of the sum of $300, to E. J. Stokes, F. M. Stokes, and W. E. Burbage, doing a turpentine business under the firm name of Stokes Bros. & Co., in the county of Coffee, said state, whereby the said James McDonald did lease and convey unto the said Stokes Bros. & Co., their heirs and assigns, lot of land and timber No. 438, lying in the Sixth district of Coffee county, in the state aforesaid, for a term of three years, beginning at whatever time the above-leased timber was boxed; the parties of the second part agreeing to return back unto the said James McDonald, his heirs and assigns, the above-leased premises, at the expiration of said lease, in as good condition as could be expected from such usage. This deed is properly executed, and was filed for record on January 7, 1895, in the clerk's office of Coffee superior court, and recorded on the same day. On January 18, 1893, Stokes Bros. & Co., as aforesaid, made a deed, for a valuable consideration, conveying the same property mentioned in the McDonald deed to O. H. Lowther. This deed is properly recorded, and was so recorded on January 7, 1895, and was filed for record on same day. The same property was conveyed by O. H. Lowther, by proper instrument of writing, duly executed, and for a proper consideration, to Williford & Loring, a firm composed of R. F. Williford and G. W. Loring; and Williford & Loring, in turn, by proper instrument of writing, for a valuable consideration, conveyed the same property to Chancey & Purdom; who, in turn, for a proper consideration, and by proper instrument of writing, conveyed the premises to R. F. Ousley & Bro., the plaintiffs in the above-stated cause; which deed from Williford & Loring to Chancey & Purdom was recorded properly, October 22, 1898. The deed from O. H. Lowther to Williford & Loring was recorded December 30, 1896. The deed from Lowther to Williford & Loring bears date December 30, 1896, and the deed from Williford & Loring to Chancey & Purdom bears date the 10th day of October. 1898, and the deed from Chancey & Purdom to R. F. Ousley & Bro. bears date October 4, 1899; this last deed being filed for record and recorded October 4, 1899. In the fall of 1898, Chancey & Purdom, a firm composed of A. H. Chancey and J. O. Purdom, entered upon said lot of land, and boxed the sawmill timber thereon for turpentine purposes (this was the first entry made upon said lot of land for such purposes), and worked the same one year; that is, until October 4, 1899, at which time they sold the same for turpentine purposes. The second year of said working will expire in the fall of the present year, and the said Ousley & Bro. claim the right under the lease to work it an additional year after the expiration of the present year. While said Chancey & Purdom were in the possession working the same for turpentine purposes, Bailey & Co. having actual notice of such possession and the working of the said timber for such purposes, R. F. Ousley & Bro. purchased the turpentine interests from said parties for the remaining period mentioned in the McDonald lease. On May 1, 1900, said Bailey & Co. notified plaintiffs in writing as follows: 'We are now about ready to cut the timber on lot 438. We have delayed as long as we could, and will still delay as much as possible, but we are liable now to go into it any day, and this is to let you know, so that you will not go to any extra expense with your boxing.' After this notice was given, the petition for injunction in the above-stated case was brought. In the latter part of 1893, James McDonald, who was then engaged in the cutting and manufacturing of lumber at McDonald's Mill, Coffee county, Ga., was placed in the hands of a receiver at the suit of the

Downing Company and others, as provided for under Civ. Code, §§ 2716, 2721, Henry T. Kennon being appointed temporary receiver. At the March term, 1894, of Coffee superior court, a decree was rendered in the said cause, appointing Henry T. Kennon as master commissioner therein, who was instructed by the order and decree entered by Hon. J. L. Sweat, judge of the superior court, on the 8th day of November, 1894, to proceed to advertise for sale all of the property of said James McDonald, and dispose of and offer all of the assets and property of the said James McDonald on the 10th day of December, 1894, before the court-house door at Douglas, Coffee county, Ga. Said master commissioner proceeded to advertise certain property in accordance with the terms of said order of November 8, 1894, and did on the 10th day of December, 1894, during the legal hours of sale, before the court-house door of Coffee county, Ga., expose and offer for sale all of said property, real, personal, and assets of every description, as the property of the said James McDonald. At said sale H. W. Reed became and was the highest and best bidder therefor, and all of the property mentioned in the deed hereinafter stated, as the property of James McDonald, was knocked off to him at and for the sum of $58,173.90. Among the property so sold by said receiver and master commissioner was all of the timber suitable for sawmill purposes on lot of land No. 438, lying and being in the Sixth district of Coffee county, Ga. In accordance with said order and decree of November 8, 1894, said sale was duly confirmed; and thereupon, on the 14th day of December, 1894, Henry T. Kennon, master commissioner, under order of the court, made a deed to H. W. Reed, conveying the property sold by him under the decree in said cause, including the said timber for sawmill purposes, on the said lot of land 438, in the Sixth district of Coffee county, Ga., which deed was properly witnessed and filed for record in the office of the clerk of Coffee superior court, on December 31, 1894, at 3 o'clock p. m., and on the 8th day of January, 1895, was duly recorded in the clerk's office of Coffee superior court, in Book of Deeds K, pages 25 to 31, inclusive. On the 14th day of December 1894, H. W. Reed made, executed, and delivered to J. S. Bailey & Co. a deed, consideration $75,000, conveying all of the property mentioned in the deed to H. W. Reed by H. T. Kennon, master commissioner aforesaid, among which property so conveyed was all of the timber suitable for sawmill purposes on lot of land No. 438, in the Sixth district of Coffee county, which deed is properly executed, and was filed for record on January 3, 1895, in the office of the clerk of Coffee superior court, and recorded in the clerk's office of the superior court of Coffee county, January 9, 1895. At the time said H. W. Reed took said deed from Kennon, master commissioner, and at the time said J. S. Bailey & Co. took said deed from H. W. Reed as aforesaid, neither had notice or knowledge, actual or constructive, that on the 20th day of June, 1890, James McDonald had made a deed, hereinbefore mentioned and set forth, to the said Stokes Bros. & Co., nor did they have any notice or knowledge, actual or constructive, at that time, of the conveyance of the same premises from said Stokes Bros. & Co. to O. H. Lowther."

It will be seen from the foregoing statement that both the plaintiffs and defendants trace their title to McDonald; the plaintiffs in error holding by a direct chain of title under a conveyance made by McDonald on June 20, 1890, while the defendants in error claim through Reed, under a deed made by the master commissioner conveying all the property of McDonald to Reed on December 14, 1894. The position, however, is well taken by the defendant in error that at the time Reed became the purchaser of the property of McDonald, and at the time they purchased the same property from Reed, that neither Reed nor themselves had any notice of the prior conveyance made by McDonald to Stokes Bros. & Co. in 1890, nor of the several conveyances constituting the chain of title of the plaintiffs in error, nor were any of the conveyances in that chain of title on record, and hence they were not chargeable with notice that McDonald had conveyed the timber prior to their purchase of the land; and that inasmuch as the conveyances by the commissioner to Reed, and by Reed to the defendants in error, were duly recorded before any of the conveyances in the chain of title of the plaintiffs in error, the conveyance to the latter of the timber on the lot in question is by law postponed to the title of the defendants in error. To this, however, it is replied that, prior to the time when Reed purchased the property of McDonald at the commissioner's sale, McDonald had by proper conveyance devested himself of all title to the timber on the lot of land, and that by his purchase Reed only took such title to the lot of land in question as McDonald had at the time. These contentions, under the admitted facts in this case, raise only one question, and that is whether the provisions of our law found in section 2778 of the Civil Code, declaring when instruments requiring record take effect, are applicable to conveyances made under a judicial sale. Just here it may be well enough to refer to the distinction which exists between judicial and execution sales. Mr. Rorer, in his treatise on the Law of Judicial and Execution Sales, declares that a judicial sale is, in contemplation of law, a sale made pendente lite, and that all the authorities concur that judicial sales are sales made by the court, and in which the court is the vendor; that it matters not to the contrary that such sale is made through the instrumentality of a master, a commissioner, or other functionary appointed thereto by the court; that as such sales are not valid or binding, and confer on the purchaser no right to the property, until

confirmed by the court, and as the confirmation is the judicial act of the court, such a sale becomes a judicial sale. Ror. Jud. Sales, §§ 1, 4, 28. The same author, however, declares, in section 590, that, in making ordinary execution sales simply by virtue of his office, the sheriff or marshal acts as the ministerial officer of the law, and not as the organ of the court; that the officer is not the instrument or agent of the court, as in judicial sales, and that the court is not the vendor, but that the authority of the sheriff or marshal rests on the law and on the writ; that the functions of the court terminated at the rendition of the judgment therein; and that the law is the officer's only guide.

Attention is called only to this distinction because, under the uniform rulings of this court, the registration acts of this state are applicable in cases of sales made by sheriffs under execution, on the theory that the officer represents in such sales the defendant in execution. McCandless v. Acid Co. (Ga.) 34 S. E. 142, and authorities cited. But, inasmuch as in judicial sales—such as that under which the defendants in error claim title—the sale is made by the court, the question arises whether the same provisions of law protect the bona fide purchaser for value. We think they do. The statute is plain that any instruments conveying title to land, or creating liens on land, which are required to be recorded, take effect only from the time they are filed for record as against the interest of third parties, acting in good faith and without notice, who may have acquired a transfer or lien binding the same property. It will be noted that the terms used in describing the persons who are protected have been very much broadened by the act of 1880, on which the section of the Code we are referring to is based. Formerly, it was the settled rule in this state that the holder of a junior deed, taken in good faith, without notice of a former conveyance, and recorded within 12 months from the time of its execution, would prevail against the holder of an unrecorded conveyance. Wise v. Mitchell, 100 Ga. 614, 28 S. E. 382. But, as the law now exists, a third party, acting in good faith, without notice, who has acquired a transfer of property, and whose deed has been recorded, acquires a title as against a prior conveyance of the same property unrecorded at the time he acquired a title. It would seem, from the language used, that a purchaser at judicial sale comes within the rule stated in the Code, which is evidently founded on the declared policy of the registry laws, which is that title, and all that affects it, should be disclosed by the public records; from whence the rule is obtained that a purchaser may rely upon the title as it appears of record, and that he will be protected against unrecorded conveyances, outstanding equities, secret liens, and conditions of which he has no notice. Ror. Jud. Sales, § 154, and cases cited in note 1, on page 242.

Construing a statute of Illinois which declares that "all deeds, mortgages or other instruments of writing which are required to be recorded shall take effect and be in force after the time of filing the same for record and not before, as to all creditors and subsequent purchasers, without notice," etc., the supreme court of the United States, in the case of McNitt v. Turner, 16 Wall. 352, 21 L. Ed. 341, said that the term "purchasers," as used in the statute, included purchasers at judicial sales, and that a deed not filed for record is as to them wholly without effect. It must be ruled, therefore, under the broad words of our statute, as well as on the authorities cited, that a purchaser at a judicial sale, for value and without notice, whose deed is duly recorded, acquires title to real property, as against a prior conveyance from the owner unrecorded at the time of the sale. The trial judge did not err in refusing the injunction. Judgment affirmed. All the justices concurring.

MORRIS v. VEACH et al.

(Supreme Court of Georgia. July 14, 1900.)

GUARANTY — CORPORATE STOCK — ENFORCEMENT—TENDER—CONSTRUCTION OF CONTRACT.

1. When one induces another to purchase stock in an incorporated company, and in consideration thereof undertakes in writing to guaranty to pay to the subscriber "one hundred cents in the dollar" for the stock "within ninety days from the date" of such agreement, the purchaser could not maintain against the guarantor an action upon the contract without showing affirmatively that in due time he had tendered the stock to the latter, and demanded of him payment in accordance with the terms of the agreement.

2. An agreement in writing that a subscriber for stock in an incorporated company was to be held "harmless from any * * * loss or damage or liability whatever as a stockholder," and that he should "in no way suffer any loss or damage by reason of [his] connection with said company as a stockholder," was not an undertaking to guaranty the subscriber against loss sustained by reason of the stock having become worthless on the market.

3. The contract involved in the present case, when construed as a whole, cannot be held to contain an unconditional agreement to pay the par value of the shares of stock therein referred to within 90 days from the date of the contract.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by J. M. Veach & Co. against C. M. Morris on a contract of guaranty. From a judgment in favor of plaintiffs, defendant brings error. Reversed.

C. J. Simmons, for plaintiff in error. Rosser & Carter, for defendants in error.

COBB, J. Veach & Co. brought suit against Morris, alleging in their petition that the defendant was indebted to them upon a contract of guaranty. The paper containing this contract recites in a preamble that a corporation known as the Atlanta Grocery Company had been organized in the city of Atlanta;

that Veach & Co. had subscribed for 12 shares of the capital stock, which subscription was to be paid with a note of the defendant, Morris, for $1,199.10, payable to plaintiffs; that N. W. Murphy and Morris had agreed to guaranty that plaintiffs should receive 100 cents in the dollar for the amount of stock subscribed, on or before the expiration of 90 days from the date of the signing of the contract; and that the plaintiffs were to be held harmless from any liability, loss, or damage by reason of their subscription. The stipulations in the contract are as follows: "Now, therefore, in consideration of the surrender by said J. M. Veach & Company of said note of C. M. Morris in payment of said stock, said N. W. Murphy and C. M. Morris hereby obligate themselves severally and jointly to pay said J. M. Veach & Company one hundred cents in the dollar for said twelve shares cash within ninety days from the date of this agreement and guaranty, and further obligate themselves severally and jointly to hold said Veach & Company, and each of them, harmless from any liability on said stock, and from any loss or damage or liability whatever as a stockholder in said Atlanta Grocery Co. It is the express purpose of this agreement and guaranty that said J. M. Veach & Company, nor either of them, shall be in any way liable as stockholders in said Atlanta Grocery Co., and that they shall in no way suffer any loss or damage by reason of their connection with said company as a stockholder, and that said N. W. Murphy and C. M. Morris severally and jointly guaranty J. M. Veach & Company, and each of them, against any such liability, loss, or damage." The contract was dated June 11, 1894, and was signed by Murphy and Morris. To the action Morris filed an answer, in which it was set up that the plaintiffs had not tendered to him, either within 90 days or at any time, the 12 shares of stock referred to in the contract. The answer further alleged that "plaintiffs retained said stock as their own until long after the Atlanta Grocery Company had failed and become insolvent, and the insolvency and failure of said company occurred long after the expiration of 90 days after the date of said contract, being the time mentioned in said contract," and "that no demand was made on him until just before the bringing of the suit, and not until long after the Atlanta Grocery Company had become insolvent and said stock worthless." It appeared at the trial that Murphy had made certain payments to the plaintiffs upon the contract, which reduced the sum claimed by them to be due to the amount sued for in the present case. The judge directed a verdict in favor of the plaintiffs, and to this judgment, as well as to other rulings made at the trial, the defendant excepted.

The contract involved in the present case, properly construed, contains two separate and distinct undertakings on the part of Murphy and Morris: (1) They were bound to pay to the plaintiffs 100 cents in the dollar for the 12 shares of stock within 90 days from the date of the contract, provided the plaintiffs desired to sell the stock, and so notified Murphy and Morris within 90 days; (2) they were further bound to indemnify the plaintiffs against loss on account of their subscription to the stock in the Atlanta Grocery Company in the event the plaintiffs were held liable in any way on account of that subscription, or in any other way, by reason of their connection with the company as a stockholder. When the parties entered into the contract sued on, there were, in all probability, in the minds of the plaintiffs, two contingencies which might arise, that they desired to so guard as to protect themselves from possible loss: First, they might not desire to continue as stockholders in the company; and, second, their subscription to stock not having been paid in money, but in property, some question might arise as to the real value of the property, and, if it was worth less than the amount of their subscription, they might for this reason be held liable on their stock subscription, or in some other way, on account of their connection with the company. The first contingency was provided for in the undertaking first referred to, and the second in the undertaking last referred to. In order for the plaintiffs to recover for a breach of the undertaking first mentioned, it is absolutely necessary that they should allege and prove that there had been a tender of the stock to the defendant, and a demand for the par value of the same, if not within 90 days from the date of the contract, at least before the suit was brought. They obligated themselves to pay a certain amount "for said twelve shares," and it was certainly contemplated that the payment of the amount stipulated should result in their obtaining that for which they had paid, to wit, the 12 shares of stock.

In order for the plaintiffs to recover for a breach of the undertaking last mentioned, it is incumbent upon them to allege and prove that they had been held liable on their subscription to the stock, or had been endamaged in some way on account of their connection with the company as a stockholder. Neither the averments of the petition nor the evidence at the trial authorized a recovery for a breach of either undertaking. It was contended that the contract amounted to a guaranty that the plaintiffs would not suffer loss on account of the insolvency of the company, and the consequent depreciation and possible destruction of the market value of the stock. We do not think the contract capable of this construction. Fairly construed, the contract cannot mean other than what we have above indicated. An undertaking to pay 100 cents in the dollar for shares of stock within a given time certainly cannot amount to an undertaking to indemnify a person against loss resulting from the stock becoming worthless on the market after the expiration of that time. Neither can an undertaking to hold a

person harmless from liability on a subscription to stock in an incorporated company, and from loss or damage or liability as a stockholder in such a company, or from loss or damage by reason of connection with the company as a stockholder, be held to mean that the person so indemnified will be held harmless if the stock depreciates in market value, or for any reason becomes worthless on his hands. While the language of the contract is broad, it is not so broad as to authorize a holding that the defendant would be liable to the plaintiffs for loss sustained by them on account of the corporation having become insolvent, and the stock having in consequence been rendered worthless. Neither can the contract be properly construed to contain an unconditional agreement to pay within 90 days a sum of money equal to the par value of the 12 shares of stock. If the plaintiffs had in due time tendered to the defendant the shares of stock, they could have compelled him to pay, according to the stipulations in the contract, 100 cents in the dollar; or if the plaintiffs are ever held liable or sustain damage on account of having subscribed for the stock, or having become connected with the company as stockholder, the terms of the contract are broad enough to amount to an indemnity against loss or liability of this character. But loss or liability incident to the destruction of the market value of the stock is not a loss or liability covered by the terms of the instrument, and the defendant would not be liable, even if the plaintiffs had sustained such loss. It would, we think, be straining the language of the contract, broad though it is, to hold that the defendant agreed to guaranty that the 12 shares of stock should always be worth 100 cents on the dollar, or that the plaintiffs would be entitled to this amount whenever they desired to call for the same, whether the stock was worthless or not.

The court erred in directing a verdict for the plaintiffs. Judgment reversed. All the justices concurring.

EDWARDS v. PLANTERS' & PEOPLE'S MUTUAL FIRE ASS'N OF GEORGIA.

(Supreme Court of Georgia. July 14, 1900.)

INSURANCE POLICY—CONSTRUCTION.

A policy of fire insurance expressly stipulating that a gin house, "which shall at intervals be operated by steam," will not be protected "so long as it is so operated," does not cover a loss occasioned by the burning of a gin house, the machinery in which is operated by steam power, if, on a day during the regular ginning season, the engine be fired up with a view to getting the machinery in order for ginning on the next day cotton already in the house, and the fire occurs during the intervening night. This is so though for a period of many days prior to that on which the engine is fired up no ginning has been done.

(Syllabus by the Court.)

Error from superior court, Clayton county; John S. Candler, Judge.

Action by J. L. Edwards against the Planters' & People's Mutual Fire Association of Georgia. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Jas. K. Hines and J. L. Travis, for plaintiff in error. C. T. Roan and W. L. Watterson, for defendant in error.

LUMPKIN, P. J. The plaintiff in error excepted to a judgment of nonsuit. His action was brought against the association for the recovery of a loss sustained by the burning of his gin house. The company interposed the defense that the property described was not, at the time of the fire, covered by the policy. It contained a stipulation in these words: "If a gin house or other building be taken into this association which shall at intervals be operated by steam, the insurance on such building, or buildings adjacent and endangered thereby, shall be removed so long as it is so operated; but, such danger being removed from such building, the policy shall again become intact." The following is a condensed statement of so much of the evidence as is now material to be considered: The plaintiff's gin was one operated by steam. The fire occurred on the 14th day of January, 1896, at 4 o'clock in the morning. The ginning season usually begins in September and ends in January. No cotton was ginned by the plaintiff after the 31st day of December, 1895, but during the month of January, and up to the date of the fire, customers had been putting cotton in the gin house to be ginned. It was the intention of the person in charge of the gin to do some ginning on the 14th. With this end in view, the engine was fired up on the 13th to see if the machinery was all right, but, as it was found to be out of order, the engine was stopped. We are of the opinion that the judgment of nonsuit was right. Even if the above-quoted stipulation in the policy is susceptible of the construction that it should, during the continuance of the ginning season, protect the gin house for intervals of one or more days while ginning operations were entirely suspended,—which is, to say the least, doubtful,—we are quite clear that where cotton was in the gin house, ready to be ginned, and on a given day the engine was fired up with a view to getting the machinery in order for ginning on the ensuing day, and during the intervening night the property was destroyed by fire, the company was not liable. Certainly, if any cotton had been actually ginned on the 13th, and operations had been suspended merely because of some temporary breakdown in the machinery, and there had been an intention after making the needed repairs to resume ginning on the next day, it could not be doubted that a fire occurring before the time for beginning work on that day should be regarded as a fire taking place during an interval in which operations by steam were being conducted. It makes no practical difference that there was no actual ginning on the 13th. As steam was

generated and the machinery put in motion, thus bringing into active operation the very dangers against which the company, by its contract, declined to insure the plaintiff, the case presents the same aspect as if cotton had really been ginned on that day. Any other construction than that which we have placed upon that clause of the policy now under consideration would manifestly be unjust to the company, and would, we think, fail entirely to carry out the intention of the parties. Certainly it cannot fairly be gathered from this policy that the company undertook to keep the property insured by night, when the engine was at a standstill, and yet, merely because the wheels were turning, be exempt from liability for a fire which occurred in the daytime, when those operating the gin were present, and thus enabled to take proper precautions to prevent loss. Literally speaking, it would all the while be true that the gin was not being operated by steam during the hours of night, if work was conducted only by day, but it was obviously the purpose of the company to avoid assuming the risk of fires which might originate in the nighttime during a period when ginning operations were being actively carried on by day. The above disposes of the question by the determination of which this case is controlled, and we therefore do not refer to points made in the bill of exceptions relating to other matters of defense set up by the company. Judgment affirmed. All the justices concurring.

COMMERCIAL PUB. CO. et al. v. CAMPBELL PRINTING-PRESS & MFG. CO.

(Supreme Court of Georgia. July 13, 1900.)

APPEAL—NEW TRIAL—GROUNDS—REVIEW—REPLEVIN—EVIDENCE.

1. Grounds of a motion for a new trial alleging error in admitting or in rejecting evidence cannot be considered, when they fail to distinctly inform the court what was the evidence to which they respectively relate.

2. When, in defense to an action of bail trover for the recovery of personalty which the plaintiff had sold to the defendant under a contract reserving title till the purchase money should be paid, the latter set up that the former had received a part of the price, and was not, without returning the same, entitled to a verdict for the property itself, it was not, though no claim for hire was made in the petition, erroneous to admit in behalf of the plaintiff evidence showing the value of the property for hire while in the defendant's possession, or to charge the jury that, if such value was equal to or exceeded the amount of the payments upon the purchase price, the plaintiff was not bound to return the money which the defendant had paid upon the purchase.

3. The evidence warranted the verdict.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Campbell Printing-Press & Manufacturing Company against the Commercial Publishing Company and another to recover personal property sold under a conditional sale. From a judgment for plaintiff, defendants bring error. Affirmed.

W. R. Brown, for plaintiffs in error. Harvey Hatcher, Jr., and E. M. & G. F. Mitchell, for defendant in error.

LUMPKIN, P. J. The Campbell Printing-Press & Manufacturing Company brought against the Commercial Publishing Company and R. B. Blackburn, as receiver of its assets, an action of bail trover for the recovery of a printing press and outfit. In its petition the plaintiff alleged that it had entered into a written contract with the publishing company, under the terms of which it agreed to purchase the property in question, paying therefor by installments, but that after paying a portion of the purchase money it had refused to comply further with its obligations; that the property was sold with reservation of title, and it was expressly stipulated in the contract that, should such default be made, the plaintiff should have the right to immediately retake possession, but that, notwithstanding this stipulation, and the fact that the publishing company was in default, it had, on proper demand, refused to yield possession of the property, which conduct on its part amounted to a conversion of the same. On the trial the plaintiff elected to take a verdict for the property itself. The defense interposed was that the contract between the parties was one of conditional sale, and the plaintiff was in equity liable to account for so much of the purchase money as had been paid to it, etc., to the end that the rights of the defendants in the premises might be protected, and an equitable rescission of the contract effected. The jury returned a verdict in favor of the plaintiff, which embraced a finding that the payments made upon the purchase price of the property did not exceed its fair rental value while in the possession of the publishing company. The defendants thereupon filed a motion for a new trial, which was overruled, and they excepted.

1. One ground of the motion alleges error in admitting oral evidence with reference to a certain matter, but fails to state what the evidence was. In several grounds complaint is made of the admission in evidence of certain documents, without setting the same forth either literally or in substance. In two of the grounds it is alleged that the court erred in refusing to permit certain questions to be answered, but the motion does not state what evidence the movant expected to elicit thereby. It is obvious, in view of the repeated rulings of this court, that none of these grounds of the motions present any question upon which we can undertake to pass.

2. The only question of law properly made is presented in certain grounds of the motion assigning error upon the admission of evidence as to the value of the property for hire, and complaining of instructions given to the jury with reference to this matter. These instructions were to the effect that, while it

was incumbent upon the plaintiff to account for and return the purchase money it had received, it was not bound to do so, if the value of the property for hire, while in the possession of the defendants, was equal to or exceeded the amount of the payments made upon the purchase price. It was insisted that the evidence admitted over objection was inadmissible, and the charges referred to were inappropriate, because the plaintiff had not, in its petition, prayed for the recovery of any sum as hire. We do not think the court erred either in admitting the evidence or in instructing the jury as indicated. It is evident that the court undertook to try the case in accord with the equitable rule recognized in Hays v. Jordan, 85 Ga. 741, 11 S. E. 833, 9 L. R. A. 373, that where a seller of personalty, who had reserved the title, and had received partial payments of the purchase money, brings an action to recover possession of the property, he is, in equity and in good conscience, liable to account for the money actually received, less the value of the property for hire. The answer of the defendants, as we understand it, was intended to be framed in pursuance of this rule, though it lacked one essential element, viz. it did not allege a willingness to account for the hire, or even, in general terms, assert a readiness on the part of the defendants to do equity. We do not think, therefore, that they can justly complain of the admission of evidence which would surely have been pertinent had their pleadings been complete. They were seeking an equitable rescission, and, in order to obtain equity, it was incumbent upon them to offer to do equity. It must not be overlooked that the plaintiff was standing squarely upon its legal right to recover possession of the property on the strength of its title, which was undisputed, and which it had an undoubted right to assert, because of the breach of a contract which expressly stipulated that, in case of default in paying any installment of the purchase money as it fell due, the plaintiff should be entitled to retake the property. As the plaintiff was not seeking by its action to do more than this, and was not asserting any claim for hire, its right to recover was manifest, unless the defendants set up some reason, either legal or equitable, to the contrary. There was nothing, from the plaintiff's standpoint, requiring it to go into the equities between the parties; and as the defendants sought to do so, it was, to say the least, incumbent on them to set forth the equities pro and con, and abide by the result. The evidence in question was therefore not inadmissible because the plaintiff was not suing for hire, but strictly pertinent to the issues which the answer sought to raise, or at least ought to have raised in order to give the defendants a standing in court. The plaintiff was not seeking to prove the hire, with a view to recovering the same, but its purpose was simply to defeat, by the introduction of competent evidence, the alleged right of the defendants to demand a return to them of the purchase money which had been paid. This was perfectly legitimate; for, as above pointed out, the pleadings of the defendants, not those filed by the plaintiff, were incomplete and defective. As the evidence objected to was properly admitted, it follows, of course, that the instructions which the court gave in connection therewith were fully warranted; they being, in substance, correct.

8. The motion for a new trial also complains that the verdict was contrary to the evidence. In our opinion, there was ample evidence upon which to base the jury's finding. Judgment affirmed. All the justices concurring.

MAYOR, ETC., OF SANDERSVILLE v. HURST.

(Supreme Court of Georgia. July 14, 1900.)

CITY—DEFECTIVE BRIDGE—LIABILITIES.

A city is not liable for injuries resulting from the defective condition of a bridge over a road on private property, approached by a gate, and in no way controlled by the city or open to the public. This is true although the bridge is within the corporate limits of the city.

(Syllabus by the Court.)

Error from superior court, Washington county; John C. Hart, Judge.

Action by Winnifred Hurst against the mayor and council of Sandersville. Judgment for plaintiff. Defendant brings error. Reversed.

Rawlings & Hardwick, for plaintiff in error. Evans & Evans, for defendant in error.

SIMMONS, C. J. According to the charter granted in August, 1872, the corporate limits of the city of Sandersville describe a circle with a radius of one mile. The charter gives the mayor and council power to open new streets and to condemn land for this purpose. From the record it appears that there was a private plantation road running through a portion of the city, and leading into the plantation of Mr. Rawlins. The city authorities adopted as a city street a portion of this road. The portion adopted extended to within 40 or 50 yards of a bridge which had been erected by private persons over a small stream. The street accepted and adopted by the city authorities terminated at a certain cross street. The balance of the road was never adopted by the city, and the owner of the premises, which were inclosed by a fence, had erected a gate across that part of the road which had not been accepted by the city, between the bridge and the city street. Mrs. Hurst, an old lady, walked along the street and the road until she arrived at the stream. The bridge had fallen into decay, and there were but two planks over which passengers could cross. Mrs. Hurst undertook to walk over these planks, when they tilted, throwing her into the stream and breaking her ankle. She brought suit against the city, and the jury returned a ver-

dict in her favor. A motion for a new trial was made and overruled. The city excepted.

The principal question argued here was whether the city was liable, under the facts stated, for the injuries sustained by the plaintiff. There was no evidence that the city authorities had ever accepted, by ordinance or otherwise, this part of the road on which the bridge was situated. There was no evidence that it had ever worked that part of the road, or had erected or maintained this bridge. On the contrary, the evidence showed that the city authorities had refused to recognize that part of the road as a street of the city. Application was made to them to furnish lumber to rebuild the bridge, and they refused to grant it. It also appeared that this bridge was on the private property of Mr. Rawlins, and that he had fenced it in and erected a gate near to the place where the city street terminated, and between that point and the bridge. There is nothing in the charter of the city which compels the city authorities to open and keep in repair all roads within the corporate limits. The charter leaves that question to the discretion of the municipal authorities. The evidence showed that these authorities had never received, accepted, or adopted as a street that part of the road on which the bridge was situated. Therefore the city was not bound to keep either the road or the bridge in repair, and the city cannot be held liable for injuries received by a person in consequence of the defective condition of the bridge. See Parsons v. Trustees, 44 Ga. 529; 2 Dill. Mun. Corp. (4th Ed.) § 1017. For the above reasons, we think the court erred in refusing a new trial. Judgment reversed. All the justices concurring.

GOETTE v. LANE.

(Supreme Court of Georgia. July 13, 1900.)

DEED—CONSTRUCTION—CONVEYANCE OF TIMBER—REMOVAL—REASONABLE TIME—USAGE—INSTRUCTIONS.

1. Relatively to the character and extent of the estate conveyed in the timber described in the conveyance involved in the present case, and to the length of time within which that estate would be determined, this case falls within the ruling made in the case of McRae v. Stillwell (decided at the present term) 36 S. E. 604.

2. Inasmuch as the question of what would be a reasonable time for exercising the privileges granted in the deed involved in the present case is one of fact, to be determined in the light of all the facts and circumstances surrounding the transaction, and inasmuch as the same would necessarily be widely variant in different cases, it cannot be determined with reference to any local custom or usage, unless such custom or usage was so general and universal as to have become necessarily, by implication, a part of the contract, which would not arise unless the custom was one which could be reasonably applied to the particular transaction under investigation. (a) The charge of the court relating to the subject of custom was not warranted by the facts in the present case.

(Syllabus by the Court.)

Error from superior court, Emanuel county; B. D. Evans, Judge.

Action by E. W. Lane against J. G. Goette. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, he brings error. Reversed.

A. C. Wright, for plaintiff in error. Henry R. Daniel, for defendant in error.

COBB, J. Lane sued Goette in an action of trespass, alleging that the defendant had entered upon the premises of the plaintiff, and taken and carried away therefrom timber belonging to the plaintiff. The jury returned a verdict in favor of the plaintiff, and, the defendant's motion for a new trial having been overruled, the case is here upon a bill of exceptions sued out by him, assigning error upon the judgment of the court refusing to grant him a new trial.

1. At the trial it appeared that the plaintiff had conveyed to one Preston "all the pine timber suitable for sawmill purposes" on various tracts of land, including the tract described in the petition, which was one containing 1,841 acres. The grantee and his heirs and assigns were to have the right to enter upon the land described "for the purpose of boxing the said timber for turpentine purposes, and of cutting, manufacturing, and hauling and taking away said timber and turpentine, or such portion of it as he may wish, at any time in reason, and also the exclusive right and privilege of having sites for sawmills and turpentine stills" on the lands, as well as the right to build and operate roads, tramroads, and railroads for the purpose of hauling the timber, logs, lumber, merchandise, and all other freight, so long as the grantee, his heirs and assigns, might see fit to use or occupy the same, with the privilege of removing all such property from the land, as well as the right to the quiet and peaceable possession of the lands at any and all times for the purpose of turpentining, cutting, manufacturing, hauling, and taking away the timber and trees. In the warranty clause of the deed it was stipulated that the plaintiff would forever warrant and defend to the grantee, his heirs and assigns, "the timber and turpentine privileges, and all other of said rights and privileges above mentioned." No definite time was specified in the deed within which the grantee was to exercise the rights and privileges conferred. The defendant in the present case is the successor in title of Preston. In the case of McRae v. Stillwell, 36 S. E. 604, it was held that a deed containing provisions very similar to those in the one under consideration in the present case conveyed to the grantees, their heirs and assigns, all the timber suitable at the date of the instrument for the purposes indicated, and that it was incumbent on the grantees and their successors in title to cut and remove such timber within a reasonable time from the date of the conveyance, and that upon failure so to do their interest in the timber ceased and determined. The principle ruled in the case just referred to is peculiarly applicable in the present case. It was there

ruled that the deed would be construed as having embraced within it a stipulation that the timber should be removed within a reasonable time. In the present case the parties have inserted in the deed itself such a stipulation; the deed, in terms, providing that the grantee shall have the right to enter upon the land for the purpose of boxing the timber for turpentine purposes, and of cutting, manufacturing, hauling, and taking away the timber and turpentine, or such portion as he may wish, "at any time within reason." The parties have, in terms, agreed that the grantee's right to use the land for turpentine and sawmill purposes shall be exercised within a reasonable time. But, even if the words "at any time within reason" were not embraced in the deed, the decision in McRae v. Stillwell would be controlling here. Counsel for plaintiff in error in the present case was also counsel for the defendant in error in the case just referred to, and at the argument of the present case he was heard upon a motion for a rehearing in the former case. Upon a careful review of the decision in that case, we adhere to the rulings therein made, and the motion for a rehearing has been denied.

2. What time should be allowed the defendant within which to utilize the timber for turpentine purposes and remove the products of such use from the land, and what additional time should be allowed for the defendant to avail himself of the use of the sawmill privileges, and the removal of the timber or the product of the sawmill from the land, are questions to be passed upon and decided by a jury under instructions that they must take into consideration all the facts and circumstances of the case, and the conditions surrounding the parties at the time of the execution of the contract, as well as all other facts and circumstances which would throw any light on the questions to be determined. After the jury have considered all these facts and circumstances, it is for them to say what would be a reasonable time to be allowed to the defendant to exercise the rights and privileges granted in the deed under which he claims. See McRae v. Stillwell, supra. This rule requires that the time fixed shall be reasonable. In cases where there may be a doubt as to whether one or the other of two periods of time would be reasonable, generally the jury should resolve the doubt in favor of the grantee, giving him the longer period of time, for the simple reason that the grantor's right rests upon a forfeiture, which a court of law will enforce, but always in such a manner that the injury to him whose rights are the subject of the forfeiture will be the least that the nature of the case will reasonably admit of. What would be a reasonable time will, of course, depend upon the peculiar facts of each case, and will be widely variant in different cases. For this reason a local custom or usage, although its existence is proven with the strictness required by law, would not ordinarily be relevant or material evidence in determining what is a reasonable time to be allowed in such cases. Certainly such a custom would have no bearing upon the case unless its observance was shown to be so general and universal that there could be no escape from the implication that the parties intended to contract in the light of the same. Especially would a local custom or usage not be applicable when the time fixed thereby might be such a short period of time as not to be at all reasonable when applied to the facts and circumstances of the particular case. The charges in reference to local custom and usage which were the subject of complaint in the motion for a new trial were erroneous, for the reason that the evidence did not establish the existence of such a custom,—at least, it did not establish the existence of a custom of such universal observance as that it was necessarily to be inferred that the parties contracted in the light of the same. Judgment reversed. All the justices concurring.

SHEEHAN v. SOUTH RIVER BRICK CO.

(Supreme Court of Georgia. July 14, 1900.)

BUILDING CONTRACTS — ACCEPTANCE — MECHANIC'S LIEN—ALTERATIONS—REMEDY OF DEFECT IN BUILDING.

1. When one who contracted to erect a building did so in substantial compliance with the terms of his contract, turned it over to the owner, received full payment for his services, and was discharged by the latter, the relation of owner and contractor between the two was at an end, whether the building in all respects conformed to the plans and specifications agreed upon or not.

2. After such relation ceased, the contractor no longer had authority to represent or bind the owner in any manner or for any purpose, and consequently could not, because of a complaint, made before the owner had accepted the building, by an architect then representing the latter, give an order for additional material to be used in remedying a defect in the building, and thus afford to the person furnishing such material a basis for asserting a material man's lien on the realty improved.

3. Though, in such a case, the additional material was in fact used upon the building, if the same was done without the owner's knowledge or consent the lien did not arise.

4. Applying what is said above to the facts of this case, it follows that the verdict of the jury was unwarranted and should have been set aside.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the South River Brick Company against Mrs. Elizabeth Sheehan and another to establish a mechanic's lien for materials furnished after completion of a building. From a judgment in favor of plaintiff, defendant Sheehan brings error. Reversed.

T. R. Corrigan and S. A. Atkinson, for plaintiff in error. Culberson & Willingham, for defendant in error.

LUMPKIN, P. J. The South River Brick Company brought an action against F. W. Pierce and Mrs. Elizabeth Sheehan for the

purpose of establishing and enforcing a material man's lien. Pierce filed no answer, but Mrs. Sheehan made a vigorous defense. The jury found in favor of the plaintiff, and she brings here for review a judgment overruling her motion for a new trial. The evidence is voluminous, and in many particulars conflicting. After a careful examination and study of it, we find that the following presents the most favorable view of the facts from the standpoint of the plaintiff: In the spring of 1895 Mrs. Sheehan made a contract with Pierce for the erection of a brick building on Piedmont avenue, in the city of Atlanta, the same to be completed by the 1st day of July, according to certain plans and specifications prepared for her by R. L. Jones & Co., architects. Pierce made an oral agreement with the South River Brick Company, under the terms of which that company undertook to furnish him what brick he "needed for the erection of that building." At the time this contract was entered into, no definite number of brick was specified, but the parties estimated that the quantity required would be between 250,000 and 300,000. On various dates up to and including the 27th of June, the brick company furnished Pierce some 294,000. It furnished no more until the 4th day of November, 1895, when it delivered upon his order 250 brick, which were used by him in raising to a greater height some of the chimneys upon the building, which had not previously been carried up to the height called for by the plans and specifications. Some time in September, R. L. Jones, a member of the firm of architects above mentioned, who was superintending the work for Mrs. Sheehan, complained to Pierce that some of the chimneys were not of the height specified in his contract with her. To this complaint Pierce at the time paid no attention. On the 19th of October, Jones & Co. addressed to him a letter of which the following is a copy: "Atlanta, Oct. 19, 1895. Mr. F. W. Pierce, City—Dear Sir: We note, by reference to the plans, that you have not carried the chimneys of the tenements of Mrs. Sheehan as high as they should be, and we therefore notify you to carry same up, or we will have same done at your expense after a reasonable time has elapsed in which you fail to do so, and we will not accept the houses as complete until this and other defects are remedied. Respectfully, R. L. Jones & Co., Archts." It does not appear that Mrs. Sheehan had any knowledge of the complaint made by her architects to Pierce with reference to the chimneys, or that she was informed that they had addressed to him the letter above quoted. Indeed, it does not appear that she even knew the chimneys had not been built according to contract. On the 2d day of November there was a meeting in the office of her attorneys, at which she, Pierce, and R. L. Jones were present. Pierce was then endeavoring to obtain a final settlement with Mrs. Sheehan. Nothing was said on that occasion with reference to the chimneys, or any other part of the brickwork on the building. She did, however, make complaint that the house had not been completed according to contract, because of the failure of Pierce to put up certain window blinds. Pierce contended that under the specifications he was not required to furnish these blinds, and in this contention was sustained by Jones. Another matter of dispute between Mrs. Sheehan and Pierce was as to how much he had forfeited by reason of his failure to complete the building within the time limited by the contract. This difference and that relating to the window blinds were adjusted, and Mrs. Sheehan then and there, by Pierce's direction, paid to Curtis & Craig, to which firm Pierce was indebted for other material, the full amount due him according to the settlement agreed upon. Thus the matter between Mrs. Sheehan and Pierce was finally and definitely closed. On the 4th day of November (two days later), Pierce, who had previously taken no action with regard to the letter of October 19th, above set forth, delivered the same to the brick company, and gave it an order for 250 brick, which were on the same day, under Pierce's order and direction, placed upon the chimneys of Mrs. Sheehan's building. This additional work was, however, done without her knowledge or consent. On the 18th of November the brick company addressed and sent to Mrs. Sheehan a written notice, which she received on the 21st, to the effect that Pierce was indebted to that company a balance of $420.26 for brick furnished for the erection of her building on Piedmont avenue. Subsequently the company recorded its lien, based upon its demand against Pierce for material furnished him.

The main contention of Mrs. Sheehan at the trial was that the plaintiff was not entitled to assert a lien upon her property, for the reason that it had failed, as required by law, to give her notice of its claim of lien within 30 days from the completion of its contract with Pierce. The question, therefore, upon which the case necessarily turns, is whether or not, upon the state of facts above recited, the brick company was entitled to a verdict establishing its alleged lien. In our opinion, it was not. It is clear that if Pierce, after the 27th of June, had given to the company no further order for material, notice to Mrs. Sheehan of its demand against him would have been unavailing if not served within 30 days from that date. In this connection, see section 2801 of the Civil Code, which declares that the notice therein provided for shall "be given within thirty days of * * * the furnishing of the material." Did the furnishing of the 250 brick on November 4th make that the date from which the 30 days should be computed? We think not. It is true that in New Ebenezer Ass'n v. Gress Lumber Co., 89 Ga. 125, 14 S. E. 892, this court held, in effect, that where material is furnished under "one and the same contract," but from time to time as required, the date to be considered in determining

whether or not a material man has recorded his lien within the time prescribed by law is that upon which the last delivery of material was made. And it would seem that this rule should be held to likewise apply in a case where the question arises whether or not the notice prescribed by statute came too late. But, as will have been seen, the 250 brick which constitute the last item of the plaintiff's account against Pierce were not ordered by or delivered to him until two days after Mrs. Sheehan had formally accepted the building, settled with him in full, and finally discharged him as her contractor. Certainly, under these circumstances, Pierce had no semblance of authority to bind her by any further orders he might give for material to be used upon the building. The relation of owner and contractor is, in a case like the present, necessary, to support a material man's lien. This relation did not exist between Pierce and Mrs. Sheehan on November 4th, and therefore he cannot be said to have been in any sense her authorized agent at that time. He had made a final settlement with her on November 2d, after a substantial, if not a literal, compliance with the terms of his contract, and she had fully released him by unconditionally accepting the building. Accordingly he really "needed" no more brick to be used in its construction, and had no right, even under his contract with the brick company, to call on it for more. Clearly, had it declined to fill his order of November 4th, no court would be justified in holding it liable for a breach of its contract with him. If, at the time of making the final settlement above alluded to, Mrs. Sheehan had insisted that Pierce should thereafter, though paid in full, place additional bricks upon the chimneys, or if it had been tacitly understood between them that he was to do so, this case would wear an altogether different aspect. In that event she could not be heard to say he was on November 4th no longer her contractor or authorized to act in that capacity. But, as has been seen, no such understanding was had between them. On the contrary, it is evident that Mrs. Sheehan in good faith endeavored on the day of the settlement to bring about a final adjustment of every matter, with a view to discharging from her service, at once and for all time, her contractor. Indeed, there is something more than a suggestion in the record that upon the occasion referred to Mrs. Sheehan was very anxious to sever all business relations with Pierce. The mere fact that the additional 250 brick were not only ordered by Pierce, but actually placed upon the building belonging to Mrs. Sheehan, would not warrant a finding that the relation of owner and contractor continued after November 2d; for it affirmatively appears that these brick were delivered on Mrs. Sheehan's premises and used on the building without her knowledge and without her consent, express or implied. Judgment reversed. All the justices concurring.

PORTER v. ROUNTREE.

(Supreme Court of Georgia. July 13, 1900.)

EXECUTORS AND ADMINISTRATORS — JUDGMENTS — COLLATERAL ATTACK — JUDGMENT AGAINST EXECUTOR—PERSONAL LIABILITY—DEVASTAVIT.

1. Where a judgment de bonis testatoris is obtained against an executor, execution issued thereon, a return of nulla bona made by the sheriff, and a suit brought on the judgment against the executor personally, suggesting a devastavit, the executor cannot, in his defense to the suit, make a collateral attack upon the judgment by showing fraud or mistake in its rendition; and this is true although the judgment was rendered by the same court in which the suit thereon is pending.

2. The modification of such judgment de bonis testatoris by the statement that it is not to be a personal judgment against the executrix does not preclude the plaintiff from bringing suit upon it against the executrix personally, suggesting a devastavit.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by D. W. Rountree against Mrs. F. L. Porter. From a judgment sustaining a demurrer to defendant's answer, she brings error. Affirmed.

J. H. Porter, Jr., and Arnold & Arnold, for plaintiff in error. John T. Pendleton, for defendant in error.

SIMMONS, C. J. It appears from the record that Rountree brought suit in the city court of Atlanta against Mrs. Porter, as executrix of her husband, and against Farrar and Williams. There was no defense to the action, but counsel for Mrs. Porter agreed in writing that a verdict and judgment be rendered against her de bonis testatoris, adding to such judgment a stipulation that it should not be a personal judgment against the executrix. Execution was issued, and a return of nulla bona made thereon by the sheriff. Thereupon Rountree brought an action upon the judgment, seeking to make the executrix personally liable for a devastavit. To this action the executrix filed an answer, setting up that the judgment sued on was obtained by fraudulent representations, and by mistake on the part of her counsel in signing the consent verdict and judgment. Various allegations were made in this answer as to the fraudulent representations and the manner in which the mistake was made. These it is not necessary, in the view we take of the case, to set out here. The court sustained a demurrer filed by the plaintiff to this answer. The defendant excepted.

1. It is well settled that a judgment regular on its face, and rendered by a court having jurisdiction of the parties and of the subject-matter, cannot be attacked collaterally by the defendant for any errors or irregularities entering into the judgment or inducing its rendition. The only way to have such a judgment set aside is by appeal or writ of error, or by a direct attack on it. In the

present case the judgment against the executrix was rendered in April, 1898. No exception was taken, and the judgment stands to-day unreversed. When the plaintiff filed against the executrix a suit predicated upon this judgment, the executrix filed the answer above mentioned. This was, in our opinion, making upon the judgment a collateral attack, which the law does not permit. This is true, although the same court which rendered the judgment was that in which was brought the suit upon the judgment. If the defense set up was true and had any legal merit, the defendant's remedy was to file an equitable petition in the superior court to have this judgment set aside as fraudulent (Civ. Code, § 5370), and to enjoin the present suit, inasmuch as the city court had no right to grant affirmative equitable relief until the merits of her case could be properly inquired into. Or, if she preferred, she could have moved in proper time in the city court to have the judgment set aside, and thus have had the merits of her case passed upon. Id. § 5373. There is an allegation in the answer that the defendant had filed an equitable petition in the superior court to have this judgment set aside, but it is not stated what was the judgment of that court upon this petition. Nothing is disclosed by the record tending to show that any motion was made in the city court to set aside the judgment which was rendered by that court. Whatever may have been or may be the result of the petition in the superior court, we are clear that the executrix has no right to attack the judgment in the indirect way employed by her in the present case. It was nothing more nor less than a collateral attack, which, as we have said, she is not permitted to make. For these reasons, we think the trial judge was right in sustaining the demurrer of the plaintiff.

2. It is claimed by counsel for the plaintiff in error that, inasmuch as the judgment against the executrix stated that it was not to be a personal judgment against her, the plaintiff in the court below could not maintain on it a suit to make it binding upon the executrix personally. Section 3508 of the Civil Code provides that, in a suit against an administrator or executor in his representative capacity, the judgment shall be de bonis testatoris, except where certain pleas are filed and found against him, when the judgment shall be that the plaintiff recover the debt and costs, to be levied in the first place upon the property of the deceased, if any such property is to be found, and, if none be found, then to be levied upon the property of the defendant. In the present case the addition to the judgment now under consideration, that it was not to be personal against the executrix, must be construed to mean simply that the judgment was not to be binding on the executrix personally; she not having filed pleas to justify a personal judgment against her. It was, however, not a waiver of the right of the plaintiff to bring an action against the executrix for a devastavit when it appeared from the return of the proper officer that the executrix had wasted or mismanaged the assets of the estate. It appeared from the verdict and judgment that there were assets of the estate in the hands of the executrix at the time of the rendition of the judgment. That she had no such assets at the time of the return of the sheriff is shown by that return. The conclusion must follow that she had in the meantime made way with the assets. When the executrix consented to the judgment de bonis testatoris, she admitted assets in her hands. As it was ascertained from the sheriff's return that no assets of the estate could be found, we think the provision that the judgment was not to be personal against the executrix would not preclude or estop the plaintiff from bringing his action against the executrix, suggesting a devastavit by her, and seeking to obtain a judgment binding upon her personally. Judgment affirmed. All the justices concurring.

COCHRAN v. WARLICK.

(Supreme Court of Georgia. July 13, 1900.)

DIRECTING VERDICT.

Though the plaintiff apparently made a prima facie case entitling him to a recovery of the land in dispute, by showing constructive possession by his grantor under color of title for more than seven years, yet, as it was, under all the evidence, a question for determination by the jury whether or not this constructive possession was overcome by the weight of evidence, or whether or not defendant had shown a good prescriptive title by actual adverse possession under a claim of right for more than 20 years before the bringing of the action, the court ought not to have directed a verdict for the plaintiff, but should have submitted the case to the jury.

(Syllabus by the Court.)

Error from superior court, Campbell county; J. S. Candler, Judge.

Action by J. W. Warlick against M. B. Cochran. Judgment for plaintiff, and defendant brings error. Reversed.

J. F. Golightly and J. H. Longino, for plaintiff in error. Dorsey, Brewster & Howell and L. S. Roan, for defendant in error.

LEWIS, J. This was a complaint for land, brought in the superior court of Campbell county by J. W. Warlick against Mrs. M. B. Cochran; the land being a town lot in Fairburn, designated as No. 11 in block A. The abstract of titles attached to the petition was: (1) Deed from Richard Moore, Alfred Austell, and Nathan Camp, conveying to Atlanta & La Grange Railroad Company, now the Atlanta & West Point Railroad Company, dated and executed November 5, 1850, lots of land Nos. 66, 52, 47, 53, and the east half of 51, all in the Ninth district of originally Fayette, but now Campbell, county, Ga.; (2) deed from Atlanta & West Point Railroad Company, formerly the At-

lanta & La Grange Railroad Company, to James C. Warlick, dated and executed December 21, 1896, conveying lot of land No. 11 in block A in the town of Fairburn,—said lot being part of lot No. 52 in the Ninth district of originally Fayette, but now Campbell, county. There is no proof in the record that the grantors of the Atlanta & La Grange Railroad Company ever had any title or possession of the land conveyed. Plaintiff therefore amended his petition, claiming that his predecessors in title paid for the land and held uninterrupted and peaceable possession of it, including the premises in dispute, under color of title, for more than seven years. The defendant answered, denying such possession and title in the plaintiff; alleging that, if the railroad company ever owned the land in dispute, it parted with its title to the same; and averring that she in good faith purchased the land, paid for it, and held actual, adverse possession of it for more than 20 years prior to the bringing of this suit. After hearing the evidence, the court instructed the jury to find for the plaintiff, which they accordingly did. Defendant made her motion for a new trial on the general grounds, and on the further ground that the court erred in directing a verdict for the plaintiff. Upon the judgment overruling this motion, error is assigned in the bill of exceptions.

The plaintiff below introduced the deeds, an abstract of which was attached to his petition. It is clearly inferable from the evidence in the record that in 1850 the railroad company purchased several large tracts of land, including lot known as No. 52, and directly thereafter constructed its road, which ran through lot No. 52, and upon that lot erected its depot buildings, and had been in possession and use of this property (that is, the track and the depot buildings) from that time to the present. There is no evidence that it was ever in actual possession of the lot in dispute. It is inferable from the testimony that this was not then a town, but simply open land, when the railroad bought, and that, after the construction of its track and the location of its depot, the town of Fairburn by degrees grew up, and was built mainly upon this lot No. 52. Plaintiff's witnesses admitted that there had been for years a number of houses built on this lot, occupied as residences and business houses by private citizens, and some of them were located on lot No. 52, between the railroad depot and lot No. 11, in controversy. How the owners of these improved lots acquired possession of the same does not appear from the record, but the probability is that the railroad, after buying the lots, sold them off to individuals to occupy and improve. Upon notice, defendant's deed was introduced, which covered on its face only lot No. 9, upon which the dwelling house occupied by her was erected. This lot adjoined lot No. 11, the property in dispute. Testimony was introduced in her behalf to the effect that about the year 1852 these lots (Nos. 9 and 11) were occupied by one Smith, who built the dwelling thereon in which defendant lived, and that he placed in one inclosure by a fence both of these lots, and for years cultivated, used, and occupied lot No. 11 as well as No. 9. The two lots thus surrounded by one inclosure, with the dwelling thereon, evidently presented the appearance of a single residence lot. There was no evidence showing the indication of any line whatever between lots Nos. 9 and 11. It was shown that several other occupants went into possession of the land after Smith vacated; that they used and occupied both lots, 9 and 11, keeping up the one inclosure around both, until the year 1876. The defendant's husband during that year died, and his brother, according to the testimony, bought both lots for the defendant, paying his money therefor, taking deed to himself at the time, stating that he would collect money due his deceased brother's estate, and reimburse himself for the sum thus expended, and would make deed to the defendant. After this purchase, in 1876, he placed her in possession of the dwelling and the two lots, 9 and 11, which were then inclosed by a fence, and told her that she owned both of them, pointing them out to her. After this, it seems, he made her a deed, which included only lot No. 9. She did not read the deed. She thought there was really one lot in the entire inclosure, knowing nothing about the division of the town lots. She went into possession, repaired the fence that inclosed the two lots, planted an apple and peach orchard on the same, honestly believing that she owned both lots, having paid a consideration for both, to wit, over $200. She cultivated lot No. 11, in dispute, and several years during her occupancy of same rented it out, and received rents therefor from her tenants. Upon this lot was erected a barn by one of them, with the privilege of his removing it if he desired, but he finally gave her the building. A stable was also built thereon. This is, briefly, an account of her occupancy from the time she moved on the place in December, 1876, down to the bringing of this action, more than 20 years thereafter. It does not appear from the evidence that the railroad company made any claim to this land, or interfered with the possession and use thereof by the defendant, until the spring or summer of 1896, when it sent agents there to inquire into this title to the land occupied by the defendant, including the property in dispute. She readily showed them the deed that her brother-in-law had given her, and the agents then informed her that it covered only lot No. 9. These agents testified that she made no claim to lot No. 11 at the time, and, when they offered to sell, said she was not able to pay for same. She testified that, while she did say that she was not able to pay for it, she said she had been in possession of it for 20 years, and they told her that

did not make any difference; that did not give her title. This was the first time she knew that the deed only covered a part of the property she had purchased. One of the agents offered to sell it to her for $50, and, in his testimony, gave as one reason for such a low offer that he wanted to avoid this identical trouble that they were now going through with in this case.

We have carefully read the testimony in this case, and the above is a fair report of it, in substance. Now, when the plaintiff closed his testimony, he perhaps made out a prima facie case, upon the doctrine that where one buys a tract of land, and receives therefor a deed, accurately describing it by metes and bounds, and goes into possession thereof, using and occupying a portion of the tract thus conveyed, he has constructive possession of the remainder, and it ripens into a prescriptive title if it be thus held for seven years under color of title. We do not mean to say that when his testimony was closed a prima facie case was not made out for the plaintiff, but it was only prima facie, and subject to be rebutted by proof. If an action, therefore, be brought by such a claimant of land, against a party holding the property in dispute adversely, two defenses can be set up: First, that the plaintiff never had such possession, either actual or constructive, as would ripen into a title; and this could be shown by proving adverse possession in some other party, although defendant would fail to make out any title for herself or for such other persons holding adversely. Plaintiff must recover on the strength of his own title, and, if such proof as that were offered in defense to his suit, it would show a want of prescriptive title in him; that is, a want of the necessary possession, either actual or constructive, as could possibly ripen into title. Another defense would be that the defendant had, prior to the bringing of suit, been in bona fide, peaceable, and adverse possession of the property, in good faith, as her own, for 20 years; and this would show her title paramount to that of the plaintiff, even if the plaintiff and those under whom he claims ever showed any title to the premises prior to her possession. It is true that from the testimony of the agents of the railroad company, who inquired into the deeds of defendant, it might have been inferred that while she was in possession she virtually acknowledged ownership in the company, or at least not in herself. This would, perhaps, have been a legitimate inference, if what the agents said was all the testimony in the case. The jury, however, might have believed her version of the matter. The defendant gives a different explanation of the conversation with these agents from what they related,—that when they spoke about her title she informed them of her 20 years' possession, and then it was they told her that would not avail her. If she was thus misled, and induced to use language which could be construed into a quasi admission that she was not holding bona fide, it would by no means follow that the same was absolutely conclusive that her possession was not bona fide and under a claim of right, the more especially when she continued to hold adverse possession.

As the case goes back for a new trial, of course we do not mean to express any opinion in regard to the weight or preponderance of this evidence on either side; but we call attention to the above, with the view of demonstrating that the judgment of the court deciding that the evidence demanded a verdict for the plaintiff was, in our opinion, erroneous, and that he should have submitted the case for consideration by the jury, giving them in charge the principles of law herein embodied. Judgment reversed. All the justices concurring.

UNITED BEN. SOC. OF AMERICA v. FREEMAN.

(Supreme Court of Georgia. July 13, 1900.)

INSURANCE—ACCIDENT POLICY—NOTICE OF INJURY—FAILURE TO SERVE—WAIVER.

1. Where a contract of insurance between a benefit society and one of its members, which, among other things, covered accidental injuries, expressly stipulated that "written notice from the member or his representative, and a certificate from the attending physician, each stating the time, place, manner, and nature of injury, * * * must be received at the principal office of the society * * * within ten days after the date of injury, * * * as conditions precedent to recovery," and the insured sustained such injuries, but failed to give the prescribed notice thereof within 10 days from the date of the accident,—it not having been impossible for him to have done so,—the society, in the absence of a waiver on its part of the time limit as to such notice, incurred no liability in consequence of such accident.

2. The facts in this case do not show that it was impossible for the insured to have given the prescribed notice within the time limited. It is therefore unnecessary to decide whether impossibility of giving the notice within 10 days from the date of the injury would be a sufficient excuse for a failure to do so within that period.

3. One cannot be held to have impliedly waived a defense of the existence of which he had no knowledge at the time he did the act which is relied upon as a waiver thereof.

(Syllabus by the Court.)

Error from city court of Griffin; E. W. Hammond, Judge.

Action by W. T. Freeman against the United Benevolent Society of America on an accident policy. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Shepard Brown, for plaintiff in error. Lloyd Cleveland, for defendant in error.

FISH, J. The application of the plaintiff for membership in the United Benevolent Society of America contained the following language: "I also understand that benefits will be allowed only while I am under the care of a duly-accredited physician, and that I must notify the society at the home office, in writing, within ten days from the commencement of disability, in order to entitle me to

benefits." The written contract of insurance sued on was expressly made "subject to conditions on the back hereof." On the back of the same, underneath the headline, "Conditions under Which This Certificate is Issued and Accepted," were 14 numbered paragraphs, stating the conditions. The first of these was: "Written notice from the member or his representative, and a certificate from the attending physician, each stating the time, place, manner, and nature of injury, sickness, or death, must be received at the office of the society in Atlanta, Georgia, within ten days after the date of injury, commencement of sickness, or death, as conditions precedent to recovery. Benefits for which the society is liable shall be payable only after satisfactory, direct, and affirmative final proofs have been received by the society in Atlanta, Georgia." As the giving of the prescribed notice within 10 days from the date of the injury was expressly made a condition precedent to the liability of the insurance society, it inevitably follows that, if this notice was not given within the specified time, the society, in the absence of a waiver of the time limit on its part, would not be liable, unless, perhaps, the circumstances following the injury rendered it impossible for the notice to be given within the 10 days. No written notice of any kind of the injury was given to anybody within 10 days from the date of the injury, and no notice, either verbal or written, was given to any officer or general agent of the defendant corporation until after the 10 days had elapsed. On the day the plaintiff was accidentally hurt, he went to Griffin, to a doctor's office, to be treated, and while there sent for Slaton, the local soliciting agent and collector of the defendant, "and told him to notify the company that [the plaintiff] was hurt," which Slaton promised to do. Slaton, however, forgot to notify the society until more than 10 days had elapsed since the plaintiff received the injury; and when he did notify it he neither stated the time, place, nor the manner and nature of the injury. Even if the notice which he, acting for the insured, gave the insurance society, could be held sufficient in other respects, it was not given within the prescribed time, and therefore could not avail the insured, unless the society waived compliance with the condition as to time. The plaintiff does not contend that the verbal request which he made of Slaton was notice to the defendant corporation of his injury, and it is evident that notice to the mere local and collecting agent of the society at Griffin would not be notice to the society at its home office in Atlanta. The effect of the request which the plaintiff made of Slaton was that Slaton should act as his agent in notifying the society. Slaton failed to so act until the time prescribed within which to give the specified notice had expired. So a condition upon which the defendant's liability was dependent was not complied with.

2. The plaintiff contends that, notwithstanding this, the defendant is liable, for two reasons: First, because "plaintiff was totally incapacitated, on account of the accident, from attending to any business, or from writing to the company to give them any notice of the injury, for more than ten days, and did write them and furnish proofs as soon as he was able to do so"; second, because "the defendant company waived any notice of the injury within the ten days by sending out proofs to be filled after the ten days had expired." We deem it unnecessary to determine whether or not impossibility of giving the notice within the time limited would be a sufficient excuse for a failure to do so, for we do not think that the evidence is sufficient to show that the plaintiff could not have given the notice within the prescribed time. It probably would have been inconvenient for him to have done so, and, in order to have done so, he might have had to get some one else to write for him; but that he was, as contended by his counsel, for more than 10 days after the injury, totally incapacitated to give the notice to the defendant, does not appear from the testimony. On the very day that he received the injury he went from his home into the city of Griffin, and to a physician's office, in order to be treated, and while there sent for Slaton and told him to notify the insurance society that he was hurt. He had not lost the use of his mental faculties, for he realized both the necessity for getting medical treatment and the necessity for promptly notifying the defendant corporation of his injury, and he went to the office of the physician of his choice to be treated, and while in the doctor's office sent for Slaton, and asked him to notify the society of the injury which he had sustained. After this he sometimes went from his home to Griffin to see the physician, and sometimes the doctor went out to see him. He testifies that he "did not forget to notify the company," but "notified Slaton, and relied on him to notify the society"; that he "understood that [he] was required to give written notice, but expected Slaton to do it for" him. We think this testimony shows that he failed to notify the society within the time prescribed, not because it was impossible for him to do so, but because he relied upon and expected Slaton to do it for him. True, he did testify: "I was prostrated from my injury. I was not in mental or physical condition to think about giving the company notice in writing of my injury. I gave the notice as soon as I was able to do so." But the first part of this statement is inconsistent with the fact that he went to his physician's office in order to be treated, and the latter part of it is inconsistent with the fact that he actually did think about giving the notice, and sent for Slaton, and asked and expected him to give the written notice for him. The fact that the accident caused him to temporarily lose the sight of one eye, and rendered it for a time imprudent and probably dangerous for him to use the other, did not render it im-

possible for him to give the requisite notice to the insurance society during the time that he was thus disabled. He could have had some one else to write for him. Probably he could have got his physician to do this for him, especially as, by the conditions of the contract, a certificate from the attending physician containing the same information as that to be given in the notice from the insured was required. If the accident had resulted in the total and permanent loss of the sight of both eyes, the necessity for giving the prescribed notice would still have existed. Many accident insurance policies provide for the payment of a specified sum of money for the total loss of sight, and yet require written notice of the injury to be given the insurance company within a certain period of time. So, granting that it was impossible for the insured to use his eyes at all during the 10 days, we do not think this fact would be sufficient to excuse a noncompliance with the condition as to giving the notice during that period of time. The evidence was not sufficient to support a finding that it was impossible for the plaintiff to give the notice to the society within 10 days from the date of his injury.

3. Under the circumstances disclosed by the evidence, did the society, by sending out the blank forms to be filled out by the plaintiff and returned to it, waive the giving of the required notice within 10 days from the date of the injury? There is undoubtedly much excellent authority for holding that if the society, with full knowledge of the facts, required the beneficiary under the contract of insurance to do some act or incur some expense or trouble which was inconsistent with the claim that the contract had become inoperative, in consequence of a breach of the condition as to the time within which the notice should be given, then it impliedly waived this defense. But certainly no one can be held to have impliedly waived a defense of the existence of which he had no knowledge at the time he did the act which he relied upon as a waiver thereof. One cannot be held to have waived something of the existence of which he was ignorant. "Acts ordinarily amounting to a waiver of a forfeiture will not have that effect, in the absence of knowledge of the forfeiture." 28 Am. & Eng. Enc. Law, 527. In Bennecke v. Insurance Co., 105 U. S. 359, 26 L. Ed. 290, Wood, J., said: "A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. A fortiori is this the rule when there is no agreement, either verbal or in writing, to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party." It does not appear from the evidence that the society, at the time that it sent to the plaintiff the blank forms for the prescribed notice, knew that 10 days had elapsed since the accident occurred. So far as appears from the evidence, the only information which it had in reference to the accident was that contained in the letter from Slaton to its secretary. In this letter Slaton simply stated that "W. T. Freeman received a very bad accident several days since, and requested me to notify you, but the matter escaped my mind until now," and requested the secretary to "kindly send [Freeman] a preliminary blank." Upon receipt of this letter the letter from the society to Freeman, inclosing the blank forms, was written. Information that the accident had occurred "several days since" was not tantamount to information that 10 days had elapsed since its occurrence. The expression "several days" might have meant 2 or 3 days, or any number of days less than 10. When the letter from the society to Freeman was introduced in evidence, there appeared upon it the following memorandum, written with a lead pencil, "Notice late." The plaintiff contends that this memorandum shows that the society knew when this letter was written that the time within which the notice required by the contract should have been given had expired. We do not think so. The memorandum was no part of the letter, and it did not appear when or by whom it was made, nor whether it was on the letter when the same was received by the insured or not. Even treating it as a part of the letter, its meaning is by no means clear. It does not necessarily mean that the writer of the letter knew that 10 days had elapsed since the date that Freeman was injured. From Slaton's letter, the secretary of the society knew that Slaton had not promptly complied with Freeman's request to notify the society of the injury which he had sustained, and the purpose and meaning of the memorandum might have been simply to let Freeman know that the reason why the society had not sooner sent him the blank forms was because Slaton had delayed in notifying it of the injury. So, even admitting that this memorandum was made by the official of the society who wrote the letter, we do not think it is sufficient to show that the society then knew that the time limit had expired before it received Slaton's letter. It certainly does not seem sufficient to show that the insurance society had full knowledge of the fact that the time for giving the notice under the contract had elapsed, and without full knowledge of this fact there could be no implied waiver of the time limit. He who invokes the doctrine of implied waiver carries the burden of showing the existence of the facts necessary to constitute such a waiver. In this case, for the reasons stated, we are of opinion that the plaintiff failed to successfully carry this burden. Judgment reversed.

FLETCHER v. AMERICAN TRUST & BANKING CO.

(Supreme Court of Georgia. July 12, 1900.)

EXECUTORS—POWERS UNDER WILL—LOAN—LIABILITY OF ESTATE.

1. Under a will giving the executor power, should it be necessary, to raise in such way as it seems best to him a sufficient amount of money to pay the debts of the testator, the executor is authorized to borrow money for the purpose of paying such debts, and to secure the loan by mortgage or security deed.

2. Where money is borrowed under such power, it is not incumbent on the lender to ascertain whether there are debts of the testator or not; the loan being made within a reasonable time after the death of the testator and the probate of the will.

3. If, under such power, the executor borrows more money than is necessary to pay the debts, the estate is liable to the lender for the full amount, where there is no fraud or collusion between the executor and the lender, and where the latter has no notice of the amount of the debts. The legatees must look for reimbursement to the executor individually.

4. Under the will and the commercial practice in this state, the authority to raise money as above indicated necessarily implies the power, in borrowing money, to contract to pay attorney's fees in the event it should be necessary to collect the debt by suit; such contract being, however, enforceable only when the person making the same files a plea and fails to sustain it.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by the American Trust & Banking Company against A. A. Fletcher, executor. Judgment for plaintiff. Defendant brings error. Affirmed.

P. F. Smith and R. R. Shropshire, for plaintiff in error. W. D. Ellis and Gray, Brown & Randolph, for defendant in error.

SIMMONS, C. J. In August, 1892, Mrs. Fletcher made and executed a will. She died and the will was probated in October of the same year. In her will she appointed her husband, A. A. Fletcher, her executor. The first item of the will was as follows: "I desire that all my debts, should I owe any, be paid as soon as practicable by my executor after my death. He is authorized to use any money that I may leave for this purpose, or, should it be necessary, to raise a sufficient amount of money for this purpose in such way as seems best to him." By another item of the will the executor was given general power and control of the estate, with full authority to invest funds, change investments, make new investments, sell property, and buy other property. He was not to be required to make an inventory of the estate or to make returns as executor, and he was authorized to execute any of the powers conferred, "without order of court and privately, without publication or public sale, and as to him seems best for the beneficiaries." Fletcher qualified as executor, and as such applied to the American Trust & Banking Company for a loan of money with which to pay off the debts of the estate, representing to the officers of the company that the debts amounted to $4,700. The company on February 16, 1894, loaned him the money, taking his note, as executor, for $4,700, due February 16, 1899, and also a number of coupon interest notes, with agreement that, upon a failure to pay any of these interest notes upon maturity, the entire indebtedness should become at once due. The notes also stipulated for the payment of 10 per cent. attorney's fees in the event the notes had to be collected by suit. To secure these notes the executor, as such, executed a deed to certain land in the city of Atlanta. The interest note falling due in August, 1897, was not paid at maturity, and in February, 1898, suit was brought in the city court of Atlanta against the executor upon the principal note and upon the unpaid interest notes. The plaintiff prayed a general judgment against the executor, binding the estate, for a special lien upon the land conveyed by the security deed, and for attorney's fees. The executor, answering the petition, admitted the execution of the notes and deed, but denied that the estate of his testatrix was liable for the debt. He claimed that the debt was his individual debt, and that the plaintiff had no right to a special lien on the land, or to a judgment against the estate for attorney's fees. The case was submitted to the trial judge without a jury, and he passed upon all questions, both of law and of fact. The executor, in his testimony, admitted borrowing the $4,700 from the plaintiff, but testified that when he obtained the money the estate owed but $3,400. One of the officers of the company testified that the executor represented to him, when the money was loaned, that the estate owed debts to the amount of $4,700. The court rendered judgment against the estate for the principal, interest, attorney's fees, and costs, and set up the special lien on the land. The executor moved for a new trial. The motion was overruled, and the executor excepted.

Three questions are involved in this case: (1) Did the executor have power under the will to borrow money, and secure the debt by deed or mortgage? (2) Having such power, could he borrow more than the amount of the debts of the testatrix, so as to make the contract binding upon the estate, not only to the amount of the debts, but to the full amount borrowed by him? (3) Was he authorized to contract for the payment of attorney's fees in the event it should be necessary to collect the debt by suit? We have no doubt but that all these questions may be answered in the affirmative, under the rules governing the power given the executor by this will.

1. The will is clear and explicit that the executor had power, in case it was necessary, to raise money in such way as seemed best to him, for the purpose of paying the debts of his testatrix. When the executor,

in the administration of the assets of the estate, ascertained that it was necessary to raise money to pay the debts of the estate, he had full power to do so. It is a well-recognized principle of law that, where power is given to raise or borrow money, the power to secure the loan is necessarily implied. The will having given power to the executor to raise money to pay the debts of the estate, he had also the power to secure the loan by deed or mortgage; otherwise, he might have been unable to successfully execute the power expressly given him by the will. The executor had, therefore, not only the power to raise money for the purpose of paying the debts of his testatrix, but also the power to secure the loan by deed or mortgage.

2, 3. The question next arises, how much could the executor borrow, and to what extent would the estate be bound where he exceeded his authority? We agree with counsel for the plaintiff in error that the executor had power to borrow no more money than was necessary to pay the debts,—that his power was restricted to the exact amount of the debts. We do not, however, agree with him that as the estate owed but $3,400, and the executor borrowed $4,700, the estate was liable for $3,400 only, the balance being the individual debt of the executor. Were this the correct view of the law, it would put upon every lender of money to an executor with similar powers, and upon every purchaser from an executor who had power to sell to pay debts, the burden of inquiring into the amount and the validity of the debts of the estate. The law does not cast such a burden upon lenders or purchasers dealing with executors who have powers such as those given in this will. Where such powers are given, the testator constitutes the executor his agent to borrow or to sell, and binds his estate for the acts of the agent or executor done within the scope of the business intrusted to him. He alone knows the amount and validity of the claims against the estate, and where the money is borrowed or the sale made a short time after the probate of the will, and within the statute of limitations of notes, accounts, or specialities, nearly all the authorities agree that it is not incumbent on the lender or purchaser to make inquiry as to the amount or validity of the claims against the estate. If the contract or transaction is free from fraud and collusion, and the purchaser or lender has no notice of the amount of the debts, the estate is bound. Of course, if the lender or purchaser colludes with the executor, or has notice of the amount of the debts, and enters into the transaction to defraud the estate, or lends more money or purchases more property than is necessary to pay the debts, the estate is not bound. As early as the first volume of the reports of the decisions of this court, in the case of Bond v. Zeigler, 1 Ga. 324, we find a recognition of this principle. There the executrix, under a power authorizing the sale of property to pay debts, sold certain property to Bond & Murdock, who were creditors of the estate. The amount of their debt was allowed them, and, the property having sold for more than this amount, the balance was paid in cash. The property was afterwards levied upon by other creditors of the estate, who contended, among other things, that the purchasers were bound to ascertain the amount of the debts due by the estate. This court held (page 344) that in such cases purchasers are not "required, before buying, to look into the accounts of the executor to ascertain that he is faithfully administering his trust. The law presumes this in his favor." It is true that the sale was of personal property, and it may be said that the executor, having title thereto by virtue of his office, could have sold it, even without the power given by the will; but we find the same principle recognized in cases where the sale was of real property. In 2 Perry, Trusts (5th Ed.) § 809, it is said: "The purchaser need not inquire into the necessity of a sale. Even express notice of the entire contents of a will cannot affect a purchaser of a chattel; for a purchaser of real estate under a power of sale to pay debts is not bound to investigate whether there are debts, nor to see to the application of the purchase money. And, as all personal property is bound for the payment of debts, a purchaser is not bound to know whether there are debts or not, nor to see to the application of the purchase money." In Larue's Heirs v. Larue's Ex'rs, 8 J. J. Marsh. 157, the executors "were only authorized to sell so much land as was necessary to raise funds to pay the debts." They transcended these powers, and sold more land than was necessary to pay the debts. The court said: "The will * * * gave them authority to sell for the purpose of paying debts. If they abused or transcended their authority, they are responsible to the heirs or devisees; but bona fide purchasers from them or their vendees cannot be affected, unless they have notice of the improper conduct of the executors. What debts [the executor] owed, or how much land it was necessary to sell to pay them, were matters of which the executors should judge, and upon which they alone were competent to decide. The testator reposed confidence in them and gave them authority to act, and thereby strangers were invited to entertain confidence. It would therefore be unjust to permit strangers, who purchased in good faith, to sustain injury from the frauds of the executors." In Rutherford's Heirs v. Clark's Heirs, 4 Bush, 27, it was said: "When a will directs the sale of real estate, if necessary, for the payment of all the testator's debts or legacies, a purchaser at any such sale, not being presumed to know, or to be able by reasonable diligence to know, the condition of the estate or the extent of its indebtedness or of its assets, should be protected in his purchase, whenever made in good faith, without notice, actual or constructive, of the

latent fact that there was no necessity for the sale, and consequent want of authority to make it. If this were not so, prudent men would not bid a fair price at such sales." In Garnett v. Macon, 6 Call, 308, Chief Justice Marshall said (page 362): "The purchaser [of chattels] is not bound to make any inquiry. The general power of the executor to sell protects him in buying, but, if he buys with notice that the sale is a breach of trust, the property remains charged with it. I feel much difficulty in resisting the application of this principle to freehold estates charged with the payment of debts. It would seem to me as if the inquiry must always be into the fact. The question must always be, is the sale, taking its object into view, a breach of trust? And are the circumstances such as to charge a purchaser, having express notice, with a participation in the breach? The purchaser of a chattel from an executor, with notice that no debts are due, or in payment of his own debt, seems to me to present the same questions." And it was held by Brett, L. J., in Re Tanqueray-Williaume, 20 Ch. Div. 465, 482: "The question whether the purchaser's title [to real estate charged with the payment of debts] would be bad if there were not in fact any debts, supposing the time which has elapsed not to be too long, is determined by Stroughill v. Anstey, 1 De Gex, M. & G. 635, which is an authority for saying that, if there is a charge of debts upon the property, then, if the purchaser has no knowledge that there are no debts, he has, except under peculiar circumstances, a right to assume that there are debts, and that his title is good, whether there are or are not debts in fact. So far, therefore, from its being prudent in him to ask this question, it is imprudent to ask it, unless there has been sufficient lapse of time to call upon him to make that requisition." See, also, Smith v. Henning, 10 W. Va. 500, 640; 11 Am. & Eng. Enc. Law (2d. Ed.) p. 1053, and notes. These authorities clearly show that this principle applies as well to the sale of land charged with debts as to the sale of personalty. The cases cited deal with sales by the executor, but there is, in our opinion, no difference as to this matter between a sale under a power to sell to pay debts, and a mortgage given to secure a loan under a power to raise money to pay debts. It is incumbent on the lender to ascertain the power of the executor under the will, and, if the will gives the power to raise money to pay debts, it is not necessary for the lender to inquire into the amount of the debts, or into the validity of the claims against the estate. Where the loan is made a long time after the death of the testator, so that there arises a presumption that the debts have all been paid, the estate is not bound beyond the amount of the debts actually owed. The expiration of a long period of time after the qualification of the executor would be sufficient to put the lender upon inquiry as to whether there are debts. In the present case the loan was made within 18 months after the probate of the will, and no fraud or collusion or notice of the amount of the debts on the part of the mortgagee was intimated in the record. The executor had the power to borrow the money to pay the debts of the estate, and the lender had the right to presume that this power was properly exercised. Not only was the executor the sole judge of the amount of the debts, but he alone knew of the amount of funds of the estate which were available to pay those debts. In order to determine the necessity for the loan, it was necessary to know, not only the amount of the debts, but also the amount of funds already on hand which were available to pay the debts. Into these matters we think the lender was under no duty to inquire. He was protected, having loaned the money in good faith and without notice, although, as matter of fact, the amount loaned exceeded the amount of the debts of the estate.

4. The power of the executor to raise money necessarily implied authority to secure the loan. We think it also necessarily implied the authority to make a contract to pay the lender 10 per cent. attorney's fees in case the debt had to be collected by suit. Contracts to pay attorney's fees have been held good by this court, and are recognized by our Code (Civ. Code, § 3667). They are, however, not enforceable unless the party, when sued, files a plea and fails to sustain it. This court has held that the insertion of a stipulation for the payment of attorney's fees does not destroy the negotiability of a promissory note. It seems now to be the general practice in this state for the borrower of money to insert in his note or contract an obligation to pay attorney's fees in case the debt has to be collected by law. The power given the executor in the present case implied authority to raise the money in any proper and usual way, and the agreement to pay attorney's fees was not improper or unusual. We therefore hold that the executor, having power under the will to raise the money in such manner as seemed best to him, had authority to contract for the payment of attorney's fees if the note given had to be collected by suit. Judgment affirmed. All the justices concurring.

RAY v. ATLANTA TRUST & BANKING CO.

(Supreme Court of Georgia. July 13, 1900.)

EXECUTION—CLAIMS OF THIRD PERSON—DELAY—DAMAGES.

1. Where, upon the trial of a claim case, after evidence has been introduced, the claim is withdrawn, and the plaintiff in fi. fa. tenders an issue asking damages against the claimant for having made the claim for delay only, and this issue is tried, and a verdict given against the claimant for damages, the court cannot consider complaints, in the motion for a new trial of the damage case, of rulings made in the trial of the claim case. When the claim is withdrawn, and the new issue made up of whether the claim was interposed for delay

only, the latter is separate and distinct from the former.

2. In the trial of this issue of whether the claim was made for delay only, it was not error to refuse to allow counsel for the claimant to testify as to what would have been the testimony of his client in the claim case if the court had allowed the case to be reopened and such evidence introduced.

3. In the trial of such issue, evidence that the claimant had in two other cases filed claims to different tracts of land, levied on by different parties, and had afterwards withdrawn those claims, is not admissible, although such tracts of land were embraced in the same deed under which she claimed in this case.

4. In the present case there was no evidence to authorize a charge that "if the claimant made this claim in the first instance in the honest belief that her title was good, and afterwards became convinced that it was not good and ought not to prevail, but did not withdraw her claim as soon as such discovery was made and the forms of law would admit, she would be liable for damages, just as though the claim was made for delay only in the first instance."

5. The plaintiff failed in the present case to show affirmatively that the claim was filed or prosecuted solely for the purpose of delay, and a verdict awarding damages was contrary to law.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by the Atlanta Trust & Banking Company against A. F. Ray. Judgment for plaintiff, and defendant brings error. Reversed.

John C. Reed and W. R. Hammond, for plaintiff in error. Hunt & Golightly and Westmoreland Bros., for defendant in error.

PER CURIAM. Judgment reversed.

HUDSPETH v. HALL et al.

(Supreme Court of Georgia. July 18, 1900.)

PUBLIC FERRY—FRANCHISE—EXCLUSIVE PRIVILEGES—PRIVATE FERRY—INJUNCTION.

1. The right to establish and maintain a public ferry is a franchise, which, in this state, can only be granted by the proper county authorities. Such a grant carries with it no exclusive privileges, but such authorities may, under the laws of this state, grant the right to establish over the same stream such additional public ferries as the public convenience demands; and, if the first grantee is injured by the establishment and maintenance of another public ferry, he has no right of action to recover damages therefor. It is damnum absque injuria.

2. To lawfully establish and maintain a private ferry, no franchise is required. Such a right is incident to the ownership of land on both sides of a stream of water, to enable the owner to better use and enjoy his land. While the owner of a private ferry may lawfully charge and collect toll from persons incidentally crossing thereat, he cannot maintain the ferry for use by the public at large. If he does this, or if he seeks public patronage, or pursues the business of keeping up the ferry for the public, it loses its character as a private ferry. (a) The injunction in this case was not sufficiently comprehensive to protect the rights of the plaintiff. The defendant should have been enjoined from establishing a ferry designed to accommodate the public or any part thereof.

(Syllabus by the Court.)

Error from superior court, Baker county; A. H. Hansell, Judge.

Suit by S. A. Hudspeth against R. L. Hall and others. From a judgment granting an injunction, plaintiff brings error. Affirmed, with directions.

B. B. Bower and A. L. Hawes, for plaintiff in error. D. H. Pope & Son, for defendants in error.

LITTLE, J. Mrs. Hudspeth exhibited a petition against Baker county and the board of commissioners of roads and revenues of Baker county, joining with them certain private individuals, and alleged that she was the owner of a public ferry across the Flint river at the town of Newton, and that she and those under whom she claims have controlled and continuously operated said ferry, without interruption, for more than 70 years; that recently, on the petition of some of the defendants, the county commissioners of Baker county granted an order establishing a free ferry across Flint river within 200 yards of her ferry. She prayed for an injunction restraining the defendants from establishing or operating the ferry so authorized, or one at any other place on said river within 3 miles of the location of her ferry. On presentation of this petition a restraining order was issued, and pending a hearing for injunction the plaintiff amended her petition, and, by way of amendment, alleged that one R. L. Hall, since the filing of the petition, and not a party thereto, had begun and was operating in his own name a ferry, by means of a batteau, across said river, at the place where the county commissioners had authorized the establishment of the ferry which she sought to enjoin, and prayed that Hall should be made a party defendant to her petition as amended, and that he be enjoined and restrained in the same manner as the original defendants to the petition had been restrained, and that he be permanently enjoined from establishing and operating said ferry. At the hearing had on this amended petition, it was ordered that Hall be made a party defendant, and that he be restrained in the same manner and to the same extent as the original defendants had been restrained. By a subsequent amendment the plaintiff alleged that Hall did not intend to establish a private ferry, but that he was a merchant in the town of Newton, and, in collusion with other merchants of the same place, was seeking and intending to establish a public free ferry over the Flint river, near her own, although it was to be run ostensibly as a private ferry, by which, if he did so, plaintiff's franchise rights would be violated. She further alleged that Hall did not own the land on the east side of said river, where he proposes to put his ferry, and he therefore could not operate a private ferry, under the law, but that she owned the land on the Mitchell county side, where Hall intends to establish his ferry.

She also alleged that, even if Hall owned the land on both sides of the river, he had no legal right to establish a ferry within any distance of that of the plaintiff where it would hurt or injure her business in any way, because when she purchased the land she also purchased the exclusive ferry rights, franchises, and privileges, of which Hall had notice when he purchased. The defendants the board of county commissioners of Baker county answered the petition, and averred that, after having the legality of the contract they made passed on by counsel, they are advised that the same is not legal; that they accepted said advice, and on the 6th day of June, 1899, after the filing of the petition, rescinded their order previously granted to establish the ferry of which complaint is made. The other defendants, except R. L. Hall, in answering the petition admitted having joined in the petition for the establishment of a ferry by the county of Baker for the use of the public, but denied that they entered into any scheme to defraud the plaintiff of her ferry franchise, and they believed that the county authorities had a perfect right to establish such a ferry. They say that they have done no act towards the establishment or operation of a ferry at Newton, other than this, and that the county authorities have revoked the order establishing the ferry for which they petitioned. R. L. Hall answered that he had no connection with any of the schemes charged in the original petition. He denied that he had sought to deprive petitioner of the profits of her ferry, but said that he owns the land on both sides of the stream at the point named in the petition, and, being a merchant in the town of Newton, he did, before the original petition was filed, own and operate a boat, designated as a "batteau," across said stream for the benefit of his trade, and for the benefit and convenience of his customers, to whom he charged no toll, and that he had the legal right to operate said boat, and, being the owner of the land, he has the right to open and operate a free ferry across Flint river, under the laws of Georgia, or to charge toll for the same, and that the plaintiff has no exclusive right to operate a ferry; and he asked that the restraining order be dissolved, so that he could open and operate a free ferry or toll ferry across said river on his own land, just as he might desire, and as, under the law, he had a right to do. Further answering, he said that he is seeking bona fide and honestly to establish and operate a ferry at the place mentioned in the petition, for the accommodation of Mitchell county customers who come to the town of Newton to trade, and, if he is mistaken as to his ownership of the land on both sides of the stream, he will move down on his own land and establish a ferry, as it is not his intention to appropriate any of the land of the plaintiff for his purposes. He denied that the plaintiff purchased the exclusive ferry rights. On the hearing the judge denied the injunction as prayed, because, while the plaintiff had shown that she was the owner of an ancient ferry by prescription, that title by prescription did not carry with it any exclusive privileges; but inasmuch as it appeared that the plaintiff was the owner of four acres of land on which the approaches to the ferry were located, on each side of Flint river, he enjoined the defendant from entering on that land for ferriage purposes, either public or private, by batteaux or other boats. The plaintiff excepted to the refusal of the judge to sustain and recognize the plaintiff's exclusive ferry franchise, and to the refusal to grant an injunction prohibiting the defendant from establishing and erecting a private and free ferry at any point within three miles of the location of the ferry belonging to plaintiff, or within such close proximity thereto as to seriously and substantially interfere with the profits, value, and franchises of the same. By all of the answers to the original and amended petitions, all legal questions as to the right of the original defendants to establish a ferry are eliminated, and only the issues raised by the answer of the defendant R. L. Hall to the allegations of the original and amended petition are to be considered. Much evidence was introduced by both the plaintiff and the defendant. As, however, there seems to be no serious conflict between the parties, except as to the ownership of the land on both sides of the stream at the particular point where it was proposed to establish a ferry by the defendant, no reference is necessary to the evidence adduced, because, in our opinion, the application of certain legal propositions to the admitted facts will determine the rights of the respective parties to this controversy.

1. The claim by the plaintiff in error that she has an exclusive right to maintain her ferry at Newton, and that no ferry can be established within three miles up and down the stream from the location of her ferry, cannot be maintained. The right of a ferry is a franchise, and originally the power to grant it was in the legislature. The constitution of 1877, in paragraph 2, § 6, art. 6, declares that the courts of ordinary shall have such powers in relation to ferries as may be conferred on them by law; and by subsection 3 of section 4238 of the Civil Code the ordinary has been invested with original and exclusive jurisdiction in establishing, altering, or abolishing ferries in conformity to law. It must be understood that reference is had alone to public ferries. A consideration of the right to establish and maintain a private ferry will hereafter be had. It is not pretended that the plaintiff in error had a grant from the legislature or the county authorities to establish the public ferry which she maintained and operated at the town of Newton. It was very clearly shown, however, that she and those under whom she

claims had maintained and operated a public ferry at the same place across Flint river for a period of time approximating 70 years, continuously and without interruption. In the case of Williams v. Turner, 7 Ga. 348, it was ruled that from 7 years' exclusive and continued possession and enjoyment of a ferry right in this state a grant will be presumed. So that, notwithstanding Mrs. Hudspeth had no direct grant of a franchise to operate a public ferry, a grant will be presumed because of her exclusive and continued possession and enjoyment of this ferry right, and, to all intents and purposes, her rights are to be fixed and determined under the same rules as if she had actually received a grant of such right; but a grant to establish and operate a public ferry does not carry with it any exclusive right. In the case of Shorter v. Smith, 9 Ga. 517, it was declared that the ancient doctrine or the common law that the franchise of ferry, although not declared to be exclusive, is necessarily implied in the grant, is inapplicable to both the local situation and political institutions of this country. Judge Lumpkin, in delivering the opinion of the court in that case, said in relation to ferry rights, after referring to a declaration made by Chief Justice Taney, that a state ought never to be presumed to surrender its power, because the whole community have an interest in preserving it undiminished: "I may be allowed to add that the proposition which it establishes commands my entire assent and approbation, namely, that the grant of a public road, bridge, or ferry confers the right to construct the improvements only, and to receive certain rates of toll, but does not carry with it exclusive privileges, where none such are expressly given, and that by grants of this description the legislature or the inferior court, acting by their authority, are not deprived of the power of making other grants side by side with the former, and in the same line of travel, provided there be no express violation in the first grant." And in the case of Williams v. Turner, supra, it is the conclusion of Judge Nisbet, who delivered the opinion, that: "The legislature may grant as many ferry rights as it pleases. One grant to A. does not preclude another to B.; and, if A., being the first grantee, is injured by B.'s ferry, he has no right of action, for it is damnum absque injuria." As before observed, these principles of law apply alone to the establishment of public ferries. In the case last cited it was declared that if A. had a grant, and is injured by B.'s ferry erected on his own land without a grant, he is entitled to recover damages to the extent of his injury. We apprehend that the case of Dougherty Co. v. Tift, 75 Ga. 815, with the reasoning of which we do not entirely agree, was in some measure, at least, sought to be based on this latter proposition. But it is sufficient on this point to adopt the express adjudication of this court that the grant to establish a public ferry does not carry with it, under the law of this state, an exclusive right to a ferry franchise, and that, a ferry having been established for public convenience, it is entirely within the power, originally of the legislature, now of the county authorities, to authorize the establishment and maintenance of such other and additional public ferries on the same stream as may be considered necessary to subserve the public interests. In this connection, see, also, Wright v. Nagle, 48 Ga. 367. It is contended, however, that the provisions of section 613 of the Code, which declares that no private ferry charging toll shall be established on any water course within three miles of where public bridges are previously erected and kept up, applies in this case, and that under its terms no ferry can be established and maintained on the Flint river within three miles of the location of the ferry owned and operated by the plaintiff in error. This position is not tenable. This court, in the case of Greer v. Haugabook, 47 Ga. 285, in construing the act from which this section was codified, declared that it would be making, rather than expounding, law, to say that this provision of law referred to a public ferry, and that, if the legislature intended to include ferries in its provisions, it is only a fair presumption to suppose that they would have said so. So that this contention of the plaintiff in error must fail, and, as a matter of law, the plaintiff in error, by the grant (presumed) authorizing her to establish and maintain the public ferry, obtained no exclusive rights thereby, and it is perfectly competent for the county authorities to establish additional public ferries as the convenience of the public may demand.

2. Prior to the act of 1850 (Cobb, Dig. p. 958) the right to establish a private ferry was incident to the ownership of the land on both sides of the water desired to be crossed, but the owner of such private ferry was not entitled to charge and collect toll for crossing. By the act above referred to, which partly appears in section 616 of the Civil Code, any person who is the owner of land through which a stream passes may establish a ferry at his expense, and charge lawful toll for crossing. It will be observed that this act does not contemplate the establishment of a public ferry, but enlarged the rights of a landowner to establish a private ferry, by authorizing him to collect toll from persons crossing at his ferry. A difficulty arose in construing this act when considered with reference to other provisions of law, which were not repealed by its passage. On the one hand, the rights of the person having the franchise to operate a public ferry were to be protected. On the other, the convenience of individuals desiring to cross a stream in the immediate vicinity of the private ferry was to be considered. And this court, in the case of Greer v. Haugabook, supra, gave a meaning to the provisions found in this section which satisfactorily harmonizes the various provisions of law applicable to the subject.

In the opinion Judge McCay says that it was the duty of the court to reconcile the provision which declares that a public ferry is a franchise, and that the owner of the land does not have the right to establish a public ferry, and that which allows a landowner to establish and use a ferry and charge toll for crossing thereat. He says: "The solution which occurs to us is the distinction between a private and a public ferry. A man may have a flat on a stream, and may use it to carry over his own people, wagons, etc., and he may occasionally take over a neighbor, and take pay for it; yet it is not necessarily a public ferry, because he does not make it a constant, regular business. There is the same distinction between a carrier and a common carrier; between one who may on occasions hire out his horse, and a liveryman, or one who may at times take pay for a meal or bed from a traveler, and an innkeeper. Perhaps this, then, is the true meaning of these statutes, taken together. A public ferry is open to all. Regular fare is established. The ferryman is a common carrier. He is bound to take over all who come, and he is bound to keep up and in good order his ferry, and he is held to strict liability. Such a right exists, not as appurtenant to his land, but is a franchise which needs the grant of the proper public authority. A private ferry is mainly for the use of the owner, and, though he may take pay for ferriage, he does not follow it as a business. His ferry is not open to the public at its demand. He may or may not keep it going," etc. In a further reference to this act of 1850, this court, in the case of Whelchel v. State, 76 Ga. 650, said: "The act of 1850, codified in section 684 [now section 616], grants authority to the owner of any land through which a stream may pass, on both sides thereof, to establish a ferry or bridge and charge toll. But the act should be construed strictly, and cannot be extended to embrace any man who buys the right to land [to construct] a bridge or abut it on both sides of the river. It is a mere privilege given the owner to pass from one side of the river to the other on his own farm by a private ferry or bridge, and, as incidental thereto, to pass others across the stream upon the payment of toll." It thus appears that the right of establishing a private ferry, under the Code, is incident to the ownership of lands on both sides of the stream, and that the prime object in the establishment of a private ferry is to subserve the convenience of the owner of such lands; and, while the owner may lawfully charge toll for persons crossing thereat, it must follow, in order to give effect to the intention of the legislature, that the number and frequency of such crossings may serve to devest such ferry of its private character, and thus render its use unlawful, unless the owner receives from the authorities a grant to operate it as a public ferry. It cannot be held that one may lawfully establish a private ferry and seek the business of the public. The provision of law which allows the establishment of a private ferry will not be enlarged by construction so as to authorize the owner to enter into the business of carrying the public, or any considerable portion thereof, across the stream on which it is located. Its operation must be confined to the legitimate purposes for which it was authorized to exist, and when crossings are made by the public as a rule, and not as the exception, the ferry ceases to be a private one, under the statute, and cannot lawfully be operated without a grant from the public. It very plainly appears that the defendant Hall had no grant to operate a public ferry. It further appears by his answer that, notwithstanding this want of authority, he claims the right to establish and operate such a ferry; and, if this was not conceded, he further claimed the right to establish a private ferry for the express purpose of having a considerable part of the public to cross at such ferry. He had no right to establish a public ferry, nor a private one for the use of the public; and, while the judge restrained him from operating a public or private ferry at a particularly indicated place, the injunction should have gone further, and restrained the defendant not only from establishing and maintaining a public ferry, but also from establishing and maintaining a private ferry for the use of the public. The judgment is therefore affirmed, with directions. All the justices concurring.

FERST et al. v. BANK OF WAYCROSS.

(Supreme Court of Georgia. July 11, 1900.)

STATUTE OF FRAUDS—PROMISE TO PAY DEBT OF ANOTHER.

If a debtor apply to his creditor for further credit for goods to be used in connection with his business, which the creditor refuses; and a third person, pecuniarily interested in the success of the debtor's business, agree to assume the debt if the creditor will extend further credit; and the creditor discharge the debtor from the debt, look to the third person for payment thereof, and extend to the original debtor further credit,—the promise by the third person to pay the original debt is not collateral, but an original undertaking, and need not be in writing.

(Syllabus by the Court.)

Error from superior court, Ware county; J. W. Bennet, Judge.

Action by M. Ferst's Sons & Co. against the Bank of Waycross. A demurrer to plaintiffs' petition was sustained, and they bring error. Reversed.

Toomer & Reynolds, for plaintiffs in error. Leon A. Wilson, for defendant in error.

SIMMONS, C. J. In the petition of the plaintiffs, M. Ferst's Sons & Co., against the Bank of Waycross, substantially the following facts are alleged: In November, 1896, Lee

was indebted to plaintiffs in the amount of $618.09. He was carrying on a railroad wood and cross-tie business, and applied to them for a further line of credit, which they refused. Lee was indebted to the Bank of Waycross in a large amount, and the bank was interested pecuniarily in Lee's business, for the reason that Lee had agreed to deposit his gross receipts with the bank in payment of his debt to it; the bank allowing Lee to draw from it only the amount actually expended in the conduct of his business, thereby retaining the balance as a credit on Lee's debt to it. The credit applied for by Lee was for goods and merchandise to be used in his business. When the plaintiffs refused to extend further credit to Lee, the bank, in order that Lee might carry on his business, agreed that, if the plaintiffs would extend further credit to Lee, it would pay them the debt owed them by Lee; the agreement being that Lee should draw his draft on the bank in favor of the plaintiffs, and that the bank should accept this draft. In accordance with this agreement, plaintiffs extended further credit to Lee, and sold him on credit goods to a large amount. They released Lee from his obligation, and looked solely to the bank for payment. Lee drew a draft on the bank in their favor for the amount of his original debt, and the bank refused to accept it. Since that time, Lee died, insolvent. This petition was demurred to upon several grounds,—principally upon the ground that the agreement relied upon was within the statute of frauds, and was void because not in writing. The demurrer was sustained, and the plaintiffs excepted.

We think that, under the facts above stated, the promise of the bank to pay to the plaintiffs the debt of Lee was an original, and not a collateral, undertaking. Lee had applied for additional credit, and it had been refused upon the ground that he had not paid the old account. Upon the success of his business depended the payment of the large debt he owed the bank. Unless he could get supplies to run his business, he would necessarily fail, and the bank lose its debt. In order to enable Lee to carry on his business, the proceeds of which were to go to the bank, the bank undertook to pay the antecedent debt if the plaintiffs would extend further credit to Lee. The plaintiffs agreed, and extended Lee further credit to the amount of several hundred dollars. They discharged Lee from the debt, and looked solely to the bank. Here, then, was a consideration moving to the bank, not for the benefit of Lee, but for its own benefit, enabling Lee to continue his business, and the bank to receive the proceeds of that business. There was, also, hurt or damage to the plaintiffs; for they relied upon the promise of the bank, extended further credit, and thus lost the amount for which Lee was credited. The consideration for the bank's promise was beneficial to the bank, and hurtful to the plaintiffs. In the leading case of Leonard v. Vredenburgh, 8 Johns. 29, Chief Justice Kent, after defining two classes of cases within the statute of frauds, said (page 39): "A third class of cases, and to which I have already alluded, is when the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly-contracting parties." This class, he said, is not within the statute of frauds. This case has been followed by a majority of the courts of this country, and the principle seems now to be well established. In the present case the promise made by the bank was not for the benefit of Lee, the debtor. According to the allegations of the petition, the bank made the agreement for its own benefit. In discussing this subject, the supreme court of the United States, in the case of Emerson v. Slater, 22 How. 28, 16 L. Ed. 360, said: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." In the case of Hopkinson v. Davis, 5 Phila. 147, Hare, J., said: "The weight of authority would seem to be that when a promise to be answerable for the debt of another is based not only upon a new consideration, but upon a consideration which moves to and benefits the promisor, by inducing delay in the institution of proceedings that might otherwise * * * break up a business in which he is interested, the obligation is in fact his own debt, notwithstanding its form, and consequently not within the statute of frauds." See, also, Reed, St. Frauds, § 69 et seq., and the able and learned opinion of Savage, C. J., in Farley v. Cleveland, 4 Cow. 432, where he reviewed many cases, and came to the conclusion that in all cases "founded upon a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, either from the plaintiff or the original debtor, the subsisting liability of the original debtor is no objection to the recovery." In the case of Sext v. Geise, 80 Ga. 698, 6 S. E. 174, this court held, "If, while a house is building, the supply of lumber is about to stop because the contractor is not considered safe, and the owner of the building procures its continuance by promising to pay the bill, his undertaking is not collateral, but original."

Counsel for the defendant in error claimed that Lee does not appear to have been a party to this transaction, or to have agreed to it. We think there is enough in the petition to show that Lee was a party to the agreement. It is alleged that Lee applied for additional credit, that it was refused, and that "then and there" the bank, through its proper officer, made the promise to pay Lee's

debt, agreeing to do so by accepting his draft upon it. It is also alleged that Lee did draw the draft, but that the bank refused to accept it. The drawing of the draft showed that Lee understood the contract, and was a performance of his part of it. It appears that on the same day, or shortly thereafter, he bought goods from the plaintiff and obtained credit by virtue of the contract with the bank. While nearly all the cases we have read hold that if the debtor is released the promise is a new and original one, and binding on the promisor, though not in writing, yet there are many cases holding that an oral promise may be binding even where the original debtor is not released. In the case of Green v. Collins, 36 Ga. 581, it was held, in substance, that where, in consideration of the agreement of the guarantor or promisor, the creditor loses the means of enforcing his claim against the original debtor, it is not usually material whether the original debtor remains liable or not. However this may be, we think that the petition in the present case sufficiently shows that Lee agreed to the arrangement by which the bank was to assume his debt, even if it were granted that his drawing the draft was not a ratification. In the case of Brown v. Harris, 20 Ga. 403, Benning, J., said (page 406): "In our opinion, 'a mere substitution by plaintiff of Rogers & Meara as debtor in the place of Brown & Harris' would, of itself, have abrogated the debt as to Brown & Harris. That, as we conceive, would be the necessary effect of such a substitution." It would seem from this that if the contract was as set out in the petition now under consideration, and the bank was to be substituted for Lee as debtor, this would of itself be a discharge of Lee from liability, whether such discharge were expressly mentioned or not. The allegations would seem to show that Lee was present, in which event there can be no doubt in regard to the matter. See, also, Anderson v. Whitehead, 55 Ga. 277; Goolsby v. Bush, 53 Ga. 353; Davis v. Tift, 70 Ga. 52.

It was also insisted in the argument here that such a promise by the bank was ultra vires and not binding. That question is, in our opinion, a matter for plea, and not for demurrer. As the case comes here on demurrer, we cannot say whether the act was ultra vires or not. The charter of the bank is not before us, and we do not know what powers are by it given to the bank or to the bank's president. Judgment reversed. All the justices concurring.

McIVER v. FLORIDA CENT. & P. R. CO.

(Supreme Court of Georgia. Jan. 31, 1900.)

DISMISSAL OF ACTION—SECOND SUIT—EJECTION FROM RAILROAD TRAIN.

1. Though the plaintiff in a suit which had been properly removed from a state to a federal court having concurrent jurisdiction of the cause of action on which the suit was founded was nonsuited, or voluntarily dismissed his case in the United States court, it was, nevertheless, his right to bring another suit on the same cause of action in the state court at any time within the statute of limitations applicable to such an action. The above is true, notwithstanding in the second suit the damages were laid in an amount which would prevent another removal to the federal court.

2. The petition set forth a cause of action as against the demurrer filed to the same.

3. When a suit is commenced in a state court and removed to a federal court under the law of congress, not only the case, but the cause of action, is removed; and, after dismissal or nonsuit in the federal court, it cannot be renewed in the state court for the same cause of action, though the damages are laid in an amount of which the federal court has no jurisdiction. Per Simmons, C. J., and Little, J., dissenting.

(Syllabus by the Court.)

Error from city court of Brunswick; S. C. Atkinson, Judge.

Action by Priscilla McIver against the Florida Central & Peninsular Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Garrard, Meldrim & Newman and D. W. Krauss, for plaintiff in error. Crovatt & Whitfield, for defendant in error.

COBB, J. Priscilla McIver brought an action against the Florida Central & Peninsular Railroad Company, alleging in her petition, which was filed on January 17, 1899, in substance as follows: The defendant, a railroad corporation, damaged her in the sum of $1,999, in that on July 17, 1897, her minor son, with a companion, had, with the consent of a negro train hand, boarded a freight train of defendant to go from one station on the road of defendant to another. They paid to a train hand the sum of 90 cents as fare, the latter agreeing to see the conductor in reference to the matter. Her son and his companion first went into a box car, and afterwards left the same and got on a flat car. While on the latter car, and the train was in rapid motion, a white man, having on the uniform usually worn by the employés of the company, "who petitioner believes and charges was the conductor in charge of the train, together with two negro train hands, one of whom was the party to whom" the 90 cents had been paid, came upon the flat car and demanded to know where they were going, to which a reply was made that they had paid their fare to one of the train hands present. One of the train hands asked if they had any money, to which a reply was made that they had, whereupon he demanded the same, and upon the refusal of the companion of petitioner's son to deliver the money the train hand attempted to take the same, and "did then and there brutally, cruelly, and inhumanly assault and beat your petitioner's said son, and did then and there force and hurl him from said rapidly moving car and train, thereby instantly causing his death." The injuries resulting in the death of her son were inflicted by the "defendant,

its agents, servants, and employés." At the time of the death of her son he was 17 years of age, and had been earning $1 per day. He was unmarried, left no wife and child, and petitioner was dependent upon him, and he contributed to her support. One of the paragraphs of the petition was as follows: "Your petitioner further shows that at the May term, 1898, of the city court of Brunswick, in and for said county, she instituted her suit against the said defendant company for the homicide of her said son, which suit was subsequently removed to the United States circuit court for the Eastern division of the Southern district of Georgia, when, on the 16th day of January, 1899, and during the November term, 1898, of the said circuit court, after the evidence for the plaintiff in said case had been concluded, upon her motion the said case of your petitioner was discontinued and dismissed from said court; and the plaintiff now, within less than two years from the accruing of said cause of action, comes and reinstitutes her said case against said defendant in conformity with law." To the petition the defendant filed a demurrer, which was, in substance, as follows: (1) The injuries alleged do not appear to have been caused by defendant, or any one acting with its permission, or under its command, or in its behalf, within the scope of the duty imposed upon such person. (2) It does not appear that the relation of passenger and carrier existed between plaintiff's son and defendant. (3) It appears that plaintiff's son was engaged with his companion in an undertaking to violate the rules of the defendant and defraud it of its revenue. (4) It appears that the train was a freight train, and not a passenger train, and it is not alleged that such train was accustomed or authorized to carry passengers. (5) It appearing that another suit on the same cause of action had been brought in the city court of Brunswick, in which the damages were laid at $10,000, and removed to the United States court, and there discontinued and dismissed, the city court of Brunswick has no jurisdiction to entertain the present suit, and the laying of damages in this suit at $1,999 is an attempt to deprive the United States court of a case solely within its jurisdiction by virtue of the removal referred to. The demurrer was sustained, and the plaintiff excepted.

1. The last ground of the demurrer will be first dealt with. When one brings an action in a court having jurisdiction to determine the same, and is nonsuited or voluntarily dismisses the case, such nonsuit or dismissal does not determine in any way the merits of the controversy; and as a general rule the plaintiff may, if not barred by the statute of limitations, institute a similar suit in the same court, or in any other court having jurisdiction of the action, or he may adopt a different remedy appropriate to the cause of action, and enforce it in the court in which the first suit was brought, or in any other court having jurisdiction to enforce the same. In the language of one writer, a nonsuit "is but like the blowing out of a candle, which a man at his own pleasure may light again." 1 Freem. Judgm. § 261, citing March, Arbitraments, 215. See, also, 3 Bl. Comm. 296; Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; Homer v. Brown, 16 How. 354, 365, 14 L. Ed. 970; Smith v. Floyd Co., 85 Ga. 420, 11 S. E. 850; Phipps v. Alford, 95 Ga. 215, 22 S. E. 152; Civ. Code, § 5043. The question raised by the ground of the demurrer now under consideration is whether the removal of a case to a federal court from a state court which has concurrent jurisdiction of the same, and the entering of a judgment of nonsuit or the allowance of a voluntary dismissal in the former court, prevents the bringing of another suit on the same cause of action in the state court, when at the date the latter suit is filed the cause of action is not barred by the statute of limitations. An action brought in a court of this state, and there nonsuited or voluntarily dismissed or discontinued by the plaintiff, may be renewed in any court having jurisdiction of the cause of action, upon payment of costs. Id. If the cause of action was not barred by the statute of limitations when the suit was originally brought, the action may be recommenced at any time within six months after the dismissal or nonsuit, notwithstanding it may have become barred while the first suit is pending. Id. § 3786. The city court of Brunswick and the federal court had concurrent jurisdiction of the cause of action on which the first suit was founded, the damages being laid at $10,000. The suit was originally brought in the former, and regularly and lawfully removed to the latter, court, and there voluntarily dismissed by the plaintiff. The plaintiff then sought to bring another suit, in which the damages were laid at $1,999, on the same cause of action, in the city court. If the cause of action was barred by the statute of limitations at the time such new suit was filed, then the case would have been properly dismissed, as it has been held by this court that when a case has been removed to the federal court, although there may be no adjudication in the federal court on the cause of action, if the same becomes barred while the case is pending in the latter court the action cannot be renewed in the state court within six months, under the provisions of the section above quoted. Cox v. Railroad Co., 68 Ga. 446. The same is true where the suit was originally brought in the federal court. Publishing Co. v. De Laughter, 95 Ga. 17, 21 S. E. 1000. There is certainly nothing in either of the cases just cited to call for a ruling that no action could ever be brought in the state court merely because of the removal of the former suit to the federal court, if the cause of action is not barred by the statute of limitations. The only point necessary to be decid-

ed in the Cox Case was, whether the law contained in the section of the Code above cited had any application to a case removed to the federal court. In that case the suit had been brought in a state court, and had been properly removed to the federal court, and while there a period of time had elapsed which would have the effect of barring the plaintiff from bringing another suit based on the same cause of action. It was held that the case could not be recommenced in the state court, as the six-months statute above referred to did not prevent the bar of the statute of limitations from attaching to a cause of action removed to the federal court. There is some language, both in the headnote and in the opinion, which would seem to indicate that the case could not have been recommenced in the state court, notwithstanding it was not barred by the statute of limitations; but such language went further than the facts of the case justified, and what is thus said is not binding as authority. The last sentence of the first headnote, that "section 2932 of the Code (Civ. Code, § 3786) does not apply to such a case," is significant, as indicating the real question involved in that case. Moreover, the court passed upon the merits of the case, and held that the plaintiff failed to make out his case. The case might well, therefore, have been put upon that ground.

The case of Kern v. Huidekoper, 103 U. S. 485, 26 L. Ed. 354, cited in the opinion in the Cox Case, does not decide the question presented by the present record. All there ruled (and there are a number of other rulings of that court to the same effect) is that, when a case has been removed from a state court to a federal court, any action taken by the state court while the case is pending in the federal court is coram non judice and void. We do not for a moment question the correctness of these decisions. When a case has been removed from a state court to the federal court, the latter court certainly has complete and exclusive jurisdiction of that particular case. The state court is ousted of all jurisdiction over the action, and any action taken by it after such removal would, of course, be void. If the supreme court of the United States has ever ruled that a case which has been nonsuited or disposed of in the federal court without a decision upon the merits cannot be recommenced in a state court of concurrent jurisdiction, if permitted by the statutes of the state, we have, after a most diligent search, been unable to find it. The supreme court of Ohio, in the case of Railroad Co. v. Fulton, 53 N. E. 265, 44 L. R. A. 520, which is cited on the brief of counsel for defendant in error, has made a direct ruling upon the question now under consideration. That case is, so far as we can ascertain, sui generis. The case of Cox v. Railroad Co., 68 Ga. 446, is cited to sustain the view therein expressed, but we think the Ohio court has entirely misapprehended the ruling in that case. A writer in the law magazine, Case and Comment, of July, 1899, has this to say in reference to the Ohio case and the Cox Case: "The right to bring a new action in a state court after dismissal of a prior action on the same demand by a federal court into which the cause had been taken by removal is denied by the Ohio supreme court in the case of Railroad Co. v. Fulton, 53 N. E. 265, 44 L. R. A. 520. This court declares that the jurisdiction of the federal court in case of removal extends to 'any suit thereafter brought on the identical cause of action after the former suit has been dismissed by it until the cause of action has been extinguished by a judgment on the merits.' The case of Cox v. Railroad Co., 68 Ga. 446, is cited as a precedent, but that was a materially different case, in which the decision was that after nonsuit in a federal court a renewal of the action in the state court was not a part of the original case, or 'on the same footing with it' with respect to the statute of limitations. The possibility that a plaintiff might improperly permit the dismissal of a cause after removal, for the purpose of beginning again in the state court, and thus compel the defendant to remove the cause again or else submit to the state court, is one ground of the Ohio decision. But the unnecessary trouble caused to a defendant by dismissing an action and suing anew is not confined to cases that have been removed from a state court. It does not in other cases prevent the plaintiff from commencing a new action after dismissing the former one, and the difference in respect to actions removed into a federal court is only in degree. The distinction between reinstatement of an action and the bringing of a new action does not seem to have been much considered in this case. Because a case can be reinstated only by the court that dismissed it, it is said that, 'by parity of reasoning,' a state court cannot pass on the right of the plaintiff to recommence an action after it has been dismissed by a federal court. But commencement of a new action, although for the same cause, is not a reinstatement, but a distinct and independent case. Exclusive jurisdiction of an action is a very different thing from exclusive jurisdiction of all possible actions for the same cause. An election to bring an action in one of two courts of concurrent jurisdiction is not usually irrevocable. After dismissal of the first one, the plaintiff has the same choice between the courts that he had originally. There seems to be no reason why this should not apply where the concurrent jurisdiction is in state and federal courts. If bringing an action originally in the federal court does not give it such exclusive jurisdiction of the entire cause of action as to prevent bringing any action therefor in a state court after the federal suit is dismissed, why should this be the result of removing a suit from a state court into a federal court? In either

case it is difficult to see why, after an action has been dismissed without prejudice to the right to bring a new action, the plaintiff has not the same election that he had in the beginning with respect to jurisdiction." The writer of the above-quoted article thoroughly apprehends the true relation of the Cox Case to the question now under discussion, and his reasoning not only demonstrates the correctness of the conclusion reached by us, but also that there is nothing in the Cox Case really in conflict with the present ruling, and that the Ohio case is not based upon sound reasoning. There being no authority which would bind this court on the question under consideration, the case should rest solely upon principle. If an action had been brought in one of the courts of this state, and there nonsuited, or voluntarily dismissed or discontinued by the plaintiff, no one would contend that it might not be recommenced within due time in the same court, or in another court of this state having concurrent jurisdiction of the action. If a suit has been begun in the federal court, and there nonsuited or discontinued, another suit on the same cause of action could certainly be brought in a state court having jurisdiction of such an action. The superior and city courts of this state are courts of concurrent jurisdiction with the circuit court of the United States of the district embracing the county where such superior or city courts are located, as to certain cases; and there is no good reason why the rule applicable to state courts should not apply, merely because one is a state and the other a federal court. The act of congress provides that certain cases may be removed from the state court to the federal court, but this does not mean that the cause of action is removed. The act refers in terms to suit, and not cause of action. Until the state court is absolutely deprived of jurisdiction of a particular cause of action, it may take jurisdiction of and pass upon the same, with the exceptions above noted,—that when the federal court has taken jurisdiction the state court cannot take any action in connection with the same so long as the cause is pending in the federal court. But when that court denies to the plaintiff a hearing, or fails for any reason to pass upon the sufficiency of his cause of action, he may bring the same again in the state court, and invoke an adjudication of that court. And the fact that the new suit is for an amount which will prevent another removal to the federal court will not invalidate the suit. If the plaintiff in the new suit voluntarily abandon a portion of his claim for damages, it does not seem that the defendant should complain. The policy of the laws of the United States is to compel persons having claims of small amounts to litigate in the state courts, and voluntarily giving up a portion of his claim for damages, and being content to accept a sum less than the federal court would entertain jurisdiction of, would not seem to be contrary to the laws of the United States and its established public policy in reference to the jurisdiction of its courts. The court had jurisdiction of the cause, and the ground of the demurrer raising objection to the jurisdiction was not well taken. See, in this connection, Willson v. Milliken (Ky.) 42 L. R. A., and notes on page 459 (s. c. 44 S. W. 660).

2. The petition set forth a cause of action as against the demurrer filed to the same. The petition, in effect, alleged that one of the train hands, in the presence of the conductor, and impliedly with his consent, attempted to commit a robbery upon the companion of plaintiff's son, and while so engaged did hurl plaintiff's son from a rapidly moving train, from which he received injuries causing his death. Under such circumstances, the defendant would be liable, whether the plaintiff's son was upon the train lawfully or unlawfully, and without regard to what was the character of the train. See Higgins v. Railway Co., 98 Ga. 751, 25 S. E. 837; Smith v. Railway Co., 100 Ga. 96, 27 S. E. 725; Railway Co. v. Godkin, 104 Ga. 655, 30 S. E. 378, and cases cited. Judgment reversed. All the justices concurring, except SIMMONS, C. J., and LITTLE, J., who dissent.

LITTLE, J. I cannot concur in the ruling made in this case by a majority of the court. In my opinion, when a suit is commenced in a state court, and removed to the federal court under the law of congress, not only the actual case pending, but the cause of action upon which it is founded, is also removed, and, after dismissal or nonsuit in the federal court, another suit on the same cause of action cannot be entertained by the state court, although in the second action the damages are laid in an amount less than the limit fixed by the act of congress to entitle a defendant to a removal when there is diverse citizenship. As was said by Mr. Justice McLean in the case of Gordon v. Longest, 16 Pet. 97, 10 L. Ed. 900, "One great object in the establishment of the courts of the United States, and regulating their jurisdiction, was to have a tribunal in each state presumed to be free from local influence;" and it was doubtless the purpose of congress, in providing for the removal by a nonresident defendant of a case brought against him in a state court, to protect such nonresident, in the trial of his case, from the local influence which might exist in favor of the resident plaintiff in the state court. This purpose would be entirely defeated, if, after a plaintiff has instituted an action to recover damages for an injury which she claims to have sustained by reason of the wrongful act of the nonresident defendant, as in this case, and has named a particular amount as the proper measure of her damage, and, exercising the right conferred by the congress, the defendant by lawful proceedings stays the jurisdiction of the

state court, and brings the action before the federal court for determination, and when that case has been dismissed in the federal court, the plaintiff may again bring and maintain her action against the same defendant for the same causes for which she first complained in the state court, by arbitrarily fixing her damages in the second suit at a less amount, so as to place the last case brought out of the jurisdiction of the federal court. The amount involved in the controversy is, under the act of congress, an incident. Congress had for its object in providing for the removal of causes the better protection of aliens and nonresidents. The state court would be no less competent to deal with a cause involving $2,100 than it would be to deal with a cause involving $1,900. While the right of removal exists only in a case where the sum involved is not less than that named in the statute, yet the consideration which moved the minds of the lawmakers to authorize the removal rested in the purpose to provide a trial free from local influence which was thought might be prejudicial to the defendant's cause, and not on the particular amount involved, except in so far as the importance of the case to the defendant was concerned. In other words, the prerequisite to removal, that a case should involve not less than $2,000, was required because of the intention to limit such removal to cases which were deemed particularly important on account of the amount involved. As to those cases not deemed particularly important, the right of removal on account of diverse citizenship was not granted. Hence, in our opinion, the amount involved in a suit is to be considered only with reference to the question whether it may be removed. If it has once been removed, that cause, that controversy, stays removed. When it is taken out of the jurisdiction of the state court, that same cause between the parties cannot again be assumed by it, not because of the amount involved, but because, being a case which was authorized by law to be removed as originally brought, the removal has the effect of vesting jurisdiction of that cause, in all its phases, in the federal court, which can alone finally adjudicate the controversy existing between the parties on the issues made by the pleadings. In Kern v. Huidekoper, 103 U. S. 485, 26 L. Ed. 354, it was said, "The suit and the subject-matter of the suit are both transferred to the federal court by the same act of removal," etc. In my opinion, the right of a plaintiff, after the removal of a case has been legally effected, to renew the action in the state court after a dismissal in the federal court, is not an open question in this state. It was ruled by this court in the case of Cox v. Railroad Co., 68 Ga. 446, that, when a case has been removed from a state court to the circuit court of the United States, the jurisdiction of the former ceases, and after nonsuit in the federal court the case cannot be renewed in the state court within six months, so as to avoid the statute of limitations. By a provision of our state law, a case which has been dismissed may within six months be renewed, and the statute of limitations can only be made to apply to time and the date at which the first suit was begun, in determining the question whether the last suit is barred by the lapse of time. The plaintiff in the Cox Case, supra, sought to make this rule apply to the renewal of his case in the state court from which it had been originally removed to the federal court, and he was there nonsuited. In delivering the opinion of the court, Chief Justice Jackson said that: "The act of removal ipso facto transfers the jurisdiction of the cause to the circuit court of the United States, and devests that of the state court. * * * Therefore, when it appeared that the plaintiff himself proved, in order to take his case without the statute of limitations, that it had been removed and adjudicated by the United States court, he removed himself out of court, and was properly nonsuited." It is said in the opinion of the majority that the exact question under discussion was not involved, and that the language used by the chief justice was obiter dicta. On the contrary, I conceive the case affords a direct ruling on the question involved. The point in question has also been expressly decided by the supreme court of Ohio in the case of Railroad Co. v. Fulton, reported in 53 N. E. 265, 44 L. R. A. 520. That court ruled the question in the following language: "Where a case that may be is duly removed from a state to a federal court, the jurisdiction of the state court over the cause at once ceases, and it can take no further step therein; and, if thereafter the case is disposed of in the federal court otherwise than on the merits, the plaintiff cannot recommence the action in the state court, although under like circumstances he might have done so had the cause not been removed." The reasoning of the court seems to me not only to be sound, but conclusive. It is based on the proposition that the federal court, having acquired jurisdiction of the action by its removal from the state court, must, on principle and the reason of the statute, retain it for all purposes,—for the purpose of determining whether it should be reinstated, or recommenced after it had been dismissed or stricken from its docket, as well as for its determination on the merits. It was also stated in the opinion rendered in the case that the jurisdiction of the federal court "in such case does not merely embrace the suit brought and removed, but any suit thereafter brought on the identical cause of action after a former suit has been dismissed by it, until the cause of action has been extinguished by a judgment on the merits." The Chief Justice agrees with the views above expressed, and we both think that the judgment of the court below should have been affirmed.

BELL v. SAPPINGTON et al.

(Supreme Court of Georgia. July 13, 1900.)

CONTRACT—CONSIDERATION—STATUTE OF FRAUDS.

1. A contract made by a parent with her daughter and the latter's intended husband, to the effect that if the contemplated marriage is solemnized, and the husband will expend the necessary amount of money in building a dwelling house upon a vacant lot belonging to the mother, she will convey the lot to the daughter, is supported by a sufficient consideration.

2. When such a contract, though resting entirely in parol, has been performed by the solemnization of the marriage and the improving of the lot at the son-in-law's expense, as agreed, it is taken out of the operation of the statute of frauds.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by T. H. Sappington and S. K. Sappington against Lucy M. Bell. Judgment for plaintiffs, and defendant brings error. Affirmed.

P. F. Smith and R. R. Shropshire, for plaintiff in error. Abbott, Cox & Abbott, for defendants in error.

COBB, J. The material averments of the petition in the present case are as follows: The petitioners are T. H. Sappington and Mrs. S. K. Sappington, and the defendant is Mrs. Lucy M. Bell, the mother of Mrs. S. K. Sappington. Petitioners are husband and wife, having intermarried in February, 1898. In contemplation and consideration of such marriage, petitioners and the defendant entered into a tripartite contract, by which it was agreed among them that the marriage should be solemnized, and that T. H. Sappington should furnish material necessary to build a dwelling house upon a one-acre lot belonging to the defendant, and that the defendant after the house was built would make to Mrs. S. K. Sappington a deed in fee simple to the lot. It was understood between the parties that the money expended by T. H. Sappington for the material to be used in erecting the house was "in equity to be considered as paid and furnished" in behalf of his wife. Petitioners fully and in all respects performed and carried out their part of the contract, T. H. Sappington buying and furnishing the material necessary to build the house. During the time the house was being built petitioners gave their time and attention to the building of the same. On November 24, 1898, defendant asked petitioner T. H. Sappington to have a deed to the lot in question prepared for her to make and deliver in accordance with her contract. This deed was prepared and submitted to the defendant, and she recognized and stated that it properly described the lot in controversy, and promised that she would sign and deliver it at once. Shortly after the house was built the petitioner Mrs. S. K. Sappington moved into the same without any objection being made by the defendant, who also moved into the house, and remained there until May, 1899. At that time she removed, and left petitioners in exclusive possession, T. H. Sappington having moved into the house, and they have remained in possession until the present time, and have given time, care, and labor to the preservation, protection, and taking care of the premises, treating it as the property of Mrs. S. K. Sappington, and paying the taxes thereon. Shortly after she left the premises the defendant placed the property in the hands of real-estate agents for sale, and has attempted to sell the property, defendant claiming that petitioners are tenants at sufferance of hers. Petitioners have requested defendant to at least pay back the money expended in building the house, and for taxes on the same; but she has refused either to do this, or to make the deed as she agreed to do. Petitioners pray—First, that defendant be decreed to make and deliver to Mrs. S. K. Sappington a fee-simple deed to the premises in dispute; second, that, if for any reason this cannot be done, the defendant be decreed to pay to Mrs. Sappington the sum expended in building the house, besides interest, and the amount expended by petitioners as taxes on the property, this amount to be reduced by the value of the premises for rent during the time petitioners have been in possession; third, that until the hearing an injunction be granted restraining defendant from alienating, incumbering, or "in any wise putting a cloud upon the title" of the property, or changing the status thereof in any way. The defendant demurred to the petition on various grounds, among them being that there was no equity in the petition; that the contract sought to be enforced was not in writing, as required by the statute of frauds; that there was no consideration for the promise of defendant flowing from S. K. Sappington; that, the only possible consideration being the contemplated marriage, the subsequent marriage was not such part performance as took the case out of the statute of frauds. The court overruled the demurrers, and granted the injunction as prayed, and to each of these judgments exception was taken by the defendant.

We do not think there was any error in overruling the demurrers to the petition. There was equity in the petition, and the same does not seem to be subject to any of the objections set up in the special demurrers. In dealing with the case, however, we will refer only to such questions as were insisted on in the argument. It was contended that the petition was defective, because there was no distinct allegation that the contract was made with any particular person. It was distinctly alleged that the petitioners and the defendant entered into an agreement whereby, upon the performance by T. H. Sappington of the undertaking therein provided for, the defendant was to make and deliver to Mrs. Sap-

pington a deed to the lot in question. These allegations, fairly interpreted, mean nothing less than that there was an agreement between Mrs. Bell and her daughter that the latter should be entitled to a conveyance of the property upon the performance by the husband of certain acts. Mrs. Sappington was the real party to the agreement, and the one to be benefited by its being carried into effect, and her husband, although he was not to receive any direct benefit from the agreement, was the person from whom the consideration was to move. If there is a valid consideration for the promise, it matters not from whom it moved. The promisee may sustain his action, though a stranger to the consideration. Civ. Code, § 3664.

Treating the petition as one setting up an agreement between Mrs. Bell and her daughter, did it set forth a cause of action as against the objections that the agreement relied on was within the statute of frauds, and that there was no consideration moving to Mrs. Bell to support the alleged promise made by her? Performance of a parol contract for the sale of land will be decreed if it be so far executed by the party seeking the relief, and at the instance or by the inducements of the other party, that if the contract be abandoned he cannot be restored to his former position. Id. § 4037. As a general rule, equity will not decree the specific performance of a voluntary agreement or a mere gratuitous promise. To this general rule there is, however, an exception. If possession of land has been given under such an agreement, upon a meritorious consideration, and valuable improvements have been made upon the faith of the agreement, a court of equity will decree a specific performance of the agreement. Id. § 4039. In the case of Mims v. Lockett, 38 Ga. 9, 20, Judge Lyon says: "It has been settled that when a parol agreement is clearly proved, in consequence of which one of the parties has taken possession and made valuable improvements, such agreement shall be carried into effect. We see no material difference between a sale and a gift, because it certainly would be fraudulent in a parent to make a gift which he knew to be void, and then entice his child into a great expenditure of labor, of which he meant to reap the benefit himself." In that case there was a parol agreement between a father and his son-in-law that the former would give to the latter certain land upon his moving upon the same, and upon the faith of this parol promise he did move upon the land, cleared the same, and made valuable improvements. It was held that the gift was good, and would be enforced in equity; that the taking possession and making valuable improvements was such a part performance as took the case out of the statute of frauds. See, also, Porter v. Allen, 54 Ga. 623; Hughes v. Hughes, 72 Ga. 173; Floyd v. Floyd, 97 Ga. 124, 24 S. E. 451; Looney v. Watson, 97 Ga. 235, 22 S. E. 935; Ogden v. Dodge Co., 97 Ga. 461, 25 S. E. 321; Causey v. Causey, 106 Ga. 188, 193, 32 S. E. 138. In a case like the present it is not necessary that there should be any valuable consideration moving to the person undertaking to convey the property, for the reason that, if the transaction be treated as a gift, it will be upheld, and a specific performance of the undertaking decreed, where the parties to the transaction are parent and child; the undertaking of the parent being thus supported by the meritorious consideration required by law. While it is necessary, in order to authorize a specific performance, that the donee should go into possession of the property, and make valuable improvements thereon, it is not essential to the right of the donee to demand performance that the improvements should be paid for by him. As between the donor and the donee, the only thing necessary to be determined, so far as this matter is concerned, is whether the donee has, relying upon the gift, made improvements which were valuable and of a substantial and permanent nature. Especially would the donee not be deprived of the right to a specific performance on account of not having himself paid for the improvements where the agreement, as in the present case, distinctly provided that such improvements should be paid for by another person. Under the facts alleged, Mrs. Sappington is entitled to a decree requiring her mother to convey to her the land in controversy, and the court did not err in overruling the demurrers.

The bill of exceptions also assigns error upon the granting of the injunction. As the petitioners were in possession of the property, and as the filing and diligent prosecution of this suit would be notice to all persons of their rights in the land, an injunction to restrain the defendant from selling or incumbering the land was not absolutely essential to the protection of their interests in the property. See Edwards v. Banksmith, 35 Ga. 213; Smith v. Malcolm, 48 Ga. 343; Clay v. Clay, 86 Ga. 359, 12 S. E. 1064. In the last two cases this court held that it was no abuse of discretion to refuse to grant an injunction restraining the defendant from selling or incumbering the land, for the reason that the plaintiff was amply protected under the doctrine of lis pendens. Where, however, the court sees proper to grant the injunction restraining the defendant from doing anything to complicate the title while the case is pending, this court will not interfere, unless in an extreme case, with his discretion in so doing. Judgment affirmed. All the justices concurring.

PERRY v. STATE.

(Supreme Court of Georgia. Jan. 31, 1900.)

CRIMINAL LAW — OPINION EVIDENCE — HOMICIDE—CIRCUMSTANTIAL EVIDENCE —INSTRUCTIONS.

1. A medical expert, after describing a wound and its location, and giving his opinion as to the character of the weapon by which it was caused, may testify to the opinion that the blow

came from the rear of the injured person. Any witness, after examining a physical instrument, may testify to the opinion that it is a deadly weapon.

2. It is competent, in a trial for murder, to prove that shortly after the mortal wound was inflicted the accused made declarations and did acts evidencing malice towards the injured person, or indifference to his fate.

3. The law of circumstantial evidence is not, without qualification, applicable in a case where the state proves a positive confession of guilt.

4. It is not erroneous to refuse to charge requests which are inapplicable to the issues involved. An inaccuracy in charging which could have resulted in no injury to the losing party is not cause for a new trial.

5. There is, in a trial for murder, no error in rejecting evidence offered merely to affect the action of the jury on the question of punishment.

6. The verdict was warranted, and the record discloses no cause for a new trial.

Little, J., dissenting.

(Syllabus by the Court.)

Error from superior court, Wilkes county; S. Reese, Judge.

Fred Perry was convicted of murder, and brings error. Affirmed.

H. M. Holden and A. W. Stephens, for plaintiff in error. R. H. Lewis, Sol. Gen., Harrison & Bryan, and J. M. Terrell, Atty. Gen., for the State.

LUMPKIN, P. J. At the last term of this court the cases of Will Taylor and Fred Perry, who had been jointly tried and convicted of the murder of Jep Dennard, were here on separate writs of error, upon each of which the judgment below was reversed. See 108 Ga. 384, 34 S. E. 2. At the next ensuing term of the trial court the accused were tried separately. Taylor was found guilty, and, under the recommendation made by the jury, sentenced to imprisonment in the penitentiary for life. This ended his case. Perry was convicted without recommendation, and sentenced to be hanged. He made a motion for a new trial, to the overruling of which he excepted, and his case is again before us. The evidence warranted a finding of the following facts: Dennard, the deceased, in the capacity of "guard," had charge of a number of persons who had been convicted of misdemeanors and sentenced to work upon a chain gang. They were not, however, employed, as they ought to have been, upon public works, but, under Dennard's supervision, labored upon a private farm, and were not under the management or control of the county authorities. Taylor, Perry, and several others composed the gang. When not at work they were kept in one room of a house, the only remaining room of which was occupied by Dennard. There was no door between these two rooms. All of the convicts except Taylor, Perry, and two others were confined to a large chain. The two named were whispering to each other most of the afternoon of Sunday, January 8, 1899, and neither of them conversed with any other convict. While, under the rules promulgated by Dennard, all conversations had to be carried on in a low voice, there was no rule requiring the convicts to talk in whispers. The whispering between Taylor and Perry was an unusual occurrence. Late in the afternoon mentioned, Dennard, from his room, directed them to bring to him some articles which he needed. They went into Dennard's room, and remained there one or two minutes. There was a scuffle in the room, and a noise as if something had fallen. While these men were in Dennard's room, he received upon the head a mortal wound, from which he soon became unconscious, and as a result of which he died the next day. The wound was inflicted with a stick of wood, which was a weapon likely to produce death. The indications were that the blow came from Dennard's rear. Immediately after he was struck, Taylor and Perry returned to the room of the convicts, the former in advance, having in his possession Dennard's gun, pistol, and watch, and Perry following closely with an ax in his hand. Neither said anything as to what had happened to Dennard until Perry, upon being asked the direct question, "Where was he sitting at when you all hit him?" replied, "He was sitting by the fire when us hit him." Taylor took the ax from Perry, and with it broke the lock on the large chain, thus releasing from it all the convicts whose shackles were thereto attached. They all went out of doors. Dennard, who was standing near the house, asked, "What's the matter here?" and spoke no more, being in a dazed and helpless condition. Referring to him, Perry said: "Put him in there [meaning in the house], God damn him! and let's go." He and Taylor then placed Dennard in the house, and fastened the door so that it could not be opened from the inside. All the convicts then fled from the place, Perry taking with him Dennard's gun. About two hours later, from a place of concealment by the roadside, they saw a physician who was going to Dennard's relief. Perry proposed to kill the doctor, and, when one of his companions remonstrated, threatened to kill the latter.

To the foregoing, which is a condensed but accurate statement of what the jury could legitimately conclude took place on the day of the tragedy, it is proper to add what follows: Perry, after his arrest, admitted that he was in Dennard's room when the fatal blow was inflicted, and, without charging the crime upon Taylor or confessing or denying his own guilt, simply said he did not know who struck the blow. In his statement to the jury he denied being in Dennard's room at the time the crime was committed, and protested that he had nothing whatever to do with the homicide. He also stated that, a few days before the day of the crime, Dennard had given him a severe flogging, and on that day had not allowed the convicts enough to eat. Taylor, who had already been convicted and sentenced as above stated, was sworn as a witness for Perry, and testified positively that he (Taylor)

struck the blow which killed Dennard, because Dennard threatened to whip him and was about to do so; that Perry was not present at the time, and had nothing whatever to do with it; and, further, that there was no conspiracy or understanding of any kind between Perry and himself to kill or harm Dennard. He explained the "whispering" by stating that it related to another matter, the particulars of which he undertook to relate. There was absolutely nothing in Taylor's testimony to the effect that he struck Dennard in order to escape from custody. Indeed, there was not a syllable of evidence that the blow was struck for any such purpose. On the contrary, Taylor testified positively and unequivocally that the crime would not have been committed if Dennard had not tried to whip him, and gave no other reason for striking Dennard. He used the expression, "I struck through fear," manifestly meaning the fear of a beating. He did testify he had been told that it was an unlawful chain gang, but said nothing in this connection about escaping therefrom. He mentioned the character of the chain gang merely as a justification for freeing the other convicts after he had struck Dennard, and gave as an additional reason for setting them at liberty that he thought his chances for avoiding capture would be better if many convicts were at large at the same time. For the purpose of impeaching Taylor, the state proved that after his arrest he repeatedly stated that Perry struck the fatal blow, and also that he (Taylor) did not know who struck it. We will now consider the grounds of the motion for a new trial:

1. It is alleged that the court erred in allowing the physician to testify that in his opinion the mortal blow was inflicted from Dennard's rear, and in allowing another witness to testify that the stick of wood with which the blow was struck was a weapon likely to produce death. There was no error in admitting any of this testimony. The physician was not only an expert, but based his opinion upon the facts which he stated; and certainly any witness, after describing an instrument, may express under oath the opinion that it is capable of causing death.

2. Error is alleged in admitting the testimony relating to Perry's proposition to kill the doctor, and his threat to kill the person who protested against his so doing. This testimony was admissible. It tended to show declarations and conduct on Perry's part evidencing malice against Dennard, or indifference to his fate. Such declarations and conduct are in the nature of incriminating admissions of the existence of malice.

3. The court was requested to charge upon the law of circumstantial evidence, the request being evidently based upon the theory that there was no direct evidence of Perry's guilt. We cannot say the request was improperly refused, for there was evidence of a confession that Perry actually participated in the killing, and such evidence is not circumstantial, but direct. Eberhart v. State, 47 Ga. 599.

4. Several requests to charge were presented to the judge, with the object of having the jury instructed that, if Perry conspired with Taylor merely to commit an assault and battery upon Dennard for the purpose of effecting an escape, he would not be chargeable with the homicide, or that even if Perry entered into a conspiracy to kill Dennard, or himself killed Dennard, for the purpose of escaping from the chain gang, it being an unlawful one, he would be guilty of manslaughter only. Error is assigned upon the refusal of the court to give these requests to the jury, and also upon a charge that "where men combine to do an unlawful act, and one goes a step beyond the rest, and does acts which they did not perform, each and all are responsible for the act." There was no evidence tending to show a conspiracy merely to beat or disable Dennard. If there was any conspiracy at all, it was murderous in its character, and there was not a particle of evidence that the attack upon him was made with a view to escaping from the chain gang. Perry did not, in his defense, set up either that he co-operated with Taylor in a design to merely commit an assault and battery on Dennard, or that his object, whatever may have been the nature of the assault, was simply to effect an escape. The sole theory of his defense was that he was absolutely guiltless of any participation whatever in the attack upon Dennard. He, therefore, has no just cause of complaint of the court's refusal to charge as requested. The requests were not pertinent to the issues actually involved, and, even if the charge excepted to was not technically accurate, it could not, under the circumstances, have been injurious to Perry. There was no contention on his part that he and Taylor conspired to do one act, and that the latter did an act more criminal, in the design of which he (Perry) did not participate. So far as the requests related to the unlawful character of the chain gang, it is to be noted that no assault of any kind upon Dennard was in the least degree essential to an escape by either Taylor or Perry from the chain gang. They had absolute control of their own movements, and had only to leave whenever they chose to do so. In view of the undisputed facts, the theory of assaulting or killing Dennard in order to escape has no foundation whatever, and it follows that the question of the lawfulness or the unlawfulness of the chain gang is, in the case as now presented, an entirely immaterial issue.

5. The jury trying Perry knew that Taylor had been convicted. He so testified. Counsel for Perry tendered in evidence the verdict against Taylor, for the purpose of showing that he had been recommended to mercy. The court declined to allow this. It is alleged that this was error, for the reason that, if the jury had been informed that Taylor had escaped the death penalty,

they might have recommended Perry to mercy. In other words, a new trial is asked because of the exclusion of evidence which might have affected the punishment of the plaintiff in error. "If the courts ever begin to grant new trials solely with reference to the question of changing penalties, they will embark upon a wide ocean of uncertainty. What evidence, other than such as would be pertinent to the question of guilty or not guilty, would be appropriate? An answer to this inquiry is suggestive of endless irrelevancy." Thus we dealt with this question in the case of another Perry v. State. See 102 Ga. 379, 30 S. E. 903. Even if we entertained a different view of it, we do not see how the course pursued by one jury, with reference to punishment, on the trial of one man, could aid another jury, trying another man, in fixing his penalty. The evidence, though relating to the same transaction, could not possibly be the same on both trials, and therefore what the first jury did could afford no lawful guide or criterion to the other; and, besides, each jury had to act on its own responsibility.

6. Complaint is made that the verdict is contrary to the evidence. We cannot sustain this contention. We do not, of course, mean to say that the evidence demanded a finding of the particular facts which we said above was warranted. It is obvious from the foregoing preliminary statement, as a whole, that the jury might have made a very different finding; but, in dealing with the question whether or not there is sufficient evidence to support a verdict, we are constrained to treat as duly established all such facts as are warranted by testimony, and to give the prevailing side the benefit of every inference favorable to it which is fairly and legitimately deducible from those facts. Following this course, which is the only one we can properly pursue, we cannot say the evidence was insufficient to satisfy the jury, to the exclusion of all reasonable doubt, that Perry was guilty. Thus viewing the case, there was mysterious and unusual whispering between him and Taylor. At the first opportunity thereafter, they went into Dennard's room. Almost immediately he received a mortal blow from the rear. They came out of his room at about the same moment. Perry made no protestation that he was innocent of the terrible deed, which would have been most natural, had he been guiltless of Dennard's blood. On the contrary, he voluntarily said, "Us hit him." This was a direct confession of guilt. He cursed the helpless man, assisted in fastening him up in the house, and remorselessly left him to his fate. He carried away Dennard's gun, proposed to kill with it a physician who was going to his relief, and threatened to kill a fellow convict who protested against the murder of the doctor. Later, Perry admitted being present when the wound was given, and did not even then claim to be innocent, but merely professed ignorance of who the murderer was,—ignorance which could not have been real, if what he admitted was true. In his statement at his trial he disclosed reasons for entertaining malice against Dennard, viz. that the latter had flogged him and refused to give him enough food. It was, under all the circumstances, certainly remarkable that Taylor should, under oath, take all the blame upon himself; and, if the jury had believed his testimony, they would surely have acquitted Perry. But they did not believe Taylor, and with good reason; for he was involved in such serious self-contradictions that no man could help feeling he was totally unworthy of credit. Our remark when this case was here before, that the evidence against Perry "was exceedingly weak and unsatisfactory," would not apply to the present record. The state's case is much stronger than it was then. The charge of the court was full and very fair to the accused. As a whole, it was an admirable presentation of the law applicable to the issues upon which the jury were to pass. After a patient and careful examination and study of the record, we find no reason which would justify us in holding that Perry's last conviction was unlawful. It does seem anomalous that he should suffer the death penalty, while Taylor, confessedly guilty and swearing to Perry's innocence, escapes with life imprisonment; but for this condition of things no responsibility rests upon us, or his honor of the trial court. Judgment affirmed. All the justices concurring, except LITTLE, J., dissenting.

LITTLE, J. (dissenting). I base my dissent from the ruling of the majority in this case on the two grounds that the evidence does not sustain the verdict which was rendered, and that the court erred in admitting the evidence of Dr. Quinn, who testified, "I think Mr. Dennard [the deceased] must have been sitting, and his assailant must have made the attack from behind." There has been no attempt to reproduce the evidence. It is voluminous, and I shall not give any part of it in detail. It is sufficient to say that there was no eyewitness to the homicide; that no one saw the accused enter the room where Dennard was slain; he says he was not there. Taylor, who had been previously convicted of the homicide, admitted that he alone killed Dennard, and swore on the trial that Perry was not in the room at the time he struck the blow that caused the death of Dennard. Circumstances strongly corroborated this evidence. Immediately after Dennard had been stricken, Taylor entered the room where the other prisoners were confined, having in his possession a gun, pistol, and watch belonging to Dennard, all of which were in the room where the blow was stricken. It is true that Taylor was followed into that room by Perry, who had an ax in his

hand. It was not shown that the ax was in the room where the homicide was committed, but most likely it was in the yard, where Taylor says Perry was at the time Taylor says he struck Dennard. Evidence of a conspiracy between the two to kill Dennard, in view of the conviction of the plaintiff in error, I must characterize as being to me painfully absent. In my opinion, it must rest alone on the fact that he had an ax in his hand after Dennard had been stricken, and when he entered the room where the other prisoners were confined. For aught that appears, we are not authorized to conclude that he had it at the time of the homicide. As a matter of fact there was but one blow inflicted on Dennard, and that was not with an ax. He was, according to his own statement and the evidence of Taylor, out in the yard when Dennard was killed; having, as they say, asked and received permission of Dennard to go into the yard previously to the difficulty. That he had an ax in his hand when he followed Taylor into the room where the prisoners were confined was certainly a circumstance to create suspicion,—would very strongly do so if it had not been shown to what use the ax was put. After Perry entered the room with the ax, Taylor took it from him and broke the lock on the large chain to which they were confined, thus freeing all the prisoners. Was it likely, if Taylor and Perry had conspired to kill Dennard, that they would not have acted together in overpowering him? What might have been a dangerous act to one alone would have been reasonably safe for two. Again, is it reasonable to believe, if Taylor and Perry were together in the room when Dennard was slain, and his gun, his pistol, and his watch taken, that Perry would not have gotten one of the articles? Yet Taylor came out with all of them. These facts add considerable weight to the positive evidence of Taylor that Perry was not in the room, and had nothing to do with the homicide. Very much of the testimony was derived from persons confined on the chain gang at the time. None of them, however, went to the extent of testifying to any facts which would of themselves authorize a conviction. If the evidence of Taylor that Perry had nothing to do with the homicide and was not in the room at the time it was committed is to be doubted, when all of this testimony went directly against his own interest, because he was a negro convict, why should credence be given to the testimony of other negro prisoners, serving their country in a like capacity?

I do not think that the evidence of Dr. Quinn, who testified, over the objection of plaintiff's counsel, that "I think Mr. Dennard must have been sitting, and his assailant must have made the attack from behind," should have been admitted. It is said by Mr. Justice LUMPKIN, in the foregoing opinion of the majority, that the physician was not only an expert, but based his opinion upon the facts which he stated. In my judgment, one sensible, observant man, who is not a physician, could have just as readily known that Dennard was sitting, and that he was struck from behind, as another such, who was a physician; and yet I do not think it can be doubted that neither one of them would know much about it. This character of evidence does not come within the domain of expert evidence. Because a man happens to be a physician, he is not thereby invested with any special power to know accurately what was the position of the parties when a homicide was committed, not within his presence. Of course, if Dr. Quinn did give the facts upon which his opinion was based, his evidence was admissible, and so would have been the evidence of a layman. But I do not think he did. Dr. Quinn testified that: He was called to see Dennard about 18 hours before his death. He was perfectly unconscious, in a profound stupor, caused from a blow inflicted upon his head, causing a fracture, or, rather, several fractures. The doctor thought the weapon with which the blow was inflicted must have been about three inches in diameter,—a round instrument. There was a central fracture, and then a surrounding fracture, and the instrument must have had a knot on it, and the central fracture must have been produced by that knot. He thought it was a piece of wood. Adjoining that was another fracture of less degree, and the diameter of the fracture was about three inches wide and about three and a half inches long. The fracture was on the right side of the head. It produced paralysis of the left side,—the opposite side,—and unconsciousness. The flow of blood was caused from a rupture of some of the cerebral vessels. The direction of the wound was about on a level. "I think Mr. Dennard must have been sitting, and his assailant must have made the attack from behind. I think the wound was nearly on a level. I mean, it was straight across the head above the ear. I think the wound was about on a level with the pinnacle of the ear, but posterior some two inches, perhaps. I mean the wound was about two inches in rear of the ear, nearly on a level." While I have not attempted to give all of the further description of the wound, made by Dr. Quinn, the above is what precedes the testimony which was objected to; and to me it appears that this testimony was admitted as expert evidence, because the description given of the wound, preceding the testimony to which objection was made, would not of itself seem to afford any reason for the opinion that the person who was stricken was sitting at the time, and that the person who inflicted the blow was in his rear. But, aside from this, the admission of the testimony did not seem to have been based so much on the reasons given for the opinion, as that it came from an expert. The evidence was very harmful to the plaintiff in error, if the jury believed

that there was a conspiracy between Taylor and himself to kill Dennard. As I do not think that the evidence can be brought in the class of expert testimony, I think it should not have been admitted, unless some distinct reason had been given for the opinion. For the reasons above stated, I have been unable to concur in the opinion of the majority of my Brethren. I think a new trial should have been granted.

COOLEY v. ABBEY.

(Supreme Court of Georgia. July 14, 1900.)

ATTACHMENT—TRAVERSE—FRAUDULENT CONVEYANCES—EVIDENCE—INSTRUCTIONS.

1. There was no error in ruling that a denial of the truth of the ground of the attachment, made in a petition to remove the attachment, was a traverse of such ground, in contemplation of law.
2. A conveyance of property by an insolvent mother to her daughter and the husband of the latter is not necessarily fraudulent, and when the jury was authorized, under the evidence, to find that such conveyance was made in good faith and for a proper and legal consideration, the verdict, in the absence of any error of law on the part of the judge, ought not to be set aside.
3. There was no error in the charge.
4. The evidence sought to be introduced was not material in this case, and there was no error in excluding it.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by J. L. Cooley against F. D. Abbey. Judgment for defendant, and plaintiff brings error. Affirmed.

C. D. Maddox, for plaintiff in error. C. J. Simmons, for defendant in error.

LITTLE, J. Mrs. Cooley filed a petition, and presented the same to the judge of the superior court of the Atlanta circuit, in which she alleged that Mrs. Abbey had made a fraudulent sale of all of her property, and prayed that an attachment should issue under the provisions of our Code. After considering the same, the attachment was ordered to issue, and was levied on certain furniture and household goods, as the property of the defendant in attachment. Subsequently Mrs. Abbey, under the provisions of the Code regulating attachments of this character, filed a petition praying that the levy of the attachment so issued should be removed. On a hearing, the prayers of this last petition were denied. No further steps were taken until the case was called for trial in the superior court. It was then insisted on the part of Mrs. Abbey that the petition for removal which had been filed was a traverse of the grounds of the attachment, and raised an issue as to the truth of the grounds therein stated. The court so ruled, and refused a motion, which had been filed, to dissolve the attachment. The plaintiff then excepted pendente lite. Treating the petition as a traverse of the ground of the attachment, the case proceeded to trial, and resulted in a finding by the jury in favor of the defendant on the issue made by the traverse. A motion for a new trial was made, which was denied, and the plaintiff excepted.

1. The first question which arises is whether the petition for removal of the attachment was properly treated as a traverse of the grounds of the attachment. By section 4543 of the Civil Code it is provided that whenever a debtor shall sell or convey or conceal his property liable for the payment of his debts, for the purpose of avoiding the same, or threaten or prepare to do so, his creditor may petition the judge of the superior court, distinctly stating his grounds of complaint, and pray for an attachment against the property of the debtor, supporting his petition by affidavit or testimony, if he can control the same. By a subsequent section (4545) it is provided that on this petition the judge may grant an attachment, which shall be executed under existing laws, and subject to existing laws as to traverse and other modes of defense. Under the provisions of this section, the judge may also, if he deems it proper, before granting an attachment, appoint a day, and hear both parties as to the propriety of granting the attachment, and may then grant or refuse it. It is provided, also, in section 4546, that the party whose property has been attached without a hearing, if he desires to do so, may apply to the judge, setting out his grounds of defense, and show why the attachment should not have been issued or should be removed. Having heard the same, the judge may then, upon a review of the law and facts, make such order in the premises as is consistent with justice, and either totally or partially remove the attachment, or refuse to do so. It is further provided that, when such attachments are issued and served, they shall be returned and disposed of as attachments are now returned and disposed of, and be subject to the same defenses. Civ. Code, § 4547. To the decision granting or refusing the attachment a writ of error lies to this court. Id. § 4548. It is provided by section 4558 of the Civil Code, under the title of "Pleading and Defenses in Attachment," that the defendant may appear by himself or attorney at law, and make a defense, at any time before final judgment is rendered against him; and by section 4560 it is provided that in all cases of attachment the defendant may traverse the truth of the affidavit in relation to the ground upon which the attachment issued, at the return of the attachment, and issue formed on such traverse shall be tried by a jury at the first term, unless for good cause. The attachment which was issued in the case at bar under the order of the judge of the superior court was dated September 29, 1897, and was returnable to the March term, 1898, of the superior court of Fulton county. The

petition to remove the attachment was filed in the office of the clerk of the superior court of Fulton county on the 25th of October, 1897. This petition to remove in terms denied all the material allegations of the petition for attachment; that is to say, it expressly denied the truth of the ground upon which it was sought to have the attachment issue. The prayer to remove the attachment was refused at a hearing prior to the March term of the court. It nevertheless became a part of the record in the case, and, besides expressly denying that the ground of the attachment was true, this petition closed with a prayer that it should be used and considered as a traverse of the ground of the attachment. While it is admitted that the defendant might traverse the truth of the plaintiff's affidavit on which the attachment issued, it is contended that such traverse must be separately made and filed at the term to which the attachment is made returnable, and it seems to us that this is very much the better mode of practice, and that the contemplation of the statute in relation to filing a traverse is that there shall be a separate denial of the truth of the affidavit on which an attachment is issued, filed at the return term; but, nevertheless, the object of the statute is to give to a defendant the right of having an attachment which has issued against him dismissed if the grounds upon which it issued are not true in fact, and we do not see, in this case, how any damage accrued to the plaintiff because of the fact that a traverse was filed in advance of the term to which the attachment was made returnable. It is true that the petition for removal is lengthy, and contains a great many allegations not necessary, in good pleading, to have been made, and contains very much more than a mere traverse; but it contains, nevertheless, a distinct denial of the truth of the grounds on which the attachment issued. It is true also that when the case was called this denial was a part of the pleadings in the case, as they then stood, and there was then a distinct prayer in the pleadings that the denial in the petition to remove the attachment be considered a traverse of the truth of the ground of the attachment. So that the ground was denied specifically, and such denial was filed before the case was called. While, as we have stated, the better practice is to file a separate traverse, yet we are confident that, considering the object of the statute, the denial of the petition for removal was sufficient to cause an issue as to the truth of the grounds to be made and tried.

2. It is contended that the verdict of the jury was contrary to law and to the evidence in the case. We do not think so. On the contrary, we are of the opinion that the verdict of the jury was fully authorized by the evidence. It is true that fraud was charged, and it is also true that by the conveyance which was attacked for fraud the defendant sought to pass title of the property to her daughter and son-in-law. Nevertheless, it appears to us that the reason for the conveyance, as well as the consideration moving the defendants, was fully and satisfactorily explained, and under the evidence the jury were authorized to find that such conveyance was made in good faith. It is not true, as matter of law, that the defendant could not in good faith sell and convey her property to her married daughter and her husband. Such conveyances are always regarded with suspicion, but, while so regarded, they will stand, unless shown to be fraudulent; and while, in determining whether the conveyance is fraudulent or not, slight circumstances may have weight, yet it is entirely within the province of the jury to determine the fact as to whether the fraud existed. The evidence warranted them in finding that it did not in the present case, and the verdict ought not to be disturbed unless some error of law was committed in the trial of the case.

3. It is complained that the court erred in charging the jury as follows: "The pleadings of the parties are not evidence, but are merely their written contentions, and are not to be taken by the jury as evidence of the facts alleged in them." This charge, abstractly considered, is a sound legal proposition, and is totally distinct from the rule of law in relation to admissions in judicio. Pleadings are the mutual altercations between the parties. The plaintiff sets out the facts upon which he relies for a recovery. The defendant either admits or denies the several alleged facts, or sets up extraneous matter as a bar to recovery. It is a legal truism that these pleadings are not evidence, and are not to be taken as such, but another rule of law holds a party to any admission which he has made in his pleadings. If any such are made, they are to be taken as true, because they are asserted by the party himself; and, while he may withdraw them formally from the pleadings, he cannot by a mere withdrawal avoid the effect of the admissions made. Medicine Co. v. Gibbs (Ga.) 33 S. E. 945. There was no request that the judge should charge the jury in reference to admissions made by the defendant in her pleadings. It appears from a note that during the trial counsel for the defendant insisted on the proposition that an admission made in pleadings was not evidence, and invoked an instruction to the jury to that effect, following which the charge complained of was made. There was no error in the instructions given, and, if the plaintiff desired any instructions in reference to admissions made in the pleadings, she should have requested that they be given. She failed to do so, and the fact that the presiding judge did not find it necessary, in the absence of a request, to refer to the subject of admission, in no way renders the charge as given illegal or inapplicable.

4. Another assignment of error is that the court rejected testimony to the effect that the

defendant came to witness after the alleged sale and made application for credit, and that she stated to him that she was in good financial standing, and agreed to settle her account every two weeks; that she owed no one anything, etc. The statement which it was sought to prove that the defendant made did not, under the explanation of the presiding judge, have any relevancy to the issue being tried. He excluded it on the theory that the insolvency of the defendant was never denied, nor was it ever in issue. This being true, proof of the fact that she made application for credit in the purchase of provisions, and stated that she was in good financial standing, and promised to pay her accounts, could not affect any question involved. The theory of the plaintiff was that the sale of all the furniture of the defendant to her daughter and son-in-law was fraudulently made, and they proved, as was claimed, that she continued in the possession of the goods which she had ostensibly conveyed; and this fact, they contended, was a badge of fraud. It seems that the defendant had been keeping a boarding house on Pryor street. Her business had not been successful, and she conveyed all of her furniture to her daughter and her daughter's husband. Subsequently the furniture was removed and placed in another house, on another street; and plaintiff contended that it was still the establishment of the defendant; that she was conducting the house there, and using the same furniture; and that these facts tended to show that the original sale was fraudulent. However this may be, we are confident that, if the insolvency of the defendant was not denied, the mere fact that while residing at her new place she desired credit in the purchase of provisions, and stated that she did not owe anybody, would have added nothing to the contention made. Ordinarily, this evidence would have gone in for whatever of value it might have had on the question of her solvency, but we do not see how it could have any further application. It was her undoubted right to purchase these goods on a credit, if she could do so. Such articles were necessary for her maintenance, whether she had fraudulently conveyed the goods or not, and, under the issues then being tried, they were immaterial. There was no error in rejecting the evidence. Judgment affirmed. All the justices concurring.

UNDERWOOD et al. v. THURMAN.

(Supreme Court of Georgia. July 12, 1900.)

PROBATE OF WILL — CONTEST — GROUNDS OF OBJECTION—UNDUE INFLUENCE —EXECUTION.

1. Grounds of objection to the probate of a paper propounded as a will are not, though separately set forth in the caveat, "pleas," in the sense in which this word is used in section 5330 of the Civil Code; and consequently it is not the right of the propounder to demand that, if the verdict be one denying probate, it shall show upon which one or more of such grounds it is based.

2. That the execution of an instrument purporting to be a will was procured by the exercise of undue influence upon the alleged testator cannot be proved by his declarations made after he signed the paper.

3. When the attestation clause to such an instrument recites all the facts essential to its due execution as a will, and it is shown that the alleged testator and those whose names appear thereon as witnesses actually affixed their signatures to the paper, a presumption arises that it was executed in the manner prescribed by law for the execution of wills; and this is so though there may be on the part of one or more of the witnesses a total failure of memory as to some or all of the circumstances attending the execution.

(Syllabus by the Court.)

Error from superior court, Fulton county: J. H. Lumpkin, Judge.

Petition of Florence A. Underwood and others for probate of the alleged will of F. D. Thurman. M. G. Thurman, widow, filed a caveat in the superior court. On appeal, judgment was rendered for Thurman, and the proponents bring error. Reversed.

Smith, Hammond & Smith, N. J. & T. A. Hammond, J. T. Pendleton, and King & Spalding, for plaintiffs in error. King & Anderson and L. W. Thomas, for defendant in error.

LUMPKIN, P. J. A paper purporting to be the will of F. D. Thurman, in which no one was named as executor, was by Mrs. Florence A. Underwood, a "person interested," offered for probate in solemn form in the court of ordinary of Fulton county. Other persons interested were afterwards made parties, and joined in the prayer for probate. Mrs. Mary G. Thurman, the widow and sole heir of the alleged testator, filed a caveat, based on three grounds, viz.: (1) that the paper was not executed in the manner prescribed by law; (2) that F. D. Thurman was not, at the time of its execution, of sound and disposing mind and memory; and (3) that he was induced to sign it because of undue influence on the part of Mrs. Underwood. The ordinary adjudged that the paper was entitled to probate, and Mrs. Thurman entered an appeal to the superior court. On the trial therein a verdict was returned in her favor, and the propounders moved for a new trial. Their motion contained four general and thirty-six special grounds. As the case is to be tried again, we shall say nothing concerning its merits. This, for the time being, disposes of the four general grounds. The three dozens of special ones present but three units of questions with which we consider it necessary to deal specifically. In the remaining three and thirty, various points are made upon rulings, charges, and refusals to charge. We do not undertake to say that, as to all of the matters thus complained of, the trial judge was entirely free from error; but, conceding that some of the grounds to which we are now referring do show that he made some mistakes, we are quite sure that none of them were sufficiently serious

to require the granting of a new trial. We agree with him that in a case like this it would be strange, indeed, "if astute lawyers, after a microscopic examination and diligent preparation, extending through about eight months since the trial, and apparently reviewing every sentence, every phrase, even every word, of the judge, could not discover something which seemed to them a flaw or error of more or less magnitude"; and we think it would be something wonderful if any judge—even one so able and painstaking as he—could try a case involving so many questions without falling into some slight errors, either of omission or of commission. Our Brother below, while frankly conceding that he may have done so, did not think that there was any error on his part which demanded a judgment setting the verdict aside. Being unable to agree with him to this extent, we feel constrained to order a new trial.

1. Several grounds of the motion distinctly present the question whether or not it was the right of the propounders to have the jury, in case they found that the paper was not the will of F. D. Thurman, specify in their verdict upon which ground or grounds of the caveat their finding was based. The judge held that the propounders had no such right, and as to this matter our judgment coincides with his. We do not think, as was contended, that the question should be resolved against the propounders merely because the ultimate issue in the case was simply devisavit vel non,—will or no will. It frequently happens that in the trial of ordinary actions there is a main and controlling issue, viz.: "Shall the plaintiff recover, or shall he not?" And yet, in deciding this issue, it may become necessary for the jury to determine a number of other issues, presented by different pleas, each setting up a distinct ground of defense, a finding on any one of which favorably to the defendant would defeat the plaintiff's action. So, here, a finding in favor of any one of the grounds of caveat would be fatal to the case of the propounders. If, then, the plaintiff in the ordinary action is, on principle, entitled to be informed by the verdict itself, when adverse to him, on what plea or pleas it is based, we see no reason why, on principle, the propounders of a testamentary paper, met with a caveat containing separate and distinct grounds, should not have a similar right. But the question is not one to be decided by inquiring what the law ought to be, but what it is. It turns at last upon the construction to be given to section 5330 of the Civil Code, which provides: "If there are several pleas filed by the defendant, a verdict for the defendant must show upon which of the pleas the verdict is rendered. The jury may render such verdict upon all the pleas, if they see proper so to do. And the judges of the superior courts of this state, upon request of the jury, in the trial of all civil cases, shall furnish said jury with written instructions as to the form of their verdict." If this section did not form a part of our statute law, it would not, we are sure, be seriously contended that the propounders had the right upon which they insisted. So the real question is, does this section apply to will cases? We do not think so. The word "pleas" is not, in its usual and ordinary signification, applicable to the grounds of a caveat to the probate of a paper propounded as a will, and there is nothing in the section which remotely suggests that this pregnant word should be understood in any other sense than that generally ascribed to it. This being so, the courts should treat this word, as used in this section, as meaning pleas proper. A plea is "a formal answer made by a defendant to a demand or charge." And. Law. Dict. Obviously, this definition would not apply to a caveat filed in probate proceedings. Much was said in the arguments of counsel and in their briefs in support of the contentions that the propounders were "plaintiffs," that the caveatrix was a "defendant," and that the several grounds of her caveat were "pleas," but we think all these contentions are answered in what has been said above. Doubtless the three terms just quoted have sometimes been loosely used in dealing with will cases, but this affords no aid in arriving at the true meaning of the Code section under consideration. The first two sentences of this section, which are the only portions thereof with the construction of which we are now concerned, became a part of our written law long prior to the uniform procedure act of 1887, which abolished all technical forms of pleading; that is to say, at a time when papers filed in the course of legal procedure were called by their right names, and nothing which was not in point of fact a plea was recognized as such. See Code 1861, § 3480. Accordingly the term "pleas" is to be regarded as having been used advisedly and deliberately in the precise sense in which it was then understood. It was argued that, in the absence of a requirement to frame the verdict as the propounders insisted it should be framed if against them, it was possible that the verdict denying probate might have been rendered without the assent of all of the jurors to the truth of any one ground of the caveat. For instance, it was urged that four, only, of them might have believed the paper was not duly executed; that another four, and they only, might have believed the alleged testator was of unsound mind; and that the remaining four, and they only, might have believed the execution of the paper was procured by undue influence. Conceding to this argument all the force it deserves, we have only to say that, if the law as it stands affords no adequate remedy for an evil of this kind, the power to correct it is in the legislature, and not in the courts. A verdict in the form de-

manded by the propounders in case the caveat should be sustained is analogous to "a special verdict of the facts only," as provided for in section 4849 of the Civil Code; but the propounders can derive no aid from that section, because it is expressly limited in its application to trials of "proceedings for equitable relief." The cases of Browne v. Browne, 22 Md. 103, and Withee v. Rowe, 45 Me. 571, relied on by counsel for plaintiffs in error, are not in point; for it seems that both of them were tried in pursuance of a practice derived from statutes authorizing or requiring the submission of special issues to the jury. We have, in cases like the present, no such practice, nor any statute which would authorize it.

2. One ground of the motion for a new trial alleges error in refusing to give in charge a written request to the effect that "undue influence" could not be proved by evidence of declarations made by the alleged testator after the execution of the paper propounded as his will. This request was not covered by any instruction contained in the general charge. We think it should have been given. Such declarations are not competent evidence to show that the statements of facts therein embraced are true, and cannot be regarded as furnishing even the slightest proof that there was any undue influence. As to that matter, they should be treated as nothing but mere hearsay; for certainly it would never do to allow a will to be in this manner set at naught. See Mallery v. Young, 94 Ga. 804, 22 S. E. 142; Jones v. Grogan, 98 Ga. 552, 25 S. E. 590; and authorities cited in each.

3. The attestation clause of the alleged will, and the signatures thereon, are as follows:

> Signed, sealed, published, and declared in our presence by F. D. Thurman as his last will and testament; and in his presence, and in the presence of each of us, we subscribe the same as witnesses.
>
> F. D. Thurman. [L. S.]
>
> Witness:
> P. L. Mynatt.
> B. F. Abbott, Jr.
> J. W. Bridges.

At the trial P. L. Mynatt testified that he recognized his signature upon the paper; that, in his opinion, the word "Witness," appearing above the names of the witnesses, was in his handwriting; and that he remembered nothing whatever as to the execution of the instrument. B. F. Abbott, Jr., testified that at the request of Mynatt he signed the paper as a witness, but he did not know its character, and was unable to state whether, at the time he so signed, F. D. Thurman was present or not. There was evidence showing that prior to the trial this witness had, in a letter written by himself, positively stated that when he signed the paper Thurman was not present. The testimony of J. W. Bridges, taken by interrogatories, was sufficient to prove that the paper was duly executed as a will, but an effort was made to impeach him by showing that in answer to a previous set of interrogatories he had sworn that the paper was typewritten; the fact being that it was in the handwriting of Thurman.

Error is assigned upon the court's refusal to give in charge to the jury a written request to the effect that, inasmuch as the attestation clause to the paper propounded was in due form, a presumption that it was duly executed as a will arose. In determining whether or not this request should have been given, it is of the utmost importance to keep clearly in mind the fact that there was no dispute at all that the signatures upon the document were the genuine signatures of Thurman and the three witnesses. Therefore, under the circumstances, the request could not, as was insisted, fairly be said to invoke an instruction that the bare fact that the attestation clause was in due form raised a presumption of due execution; but its real meaning was that, in view of the fact that Thurman and the witnesses undoubtedly affixed their signatures to the paper, and of the further fact that the attestation clause recited all the essentials of due execution, such a presumption did arise. Treating the request as having this meaning,—and, in the light of what is stated above, it could not be fairly said to have had any other,—we think it was pertinent and appropriate to the case as it stood at the close of the testimony, and, accordingly, that the refusal to give it in charge was erroneous. An attestation clause, appearing upon a testamentary paper, and containing a recital of all the facts essential to its due execution as a will, as was the case here, raises a presumption that such paper was executed with all the requisite legal formalities pertaining to wills, if it be shown, as was done in the present instance, that the alleged testator and the witnesses actually affixed their signatures to the instrument; nor does it matter that as to two of the witnesses there was such a failure of memory, as that above indicated. "If a will purports to have been duly signed, attested, and witnessed, on proof of execution the court will presume, in the case of the death of the witnesses, or in case they do not remember the facts connected with its execution, that the law was complied with." 1 Jones, Ev. p. 89, § 44. On this subject Greenleaf says: "If the subscribing witnesses to a will are dead, or if, being present, they are forgetful of all the facts, or of any material fact to its due execution, the law will in such cases supply the defect of proof by presuming that the requisites of the statute were duly observed." 1 Greenl. Ev. (16th Ed.) § 38a. From 1 Redf. Wills (4th Ed.) *238, we extract the following: "It seems to be well settled that, in the absence of all proof, the witnesses being deceased or not in a condition to give testimony, the presumption omnia rite acta will arise, as in ordinary cases. So, also, where the attestation is general, not enumerating the particulars, it will be presumed the will was duly executed, unless the

contrary appear. And, where the attestation clause contains all the particulars of a good execution, it will always be prima facie evidence of due execution, and will often prevail over the testimony of the witnesses who give evidence tending to show that some of the requisites were omitted." The distinguished author also says that "the mere forgetfulness of the witnesses of the facts certified in the attestation clause is not regarded as an obstruction to granting probate of the will," and, after referring to a case where probate was allowed even where the witnesses deposed that the legal requirements were not complied with, adds that it has been held that the presumption of due execution "will only be made where the will, upon its face, appears to have been duly executed, or, being lost, proper evidence is adduced of such having been the fact." Id. *239. To the same effect, see 1 Jarm. Wills (5th Am. Ed.) 219, 220. With reference to the utility and probative force of attestation clauses, Schouler says: "The advantage of an attestation clause with suitable recitals is shown in many of our decisions relating to the proof of wills. Where, indeed, there is nothing but a formal attestation clause on one side, and the testimony, decidedly adverse, of both subscribing witnesses on the other, probate of a will has been refused. But, with the aid of a proper attestation clause to contradict such persons, or possibly without it, wills have been established in proof against the concurring statements of both subscribing witnesses, or the statement of either, that the legal requirements of execution were not fully complied with. And whenever these witnesses fail to recollect, and give no positive testimony, or cannot, both or all, be produced in court, the clearer the recitals of an attestation clause, the stronger becomes the presumption that the will was executed in all details as the law requires. It matters little, under such circumstances, that subscribing witnesses cannot testify affirmatively to the facts thus recited; that the memory fails; that details are not orally shown with clearness. And, though the attesting witnesses were all dead or beyond the reach of process, proof of their handwriting would in general make out a prima facie case of due execution, which, if aided by the recitals of a full attestation clause, would afford a very strong presumption, unless the contrary appeared on the face of the will. But in no case will the presumption of compliance with all statutory formalities arise unless the will appears on its face to have been duly executed. And any such presumption is rebutted by clear proof to the contrary." Schouler, Wills, § 347. See, also, 29 Am. & Eng. Enc. Law, 199–202; Chaplin, Wills, 281 et seq. All of these text-books support the doctrine announced by reference to numerous authorities, an examination of which cannot fail to remove all doubt of its correctness. Indeed, it is no longer open to serious question. Certainly this is so in this state; for in Deupree v. Deupree, 45 Ga. 415, a majority of the court, at the January term, 1872, held that under the circumstances of that case a presumption of the due execution of a paper testamentary in character, and shown to have been signed by the alleged testator, arose from an attestation clause which did not recite that the witnesses signed in the presence of the testator; and all the members of the court agreed that, if the attestation clause had so recited, it would, when the signatures of the testator and the witnesses were proved, have raised a presumption of law that the paper was duly attested as a will. Nothing to the contrary was laid down in this case when it was again here at the July term, 1873 (49 Ga. 325); nor has this court, so far as we have been able to ascertain, ever held that a presumption of due execution did not arise in such a case as the one now before it.

It was further insisted that "the presumption stated in the request would not arise if the attesting witnesses gave affirmative evidence of the want of due execution," and "would only arise if they failed to remember or were dead." In this connection it was argued that the testimony of the subscribing witnesses in effect negatived due execution. The brief summary of this testimony appearing above will show that this last position is untenable. As to two of the witnesses, there was certainly lack or failure of memory, and the testimony of the other afforded positive proof of due execution. Even if Abbott and Bridges were so impeached as to break down their credibility, nothing more could result than the elimination of their testimony from the case. It is palpably true that their impeachment would not furnish proof that the paper was not duly executed as a will. We cannot, therefore, agree with counsel for the defendant in error that there was on the part of any of the attesting witnesses affirmative evidence that there was a want of proper execution; and, accordingly, we could, for the purposes of this case, fully concede the correctness of their assertion that the presumption of due execution arises only where the witnesses fail to remember or die. We are, however, by no means prepared to admit that the rule should be thus restricted. See, in addition to the authorities above given, those cited in Gillis v. Gillis, 96 Ga. 1, 23 S. E. 107, 30 L. R. A. 143.

The point was also made that no presumption of due execution could arise in this case, because the attestation clause was not itself in due form, for the reason that the appearance of the word "Witness" under that clause, and above the names of the witnesses, showed that at least one of them did not know the contents of the attestation clause, but merely supposed he was attesting some ordinary instrument, such as a contract. The fact that this word was written on the paper might be accounted for in many conjectural ways. We do not care to go

into them. That it was so written is a circumstance altogether too trivial to affect the real merits of the question in hand.

Another attack on the attestation clause was based on the fact that the signature of the alleged testator was below, and not above, this clause. So far as we can gather from the copy in the record, Thurman, in selecting the place for his signature, did not depart to any great extent from what is customary in such cases. See what Lord Campbell said about such matters in Roberts v. Phillips, 4 El. & Bl. 450, 30 Eng. Law & Eq. 147.

In view of the two errors discussed above, and more especially of the latter, the seriousness of which in its bearing upon the case as it stood will have been perceived, we think there should be another trial. Judgment reversed. All the justices concurring.

GRAY v. MAYOR, ETC., OF GRIFFIN.

(Supreme Court of Georgia. July 13, 1900.)

CITIES—MAINTAINING PRISON—NEGLIGENCE—LIABILITIES.

1. In erecting and maintaining a city prison a municipal corporation is exercising a purely governmental function, and is, therefore, not liable in damages to a person arrested and imprisoned therein by its police officers, for injuries sustained by him, while so confined, by reason of the improper construction or negligent maintenance of such prison.

2. A municipal corporation is not liable for the illegal arrest of a person by its police officers, nor for his consequent imprisonment.

3. Nor is a city liable in damages because its mayor required of a person charged with a violation of a city ordinance a larger bond for his appearance than the law authorized, even if the failure of such person to give bond and his consequent confinement were occasioned thereby.

(Syllabus by the Court.)

Error from superior court, Spalding county; E. J. Reagan, Judge.

Action by William E. Gray against the mayor and council of Griffin. From a judgment sustaining a demurrer to the complaint, plaintiff brings error. Affirmed.

Jas. Flynt and Lloyd Cleveland, for plaintiff in error. Wm. H. Beck and O. H. P. Slaton, for defendant in error.

FISH, J. Taking the allegations of the plaintiff's petition to be true, as we must do upon demurrer, he certainly has just and great cause to complain of the needless hardships and suffering which he endured while confined in the city guard house. But, however strongly the story of his sufferings may appeal to our sentiments of humanity, the law affords him no redress against the municipality. The general rule is well established that a municipal corporation is not liable in damages for injuries sustained by reason of the negligent or improper exercise of a purely governmental power. The preservation of the public peace, quiet, good order, etc., of a community, is a governmental function. Where the legislative authority of a city passes ordinances for such purposes, it is clearly exercising a governmental power. When, for the purpose of enforcing such ordinances, the city erects and maintains a prison wherein to confine offenders, for the purpose of punishment, or those charged with offenses, for safe-keeping until they can be tried, it is exercising the same power. The enactment of such ordinances, and the provisions made for their enforcement, belong to the police power, which is purely governmental in character. In Love v. City of Atlanta, 95 Ga. 129, 22 S. E. 29, this court held that as "the duty of keeping the streets clear of putrid and other substances offensive to the sense of smell, and which tend to imperil the public health, devolves, under the charter of the city of Atlanta, upon the board of health of that city, and the functions of this department of the city government being governmental, and not purely administrative, in their character, it follows that if, in the exercise of such functions, and in the discharge of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city." In the opinion, Mr. Justice Atkinson said: "The principle of nonliability rests upon the broad ground that, in the discharge of its purely governmental functions, a corporate body to which has been delegated a portion of the sovereign power is not liable for torts committed in the discharge of such duties, and in the exercise of such powers." In Bartlett v. City of Columbus, 101 Ga. 300, 28 S. E. 599, it was held that "a municipal corporation is not liable, in an action for false imprisonment, for damages alleged to have been occasioned to the plaintiff by reason of his imprisonment under a judgment rendered against him by a municipal court for the violation of an ordinance; and this is true though such judgment may have been irregular, erroneous, or even void." In Nisbet v. City of Atlanta, 97 Ga. 650, 25 S. E. 173, it was held that "a municipal corporation is not liable in damages for the death of one convicted in a corporation court and sentenced to work upon the public streets, although his death was occasioned while the convict was engaged in such work, and resulted from negligence on the part of the foreman who had been placed by the municipal authorities in charge thereof, and from the failure of such foreman to provide the convict, after his injury, with proper medical attention and treatment." In the opinion Mr. Justice Lumpkin said: "Neither the law of master and servant, nor the doctrine of respondeat superior, applies" in such a case, "because in such matters the municipal corporation is exercising governmental powers and discharging governmental duties, in the course of which it, of necessity, employs the services of the officer in question." In the case of Brown's Adm'r v. Town of Guyandotte, 12 S. E. 707, the supreme court of West

Virginia held that "a town is not liable for damages for the death of a person caused by the burning of its jail while such person was confined therein for a violation of its ordinances, though such fire was attributable to the wrongful act or negligence of the officers or agents of the town." Brannon, J., in the opinion, said, "I think the duty and function of keeping a jail, and confining therein offenders against the municipal ordinances of a town, are plainly purely governmental in character." In La Clef v. City of Concordia, 41 Kan. 323, 21 Pac. 272, it was held that, "where a person is confined in a city prison upon conviction for disturbing the peace and quiet of the city, the city is not liable for damages for injuries sustained by reason of the bad character of the prison, or the negligence of the officer in charge of the same." This decision was followed in City of New Kiowa v. Craven, 46 Kan. 114, 26 Pac. 426, where an administratrix sought to recover from a city damages for the death of her intestate husband, alleged to have been caused by his confinement and exposure in an unhealthy, uninhabitable, and filthy prison. In Gullikson v. McDonald, 62 Minn. 278, 64 N. W. 812, it was held that "a municipal corporation is not liable for negligently maintaining its lockup in a defective and unfit condition, by reason of which a prisoner confined therein is injured." In Blake v. City of Pontiac, 49 Ill. App. 543, a case in which damages were sought for injuries alleged to have been sustained by reason of the confinement of the plaintiff in an improperly constructed and negligently maintained city prison, it was held that the municipal corporation was not liable, and that "the building of the calaboose, and the establishing of regulations for the detention of prisoners therein to answer to charges of violating the ordinances of the city, are clearly within the police power of municipal corporations, and are not in their nature corporate acts." So, in Kelly v. Cook (decided by the supreme court of Rhode Island, Oct., 1898) 41 Atl. 571, it was held that "a demurrer to a declaration was properly sustained where it was alleged that complainant was negligently cared for while temporarily confined in a police station, as such negligence did not render the city liable, since in caring for persons under arrest the city discharged a public duty." The precise question under consideration was decided in another recent case, in New York, and the court held that "where a person was arrested for violation of a village ordinance, and imprisoned in a place negligently permitted to become and remain so dilapidated that in consequence of the exposure he contracted a disease which caused his death, the village was not liable for the omission of its duty in the exercise of its governmental functions." Eddy v. Village of Ellicottville, 35 App. Div. 256, 54 N. Y. Supp. 800.

In support of their contention as to the liability of the municipal corporation for the injuries sustained by the plaintiff while confined in the city guard house, his counsel cite Moffitt v. City of Asheville, 103 N. C. 237, 9 S. E. 695, and Shields v. Town of Durham (N. C.) 21 S. E. 402, in each of which cases the allegations of the respective plaintiffs were of a similar character to those in the present case. In each of those cases, however, the court held that the municipal corporation sued was not liable in damages, as it had complied with the law of North Carolina in the construction of its prison and the furnishing of the necessary supplies, etc., therefor, and the plaintiff's injuries were sustained in consequence of the neglect of the jailer or attendants, of which notice had not been brought to the city before the injuries were received; and the court recognized and upheld the general rule, stated by Avery, J., in the Asheville Case, that "when a city or town is exercising the judicial, discretionary, or legislative authority conferred by its charter, or is discharging a duty imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, unless some statute, expressly or by necessary implication, subjects the corporation to a pecuniary responsibility for such negligence." These cases are doubtless cited because they do recognize the principle which obtains in North Carolina, which, as stated in the same opinion from which we have just quoted, is that towns and cities "are liable in damages only for a failure to so construct their prisons, or to provide them with fuel, bedclothing, heating apparatus, attendants, and other things necessary, as to secure to the prisoners committed to them a reasonable degree of comfort, and protect them from such bodily suffering as would injure their health." But this principle is derived by the supreme court of North Carolina from the constitutional and statutory law of that state; the case in which it was first involved and ruled being that of Lewis v. City of Raleigh, 77 N. C. 230, in which a municipal corporation was held liable in damages for the death of a person, the jury having found that his death was "accelerated by the noxious air of the guard house" of the city, in which he was confined. The decision of the court was expressly based upon the wise and humane provision of the constitution of the state, which provided that "it shall be required by competent legislation that the structure and superintendence of penal institutions of the state, the county jails and city police prisons, secure the health and comfort of the prisoners," and upon certain provisions of the Code of that state with reference to furnishing necessary supplies to jailers, and the care to be taken by sheriffs and jail keepers of prisoners and the rooms in which they are confined. And in the opinion in Moffitt v. City of Asheville, supra, Avery, J., said that when the aldermen of Asheville, who were vested with authority to erect a city prison, "built the police guard house in the exercise of their power, the city became as fully amenable for its proper con-

struction and superintendence, as the general assembly was required by the constitution to make it answerable by competent legislation." But he further said, "The defendant, in the discharge of its judicial duties, could not have incurred any liability, in any view of the case, but for the express provisions of the constitution and laws." For the sake of humanity, we can but regret that there are no such express provisions in the constitution and laws of our own state in reference to municipal prisons. The only case that we have found in which a municipal corporation has been held liable in damages for injuries sustained by a person confined in its prison, in consequence of its unwholesome condition, where there was no express constitutional or statutory provision upon which to base the decision, is that of Edwards v. Town of Pocahontas (C. C.) 47 Fed. 268, in which District Judge Paul held "that a town which used a jail of its own was liable for injuries to the health of a prisoner caused by its filthy condition, since, under section 927 [of the Code of Virginia], and a special provision of its charter, it might have used a county jail, subject to inspection and control." In view of the decisions of this court in reference to the nonliability of a municipal corporation when exercising governmental functions, and the overwhelming weight of outside authority in cases similar to the one we have under consideration, we are constrained to hold that the defendant is not liable to the plaintiff for any injuries which he may have sustained while confined in the city guard house, by reason of its improper construction and unwholesome condition, or by reason of the failure of the municipal authorities to provide the means by which he could have protected himself from the inclemency of the weather during his imprisonment.

2. We think that the municipal corporation was not liable for another reason. The petition alleges that the plaintiff "was without just cause arrested by the police officers of the city of Griffin without a warrant, and was placed in a certain place, called the 'guard house' of the said city"; that "he was not drunk or disorderly, and no reasonable cause can be assigned for such conduct on the part of the city government, and he was not guilty of any violation of law whatever." If he was arrested without just cause, was not drunk or disorderly, was not guilty of any violation of law whatever, and no reasonable cause can be assigned for the conduct of the police officers in arresting and imprisoning him, then, clearly, his arrest and consequent imprisonment were the result of the tortious acts of the police officers, and for such acts committed by its policemen a municipal corporation is not liable. Section 744 of the Political Code provides that "a municipal corporation is not liable for the torts of policemen or other officers engaged in the discharge of the duties imposed on them by law." "A municipal corporation is not liable to an action for damages for the illegal arrest of a citizen by one of the police officers of the city." Cook v. Mayor, etc., 54 Ga. 468; McElroy v. City of Albany, 65 Ga. 387. Nor for the consequent imprisonment of the person arrested. Harris v. City of Atlanta, 62 Ga. 290. In Attaway v. Mayor, etc., 68 Ga. 740, the plaintiff alleged that the marshal and a policeman of the city, "in executing the commands of the said mayor and aldermen, did arrest and imprison him for the space of ten days in the calaboose of the said city, without lawful warrant, and without the authority of law; that the said imprisonment was wanton, inhuman, and brutal, because of the size, ventilation, and filthy condition of said calaboose"; and "that by reason of said unlawful imprisonment he became sick." In the court below there was a demurrer to the declaration, which was sustained; and this court affirmed the judgment upon the ground "that the city is not liable for the illegal acts of police officers," the court citing the three cases last above cited.

3. The defendant corporation was not liable for the act of the mayor in requiring the plaintiff to give a larger bond than the law authorized. In fixing the amount of the bond, the mayor acted in a judicial capacity, and for an error committed in the exercise of judicial authority a municipal corporation is not liable. Pol. Code, § 748; Bartlett v. City of Columbus, supra. Judgment affirmed. All the justices concurring.

KRUGER et al. v. WALKER.

(Supreme Court of Georgia. July 13, 1900.)

CREDITORS' SUIT—PARTIES—PLEADING—VENUE.

1. An equitable petition wherein the plaintiff declares upon a dormant judgment, and whereby he seeks to subject to the satisfaction of his claim property alleged to be that of his debtor, whose title thereto, by reason of a conspiracy between him and another, has been covered up and concealed by fraudulent conveyances, is not demurrable for want of equity, or on the ground that the plaintiff has an adequate remedy at law.

2. The person with whom the debtor defendant made the alleged fraudulent conspiracy is a proper party defendant to such an action.

3. Such a petition is not multifarious, and is maintainable notwithstanding the plaintiff has no existing lien upon the property of the main defendant.

4. The objection, raised by demurrer, that the plaintiff's petition failed to show that the dormant judgment declared upon was binding upon the individual assets of the partners composing the firm against which such judgment was alleged to have been rendered, was fully met by an appropriate amendment.

5. There being in the petition a prayer for substantial relief against the debtor, the action was properly brought in the county of his residence; and, his alleged co-conspirator being a proper party defendant, the superior court of that county had jurisdiction of the case, irrespective of the latter's residence.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by B. F. Walker against L. V. Kruger and others. Judgment for plaintiff. Defendant Kruger brings error. Affirmed.

J. C. Jenkins and Mayson & Hill, for plaintiff in error. Westmoreland Bros., for defendant in error.

LUMPKIN, P. J. An equitable petition was filed in the superior court of Fulton county by B. F. Walker, the portions of which now material are, in substance, as follows: On the 28th day of June, 1890, the plaintiff obtained a judgment against the partnership of Chambers & Co., then composed of R. Chambers, who has since become a nonresident of this state, and George B. Nazerenus, who then resided and still resides in Fulton county. Both partners were served. In 1892 and 1893 Nazerenus, with his own funds, purchased a number of described lots in said county from S. A. Inman and others. He fraudulently had the titles made to himself as trustee for Mrs. Laura V. Kruger, his daughter, who now resides in Coweta county; his purpose in so doing being to hinder, defraud, and defeat the plaintiff in the collection of his judgment. Each of the trust deeds embraced a power authorizing Nazerenus to sell and convey the property therein described without an order of court. The title to these lots is really vested, so far as the plaintiff is concerned, in Nazerenus in his individual capacity, as the deeds were made for his benefit, and were taken, as stated, merely as a subterfuge "to hide property from his creditors." Mrs. Kruger was a party to this fraudulent scheme to defraud the plaintiff, and is collecting the rents on the property, and holding the title deeds thereto, without ever having paid any part of the consideration therefor, being purely a volunteer. The alleged fraud was not discovered by the plaintiff till August, 1897. He then caused an execution issued upon his judgment to be levied, when a claim was filed by Mrs. Kruger. On the trial thereof he offered in evidence "the said fi. fa., with the indorsements thereon," but, objection being made thereto "on the ground that said judgment and execution were dormant, —the entries of the sheriff of nulla bona never having been entered by the clerk of the court in the general execution docket of said county,"—and the court sustaining this objection, plaintiff had no recourse but to dismiss the levy; it appearing from an examination of "the said execution docket," which was produced in court, that the same "did not disclose that said nulla bona returns had been so entered." There is no property, other than the realty described in the trust deeds, out of which the plaintiff can make his money. The petition, among other things, prayed (1) for service on Chambers, Nazerenus, and Mrs. Kruger; (2) for a judgment against Chambers & Co.; (3) that the title to the lots above mentioned be declared to be in Nazerenus, and that the same be subjected to the plaintiff's judgment; (4) that Nazerenus and Mrs. Kruger be enjoined from conveying the property; (5) that a receiver be appointed; and (6) for general relief. Mrs. Kruger filed a demurrer, which presented for adjudication the questions discussed below. The court sustained the demurrer and dismissed the case as to her, but subsequently, during the same term, rescinded this action, and passed an order overruling Mrs. Kruger's demurrer, to which order she excepted.

1. The first two grounds of the demurrer were that there was "no equity in the complaint," and that the plaintiff had a complete and adequate remedy at law. That these points are without merit is settled by the decision in the case of De Lacy v. Hurst, 83 Ga. 223, 9 S. E. 1052. It was in that case held, "The former rule that courts of equity would not entertain a bill as long as the plaintiff had a common-law remedy, and that he must allege and prove that he had sued his claim to judgment, and had an execution issued thereon, on which a return of nulla bona had been made by the sheriff, before equity would take jurisdiction and aid him by setting aside fraudulent conveyances, etc., has been abolished since the passage of the uniform procedure act of 1887, which confers upon the superior courts jurisdiction to hear and determine all causes of action, legal or equitable, or both."

2. The next point presented by the demurrer is that there is a misjoinder of parties defendant. It was argued here that Mrs. Kruger was not a proper party to the case. A complete answer to this contention is to be found in the case of Conley v. Buck, 100 Ga. 187, 28 S. E. 97, wherein numerous authorities were cited to show that where one or more persons enter into a general conspiracy with a judgment debtor, and endeavor, by means of fraudulent conveyances, to hide out his property, in order that the same may not be reached by his creditors, each and all of such conspirators may properly be joined as parties defendant to an equitable petition filed with a view to setting aside such fraudulent conveyances and establishing the right of the plaintiff to subject to the payment of his demand the property thus sought to be placed beyond his reach. The petition now before us, as will have been seen, distinctly alleges that Mrs. Kruger was a party to a fraudulent scheme entered into between herself and Nazerenus with a view to defrauding the plaintiff and defeating the collection of his judgment.

3. Other grounds of objection to the plaintiff's petition raised by the demurrer are "that there is a misjoinder of two or more separate and distinct causes of action in this complaint," and that "the plaintiff has not reduced his claim to judgment, and has no lien upon which to base his prayers for relief." The contention that the petition is multifarious is predicated upon the idea that

it seeks a judgment based on the dormant judgment against Chambers & Co., and at the same time prays that the property described in the petition be made subject to the satisfaction of such judgment, when obtained. In other words, the complaint made is that the petitioner not only prays for a judgment founded upon his legal cause of action, but also that Mrs. Kruger be affected thereby, to the extent of rendering subject thereto property the legal title to which is in her trustee, and not in Nazerenus in his individual right. We hold, upon the authority of De Lacy v. Hurst, cited above, that neither this contention, nor the one setting up that the plaintiff has not reduced his claim to judgment, is well taken.

4. Still another point presented by the demurrer is that the petition fails to show that the judgment sued on is against Nazerenus individually, or that it was a judgment binding his individual assets. This objection was met by an amendment to the petition setting forth the record of the plaintiff's original action against Chambers & Co., from which it affirmatively appears that both of the partners were served, and that a judgment binding upon the individual property of each was accordingly entered up, agreeably to the provisions of section 2638 of the Civil Code.

5. The ground of the demurrer mainly insisted upon here was that the superior court of Fulton county had no jurisdiction over Mrs. Kruger, for the reason that she was a resident of Coweta county. In this connection it was urged that there was "no prayer for substantial equitable relief against any other defendant." We have already undertaken to show that it was proper to join Nazerenus and Mrs. Kruger as co-defendants to the plaintiff's action. If, therefore, the petition prayed for substantial relief of any kind against Nazerenus, this was sufficient to give the court jurisdiction over Mrs. Kruger. The constitution of this state declares that "equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed." Civ. Code, § 5871. In section 4950 it is provided that "all petitions for equitable relief shall be filed in the county of the residence of one of the defendants against whom a substantial relief is prayed, except in cases of injunctions to stay pending proceedings, when the petition may be filed in the county where the proceedings are pending." Unquestionably, substantial relief was prayed against Nazerenus. Nothing could be more substantial than to convert a dormant judgment without a lien into a living judgment binding upon specific property. The prayers in the present case, so far as they relate to the question of jurisdiction, are not materially different from those in the De Lacy and Hurst Case, and the ruling therein is direct authority for the one now made.

In addition to what is said above, we need only to further remark that while counsel for the plaintiff in error argued here that the petition was defective, in that the persons who conveyed to Nazerenus by trust deeds were not joined as parties defendant, there is no ground of the demurrer even vaguely presenting for determination any question as to this matter. Judgment affirmed.

PHINIZY v. GUERNSEY et al.

(Supreme Court of Georgia. July 12, 1900.)

VENDOR AND PURCHASER—LOSS BY FIRE—RIGHTS OF PARTIES—INSURANCE—ABATEMENT OF PRICE.

1. Where a binding executory contract for the sale of improved realty has been made, and the improvements are destroyed by fire before the vendor is in a position to convey the legal title, and before the vendee obtains possession, the loss is that of the vendor.

2. If, in such a case, the property was insured, the vendor is entitled to collect the insurance money in his own right, and does not hold the same in trust for the vendee.

3. Though, under section 4041 of the Civil Code, it might not, in such a case, be the right of the vendor to compel a specific performance by the vendee of the original contract, yet, under the provisions of that section, the vendee may compel specific performance; and, to this end, a court of equity will allow him such an abatement of the contract price as is just and reasonable in view of the changed condition of the property.

4. The rule for determining the amount of such abatement would be to ascertain if there was any difference, on the day the contract became binding, between the market value of the entire property and the contract price. In case there was no difference, then the purchaser would be entitled to a decree requiring the seller to convey him the property upon payment of a sum equal to the market value of the lot, without the building, on the day the contract was made. If at the date the contract became effectual the market value of the property was greater than the contract price, a sum representing this difference should be deducted from the market value of the lot without the building, and the balance remaining would be the amount which the plaintiff should be required to pay for a conveyance of the land. In this way the purchaser would obtain the benefit of his bargain. If the contract price exceeded the market value, the purchaser should pay, in addition to the market value of the lot without the building, the difference between the market value of the property at the date of the contract and the contract price. In this way the vendor would be given the benefit of his bargain.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by Leonard Phinizy against C. H. Guernsey and others. From a judgment sustaining a demurrer to the complaint, plaintiff brings error. Reversed.

J. R. Lamar, for plaintiff in error. Jos. B. & Bryan Cumming, for defendants in error.

COBB, J. This was an action brought for the purpose of compelling the specific performance of a contract for the sale of land. According to the allegations of the petition, the defendants, who were the owners of a city lot upon which was situated a building, entered into a written agreement to sell the

same to the plaintiff for the sum of $16,000, of which $5 was paid when the writing was signed, and the balance was to be paid when the vendee should satisfy himself that the vendors' title to the property was good. The plaintiff had agreed to take the property, but, though it is not affirmatively stated in the petition, it is clearly inferable therefrom that he never entered into possession. The written agreement to sell the property was signed on January 28, 1899. A conveyance of the property was delayed while the plaintiff was investigating the title, and after this investigation a further delay was occasioned by the fact that the defendants could not have canceled a security deed which they had given to the property, for the reason that the holder thereof refused to cancel the same until his bond for titles was surrendered, and that paper had been lost by the defendants. Pending this delay, on June 8, 1899, the building on the bargained premises was destroyed by fire through no fault of the defendants. There were at the date of the fire in full force policies of fire insurance for amounts aggregating the sum of $10,000. The plaintiff avers his desire to comply with the contract of sale, so far as it is possible, in the changed condition of affairs, to carry the same into effect. He alleges that he is willing to take the land, and that the amount to be paid by him should be ascertained by the application of equitable principles. There was no agreement between the parties with reference to the ownership of the policies of insurance prior to the actual conveyance of the property, though it was agreed that when the property was conveyed in accordance with the terms of the contract the policies of insurance should be assigned to the plaintiff. The prayers of the petition were that the defendants be decreed to make to plaintiff a conveyance of the land under the terms set forth in the contract of sale, the court to make an abatement in the purchase price to the extent of the value of the improvements destroyed by fire, and for general relief. By amendment, prayers were added that, in the event the court should be of opinion that the plaintiff is not entitled to an abatement of the purchase money by reason of the destruction of the improvements, a decree should be entered that upon payment of the purchase money the defendants should be required to make to plaintiff a deed to the land, and turn over to him the insurance money collected. There was a demurrer to the petition on the ground that the facts set forth did not entitle the plaintiff to the relief prayed, and that on account of the changed condition in affairs a specific performance of the contract was impracticable. The court sustained the demurrer and dismissed the petition, and to this ruling the plaintiff excepted.

1. "When a binding agreement is entered into to sell land, equity regards the vendor as a trustee of the legal title for the benefit of the vendee, while the latter is looked upon as a trustee of the purchase money for the benefit of the former." Bisp. Eq. (5th Ed.) § 864. This rule, however, is not applicable unless there is an ability as well as a willingness on the part of the vendor to convey; the purchaser not being considered as the owner from the date of the contract unless the vendor is prepared to convey a clear title and is not in default. 1 Warv. Vend. p. 195. In the case of Mackey v. Bowles, 98 Ga. 730, 25 S. E. 834, it was held that if, after the parties had entered into a binding executory contract to sell, the property was damaged before the vendor was in a condition to convey, the loss fell upon the vendor, and not on the purchaser. The loss in that case arose out of the destruction by fire of a building situated upon the land which was the subject-matter of the sale. See, also, in this connection, Kinney v. Hickox, 24 Neb. 167, 38 N. W. 816; Thompson v. Gould, 20 Pick. 134. Applying the principles above alluded to to the present case, as the vendee had not gone into possession before the fire, and the vendors were not, prior to that occurrence, in a position where they could make to the vendee an unincumbered title to the property, they were the owners of the property at the date the fire occurred, and the loss resulting therefrom must fall upon them. If the contract has been so far completed that the vendee is to be treated as the owner of the premises, then the loss falls upon him, as was the case in Paine v. Meller, 6 Ves. 349, where it was held that when there was a contract for the sale of houses, which, on account of defects in the title, could not be completed,—the treaty, however, proceeding upon a proposal to waive the objection upon certain terms,—and the houses were burned before the conveyance, the purchaser was bound if he accepted the title; and the fact that the vendor allowed insurance on the houses to expire on the day on which the contract was originally to have been completed, without notice to the vendee, makes no difference.

2. The next question to be determined is, who was entitled to collect the insurance? As has been seen, the loss occasioned by the fire fell upon the vendors, and it would seem that the indemnity against loss should belong to them. This is, we believe, the rule in such cases. If the contract of sale had been so far completed that the vendors would have held the legal title as trustees for the vendee, then they would likewise have held title to the policies in the same capacity. But, as they were the owners of the property to the extent that the loss occasioned by the fire fell upon them, they will also be treated as owners of the property so far as the right to the insurance on the building is concerned. In Poole v. Adams, 33 L. J. (N. S.) 689, it was held that a purchaser of property insured, which was destroyed by fire, does not by the mere fact of purchase acquire a right to the insurance money. It has been held in some cases that, where a con-

tract of sale is so far completed that the vendor is to be treated as the trustee of the vendee, the vendor would also hold in trust for the vendee a policy of insurance which was on the property at the time the contract was made, and that, if a loss by fire occurred between the date of the contract and the time fixed for the delivery of the deed, the vendor would be compelled to account to the vendee for the insurance money collected on the policy, as he was in equity the owner of the property at the time of the fire, and the loss fell upon him. Reed v. Lukens, 44 Pa. St. 200. See, also, Insurance Co. v. Updegraff, 21 Pa. St. 513; Williams v. Lilley, 67 Conn. 50, 34 Atl. 765, 37 L. R. A. 150; Grange Mill Co. v. Western Assur. Co. (Ill. Sup.) 9 N. E. 274. The rule is thus stated by the supreme court of Ohio in Gilbert v. Port, 28 Ohio St. 276 (Syl., point 8): "As between vendor and vendee under a valid and subsisting contract of sale of real estate, covered by a policy of insurance, where a loss insured against occurs after the date of the contract and before conveyance, the true test for determining for whom the money recovered on the policy belongs, in the absence of stipulations governing, is to determine who was the owner, and which party actually sustained the loss." As in the present case the loss fell upon the vendors, they were entitled to collect and hold the money due by the insurance companies on the policies issued on the property.

3. When there has been a binding agreement to sell improved real estate, and before the property is conveyed the improvements upon the property are destroyed by fire without the fault of the vendor, will a court of equity compel, at the instance of the vendee, a specific performance of the contract? Section 4041 of the Civil Code declares: "The vendor seeking specific performance must show an ability to comply substantially with his contract in every part, and as to all the property; but a want of title, or other inability as to part, will not be a good answer to the vendee seeking performance, who is willing to accept title to the part, receiving compensation for the other. If the defects in the vendor's title be trifling or comparatively small, equity will decree at his instance granting compensation for such defects." The section quoted is but a modification of the general rules recognized by courts of equity in reference to application for the specific performance of contracts. "It is settled that immaterial deficiencies will not deprive the vendor of his right to have the contract performed as against the vendee, provided that the deficiencies are such as may be compensated in money. Under such circumstances, the vendee may be compelled to take the property, and a suitable deduction will be made in the price. But, if the deficiencies are material and important, the vendee will not be compelled to take the property. He is entitled to have what he bargained for, and it would obviously be extremely unjust to force anything upon him which he had not designed or contracted to buy. If there is a failure in that which is an inducement to the purchase, he will not be compelled to take." Bisp. Eq. (5th Ed.) § 389. In Gould v. Murch, 70 Me. 288, it was held: When the owner of land with a building thereon agrees to convey it at a future day on payment of the purchase money, and before payment and conveyance the building is destroyed by fire without the fault of either party, the loss must fall upon the vendor; and, if the building formed a material part of the value of the premises, the vendee cannot be compelled to take a deed to the land alone, and pay the purchase money. See, also, Smith v. Cansler, 83 Ky. 367; Wells v. Calnan, 107 Mass. 514; Powell v. Railroad Co., 12 Or. 488, 8 Pac. 544; Kinney v. Hickox, 24 Neb. 167, 38 N. W. 816; Huguenin v. Courtenay, 21 S. C. 403. It may be stated as a general rule that, where property which is the subject of a contract of sale has been substantially damaged or materially changed between the date of the contract of sale and the time when the vendor offers to convey, the courts will not decree a specific performance of the contract at the instance of the vendor. The reason for this is apparent. The vendor has no right to force upon the vendee something which he has not agreed to buy. The rule is different, however, when the application for specific performance comes from the vendee. There is a manifest reason for this difference. The vendee has a right, if he sees proper to do so, to accept less than he bargained for, and compensation for the loss of that which he does not obtain. If, for any reason, the vendor cannot convey to the vendee substantially what the contract calls for, of course a specific performance of the contract according to its terms is impossible. Such obstacles to a specific performance may arise from a defect in the title to some portion of the premises bargained for, or from the fact that the interest of the vendor is different from that described in the contract, or the property may be subject to liens or incumbrances, or, if the subject of the contract is land, it may be deficient in quantity or quality or value. "In such a case there are only three possible alternatives for a court of equity to pursue: Either to refuse its remedy entirely; or to enforce the contract without any regard to the partial failure, compelling the purchaser to take what there is to give, and to pay the full price, as agreed; or to decree a conveyance of the vendor's actual interest, and allow to the vendee a pecuniary compensation or abatement from the price proportioned to the amount and value of the defect in title or deficiency in the subject-matter." Pom. Cont. § 434. In the same connection the author just quoted says: That the first alternative might often contravene the wishes and interests of both parties, and cannot, therefore, be taken as

the universal rule. That the second one would be extremely unjust and inequitable, though it is occasionally resorted to when the vendee is not in a situation which entitles him to favorable consideration. That the third is based upon equitable principles. It endeavors to preserve the rights of both parties, and is therefore constantly resorted to and applied by courts of equity in aid of a vendee, and sometimes, although under more and greater restrictions, in aid of the vendor. But that there are circumstances under which even a vendee is not allowed to avail himself of the doctrine. In section 435 the same author says: "If the purchaser is willing and desirous to take the partial interest which the vendor can convey, and especially if he is the party calling upon the court for relief, there can be but little difficulty in granting him the remedy of performance, with a reasonable compensation for the defects." Mr. Bispham, in his work on the Principles of Equity, thus states the rule: "It may sometimes happen that defects exist which render the property less valuable than the contract price, but which nevertheless may not be of so vital a character as to induce the purchaser entirely to throw up his bargain. In such a case the equity of specific performance with compensation comes into play for the benefit of the vendee. He is entitled to have the agreement carried out, and yet at the same time to have an abatement or allowance made by reason of the defects." Bisp. Eq. (5th Ed.) § 390. See, also, Fry, Spec. Perf. (3d Ed.) §§ 1222, 1223; 2 Story, Eq. Jur. (13th Ed.) § 779; 2 Suth. Dam. (2d Ed.) § 589, p. 1311; 2 Beach, Mod. Eq. Jur. §§ 624, 627; 22 Am. & Eng. Enc. Law (1st Ed.) pp. 942, 943; Harbers v. Gadsden, 6 Rich. Eq. 284, 62 Am. Dec. 390. The text-books and cases cited show that the doctrine of specific performance, with compensation for defects when the vendor cannot convey exactly what his contract calls for, is thoroughly established, and it is in rare cases where the court will refuse such relief at the instance of the vendee. It is true that in nearly if not quite all of the cases the inability on the part of the vendor to convey what the contract called for arose from some fact which was in existence at the time the contract of sale was made, such as defects in the title to a part of the premises, deficiency in quantity or quality or value of the property which was the subject-matter of the contract, and the like. There does not seem, however, to be any good reason why the principle should not be applicable where the inability of the vendor to convey a part of that which his contract stipulated for arose subsequent to the making of the contract, out of some transaction in which the vendee was not involved; and the fact that the vendor was himself without fault would not seem to be an obstacle which would prevent the application of the rule. Requiring a vendor to pay damages to his vendee for a failure to convey property which subsequent to the execution of the contract of sale was destroyed by fire is no greater hardship than requiring a vendor to pay damages on account of his having ignorantly, though honestly, and after the exercise of all possible diligence, bargained away something which he did not own, but which he believed was his own. That he would be required to pay damages in the latter case, no one will doubt. That he should be in the former case, ought not, it would seem, to be questioned, upon principle. In Lombard v. Chicago Sinai Congregation, 64 Ill. 477, which was a case of an executory contract for the sale of real estate, where the vendor was to furnish an abstract of title, and, if not satisfactory, he was to have the option of perfecting the title, or annulling the contract and returning the money paid, and the abstract failed to show title, and the vendor failed to exercise his option, after notice to do so, until after buildings thereon were destroyed by fire, the vendor still remaining in possession, it was held, on a bill by the vendee for the specific performance of the contract as to the land, and compensation for the buildings and property destroyed, that the contract was not so complete as to make the land the property of the vendee, so as to throw upon him the loss of the buildings, and that upon specific performance being ordered the vendee was entitled to compensation for the loss, to be deducted from the purchase money, and that the vendor was entitled to interest on the unpaid purchase money only from the time a good title to the property was shown, the vendor being entitled to the rents and profits up to such time. The case just referred to is the only one which has been called to our attention which is at all similar to the present case. Upon principle, however, we have no hesitancy in holding that the vendee in a case like the present is entitled to have a conveyance made to him of the land, and compensation for the loss of the building, provided the loss thus sustained is capable of computation. If the plaintiff sustains his allegations, a decree should be entered that the defendants convey to him the land which was the subject-matter of the contract, and that the purchase price be abated in such an amount as is just and reasonable in view of the changed condition of the property.

4. If the difference in value between the interest contracted for and the interest that can be conveyed is incapable of computation, of course the court will not undertake to enter a decree for specific performance, with compensation for defects. But, as has been said, in the light of many adjudicated cases, "It is conceived that the court will seldom now consider a difficulty of this kind insuperable." Fry, Spec. Perf. (3d Ed.) § 1240. We do not think the present case falls within the rule above referred to, as it seems to us that the amount which should be allowed to

the plaintiff as compensation for the loss sustained by him in not obtaining a conveyance of the land with the building on it can be made the subject of exact computation. Let it be kept in mind that the plaintiff is entitled to be placed, so far as property and money will place him, in exactly the same position that he was in on the day that the contract of sale was entered into. If on that day the property was worth more than he agreed to pay for it, he is entitled to the profit on his bargain. If, on the other hand, the property was worth less than he agreed to pay for it, he must suffer the loss. Let it be ascertained what was the market value of the property with the building on it on the day that the contract was entered into. Let it also be ascertained what was the market value of the lot without regard to the building on that day. If the market value of the improved lot was more than the contract price, the difference between these two sums would be the profit that the plaintiff would have realized on his bargain. Deduct the amount of profit from the market value of the lot alone, and the sum remaining will be the amount which the plaintiff should be required to pay. If the market value of the property and the contract price are the same, then the plaintiff should be required to pay a sum which would equal the market value of the lot without the building. If the market value of the whole property was less than the contract price, then the plaintiff should be required to pay the market value of the lot without the building, and in addition to this the difference between the market value of the lot and building and the contract price, provided that in no event should the plaintiff be required to pay more than $16,000. While we find no rule for computing the amount of compensation in such cases, we think the above rules are in accordance with equitable principles, and are deducible from the general rules which seem to have been recognized by the courts and text writers. See, in this connection, Smith v. Kirkpatrick, 79 Ga. 410, 7 S. E. 258; 2 Suth. Dam. (2d Ed.) pp. 1311, 1312; 2 Beach, Mod. Eq. Jur. § 629; Wilcoxon v. Calloway, 67 N. C. 463; Fry, Spec. Perf. (3d Ed.) § 1239. The prayers of the petition were broad enough to authorize relief along the lines above indicated. The court erred in sustaining the demurrer, and the case should be tried in the light of what is here laid down. Judgment reversed. All the justices concurring.

WALKER v. EDMUNDSON.

(Supreme Court of Georgia. July 14, 1900.)

TENANT HOLDING OVER—DEFENSES—STATUTE OF FRAUDS.

Where a landlord sues out a warrant to eject a tenant on the ground that he is holding over and beyond his term, and the tenant, in his counter affidavit, denies these allegations, and alleges that he had made a contract with the plaintiff whereby he rented the premises for the term of two years at a specified monthly rental, and purchased a stock of goods from the plaintiff (the goods being in one of the houses on the premises), and in the same contract the plaintiff agreed and stipulated that the defendant might, at any time within two years from the date of the contract, purchase the premises, with a specified number of acres of land, at a specified price per acre for the land, and the cost of the material of which the houses were built, *held*, that the defense was not demurrable on the ground that it did not allege whether the contract was oral or in writing, nor on the ground that it failed to allege any sufficient consideration for the contract, and showed that the same was unilateral, nor on the ground that it set up a contract too indefinite to be enforced.

(Syllabus by the Court.)

Error from superior court, Johnson county; B. D. Evans, Judge.

Action by W. E. Walker against J. S. Edmundson. From a judgment overruling a demurrer to defendant's counter affidavit, plaintiff brings error. Affirmed.

A. F. Daley and J. L. Kent, for plaintiff in error. V. B. Robinson, for defendant in error.

SIMMONS, C. J. A warrant was sworn out by Walker for the purpose of dispossessing Edmundson of certain premises on the ground that Edmundson was a tenant who had failed to pay his rent, and who was holding over and beyond his term. Edmundson filed a counter affidavit, denying that he had failed to pay his rent, and alleging that he had made a contract with Walker whereby he had rented the premises for two years at five dollars per month, and in the same contract purchased from Walker a certain stock of goods in one of the houses on the premises; that in the same contract Walker agreed that Edmundson might purchase the premises, with 25 acres of land adjoining, at five dollars per acre for the land, together with the value of the material of which the houses were built. He alleged that this contract of rental expired on April 29, 1899, and that on April 22, 1899, he had informed Walker of his acceptance of the option to purchase, and had tendered him the full amount of the purchase money agreed upon; that he had caused a survey of the land to be made, and that, instead of containing 25 acres, as stated in the contract, the tract contained less than 20 acres; that Walker had refused to receive the money tendered, and had threatened Edmundson with violence if he renewed the tender. The tender was renewed in the counter affidavit, which also alleged that Walker, to defraud the defendant and place a cloud upon the title to the land, had made a deed to his minor daughter. There were prayers that this minor daughter be made a party and the deed to her canceled, and that specific performance of the contract be decreed; the defendant paying the amount agreed upon, and Walker conveying him the premises. To this counter affidavit Walker demurred on the ground that it "did not set forth any valid and legal defense, and did not deny

the expiration of the term of rent, but undertook to set up the right to exercise an option to buy under a contract without consideration, and which was unilateral in its terms, and too indefinite in its terms to be susceptible of enforcement by judgment of the court for specific performance." The court overruled this demurrer, and the plaintiff excepted.

There was no error in refusing to sustain any of the grounds of the plaintiff's demurrer. If the allegations of the defendant's counter affidavit are true, he has a good defense to the warrant seeking to eject him. He denies the indebtedness for rent, and denies that he is holding over as a tenant, and, to sustain these allegations, sets up facts which constitute a good defense. If the defendant made a contract with the plaintiff to rent the place for two years, with an option given him to purchase within that time, and he gave notice in time to the plaintiff that he would purchase, and, having paid up his rent to that time, tendered the purchase money agreed upon, then, of course, he was not indebted for rent, or holding over as tenant. When he had exercised his privilege and had tendered the purchase money, he ceased to be a tenant, and became, in law and equity, the owner of the premises. It was claimed in the court below and in the argument here that the contract for the sale of the land was within the statute of frauds, and that, inasmuch as the counter affidavit did not allege that it was in writing, the demurrer should have been sustained. We do not agree with plaintiff's counsel in this contention. The rule is well settled that it is not necessary to aver in pleadings that contracts required by the statute of frauds to be in writing are in fact so. When a contract of this kind is set up, the court will presume that it was in writing, unless the pleadings show to the contrary. Where the contract is alleged, without stating whether it is written or oral, the pleading is not demurrable because silent on this question. This point has been recently passed upon by this court and discussed in an elaborate opinion by Mr. Justice Lewis in the case of Draper v. Dry-Goods Co., 103 Ga. 661, 30 S. E. 566, in which the decisions of this court and many other authorities are reviewed and discussed. In that case it was held that a petition was not demurrable because it failed to allege that a contract which was within the statute of frauds was in writing. This ruling was followed and approved by a full bench in the case of Bluthenthal v. Moore, 106 Ga. 424, 32 S. E. 344, and it is unnecessary to further elaborate the subject here.

Nor was the contract in the present case without consideration. It will be remembered that the contract of rental of the premises, of sale of the merchandise, and of giving an option on the land, was all one. Edmundson agreed to rent the place and buy the goods, and Walker agreed to sell the land at any time within two years that Edmundson desired to purchase it. We think the promise of Edmundson to pay rent for the place, and the payment by him of the purchase price of the goods, was sufficient consideration for Walker's promise to sell him the land. In all probability, Edmundson would not have agreed to rent the place and buy the goods at the agreed terms if Walker had not given the option as a part of the contract. It is probable that Edmundson was induced to buy the goods for a larger price by this opportunity to obtain the stand or location for merchandising, in the hope of continuing business there. Certainly he did have this option included as a part of the contract, and the consideration of the contract supports its every part, it being entire. Nor was the contract unilateral. One party agreed to pay rent and buy the goods, and the other promised to allow the use of the rented place, to sell the goods, and to sell the land, at the option of the first. True, Edmundson had an option, and was not bound to purchase the land; but when he exercised his option, by offering to buy, the contract of sale then became binding on both parties. Upon these questions see the opinion of Mr. Justice Little in the case of Black v. Maddox, 104 Ga. 157, 30 S. E. 723.

We think that the contract set up by Edmundson was not too indefinite to be susceptible of specific enforcement. It was clearly alleged that the plaintiff agreed to sell the defendant two houses and a 25-acre tract of land, at five dollars per acre, together with the value of the material of which the houses were built. Here, then, is a contract which specifies the land involved, its exact location and boundaries, and that the price is to be five dollars per acre. It is true, the counter affidavit alleges that there is a deficiency in the number of acres; but as the contract provided for payment according to the number of acres, and not for a fixed price for the whole, there is no difficulty in ascertaining the exact number of acres to be paid for by the defendant. In such a case the vendee can enforce specific performance of the contract, abating the price on account of the deficiency. See Phinizy v. Guernsey (this term) 36 S. E. 796. The value of the material of the houses could be easily ascertained, and the fact that the price of it was not definitely fixed by the contract would not render the agreement so uncertain and vague as to defeat a proceeding to have it specifically enforced.

For these reasons, we think that the judge did not err in overruling the demurrer filed by the plaintiff to the defendant's counter-affidavit. Judgment affirmed. All the justices concurring.

MOORE v. KELLEY & JONES CO.

(Supreme Court of Georgia. July 13, 1900.)

CONTRACT OF EMPLOYMENT—WRONGFUL DISCHARGE—ACTION FOR SALARY—PLEADING.

1. A declaration alleging that the plaintiff and defendant had, after certain correspondence, entered into a contract of employment, under which the plaintiff was employed by the defendant for one year at a specified salary, which was payable monthly; that, after he had performed his services for several months, he was wrongfully discharged by his employer; that he was ready and willing to perform the services, but the employer refused to accept them; that he had recovered a judgment for a part of his salary; and that this action was for the recovery of the balance,—sets forth a cause of action.

2. The recital in the declaration of the correspondence which led up to the contract finally made was mere surplusage, and need not have been set out in full in response to a special demurrer based on the ground that it was not so set forth. So likewise with the recital of the judgment for a part of the plaintiff's salary.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by one Moore, doing business as V. A. Moore & Co., against the Kelley & Jones Company. A demurrer to the complaint was sustained, and plaintiff brings error. Reversed.

Culberson & Willingham, for plaintiff in error. C. D. Maddox, for defendant in error.

SIMMONS, C. J. Suit was brought by one Moore, doing business under the firm name of V. A. Moore & Co., against the Kelley & Jones Company for the balance of plaintiff's salary under a contract of employment for one year at a salary of $200 per month. The petition contained many allegations which were useless and superfluous. The defendant demurred generally and specially, some of the grounds of demurrer being as useless and superfluous as the allegations of the petition just referred to. The plaintiff amended his petition by striking therefrom some of the allegations, and thus reduced it to substantially the following: The defendant company is indebted to plaintiff in the sum of $1,000 for salary covering the period from September 12, 1898, to February 12, 1899, inclusive. This indebtedness arose in the following manner: In January, 1898, plaintiff received a letter from defendant, seeking plaintiff's services as sales agent; the letter concluding with a request for statement of what salary per year, payable monthly, plaintiff would require. Plaintiff replied January 29, 1898, that he would take business at $3,000 per annum, payable $250 per month, and discontinue some smaller lines he had already. Defendant replied February 4, 1898, that it could not pay amount asked, but would pay at the rate of $200 per month, and, if the sales justified, even more. Defendant wired plaintiff to come to Pittsburg, Pa., which plaintiff did. Defendant then renewed proposition to employ plaintiff as sales agent for certain states for one year, at a salary payable monthly, at rate of $200 per month, beginning February 12, 1898. This proposition plaintiff then and there accepted, and he returned to Atlanta, and at once entered faithfully upon the discharge of his duties under said contract. Plaintiff was notified in May, 1898, that owing to the dullness of the trade his services must be dispensed with after June 12, 1898. Plaintiff refused to consent to this termination of the contract, as he was employed by the year, and insisted on a compliance by defendant with the terms of the contract. Plaintiff continued to take orders, but defendant refused to fill them. Defendant would then write to parties giving orders, and tell them that any orders sent directly to defendant would be filled. Plaintiff was ready at all times to comply with contract, and so notified defendant, which persistently refused to accept any services from plaintiff. Plaintiff has obtained judgment against defendant for the amount due him up to September 12, 1898, and now sues for $1,000, the amount due under his contract up to February 12, 1899; that is to say, for his salary due him for the months ending, etc. The demurrers were renewed, and the court sustained them and dismissed the action.

1. We think that the petition set out a cause of action. If the contract of employment was for one year, at a stipulated salary, payable monthly, and the employer wrongfully discharged the employé, the latter can bring his action at the expiration of each month for the amount of his salary for that month; there being a partial breach of the contract each time the monthly salary is refused. In the case of Blun v. Holitzer, 53 Ga. 82, it was decided that "where the plaintiff was employed for one year, at a stipulated sum per month, but was discharged before the expiration of his term, and thereupon sued and obtained a judgment for the amount due up to the time of such discharge, he is not thereby estopped from instituting proceedings to recover the balance due him for the remaining portion of the year." In the case of Isaacs v. Davies, 68 Ga. 169, it was held, "If a servant be employed for five months at a specified rate per month, payable monthly, and pending the employment he be wrongfully discharged, he may, in his option, sue at the end of each month, and a recovery for one month will be no bar to a suit at the end of the next month." From these decisions it is clear that an employé is not obliged to sue for the breach of the contract as soon as he is discharged, nor is he compelled to await the expiration of the term of his employment before he brings his action.

2. The allegations in the petition that there had been a correspondence between plaintiff and defendant as to the terms of the employment, setting out the substance of the correspondence, may be treated as surplusage, inasmuch as the petition shows that the contract was not made in this correspondence, but in a personal interview between plaintiff

and defendant; the correspondence merely leading up to this personal interview. As the action is not predicated upon this correspondence, it was not necessary, in response to a special demurrer, to set out in full the letters referred to in the petition. As it was unnecessary to allege that there had been any correspondence, such an allegation will be treated as surplusage, or as mere matter of inducement. The same reasons will apply to the grounds of the demurrer which were based on the failure to set out the record and judgment in the former suit to recover salary for the other months. It was not necessary to recite this former recovery of a portion of the salary, but what was alleged in reference to it was simply to show the reason the suit was not for the whole amount of the salary from the time of discharge. Viewing the declaration as it stands after amendment, we think it sets out a cause of action good against all the demurrers filed, and that the court erred in dismissing it. Judgment reversed. All the justices concurring.

DAVIS v. MILLEN.

(Supreme Court of Georgia. July 14, 1900.)

GARNISHMENT—TAX EXECUTION.

Where a tax execution has been by the tax collector transferred to a private person, such transferee cannot base upon it a garnishment proceeding against a debtor of the defendant in execution.

(Syllabus by the Court.)

Error from superior court, Tattnall county; B. D. Evans, Judge.

Action by J. T. Millen against C. P. Davis and one Swain, garnishee. Judgment for plaintiff, and defendant in execution brings error. Reversed.

E. T. Davis and Jas. K. Hines, for plaintiff in error. E. J. Giles, for defendant in error.

SIMMONS, C. J. A tax execution was issued against Davis. It was afterwards transferred to Millen, who sued out on it a summons of garnishment before a justice of the peace, and had the summons served on Swain. At the trial the defendant objected to the summons of garnishment as issued. The magistrate overruled the objections, and gave judgment against the garnishee. The defendant took the case by certiorari to the superior court, where the certiorari was overruled. The defendant in execution excepted.

Summons of garnishment can, in this state, issue in but three classes of cases: (1) Where there is a suit pending (Civ. Code, §§ 4549, 4705); (2) where a judgment has been rendered by a court having jurisdiction (Id. § 4705); and (3) where a tax collector has issued an execution, has it in his hands, and, being unable to find any property of the defendant, makes an entry of nulla bona thereon (Pol. Code, §§ 895, 896). Process of garnishment issued in any other case or upon any other ground is without authority of law, and a judgment based upon it is binding upon no one. "As [garnishment] proceedings are purely statutory, and cannot be extended to cases unprovided for, without mischief, the courts have no discretion to enlarge the remedy, or hold under it either persons or property not made subject to the process. Writs of garnishment can issue only in the cases enumerated in the statute. To entitle the plaintiff to the benefit he claims, he must show that his case is one clearly contemplated by the statute, for the remedy cannot be extended to doubtful cases." Rood, Garnish. § 13. In the present case no authority for the issuance of the garnishment can be derived from the power given to tax collectors by section 895 of the Political Code; for no effort was made to comply with its provisions, and the execution was not in the hands of the tax collector. There is no general statute allowing garnishment proceedings, other than as mentioned above, and we think that there was no authority for the present proceeding. A tax execution is not founded upon any judgment rendered by any court, and therefore cannot be the foundation of a garnishment proceeding. The Code requires the garnishment to be returned to the court in which the suit is pending or in which the judgment was rendered, except that, where a tax collector issues a summons of garnishment, it shall be returned to the superior court. This clearly shows that the statute contemplates that, except where the tax collector issues the summons, garnishment proceedings must be based upon a suit pending in some court, or upon a judgment rendered by some court. In the present case the justice's court had no jurisdiction to issue the summons of garnishment, and had no jurisdiction to try any issue made thereon. The judgment was, therefore, necessarily void, and the judge of the superior court should have so declared upon the hearing of the certiorari. Where a justice's court, without jurisdiction of the subject-matter of the suit, renders a judgment, and the case is taken up by certiorari, the superior court should reverse the judgment. If the superior court affirms the judgment of the justice's court, this court will reverse the judgment of the superior court. Judgment reversed. All the justices concurring.

GUNN v. WILLINGHAM.

(Supreme Court of Georgia. July 14, 1900.)

INJURY TO EMPLOYÉ—FELLOW SERVANTS—DEFECTIVE MACHINERY—NOTICE.

1. One who is engaged with others in raising, by means of a derrick, timbers which are being used in the construction of a house, and whose particular duties are to stand on a scaffold and receive and detach such timbers from the derrick when they are sufficiently elevated for the use intended, is a fellow servant of one who stands on the ground and operates the machinery which elevates such timbers, when the persons so engaged are under one common employment, receiving orders from another as superintendent of the entire construction; and this is so even if the person operating the derrick is invested with authority to direct how and when the elevation of the timbers shall be made.

2. Even if, in a given case, it be shown that the machinery and appliances furnished by the master for the prosecution of the work in hand were defective, he is not liable to a servant for an injury occasioned by defects of which the latter had knowledge before he was injured, if, with such knowledge, and without calling attention to the defects, he continued in the work carried on by the use of such machinery. Nor is he entitled to recover on the ground that the master negligently employed an incompetent fellow servant, unless it be made to appear not only that such fellow servant was in fact incompetent, but that this was known, or ought, in the exercise of due diligence, to have been known, to the master at the time of the employment, or else that the master negligently retained such fellow servant in his service under circumstances warranting a finding that he knew, or was fairly chargeable with knowledge, of such incompetency.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by J. H. Gunn against E. G. Willingham. Judgment for defendant, and plaintiff brings error. Affirmed.

Hoke Smith and H. C. Peeples, for plaintiff in error. Westmoreland Bros. and Culberson & Willingham, for defendant in error.

LITTLE, J. Gunn instituted an action against Willingham by which he sought to recover damages which it is alleged he sustained by reason of the negligence of the defendant while the relation of master and servant existed between them. The petition and answer raised the issue whether the master had provided reasonably safe appliances in the work being performed by the plaintiff and those engaged with him in a common business, and also whether the master was negligent in the employment of an incompetent servant, who was handling the machinery at the time the plaintiff was injured. It is alleged that the master was negligent in each of these particulars, and that the plaintiff was free from negligence, and was engaged in separate work from that connected with the handling of the machinery, which was the proximate cause of his injury. It appears from the evidence of the plaintiff, who was a witness in his own behalf: That he was an experienced carpenter in the employ of the defendant in July, 1897, when he was injured. That the defendant was a contractor engaged in the construction of a large building to be used for manufacturing purposes. In the construction of the building a derrick something near 75 feet in length was being used. It was constructed by lapping pieces of timber together, and having them heavily spiked and bolted. It also appears that the plaintiff and one other employé of the defendant constructed the derrick, which was used for hoisting heavy timbers to the top of the work as it progressed. Originally this derrick was operated by one Carey, who, the plaintiff testified, had experience in that business; and the witness, who had knowledge of such matters, was satisfied with the manner of the construction of the derrick, and the way in which Carey handled it. The base of the derrick was originally placed on the ground floor of an old building which stood on the same site, and which had been previously used for the manufacture of commercial fertilizers. On the day previous to the time when plaintiff was injured, the derrick was put in charge of one Brantley, and Carey had charge of the landing of the timbers. The plaintiff, Brantley, Carey, and others were building the house together. When Brantley took charge of the derrick, he cut off a part of it, and took it out of the cellar or pit and placed it on a bank, supporting it as it was supported before,—by three guy ropes which were attached to stakes driven in the ground 15 or 20 feet from the mast of the derrick. At the time he was injured the derrick was being used to carry heavy timbers to the top of the building. Plaintiff was on a scaffold, helping to receive the timbers brought up by the derrick, and was 50 feet above the ground. While the heavy timbers were being brought up, one of the ropes broke, and the derrick was overthrown, striking the scaffold and precipitating plaintiff to the ground. The guy ropes were being used in the same way that they had been theretofore used, and were fastened in the form of a triangle, with the mast of the derrick as the apex. The guy ropes were new at the beginning of the work, but they were small,—about an inch or three-quarters of an inch in diameter. Witness had seen larger guy ropes used to elevate timbers of that character, but these had sustained similar loads up to that time without being broken. Plaintiff knew that these ropes were being used, and that the ropes were too small, but did not consider it his business to suggest that fact. He thought the ropes were liable to break, using them so long, and he considered it dangerous work, anyway. At the time the ropes gave way and caused the derrick to fall, Brantley himself was managing the derrick. There was acid in the cellar, and before the derrick was removed the guy ropes often got in the acid, because it was banked up in the cellar. At the time plaintiff was hurt the building was almost completed, and the derrick was taken out of the cellar in order to carry the timbers which were necessary to complete it to the top of the building. Plain-

tiff had known Brantley ever since he was a boy. They had worked together before the superintendent hired the plaintiff and Brantley to engage in this work. Brantley's business was that of a carpenter and wood workman. Plaintiff did not know of any experience he had in the management of derricks. Previous to the time when Brantley took charge of the derrick, he was engaged at work on another building, and when that was finished he came to this one. There was testimony, also, tending to show that the derrick was not properly managed by Brantley; and one witness testified that, while he had known Brantley to handle smaller derricks, he had never before known him to handle a derrick of that size, and that a failure by Brantley to follow the instructions of Carey caused the derrick to fall. Evidence was also introduced tending to show that one of the guy ropes of the derrick was fastened to a tree, another under the railroad iron, and the other to a stake driven in the ground; that the derrick was in a leaning position, against the line which was fastened to the stake, which caused the stake to be pulled out of the ground. When the stake was pulled out of the ground the weight was thrown on the rope, which broke. The stake was driven in the ground two feet,—sufficiently, in the opinion of the witness, to have held the rope. At the time of the fall, Brantley was directing the operations. Another witness, who stated that he had experience in such matters, testified, among other things: That he saw the derrick after it was fixed. That there was nothing about it sufficient to call attention that anything was wrong. Jim Brantley was doing the work with a squad of men. Jim Brantley was under William Brantley, and William was under Padgett, and Padgett worked for the defendant. Padgett, the superintendent, was there frequently, as was also the defendant. On the conclusion of the evidence for the plaintiff, the defendant moved for a nonsuit, which was granted, and the plaintiff excepted.

1. It is insisted here that the nonsuit was improperly granted, and that the evidence showed that the ropes used to support the derrick were too small; that the superintendent in charge of the derrick managed it improperly; that he was incompetent, that the master knew all this, or ought to have known it; and that the plaintiff received his injuries because of the defective ropes and the improper handling of the derrick by the incompetent foreman, while the plaintiff was in the discharge of his duty, using due care. Our Civil Code (section 2610) declares that, except in case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business. There certainly cannot be any serious contention but that Brantley, who was operating the derrick, and the plaintiff, who was receiving the timbers which the derrick carried to the top of the building, were engaged about the same business. They and the others with them were engaged in the construction of a house. In order that the necessary timbers might be taken to the top of a building, it was important that a derrick should be used. In using it, it was necessary that some one should so direct its movements that the necessary timbers should be fastened to this lifting power, and also necessary that when such timbers had reached the proper height they should be received and detached. It was the business of Brantley to do the one, and of the plaintiff the other. This court ruled in the case of McGovern v. Manufacturing Co., 80 Ga. 227, 5 S. E. 492, that a workman engaged with two others, and having the direction of the work in the picker room of a factory, as foreman, was not the general superintendent of the corporation operating the factory, so as to render it liable for his negligence in starting a machine, whereby another employé was injured. And in case of Ellington v. Lumber Co., 93 Ga. 53, 19 S. E. 21, where a number of previous cases ruling on the question as to who are fellow servants are referred to, quoting from Mr. Wood in his treatise on the Law of Master and Servant, the court said: "It is subjection to the same general control, coupled with an engagement in the common pursuit, that affords the test." And, without further reference to this or the great number of other adjudicated cases which elaborate the law declaring who are fellow servants, it is sufficient to say, under this test, that Brantley, the foreman of the squad, and the plaintiff, were fellow servants. They were engaged in one common employment, which was placing timbers on a house in process of erection. One gave the orders, the timbers were attached to the machine, the foreman then raised them by the application of machinery, and the plaintiff received them. It was a common pursuit. Both were subject to another Brantley, that Brantley to Padgett, and all to the defendant, Willingham. They were, in our opinion, fellow servants.

2. While the master is not liable for injuries arising from negligence or misconduct of other servants about the same business, he is liable for the failure to exercise ordinary care in the selection of his servants, and of their retention after he has knowledge of their incompetency. He must also exercise the same degree of care in furnishing machinery equal in kind to that in general use, and which is reasonably safe for all persons who operate it with ordinary care and diligence. Civ. Code, § 2611. These are but the rules of the common law, and the principle upon which they are founded is that one man is not to be held liable for the negligence or misconduct of another, unless that one owes to the person injured by such misconduct or negligence a duty; and, in an issue arising between master and servant, that duty must be shown. The burden of proving negligence upon the part of the master is on the servant, and he is

bound to show that the injury arose from defects known to the master, or which he would have known by the exercise of ordinary care, or that the master has failed to observe precautions essential to the protection of the servant which ordinary prudence would have suggested. Wood, Mast. & S. § 368. And no presumption of negligence on a master's part is raised from the mere fact that an injury results to a servant from a latent defect in machinery or other appliances used in a particular business. There must be evidence of negligence connecting him with the injury. Id. So that, if the plaintiff was entitled to recover in this case, the burden was upon him to show this negligence. It is insisted first that the evidence was sufficient to carry this case to the jury; that the master was negligent in not furnishing proper ropes by which the derrick was to be upheld. We do not think so. The only evidence relating to that subject is as to the size of the rope, and that it had been stretched in a cellar, where there was an accumulation of acid. It was not shown that the rope had been affected by the acid. At best, it leaves only an inference that it might have been. Nor was it shown of what size a rope should have been, to have been safely used in carrying necessary timbers to the building which was being erected. It is true that the plaintiff says that the rope used was too small, and yet, according to his own evidence, he does not know anything more than that one of the ropes broke. The manner of the breaking is explained by another witness for the plaintiff, who, in giving an account of the accident, says that a stake to which one of the ropes was attached, in consequence of the strain upon it, was drawn from the ground. If this be true, the rope bore the strain sufficiently to draw up the stake without breaking, and the fault would seem to have been that the stake had not been sufficiently fastened. The same witness, testifying as to the breaking of the rope, says that after the stake was drawn from the ground the derrick pressed against another rope, and by its weight caused it to break. So, therefore, it does not appear at all that the rope was broken because of the strain of operating the derrick. But suppose we assume that the rope was too small for this use, and even go further, and assume that the rope was injured by its contact with acid, which does not appear; a sufficient reply to the plaintiff's right of recovery is that he knew of both facts preceding the occasion of his injuries, and with this knowledge continued the work. It is declared by section 2612 of our Civil Code that a servant assumes the ordinary risk of his employment, and is bound to exercise his own skill and diligence to protect himself. In suits for injuries arising from the negligence of the master in failing to comply with his duties, it must appear that the master knew, or ought to have known, of the defects or danger in the machinery supplied, and it must also appear that the servant injured did not know, and had not equal means of knowing, such fact, and, if he exercised ordinary care, could not have known thereof. The liability of a defendant in a case like this arises from the fact that he was the cause of the injury, by employing the servant in a particular work when he knew or ought to have known that the machinery by which he carried on the work could not be safely used for that purpose, and that its use was accompanied by extra risk and danger. Loonam v. Brockway, 28 How. Prac. 472. But the rule is universal that he is not liable for injuries occasioned by such machinery if the servant has the same knowledge of its defects, or the danger incident to its use, as the master, in the exercise of due care, possesses, and at or before the time the accident occurred there was nothing to indicate any danger, such as demanded or suggested precautions which were omitted; nor, if the instrumentalities of the business are suitable, and proper precautions are adopted, is the master liable for an injury that results from an improper or imprudent use of the same by a co-servant. Wood, Mast. & S. § 371; Summersell v. Fish, 117 Mass. 312; Pitts v. Railroad Co., 98 Ga. 655, 27 S. E. 189. See, also, Ingram v. Lumber Co., 108 Ga. 190–197, 33 S. E. 961.

It is, however, contended that there was evidence showing that Brantley, who was operating the derrick, was incompetent, and that the master was chargeable with a knowledge of such incompetency at the time he was employed, or during the progress of the work, before the injury. It was shown, even by the plaintiff himself, that, as to general carpenter work, Brantley was a good workman. It was shown, also, by another witness for the plaintiff, that Brantley had experience in the operation of derricks. It is true that the last witness testified that Brantley's experience had been confined to derricks of smaller size, but nevertheless the fact remains that he had experience in the business of using a derrick to elevate material. This evidence was not sufficient to establish even that Brantley was incompetent. He might have been careless in the particular instance where the plaintiff was injured. He may not have observed proper precautions, and, had this been the issue, under the evidence the case ought to have gone to the jury. But that fact would not be sufficient to charge the master with liability. The burden in all such cases is upon the servant seeking a recovery to establish the fact that the injury resulted to him because the master did not exercise reasonable and proper care in the employment of the servant, and this must be established as a fact in the case, and cannot result as an inference from the circumstance that the servant causing the injury was even in fact incompetent. Baulec v. Railroad Co., 59 N. Y. 356; Moss v. Railroad Co., 49 Mo. 167; Davis v. Railroad Co., 20 Mich. 105. The question, therefore, relates to the want of care on the part of the master in employing

the servant, even when it is shown that the injury occurred by reason of the negligence or inefficiency of such servant; and, taking all of the evidence of the plaintiff, we do not find that it contains anything which would have authorized the jury to determine that the defendant was negligent and failed to use proper care in the employment of Brantley. Indeed, the plaintiff himself testified that he had known Brantley a great many years, and knew that he was a good workman; and, while his testimony is to the effect that Brantley improperly managed the derrick, he did not testify to any fact from which it could be inferred that the defendant was negligent in employing him. The plaintiff was undoubtedly severely injured, but pecuniary compensation does not follow every personal injury. The work in which he was engaged was a dangerous one. He recognized that it was, and so testified. He was fully acquainted with the machinery that was being operated, and the appliances used to operate it. He knew his fellow servant Brantley,—knew his general capabilities. If he was in fact incompetent to manage the derrick, it was not shown that it was generally known; and the fact that he managed it improperly in a particular instance is not sufficient, of itself, to support the charge against the master of negligence in the employment of Brantley. The rule of liability in such a case is well fixed. The evidence did not make a case which would support a verdict in favor of the plaintiff, from any point of view, and there was therefore no error in granting the nonsuit. Judgment affirmed. All the justices concurring.

WATKINS v. BRIZANDINE.

(Supreme Court of Georgia. July 14, 1900.)

ACTION—DISMISSAL—REINSTATEMENT—LACHES.

1. A motion to reinstate a case, made after the expiration of the term at which the order of dismissal was entered, stands, as to excuses for delay, upon the same footing as an "extraordinary" motion for a new trial.

2. There being in the present case no sufficient excuse for failing to make the motion to reinstate at an earlier term than that at which it was filed, the court erred in sustaining it.

(Syllabus by the Court.)

Error from superior court, Columbia county; E. L. Brinson, Judge.

Application of C. R. Brizandine for dower. Sarah Watkins, a creditor of the deceased husband of applicant, filed a caveat. Application dismissed. From an order granting a motion to reinstate, Watkins brings error. Reversed.

E. H. Callaway and Lawson & Scales, for plaintiff in error. Thos. E. Watson, for defendant in error.

LUMPKIN, P. J. On January 10, 1896, Mrs. C. R. Crawford, who was then the widow of William P. Crawford, but who afterwards intermarried with one Brizandine, made an application to the superior court of Columbia county for dower. Commissioners were appointed, who made their return to the March term, 1896, of that court, at which term Mrs. Sarah Watkins, a creditor of the estate of William P. Crawford, filed a caveat. The presiding judge being disqualified, counsel for the parties entered into a written agreement to try the case before an attorney at law, to be thereafter selected, as judge pro hac vice; the trial to take place in the city of Augusta after three days' notice to each of the parties. No attorney to act as such judge was ever agreed upon, and at the September term, 1897, of Columbia superior court, the application for dower was dismissed for want of prosecution. At the March term, 1899, of that court, Mrs. Brizandine filed a motion to reinstate the case, and also a separate motion to set aside the judgment of dismissal. Both motions were at the following September term heard and disposed of together by his honor, Judge Brinson, who passed an order setting aside the judgment of dismissal and reinstating the case. To this action of the court, Mrs. Watkins excepted.

A considerable amount of evidence was introduced at the hearing before Judge Brinson. This evidence warranted a finding that Mrs. Brizandine was justified in not appearing at the September term, 1897, for the purpose of giving attention to her case. As a reason for not taking steps at the March term, 1898, to have the same reinstated, she showed that she had prior to that term employed Mr. Thomas E. Watson to prepare the necessary motion, and that he was absent therefrom under leave of the court, on account of sickness in his family. It further appeared that Mrs. Brizandine was herself present at the September term, 1898, but was too ill to give attention to business. It did not, however, appear whether Mr. Watson was or was not also present at that term; nor is any reason disclosed why he did not then move to reinstate the case. The question is, did the judge err in passing the order of which the plaintiff in error complains? While, as above stated, two separate and distinct motions were filed, they were in essence the same, and amounted to simply an effort to have the case reinstated. Assuming that up to the September term, 1898, there had been no lack of diligence on the part of Mrs. Brizandine or her counsel, we are constrained to hold that no excuse is shown for failing to move at that term. In Austin v. Markham, 44 Ga. 161, it was distinctly ruled that "a motion to reinstate a case, made at a term subsequent to that at which the judgment of dismissal was had, stands on the footing of a motion for a new trial, and requires the same excuses for a delay as are required in motions for new trial after the term has passed." In the opinion Judge McCay said, in effect, that whether the dismissal was apparently proper, or the result of an error of law, "there ought to be the same excuses for delay as are required to excuse delay in a motion for a new trial." Applying the rule

laid down in the case cited to that before us, we think it clear that the judge erred in reinstating the case. If the motions made by Mrs. Brizandine stand upon the same footing, relatively to the question of delay, as would an "extraordinary" motion for a new trial, it is obvious that she moved too late. There is not the semblance of an excuse for failing to present her motions at the September term, 1898. There may be some good reason why Mr. Watson did not do so, but, if so, the record affords not even a hint of it. The fact that Mrs. Brizandine was indisposed at that term does not, of itself alone, justify the action taken by the judge; for it does not appear that her counsel required any assistance from her in preparing a proper motion, or was for any other reason unable, because of her illness, to properly attend to the matter. For aught that the record before us discloses, her motion to reinstate could and ought to have been filed at that term, and, if there was any good reason why the same could not then be heard, it would, of course, have been proper to move to postpone the trial thereon. Judgment reversed. All the justices concurring.

SANDS v. DURRENCE et al.

(Supreme Court of Georgia. July 14, 1900.)

APPEAL—REVIEW.

No material error of law was committed, and the evidence authorized the verdict.

(Syllabus by the Court.)

Error from superior court, Tattnall county; B. D. Evans, Judge.

Action between J. J. Sands and F. B. Durrence and others. From the judgment, Durrence brings error. Affirmed.

W. T. Burkhalter and H. D. D. Twiggs, for plaintiff in error. J. P. Moore and Jas. K. Hines, for defendants in error.

PER CURIAM. Judgment affirmed.

DUN et al. v. WEINTRAUB.

(Supreme Court of Georgia. July 13, 1900.)

LIBEL—WHAT CONSTITUTES—SPECIAL DAMAGE.

1. To publish of a merchant that he has given a mortgage upon his stock of goods, though the same does not appear of record, is not actionable, without allegations of special damage.

2. To publish of a merchant that he has not "succeeded in obtaining the implicit confidence of local people," and that "he is looked upon locally as an itinerant trader, of small financial responsibility and of uncertain prospects," is, if false, libelous per se.

3. Any disparaging words, spoken or written of a merchant, which are false and productive of special damage, flowing naturally and immediately therefrom, will support an action.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Action by Sigmund Weintraub against R. G. Dun & Co. Judgment for plaintiff. Defendants bring error. Affirmed.

Irvin Alexander and E. H. Callaway, for plaintiffs in error. Russell & Rosenfield and E. B. Baxter, for defendant in error.

COBB, J. Weintraub sued Dun & Co. The petition alleged that the plaintiff was a merchant, and the defendants carried on the business of a commercial agency, which undertook to give ratings of all persons engaged in trade, and also give such other information as would be desired by one to whom application had been made for credit by a trader. On February 2, 1898, the defendants published and circulated among their patrons a writing in reference to plaintiff which, among others, contained the following statements: "His stock and bills receivable amount to $1,975; owes for merchandise, $150; closed by notes, $200; insurance on stock, $1,000. Said to have a capital of $1,200, of which $200 is said to be borrowed. The capital is represented almost entirely by stock of goods on hand. Those in a position to learn state that he has given a mortgage to secure the $200.00 liability, though same does not appear of record." Though he "has paid his debts since he has been here, he does not seem to have succeeded in obtaining the implicit confidence of local people, however. He is looked upon locally as an itinerant trader, of small financial responsibility and uncertain prospects." It is alleged that the statement that he had given a mortgage to secure the $200 liability was false and malicious. It is further alleged that the purport of the statement in reference to the mortgage, and the intention of the defendants in making the statement, was to charge that the plaintiff was embarrassed and compelled to give a mortgage to secure his creditor, and was colluding with him to keep the same from record in order that the goods of others might be brought in and made subject to the mortgage whenever the mortgagee should see proper to record the same, and that the language, in effect, charged the plaintiff with being a common cheat and swindler. It was also alleged that the language in reference to plaintiff's not having obtained the implicit confidence of local people, and as to how he was looked upon by local people, was false and malicious, and the purport and intended effect of the language was that he was not entitled to the confidence of persons from whom he might seek to buy; it being a well-established principle of trade that, without local confidence, credit was not easily obtainable in other places,—the effect of the language being to charge that, from want of business ability or lack of honesty, he had failed to obtain the confidence of the business community in which he lived. It was further alleged that, after the publication of the statements above referred to, the plaintiff's credit was destroyed, and numerous items of special dam-

age alleged to have resulted from the publication of the statements were set forth in the petition and amendment. To this petition the defendants filed demurrers, both general and special. The court sustained some of the special demurrers in so far as they related to designated paragraphs of the petition, which were stricken. The other special demurrers and the general demurrer were overruled, and the defendants excepted.

1. To write of a merchant that he has given a mortgage on his stock is not libelous per se. Newhold v. Bradstreet, 57 Md. 38; Dun v. Maier, 27 C. C. A. 100, 82 Fed. 169. Nor is it libelous per se to publish of a merchant that a judgment has been recovered against him. Woodruff v. Bradstreet Co. (N. Y.) 22 N. E. 354, 5 L. R. A. 555. The statements made in the financial report which is the subject of the plaintiff's complaint, so far as they relate to the mortgage which he is said to have given, contain nothing which is discreditable to him either as an individual or as a merchant. For a merchant to secure his creditor by mortgage upon his stock is neither discreditable nor dishonest, and there is nothing in such an act which is calculated to hold the merchant up to public ridicule or contempt. It might be otherwise if the charge had been that the plaintiff had made a fictitious mortgage, or that he had executed a mortgage to a bona fide creditor, and had colluded with him to withhold the same from record, in order that the goods of others might be fraudulently brought under the lien of the mortgage, or if it had been stated that he had given a mortgage for the purpose of giving a preference in violation of the bankrupt law. To execute a mortgage, which was founded upon no consideration, with the understanding that the same was to be used by one to whom the person purporting to be the mortgagor owed nothing, would, if used to the detriment of creditors or others, amount to a gross fraud. Withholding from record a mortgage taken in good faith for the purpose of misleading those to whom the debtor will apply for credit is a badge of fraud. Under the bankrupt act of 1898, the transfer by a debtor, while insolvent, of any portion of his property, to one or more of his creditors, with the intent to prefer such creditors from other creditors, would be an act of bankruptcy. Fost. Fed. Prac. § 72. But, even if charging any of these acts would make the publication a libel, there is nothing in the language used in the present case which would justify an inference that it was the purpose of the defendants to charge any of these acts.

2. Was the statement that the plaintiff did not seem to have succeeded "in obtaining the implicit confidence of local people," and that he was "looked upon locally as an itinerant trader, of small financial responsibility and uncertain prospects," libelous per se? Whether it would be libelous to say of a merchant that he is an itinerant trader, we will not stop to inquire, as, under the view we take of the present case, it is unnecessary to decide this question. To say of a merchant that he has not succeeded in obtaining the implicit confidence of his neighbors, coupled with the statement that he is a man of small means and of uncertain prospects, would be, to say the least of it, placing the individual thus spoken of in a position which is neither enviable nor desirable, and would be calculated to injure him in the estimation of the business men of other communities with whom he might be compelled to come in contact. The words imply that he has made an effort to secure the confidence of his neighbors, and for some reason has failed to attain this end, and that on this account, coupled with the fact that he is man of small means, his future success is doubtful. Such statements in reference to a merchant could have but one effect upon his business, and that is to seriously injure, if not destroy, his credit in those markets where the character thus given to him precedes his applications for credit. Such statements in reference to a merchant, when false, are libelous per se, as we understand the law. The Code declares that charges made of another in reference to his trade, office, or profession, calculated to injure him therein, are slanderous, without proof of special damage. Civ. Code, § 3837. And as said by the present Chief Justice in Hardy v. Williamson, 86 Ga. 557, 12 S. E. 876, "If this be true as to mere slander, much more is it true as to written defamation." See, also, Brown v. Holton (Ga.) 34 S. E. 717; 13 Am. & Eng. Enc. Law (1st Ed.) 314; Newell, Defam. (2d Ed.) pp. 74, 193; Odgers, Lib. & Sland. p. 77; Price v. Conway, 134 Pa. St. 340, 19 Atl. 687, 8 L. R. A. 193.

3. It is alleged that, by reason of the publication of the statements above referred to, plaintiff has sustained special damage, the items thereof being set forth in the petition. If the publication in reference to the giving of the mortgage was, as was alleged, false and malicious, and special damage resulted therefrom, the plaintiff is entitled to recover the items of special damage, though the language be not libelous per se. This is also true of any other statement set out in the petition, if it was falsely and maliciously made. If the plaintiff has sustained special damage by reason of the publication of the statements referred to in the second division of this opinion, he is entitled to recover for such damage in addition to the general damages he may recover by reason of the publication. See, in this connection, Odgers, Lib. & Sland. pp. 289, 309; Newell, Defam. (2d Ed.) p. 849, § 17. In reference to special damages the author last cited lays down the following rules: (1) They must be "actual and substantial; (2) they must actually have accrued at the time of the commencement of the suit; (3) and must be the immediate consequence of the defamatory words." Page 851, § 19. See, also, 13 Am. & Eng. Enc. Law (1st Ed.) 436. Judgment affirmed. All the justices concurring.

ALLEN v. HIXSON.

(Supreme Court of Georgia. July 14, 1900.)

INJURY TO EMPLOYÉ—VOLUNTARY SERVICES—CAUSE OF ACTION.

1. An employé who, as a mere volunteer, does an act entirely outside of the scope of his employment, and in consequence receives personal injuries, cannot hold his master liable therefor.

2. No cause of action arises from a failure to perform an act of humanity, if such failure involves no breach of a duty imposed by law.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by Agnes Allen against William P. Hixson. Judgment for defendant. Plaintiff brings error. Affirmed.

The following is the official report.

The plaintiff was a young woman employed in the defendant's laundry as an operative of a mangle, which consisted of an upright frame, holding two horizontal metallic rollers, covered with divers layers of cloth, and an uncovered hollow metallic bar between said rollers, and a lever or appliance on one side of said frame for the purpose of bringing the rollers in close proximity to the bar, and on the other side of the frame was an arrangement of bandwheel and cogwheel for receiving and conveying steam power to the rollers. The method of operating the mangle was to put the rollers in motion by the appliance of steam power through said arrangement of bandwheel and cogwheel, and then bring the rollers in close proximity to the bar by the use of the lever. When steam power was so applied, the rollers would revolve parallel to each other and to the bar, but with an interstice between them sufficient to allow the introduction of a hand; but when the lever was used for the usual operation of the mangle the rollers would be brought into such close proximity to the bar as only to admit of the passage between them of a collar, cuff, or other article to be laundered. After the application of steam power it was the duty of plaintiff to bring the rollers into close proximity to the bar by the use of the lever, and then to insert the articles to be ironed. One morning, on coming to work, she found that the power had been applied, and that the rollers were revolving, but she observed that they were not revolving in their usual and proper manner, namely, upon axes parallel to each other, but converged obliquely, so that at their right-hand ends, facing the machine, they were closer together than at the other ends. She further observed that the cloth layers on the rollers were not firmly wrapped around them in their usual manner, so as to remain firmly in position, but they appeared to be loose and loosening, so as to be unwinding from the rollers, the unwound portion lying in front of the rollers, and extending out upon the shelf in front of them. The lever had not been so applied as to bring the rollers into close proximity, nor did she apply it. Seeing that the machine was not in its usual condition, she did not attempt to use it, but reported that fact to Pickett, the representative, general superintendent, and master mechanic of defendant in said business; it being her duty to make such report to him and to obey his orders. He came to inspect the mangle. The unwrapped cloth concealed from view the condition of the rollers, and, in order to show Pickett such condition, she, using her right hand, took hold of the unwrapped end of the cloth, then lying on the shelf, in order to raise the cloth and allow an inspection of the rollers. The cloth could and would have been handled by her with perfect safety, but for a hidden defect in some other part of the machine, of which defect she had no warning or knowledge; but at the instant she so took up the cloth a sudden, violent, and unexpected jolt of said other part of the machine caused the rollers to come into violent contact with said bar, and at the same instant, and before she could drop the cloth or withdraw her hand, drew the cloth and her hand and wrist with great force and velocity between one of the rollers and the bar, crushing her hand and wrist. She alleges that the injury was directly caused by the defendant's negligence in having the machine in an unsafe and dangerous condition, which condition was known to defendant, she being unable, from her ignorance of the constructing and operating details of machinery, to state the mechanical cause of this condition; that she was not negligent, and could not, by ordinary care, have avoided the consequences to herself of defendant's negligence; and that defendant negligently allowed her hand and wrist to remain between the roller and bar for half an hour, thereby grievously aggravating her agonizing suffering, which she describes in detail. She also alleges her age, earnings, etc. A general demurrer was sustained, and she excepted.

F. W. Capers and Salem Dutcher, for plaintiff in error. Jos. B. & Bryan Cumming, for defendant in error.

LUMPKIN, P. J. The bill of exceptions alleges error in sustaining a general demurrer to the plaintiff's petition, the substance of which appears in the official report. Assuming as true the plaintiff's allegations, we agree with the trial judge that she did not set forth a cause of action. It affirmatively appears that it was her duty to feed the machine by which she was injured, and it is a legitimate inference that it was also incumbent upon her to inform the superintendent that this machine was out of order. Beyond this, it cannot be gathered from her petition that anything more was required of her. It is therefore clear that she was not injured while in the performance of any duty growing out of the service in which she was engaged. It follows that the master was under no duty of protecting her against injuries received while she was, as a mere volunteer, endeavoring to accomplish something entirely outside the scope of her employment. The act which caused her injury was certainly one of this kind; for, in taking hold of the unwrapped cloth for the purpose of showing the superintendent the condition of the machine, she volunteered to perform a service not required of her, and therefore necessarily acted upon her own responsibility and at her own risk. It makes no difference that the machine had a defective part of which she was ignorant, for its existence could not, on the occasion referred to in her petition, have been the source of injury to her, if she had confined herself to the performance of the duties pertaining to the service for which she was employed. As will have been seen, the plaintiff was an adult, and actually knew when she first approached the machine that it was out of order. Recognizing the danger of attempting to operate it in that condition, she prudently refrained from so doing, and made a prompt report to the superintendent in regard to the matter. Unfortunately, however, she did not continue to exercise the same degree of prudence when she went outside the scope of her duties, and, without any direction or request on his part, volunteered to assist him in ascertaining precisely the extent and character of the derangement which had brought about the condition in which she had found the machine.

As to so much of the petition as claims damages because the "defendant negligently allowed petitioner's hand and wrist to remain between said roller and bar," or because of the defendant's "negligently failing * * * to effect her release," we do not think a good cause of action is set forth. When an employé, without fault on the master's part, becomes placed in a dangerous or painful situation, the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employé's speedy release. Being in no way responsible for the unfortunate occurrence, the master cannot be said to be guilty of a tort if he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is one of humanity, and for a breach thereof the law does not, so far as we are informed, impose any liability. Judgment affirmed. All the justices concurring.

CENTRAL OF GEORGIA RY. CO. v. EDWARDS.

(Supreme Court of Georgia. July 14, 1900.)

MASTER AND SERVANT—INJURIES TO SERVANT—MASTER'S LIABILITY—PROXIMATE CAUSE—NONSUIT.

1. An employé who has suffered a physical injury cannot maintain therefor an action against his master merely because there may have been

on the part of the latter negligent acts or omissions, which, though they may to some extent have contributed to bringing about a dangerous situation, in which the employé did an act from which the injury directly resulted, were not themselves the cause of the injury.

2. The only alleged act of negligence on the part of the defendant which could in the present case have been fairly found to have been a contributing cause of the injury not having been shown to be in fact an act of negligence, it was error not to have granted a nonsuit.

(Syllabus by the Court.)

Error from superior court, Effingham county; Paul E. Seabrook, Judge.

Action by H. L. Edwards against the Central of Georgia Railway Company. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant brings error. Reversed.

Lawton & Cunningham, for plaintiff in error. Twiggs & Oliver, for defendant in error.

LITTLE, J. It appeared from the petition of Edwards, who instituted an action against the plaintiff in error to recover damages for a personal injury which he sustained, that he was an employé of the Central of Georgia Railway Company, as brakeman on a freight train, at the time he received his injuries; that the train consisted of an engine and about 50 freight cars, besides one caboose. The plaintiff alleged: That on the day he was injured the train was running 40 minutes behind its schedule time, because of a defective driving rod, and of the large number of cars which were attached to the engine. That, owing to its delayed schedule, the train upon which he was employed was forced to enter a siding at Brewer, a station on the Central road, to clear the main line for the passage of a passenger train going in the same direction as the freight train. That sufficient side tracks for the passage of trains had not been provided, because the east switch of the side track had been temporarily removed, and it was necessary for the freight train to pass entirely beyond the west switch of the side track, and then back onto such siding. As the freight train was passing over the west switch at about the speed of 7 or 8 miles per hour, the plaintiff was standing on top of a car about 10 or 12 car lengths behind the engine. The conductor of the train was also standing on the top of a car, a few car lengths behind the plaintiff. That, when the train was passing over the west switch, the conductor, wishing to put his train on the side track as soon as possible in order to avoid a collision with the passenger train which was following, ordered the plaintiff to jump off of the freight train, for the purpose of changing the switch as soon as it became clear. That in obedience to the order the plaintiff, alleging that he was in the exercise of ordinary and reasonable care, proceeded to alight from the train, and, when he jumped from the ladder of the car on which he had been standing, was unable clearly to see the ground beneath him, and consequently his right foot, when he reached the ground, became fastened in the frog of the switch,—such frog not having been blocked so as to prevent the foot of the plaintiff from becoming fastened therein,—and the wheels of the car crushed and mangled his foot so that he never can have free use of the same, and that his left leg was badly broken, and is now one inch shorter than its natural length, and the ankle of the left foot is stiff and useless. The acts of negligence on the part of the railroad company, its officers, and servants, are alleged to be as follows: First, in allowing the driving rod and other machinery of the engine to get into a condition of disrepair, and thereby to cause the train to run behind its schedule time; second, in overloading with 50 cars the engine of said train, and thereby to cause said train to run behind its schedule time; third, in not maintaining and allowing to remain where it had been placed the switch at the east end of said track, and thereby to have avoided the necessity for the plaintiff to jump from the moving train, even though a collision was imminent, and in failing to protect said train so as to have avoided the imminence of a collision; fourth, in maintaining and using a switch, the frog of which was not properly blocked and guarded for the prevention of like casualties. That there was in use among railway companies, known to the defendant, a simple device, efficient and sufficient for the blocking and guarding of the switch frog, so that, had the frog been blocked and guarded by such device, the plaintiff would not have suffered the injuries described, and that the defendant knew, or by the exercise of ordinary care should have known, that the frog was not blocked and guarded. Plaintiff alleges that when he received such injuries he was entirely without fault, and in the exercise of ordinary and reasonable care. The defendant answered, denying each and every allegation of every paragraph of the petition. The plaintiff, after having shown the fact that he was very seriously and permanently injured, testified in his own behalf: That he was employed as brakeman on the freight train, which had about 50 cars, half of them loaded, and that such a great number of cars was unusual. That the train was late, on account of the crank pin of the driving rod being hot. That Guyton was five miles from Brewer, where he was injured. That there was a side track there sufficient to have held the train. That Egypt was the passing point for the freight and passenger, but that in fact on that day these trains passed at Brewer, because the freight was overtaken by the passenger at Brewer. That when the freight train came to Brewer the plaintiff was on top of a box car about seven cars from the engine. That the conductor was on top of a box car several car lengths behind him. That he looked back to the conductor for signals, and when the train was near the west switch the conductor signaled plaintiff, and pointed down to the switch and back to the passenger train. Plaintiff looked, and

saw that the passenger train was about the length of the freight train behind. The conductor pointed as if he desired the plaintiff to get down at once on the west end of the side track. That the east switch had been taken up, and had it been there the train would have stopped and pulled in, and it would not then have been the duty of the plaintiff to change the switch. At the time he jumped he thought he had passed the switch. The frog was not blocked at the time of his injury, but afterwards was blocked with wood, so that it was impossible for a person to get his foot into the frog. This was the first time that he ever remembered to have seen one of the switches on the Central Railroad blocked that way, but now all the switches which he has seen since are blocked. The side track also, after his injury, was put in perfect condition, and, if a switch had been on the east end of the side track on the day his injury occurred, the train would have gone into the side track over it, and he would not have been injured. Before he was hurt he thought the frogs were in good condition and not dangerous, and did not know that they were liable to catch his foot. To ascertain that they were so, he would have had to make an examination. For this he had no time, and it was not his business to examine the switches. Plaintiff had been running on the railroad for five years, and had seen the switch where he was injured perhaps as many as three times a week. Plaintiff had seen one switch blocked with steel on the Plant System before he was injured. Had never seen any other. Had never heard of a blocked frog before he saw that on the Plant System of railroads. At the time he jumped from the car he did not know that he was jumping in the frog, because he could not see it. He looked as best he could under the circumstances. At the time plaintiff jumped from the train, it was moving six or seven miles an hour. He could not see anything that was under him, on account of the dust. That his object was to get off as quickly as possible, and he trusted to luck. His object in getting off quickly was to avoid a collision, and put the switch in order for the freight train to back in on the side track. If he had seen the hole or the frog, he would have gotten off if he could, but would not have jumped into them. The switch blocks are generally used on the Plant System, and are effective in keeping one's foot out of a frog. Witness did not know that the blocked frogs were used all over the Central Railway at that time. Had seen several. By another witness the plaintiff proved that an unblocked frog was dangerous; that a man could get his foot hung in it. By this witness it was proven that he had seen two or three of these blocked frogs on the Central Railroad. Another witness for the plaintiff testified: That he had worked for the Plant System and another railroad for seventeen years as a locomotive engineer, and that it was a part of his business to observe switches and frogs. That the Plant System had been using several kinds of frogs in the past five years. These will prevent the foot of a man from getting caught in the frog. A number of the rules governing employés of the Central Railway Company were also introduced, and the plaintiff closed his case. At the conclusion of the plaintiff's evidence the defendant moved the court to grant a nonsuit. The motion being overruled, the defendant excepted pendente lite, and had its bill of exceptions certified and put on record. The case proceeded to trial, and a verdict was rendered for the plaintiff. The defendant made a motion for new trial on several grounds, which was overruled, and it excepted, assigning error to the ruling of the court in refusing to grant the nonsuit and in overruling its motion for a new trial.

We think the court erred in overruling the motion for a nonsuit. Under the allegations made in the petition, the negligence of which the plaintiff complained that the railroad company, by its officers and servants, was guilty, consisted in the following acts: (1) In allowing the machinery of the locomotive which was pulling the train on which he was employed to get out of order, and so causing the train to run behind its schedule time; (2) in overloading the engine, thus causing it to run behind its schedule time; (3) in not maintaining and allowing to remain a switch on the east end of the side track at Brewer, so as to avoid the necessity which caused the plaintiff to jump from the moving train in order to set a switch at the west end of the side track; (4) in maintaining and using a switch, the frog of which was not properly blocked and guarded. Neither the fact that the machinery of the locomotive was out of order, nor that the engine had attached to it too many cars, nor the fact that there was no switch at the east end of the side track in Brewer, was the proximate cause of the injury which the plaintiff sustained. If these were causes at all, they were too remote as a basis for a recovery. Without entering into a discussion of the doctrine of proximate and remote causes of injury, it is only necessary to refer to the provisions of our Civil Code, in sections 3912 and 3913, declaring the rule on this subject. In the first of these it is declared that if the damages are only the imaginary or possible result of the tortious act, or if other and contingent circumstances preponderate largely in causing the injuries, such damages are too remote to be the basis of recovery against the wrongdoer; and in the latter the rule is stated to be that damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered, but that damages which are traceable to the act, but not its legal or material consequence, are too remote and contingent. The reasoning by which it is sought to charge the defendant company with the negligence which caused the injury to the plaintiff must be

as follows: If the crank pin had not been allowed to get too hot, the freight train upon which the plaintiff was employed would have been able to make its schedule time; and, if it had made its schedule time, then there would have been no imminence of a collision at Brewer; and, if there had been no imminence of a collision, there would have been no necessity on the part of the plaintiff to jump from the moving train in order to set the switch. But the crank pin was allowed to get too hot to make the schedule time, and there was imminence of a collision, and because of such imminence the plaintiff jumped off from the car, and, as he was injured in such jump, he was entitled to recover because the crank pin was allowed to get too hot. Or, take the other proposition that, if there had been a switch on the east end of the side track at Brewer, the train would have entered said side track, and it would have become the duty of another brakeman to set such switch, and therefore there would not have been any necessity on the part of the plaintiff to jump from the moving train, and consequently he would not have been injured. However logical these deductions may be, they fail to establish a right of recovery in the plaintiff for the injuries which undoubtedly he sustained. To constitute an actionable tort, there must be damage to the plaintiff, and negligence by the defendant, causing the injury. Railroad v. Freeman, 75 Ga. 331; Mayor, etc., v. Dykes, 103 Ga. 847, 31 S. E. 443. See, also, Railway Co. v. Price, 106 Ga. 176, 32 S. E. 77, 43 L. R. A. 402, and numerous cases cited in the opinion on page 178, 106 Ga., page 78, 32 S. E., and page 403, 43 L. R. A. The direct and proximate cause of the injury which the plaintiff sustained was caused by his jumping from the train, and, if he is entitled to recover damages from the defendant company therefor, it is because of some negligence on the part of said company which caused either the jump from which the injury resulted, or negligence in not protecting the place where in fact he did jump. As we have seen, it is not charged in the petition that the railroad company was, through its conductor, negligent in directing the plaintiff to jump from the car at the time he did. Therefore, discarding these remote causes, so particularly set out in the petition, as in themselves not giving to the plaintiff a right of action, there must remain but one question, and that is whether or not the company was negligent in not protecting or blocking the frog in which the foot of the plaintiff became fastened, and from which fastening his serious injury was a consequence. By section 2611 of the Civil Code it is declared that the master is bound to exercise ordinary care in furnishing machinery equal in kind to that in general use, and reasonably safe for all persons who operate it with ordinary care and diligence. In the case of Whatley v. Block, 95 Ga. 15, 21 S. E. 985, our present chief justice quoted approvingly the rule which governs this subject, taken from 14 Am. & Eng. Enc. Law, pp. 903, 904, in the following words: "A custom with reference to the adoption of certain safeguards in a given business must be so general that it is presumed that the defendant had knowledge of it, in order to make him liable for neglecting to provide the same." No general custom of any character was shown to exist in relation to blocking the frogs of a switch on a railroad track, either at the time the plaintiff sustained his injuries, or at the time of the trial. The evidence of the plaintiff on this subject only went to the extent of showing that since he had sustained his injuries certain particular frogs on the Central Railroad had been blocked, and that on the Plant System of railroads there existed a number of different kinds of blocks to such frogs. But the master, while bound to exercise due care in protecting his servant in the use of these frogs, cannot be bound to provide a particular contrivance until it is shown primarily that such a contrivance is a safeguard, to some extent, at least, against such injuries, and that it is a general custom among other persons engaged in the same character of business to employ them. The evidence entirely failed to show that the employment of these blocks was even a custom among railroads. Whether they are or not, we do not know; and, while the evidence of the plaintiff contained in this record is sufficient to show that they are a protection, it does not show that they were or are in such general use by the railroads of the country as to make the railroad company in this case responsible for their nonuse; and inasmuch as this general custom was not shown, and this being the only point set out in the petition as showing negligence on which a recovery could have been had if satisfactorily proven, it follows that a nonsuit should have been awarded. Because of so ruling, it is unnecessary to pass on the error alleged to have been committed in overruling the motion for a new trial. Judgment reversed. All the justices concurring.

BROWN et al. v. EVERETT-RIDLEY-RAGAN CO.

(Supreme Court of Georgia. July 18, 1900.)

COMPROMISE WITH CREDITORS — SECRET AGREEMENT—VALIDITY—RES JUDICATA.

1. When one of several creditors of a common debtor who is in failing circumstances ostensibly agrees with the other creditors and the debtor upon a compromise and settlement of all their claims at a specified per cent. on the dollar, and the creditor first referred to, by a secret arrangement with the debtor, of which the other creditors are kept in ignorance, obtains from him money and promissory notes in addition to what is paid under the terms of the general settlement, this latter transaction is in law fraudulent, the notes given in pursuance thereof are void, and the debtor may recover the money paid in pursuance of the secret preference thus given.

2. The debtor may, in defense to an action upon notes so given, not only set up that they are void, and defeat a recovery thereon, but

may, by way of cross action, claim and obtain a judgment against the plaintiff for the money paid in pursuance of the illegal supplemental agreement, if the amount claimed in the cross action is within the jurisdiction of the court.

3. When there are several of such notes, and the plaintiff brings two separate actions thereon and the defendant makes the same defense in each as to the validity of the notes, and also in each of his answers prays for a recovery of the money paid to the plaintiff under the illegal contract, a verdict rendered for such money in his favor on the trial of one of the actions would bar a recovery thereof in the trial of the other action.

4. The rulings and charges complained of in the present case were, in the light of what is above laid down, erroneous.

(Syllabus by the Court.)

Error from superior court, Washington county; John C. Hart, Judge.

Actions by the Everett-Ridley-Ragan Company against Brown & Franklin. The cases were consolidated, and judgment for plaintiff, and Brown & Franklin bring error. Reversed.

Rawlings & Hardwick and Evans & Evans, for plaintiffs in error. Phillips & Phillips, for defendant in error.

LEWIS, J. The Everett-Ridley-Ragan Company brought two suits in the county court of Washington county against Brown & Franklin and H. M. Franklin,—one on a promissory note for $100, and the other on two promissory notes of $100 each, besides interest. These cases were appealed from the county court to Washington superior court, and were there consolidated and tried together before a jury before his honor, John C. Hart, judge presiding. The answer to each case involved the identical issues for trial. To the petition the defendants filed answers admitting the execution and delivery of the notes sued upon. They denied any indebtedness on the notes, stating, in substance, that shortly before their execution the Brown & Franklin Company, a corporation duly chartered under the laws of Georgia, and then engaged in the mercantile business at Tennille, Ga., and composed of the following incorporators, to wit, C. E. Brown, H. M. Franklin, and B. W. Franklin, became very much involved financially, and failed, being indebted to many different creditors in amounts aggregating many thousand dollars. One of the creditors was the plaintiff in this case, the amount of its claim being $1,087.81. After the Brown & Franklin Company had failed, a meeting of its creditors was held at Macon, Ga., on or about October 27, 1894, and there were present or represented at that meeting many different creditors, representing claims that aggregated many thousand dollars. Among those present, and among the most active of the creditors in getting up this meeting, was Ragan, a member of plaintiff's firm, with full authority to act for plaintiff. At the meeting he advocated an acceptance of a compromise of 50 cents on the dollar by the creditors, which settlement was agreed to by them and by H. M. Franklin, who was acting in behalf of the Brown & Franklin Company. The meeting then adjourned, with the understanding that the settlement was agreed to if carried into effect by the Brown & Franklin Company within the next few days immediately thereafter; but after this adjournment Ragan took Franklin off privately, and threatened to break up the settlement unless his firm (plaintiff herein) got 100 cents on the dollar, assuring Franklin that, unless his firm did get 100 cents on the dollar, he (Ragan) could and would break up the settlement; and he promised Franklin that if he would give him notes for $300, and pay him the balance of the 50 cents (amounting to $243.90) in money, thus making the entire 100 cents on the dollar for plaintiff, he (Ragan) would assist him in carrying out the settlement with the other creditors, and would keep the giving of the notes and the payment of this money, in excess of the compromise agreed on, secret from them, and help him in every way possible in the matter. Franklin, being very anxious to settle up the entire business, and being alarmed at the threats of Ragan about breaking up the settlement, was forced to comply with the demands of Ragan, and in accordance therewith did give to plaintiff the notes sued on, and pay to it $243.90 in money, which belonged to H. M. Franklin and C. E. Brown individually and jointly. These were the notes sued on in this case. The payment of the money was kept secret from all the other creditors both by Franklin and Ragan. Defendants alleged that Ragan continued to use his influence with the other creditors to get them to stand to their promise, still concealing from them the fact that his firm was to get 100 cents on the dollar. A few days after the giving of the notes and payment of the money, the settlement was carried into effect; plaintiff still making it to appear to the other creditors that the Everett-Ridley-Ragan Company were only getting 50 cents on the dollar, like the balance, and still keeping secret the existence of these notes and the payment of the money. On account of these facts it was claimed in the answer that the notes sued on were absolutely fraudulent and void, and they further prayed to recover back the cash paid to the plaintiff. An oral demurrer was made by plaintiff's counsel to strike that part of defendants' plea in which they pleaded as a set-off the cash paid plaintiff over and above the demand of plaintiff against them; and this demurrer the court sustained, to which judgment defendants filed their exceptions pendente lite, and allege error thereon in the main bill of exceptions.

The case then proceeded to trial, and the following is substantially the testimony introduced in behalf of the defendants: On September 26, 1894, the Brown & Franklin Company made an assignment to J. M. Brown, assignee. On October 18, 1894, there was a receiver appointed by the United States court to take charge of the assets of this concern and wind it up. The company was indebted to the Everett-Ridley-Ragan Company, of Atlanta, in the sum of

$1,087.81; and Willis Ragan, of plaintiff's firm, came down to see defendants after the receiver had been appointed, and suggested a settlement. The case was set for a final hearing about November 26th of the same year. After Ragan went back to Atlanta, H. M. Franklin, of the defendant corporation, went to Atlanta and saw him there, and Ragan agreed to accept 50 cents on the dollar for his claim. Franklin found he could raise the money to pay 50 cents. The final meeting of the creditors was had in Macon about October 29th, in the office of Hardeman, Davis & Turner, and all the other creditors agreed to accept 50 cents on the dollar for their claims. After the adjournment of the meeting, Ragan took Franklin aside, and told him that he would not accept 50 cents on the dollar, but had to have 100 cents on the dollar for his claim. He advocated the settlement publicly, but he said he would have to have 100 cents on the dollar, or he would break up the settlement. Defendants were not familiar with the practice in the United States court, and Franklin, who was acting for the company, had a dread of that court, and feared, if he did not pay to Ragan what he asked for his firm, it would break up the other settlement, and very much against his will he accepted his proposition and agreed to it,—gave him a check for the cash, $243.90, and three notes, of $100 each, for the balance, which were sued on in this case. Franklin further testified that he paid plaintiff's attorneys, Hardeman, Davis & Turner, the 50 per cent. agreed upon in the compromise by the creditors. Hardeman, Davis & Turner represented the other creditors also. They got 50 cents on the dollar for all their other creditors. Ragan had telegraphed to the witness Franklin to come to Atlanta, and this was the reason he went there to see him. Ragan advised the creditors to take 50 cents on the dollar for their claims, and told them he was only getting 50 cents on the dollar for his. The creditors had another meeting at the office of Hardeman, Davis & Turner, and Ragan made at this meeting a statement to everybody, publicly, that he was getting 50 cents on the dollar. He did not say anything in Atlanta about getting these notes, but told witness that after getting to Macon. "He said, if we would give these notes, he would help us in the settlement." Another witness, C. E. Brown, testified: That he was interested in the concern of the Brown & Franklin Company. Was present when Ragan came to Tennille. Ragan was the first man to mention settlement, and said he would settle at 50 cents on the dollar. He said, if the Brown & Franklin Company would pay that, he would do all he could to get the other creditors to accept it. There was also testimony that the accounts against these defendants after the settlement were transferred to J. D. Franklin, but it does not appear that he knew anything about it, and there was evidence to the effect that there was no consideration therefor. Another witness, B. D. Evans, testified: That in the fall of 1894 he was counsel for the Brown & Franklin Company. That, after the filing of the bill in the United States court, negotiations for settlement were opened up by H. M. Franklin with plaintiff's attorneys in that case. At his instance, witness went with him to Macon, and had an interview with Hardeman, Davis & Turner, at their office, respecting the settlement of the pending litigation. Ragan was in Macon at the time, and witness thinks he was present at the settlement, representing his firm. One Leonard was also present, representing Inman, Smith & Co. The minds of all parties met, and it was agreed that the litigation should be settled upon the payment by defendants of 50 cents on the dollar and the court costs. The 50 cents was to be received by creditors in full settlement of their claims. The parties to this settlement, as witness remembers, were Ragan (representing the Everett-Ridley-Ragan Company), Leonard (representing Inman, Smith & Co.), Hardeman, Davis & Turner (representing the plaintiffs in the bill), Franklin, and witness. Witness saw Ragan and Franklin have several interviews. Ragan, by his actions, impressed witness as assisting in bringing about the settlement, and he understood that the Everett-Ridley-Ragan Company was to receive in settlement of its claim the same as all the other creditors. He did not know any better until the Everett-Ridley-Ragan Company sent him the notes for collection, and witness told them he was disqualified from representing them. There was testimony introduced in behalf of plaintiff, and some conflict in the evidence of Ragan and the witness Franklin; Ragan claiming that he told Franklin when he came to Atlanta that he would not take less than 100 cents on the dollar for his claim. There was testimony tending to show he was not a party to the compromise agreement with the creditors. He admitted, however, that he did not inform his own attorneys that he had received anything at all on his claim in addition to the 50 per cent. that had been paid to his attorneys, and he thought they understood he was getting only 50 cents on the dollar.

After the close of the evidence and charge of the court, the jury returned a verdict for plaintiff for $300 and interest, costs of suit, and attorney's fees, whereupon defendants made a motion for a new trial, and to the judgment of the court overruling this motion they except.

1, 2. We think the court erred in sustaining the demurrer of counsel for plaintiff below to defendants' plea seeking a recovery of the cash paid to plaintiff over and above the amount agreed upon in the alleged composition had between the creditors. It will be seen from the above recital that there was testimony in this case to the effect that a composition was entered into among various creditors of the defendants below; that a member and representative of plaintiff's

firm was active in bringing about this settlement, advised a compromise of 50 cents on the dollar, used his influence with other creditors to get them to accede to it, was present at the public meetings had by these creditors at Macon, and left the impression on their minds that he was willing to accept 50 cents on the dollar for the claim of his firm. After that settlement was agreed on, according to defendants' testimony, he saw one of them, who was representing his company, and gave him to understand that, if he was not paid 100 cents on the dollar, he had it in his power, and he would so act as, to break up the settlement. This representative of defendants became alarmed, fearing the litigation in the United States court, and it was developed by the evidence that that litigation sought to set aside a deed of certain property this member of the company had made to his wife, the evidence on this subject showing that the deed was made long before any insolvency of the company; and, laboring under this restraint and fear, he finally agreed to pay plaintiff 100 cents on the dollar, and accordingly gave the notes sued on in this case, and paid besides that the cash money set up in the plea of offset, and in addition to that paid plaintiff's attorneys the 50 per cent. agreed upon in the composition by the creditors. It seems that plaintiffs even kept the getting of the money and the notes, in addition to the 50 per cent. paid under the compromise, secret from their attorneys. Under this state of facts, this agreement had between plaintiff and defendants was manifestly null and void as between the parties themselves. It is contended, however, by counsel for defendant in error, that these parties, in negotiating a settlement with the plaintiff by which they received more than the amount agreed upon and accepted by other creditors, so far as the cash payment was concerned, were in pari delicto, and that therefore defendants were not entitled to recover back this money they had paid to plaintiff; but we do not think this transaction falls within the general principle of law that when parties are in pari delicto a court of law or equity will leave them where it finds them. The influence brought to bear upon defendants, under their testimony, was in the nature of duress; the defendants being at a great disadvantage, and being reluctantly forced, as it were, to accede to plaintiff's demands. While we do not know that this identical question has been made before this court in the history of its adjudications, yet we think, under well-established authority, that these transactions are void between the parties themselves, and that the debtor in such a case can recover back even money paid by him in furtherance of such a fraudulent scheme. In 6 Am. & Eng. Enc. Law (2d Ed.) p. 394, it is declared: "Any advantage obtained by any creditor in any agreement of composition without the knowledge and consent of all the other parties to the composition is a fraud on the other creditors, and renders the composition void as to those innocent creditors." A vast amount of authority is cited upon that principle. But the same principle has been announced by our court in Woodruff v. Saul, 70 Ga. 271 (Syl., point 1). On pages 396 and 397 of the same volume of the Encyclopedia of Law it is declared: "Any agreement for such a secret preference of any creditor is void, and will not be enforced by the courts, on the ground that such agreement is fraudulent, and to enforce it would be against public policy. Notes and securities given under such secret agreement are void between the original parties and third parties who take them subject to equities. Money paid under a secret agreement as an inducement to the creditor to sign, or in excess of his claim under the composition, may be recovered back by the debtor, as the law regards the payment as having been made under duress." Under each of the principles the author cites a large number of authorities from England, Canada, and many states throughout this Union. In Sternburg v. Bowman, 103 Mass. 325, it was held: "Promissory notes given by a debtor to his creditor for twice the amount really due, for the purpose of enabling that creditor to obtain a larger dividend under a composition deed between the debtor and all his creditors, are void as between the parties to them." In Willis v. Morris, 63 Tex. 458, it was held: "When a composition agreement has been made between a debtor and all his creditors, to pay them each in discharge of his debt a specified per centum of the amount owing, in a designated time, and there is a secret agreement between the debtor and one of the creditors that the debtor shall execute his note for the unpaid balance of his original debt, and such note is executed, its payment cannot be enforced, for it is tainted with the fraud of the secret agreement." See the same principle announced in Morrison v. Schlesinger, 10 Ind. App. 665, 38 N. E. 493. In the opinion in that case, on page 669, 10 Ind. App., and page 494, 38 N. E., it is announced: "It is also the law that the debtor himself may set up the fraud in defense of an action on the secret agreement." A number of authorities are therein cited to sustain this proposition. See, also, Russell v. Rogers, 10 Wend. 479. In Bean v. Brookmire, 2 Dill. 108, 2 Fed. Cas. p. 1132, it was decided: "Secret preferences paid as inducements to obtain signatures of creditors to composition deeds can be recovered by the debtor himself, or by injured creditors, or by an assignee in bankruptcy who represents both debtor and creditor. Such recovery may be at law or in equity." In the opinion in that case, on pages 115, 116, 2 Dill., and page 1134, 2 Fed. Cas., it is announced: "The rules of law respecting the good faith to be observed by all who unite in a composition agreement are well known and well settled, and rest upon the soundest policy and upon the clearest principles of equity, com-

mercial morality, and fair dealing. The temptation to obtain undue or secret advantages is so great that the necessity for the severe rules which have been declared by the courts to repress it is undeniable. All must be open and fair. If a creditor, appealed to by his debtor, makes it a condition of his uniting in a composition that he shall have any advantage not enjoyed or made known to the others, the transaction cannot stand either at law or in equity. It is a fraud upon creditors, and they can avoid it. It is treated as oppression or duress towards the debtor, and he may defend against any promise to pay made under such circumstances, or, if he has actually paid, he may recover back the amount, as the law does not consider the parties as being in pari delicto, nor regard the payments thus made as voluntary, and allows such recovery on grounds of public policy." Quite a number of authorities are cited to sustain these principles. See, also, Bradshaw v. Bradshaw, 9 Mees. & W. 28; Crossley v. Moore, 40 N. J. Law, 27, where the same principle was decided, and where it was held that money paid by the debtor under such an agreement, where a composition has been made by creditors, in excess of the due proportion of such creditor's debt, may be recovered back, unless it be paid under such circumstances as to be regarded in law as a voluntary payment. The jury in that case found that it was not a voluntary payment, and the court held that they were justified in this finding; that the money was obtained by coercion exercised by means of the situation of the parties, in fraud of the other creditors; and that the money was paid under the same compulsion. The testimony in the present case introduced in behalf of defendants we think certainly makes out as strong a case of coercion. The court therefore erred in sustaining the demurrer to that portion of the answer which seeks a recovery back of money thus paid by the debtor to the creditor, the amount claimed being within its jurisdiction.

3. Comment is unnecessary on the proposition announced in the third headnote, as its correctness will bear truth upon its face.

4. One among the grounds in the amended motion for a new trial is the following: "Because the court committed error in charging the jury as follows: 'The court charges you that merely an agreement on the part of a creditor to receive less than his debt is not a binding agreement; that is, if the Everett-Ridley-Ragan Company had stated that they would take fifty cents on the dollar, they would not be bound by that agreement.' Movants allege that this charge was erroneous: (1) Because it was entirely inapplicable to the facts of this case. (2) Because its tendency was to confuse and mislead the jury as to the real issue involved. (3) Because it is not a correct statement of the law; the law being that the Everett-Ridley-Ragan Company would have been bound to accept fifty cents on the dollar if they by their actions induced other creditors to accept fifty cents on the dollar, and had publicly agreed to enter into composition for that amount." We think the criticism of counsel on the charge of the court is entirely just. It is true, as a general rule of law, that a creditor is not bound by an agreement to take less than his debt, unless it has been executed by the payment of the money, or the giving of additional security, or the substitution of another debtor, or some other new consideration. This question was thoroughly discussed in Stewart v. Langston, 103 Ga. 290, 30 S. E. 35. See opinion of the writer, on page 292 et seq., 103 Ga., and page 36, 30 S. E. While this principle was in that case recognized as a general rule of law, it was further announced: "It is equally as well established that a contract is binding when it forms a part of a composition in which several creditors join, mutually agreeing, on account of the embarrassed or insolvent condition of their common debtor, to forbear pressing their claims to the full amount, and to release their debtor on payment of a certain portion of his indebtedness. The new consideration which enters into and supports such an agreement is the undertaking of the other creditors to give up a portion of their claims." See authorities therein cited and quoted. That was a case involving a composition agreement between creditors and their common debtor. It was there held that "an offer by the debtor to pay one of the creditors the amount due him in accordance with the agreement, after all the others have received their pro rata part in full settlement of their claims, constitutes a legal tender of the debt due such creditor." It does not follow that all the creditors of a debtor should necessarily enter into such composition, but all who do so are bound by the agreement. See the quotation in that case on page 292, 103 Ga., and page 36, 30 S. E., from the case of Brown v. Farnham, 48 Minn. 317, 51 N. W. 377, where it is stated, "The composition deed is an agreement between the creditors and the defendant which involves rights and interests common to all creditors who join in it." In the present case there was evidence to show that all the creditors entered into the composition, though some testimony tended to show that a few did not. Evidently the bulk of the creditors entered into it, including all those who were parties to the suit in the United States court, which was the basis of the compromise and composition of the creditors, and which suit was dismissed in consequence of such settlement. We think the charge was not applicable to this case, and that the court should have submitted to the jury a determination of the question as to whether or not plaintiffs had, by their conduct and declarations made through their representative, entered into this composition which was had with the other creditors, or induced and persuaded the creditors to enter into it, and created the impres-

sion that they would enter into it themselves and settle at 50 cents on the dollar. He should have charged that such an agreement, notwithstanding it was an agreement to take less than the amount of their debt, was binding upon every creditor who entered into it, and a secret agreement to take more from the debtor, unknown to the other creditors, was a fraud upon them, and would render the notes sued upon void, as without consideration, and would entitle the defendants to recover the cash pleaded as an offset. Another ground in the motion excepts to the following charge of the court: "It is the contention of the plaintiffs in this case that he made no such misrepresentation, but, on the contrary, stated all along that he was entitled to one hundred cents on the dollar, and that it was finally agreed among himself and certain members of the Brown & Franklin Company that Ragan was to sell Everett-Ridley-Ragan Company's debt to Mr. J. D. Franklin, a kinsman of certain members of the Brown & Franklin Company, and that he was to receive one hundred cents on the dollar for the debt of the Brown & Franklin Co.,—a portion in cash, and these notes representing the balance. If you find that to be the truth of the case, then Everett-Ridley-Ragan Company ought to recover." Movants allege that this charge was erroneous: "(1) Because it had a tendency to confuse and mislead the jury as to the real issue involved. (2) Because it is not a correct statement of the law, for the reason that, if plaintiff would not have been entitled to recover in the event the accounts had been marked settled, then they would not have been entitled to recover, although the accounts were transferred to J. D. Franklin, if the transfer to Franklin was not a transfer for value and bona fide, and one on which Franklin could have successfully enforced the demand of plaintiffs against the Brown & Franklin Company. (3) Because the submission by the court of plaintiff's contention in this matter of the transfer to J. D. Franklin, without submitting the contention of the defendants in reference thereto, was misleading and was liable to confuse the jury, and was unfair to movants." It would seem from the allegations in the motion that the court very strongly stated the contention of the plaintiff, and in no part of his charge did he state the contention of the defendants upon the same issue. It is a well-settled rule of law, if the judge undertakes to state the contention of one party, he should also state the contention of the other; and, while it need not necessarily appear in the same connection, yet his charge ought somewhere to fairly state it. Railway Co. v. Findley, 76 Ga. 311 (Syl., point 3); Small v. Williams, 87 Ga. 682, 13 S. E. 589 (Syl., point 2). Another ground in the motion was that the court erred in charging the jury as follows: "If you were to find from the evidence in this case that Everett-Ridley-Ragan Company had deceitfully and knowingly deceived other creditors, and got them to accept less than Everett-Ridley-Ragan Company received, then I charge you that the law would estop him, for the reason that the law does not become a party to any deceit." Objection was made to this on the ground that it is not a fair statement of the law. We think the charge implies that Everett-Ridley-Ragan Company must be guilty of a moral fraud, and that it was calculated to mislead the jury by leading them to infer that the defendants were liable unless such moral fraud had been perpetrated by plaintiffs. Under the contention of the defendants, supported by their testimony, in view of all the authorities to which we have called attention, and the principles of law therein announced, we do not think the moral quality of the conduct of plaintiffs or their representative in the transactions complained of in the answer is necessarily involved. If they are guilty of the conduct claimed, they are guilty of legal fraud, which would effectually render null and void the entire transaction. For instance, as contended by counsel for plaintiffs in error, if the plaintiffs below, even without intention to deceive anybody, had changed their minds as to accepting the 50 cents on the dollar, but after notifying the other creditors that they would accept that much, and agreeing to the composition had by the others, failed to notify them of the change in their intention, by taking cash and notes for the balance of their debt, they would, nevertheless, under the law, be unable to collect the notes sued upon, and would be liable for the cash paid them over and above the 50 cents on the dollar. This, to say the least of it, would be a legal fraud, under the principles of law herein announced.

In the light of this record, and what is herein laid down as the principles of law applicable to the present case, we think these rulings and charges of the court necessitate the grant of a new trial. Judgment reversed. All the justices concurring, except LUMPKIN, P. J., disqualified.

BARNWELL et al. v. MARION.

(Supreme Court of South Carolina. Aug. 16, 1900.)

JUDICIAL NOTICE—JUDGES—TERM OF COURT—JUDICIAL CIRCUIT—ORDER OF COURT—SIGNATURE—DISCRETION.

1. The court will take judicial notice that a certain person is the judge of a particular judicial circuit within the state.

2. The court will take judicial notice that a particular circuit judge was regularly assigned to hold court in a certain circuit within a state at a certain time.

3. The court will take judicial notice that a certain day was the first day for the holding of a session of court in a particular judicial circuit within the state.

4. The court will take judicial notice that a certain county within a state is embraced in a particular judicial circuit.

5. The fact that a presiding judge appends the words "circuit judge" to his signature to an order will not affect his jurisdiction.

6. The court has discretion to order a reference to take testimony pending a motion for the submission of the issues to a jury under a rule of court.

Appeal from common pleas circuit court of Charleston county; George W. Gage, Judge.

Suit by Joseph W. Barnwell, as trustee and individually, and as agent and guardian, and others, against Sophia Frances Sheppard Marion. From an order of reference to take testimony, defendant appeals. Affirmed.

For former opinions, see 32 S. E. 313, and 33 S. E. 719.

The order of reference is as follows:

"Due notice of the motion for an order of reference having been given in this case on September 20, 1899, and the time and place for hearing the same having been changed, by a consent order dated September 26th in said year, to this day and place: Now, on motion of plaintiffs' attorneys, no opposition being made thereto, it is ordered that it be referred to G. Harbert Sass, one of the masters of said court, to take the testimony in the above case preparatory to the hearing of the case on the merits, and that he report the same at the next term of said court; this order to be without prejudice to any of defendant's rights to another mode of trial of the issues first mentioned in the notice of motion served by defendant upon plaintiffs' attorneys on March 16, 1899, as to the commissions of the trustee and counsel fees under the mortgage mentioned in the complaint herein. And it is further ordered, in view of the expression of the supreme court in the opinion rendered in this case upon the last appeal therein, that the master do forthwith proceed to take such testimony, with a view to an early report,—at least ten days before the sitting of said court."

Defendant filed exceptions as follows:

"(1) His honor, Circuit Judge George W. Gage, being judge of the Sixth circuit, had no jurisdiction at chambers at Monks Corner, in the county of Berkeley, in the First circuit, on the 11th October, 1899, to pass the said order of reference to master; the judge of the First circuit being then within the limits of the First circuit, in Charleston county. (2) His honor, Circuit Judge George W. Gage, being judge of the Sixth circuit, had no jurisdiction at chambers at Monks Corner, in the county of Berkeley, in the First circuit, to pass the said order of reference to a master, while there was pending the motion of defendant, served March 16, 1899, for issues to jury under twenty-eighth rule of circuit court, to be heard before the court of common pleas for Charleston county under said rule. (3) His honor, Circuit Judge George W. Gage, erred in granting at chambers said order of reference to the master, while there was pending the motion of defendant, served March 16, 1899, for issues to jury under twenty-eighth rule of circuit court, to be heard before the court of common pleas for Charleston county under said rule. (4) His honor, Circuit Judge George W. Gage, erred in granting at chambers said order of reference to the master, and thereby compelling defendant to give her testimony on all issues before the master, while there was pending the motion of defendant, served March 16, 1899, for certain issues to jury under twenty-eighth rule of circuit court, to be heard before the court of common pleas for Charleston county under said rule."

Bryan & Bryan, for appellant. Langdon Cheves and J. W. Barnwell, for respondents.

McIVER, C. J. This is an appeal from an order granted by his honor, Judge Gage, at Monks Corner, on the 11th of October, 1899, and filed on the 12th of October, 1899. This order is set out in the "case," and should be incorporated by the reporter in his report of the case, together with the exceptions thereto. It seems that this order was made at the time and place mentioned in pursuance of a consent order previously made by Judge Gage on the 26th of September, 1899, upon the motion of Messrs. Bryan & Bryan, attorneys for defendant, with the consent of plaintiffs' attorneys, postponing the hearing of the motion for the order appealed from, on account of the absence of Mr. J. P. K. Bryan, who was especially charged with the conduct of the case, from the state, and ordering "that the hearing of the said motion be postponed until 10 o'clock a. m. on Wednesday, October 11, 1899, and be heard at the court house of Berkeley county, at Monks Corner, in state aforesaid, before me." It seems that on the 16th of March, 1899, the attorneys for defendant had given notice of a motion, under the provisions of section 274 of the Code, for the trial of certain issues of fact, to be tried by a jury, which motion was still pending when the order appealed from was granted. These issues of fact, as stated in the frame of the order accompanying the notice of the motion for the trial by a jury of such issues, are: (1) Whether the defendant "is liable for any sum for commissions of trustee under said mortgage mentioned in the complaint, and, if so, what sum?" (2) Whether the defendant "is liable for any sum for attorney's fees under said mortgage mentioned in the complaint, and, if so, what sum?" It may also be stated that it appears from the "case" that the action in this case was for the foreclosure of a mortgage on real estate situate in the county of Charleston, and was instituted in the court of common pleas for that county, and is now, and since the 2d of February, 1898, has been, docketed on calendar 2 of that court.

The first exception was manifestly taken under a misconception of the fact; for there is not only nothing in the "case" to show that Judge Benet was within the limits of the First circuit, where this case was pending, at the time the order appealed from was granted, but, on the contrary, the telegram from Judge Benet, printed in the "case," does show that he was not in the First circuit at

that time; and, as counsel for appellant makes no allusion in his argument to the first exception, we presume it has been abandoned, but, whether abandoned or not, it certainly cannot be sustained.

The other exceptions raise but two points, which are thus stated in the argument of counsel for appellant: "(1) That his honor, Circuit Judge George W. Gage, being judge of the Sixth circuit, had no jurisdiction at chambers at Monks Corner, county of Berkeley, in the First circuit, on the 11th of October, 1899, to pass the order. (2) That the circuit judge, George W. Gage, could not compel the defendant to give her testimony on all the issues before the master while there was pending her motion for issue to the jury, under twenty-eighth rule of the court."

Before considering these points, it may be as well to notice the position taken by counsel for respondents, that the order in question is not appealable, for the purpose of avoiding any misapprehension, and preventing this case from becoming a precedent. In the first place, the order appealed from was practically a consent order. As is stated above, it appears in the "case" that, on the day appointed for hearing the motion for an order of reference to take the testimony, the order of the 26th of September, 1899, was granted, on the motion of Messrs. Bryan & Bryan, attorneys for defendant, with the consent of the attorneys for the plaintiffs, whereby the hearing of such motion was postponed until the 11th October, 1899, and it was ordered that the same be heard at the court house of Berkeley county, at Monks Corner; and to this order is appended a formal consent, in these words: "We consent. Bryan & Bryan." And it also appears in the order appealed from that when the motion was heard and granted, at the place and on the day thus appointed, it was recited that no opposition was made thereto. In the second place, the order was, simply, "to take the testimony in the above case preparatory to the hearing of the case on the merit," which decides nothing, and ordinarily was certainly not appealable. We are very much inclined to hold that the order is not appealable. But, as the appeal is based upon what are claimed to be jurisdictional grounds, we will waive this objection, and assume, for the purposes of this case only, that the order in question is appealable. We will therefore proceed to consider the two points presented by counsel for appellant in their argument here.

The first point rests upon two assumptions of fact: (1) That Judge Gage was the judge of the Sixth circuit; and (2) that the order was granted at chambers. And neither of these facts appear in the "case," as prepared for argument here. This alone would be destructive of appellant's first point. But we are unwilling to rest our conclusion upon that ground, for the reason that there are certain facts of which this court will take judicial notice, one of which is that his honor, Judge Gage, is, and was at the time he granted the order appealed from, the judge of the Sixth judicial circuit. But this is not the only fact of which this court will take judicial notice in this case. 1 Greenl. Ev. c. 2, § 4, where the general doctrine on the subject is stated. See, also, 3 Greenl. Ev. § 269. As is said in 12 Am. & Eng. Enc. Law (1st Ed.) p. 182: "The terms of subordinate courts and the extent of their jurisdiction, as provided by law, are judicially noticed by appellate courts having their authority within the same territorial limits. * * * Courts will also take judicial notice of their own record and officers, of the manner and extent of their jurisdiction, * * * whether a judgment was rendered in vacation, * * * the terms of courts," besides a great many other matters. So, in 2 Am. & Eng. Enc. Law (2d Ed.) p. 173, it is said: "The court will take judicial notice of an almanac." And in one of the notes to that passage it is said: "The almanac in such cases is used like a statute, —not strickly as evidence, but for the purpose of refreshing the memory of the court and jury." See, also, to same effect, Wilson v. Van Leer, 127 Pa. St. 371, 17 Atl. 1097, as reported in 14 Am. St. Rep. 854, where the subject is discussed and the authorities are cited. Deriving our knowledge from these sources of information, this court will take judicial notice of the following facts: That Judge Gage was and is the judge of the Sixth judicial circuit; that in pursuance of the statute he was regularly assigned to hold the court of the First judicial circuit at the third session thereof in the year 1899; that the day on which the order in question was signed, to wit, the 11th of October, 1899, was the first day appointed by law for holding the court of common pleas for Berkeley county, at Monks Corner, during that month of that year; and that Berkeley county is one of the counties embraced in the First circuit. Under these facts, it is quite clear that, by virtue of the provisions of sections 2248 and 2249 of the Revised Statutes of 1893, Judge Gage had jurisdiction to make the order appealed from. —especially where, as in this case, the time and place for hearing the motion were fixed by consent of the parties. The point made in the argument as to the distinction between the "circuit judge" and the "presiding judge," even if properly raised by the exceptions, is not tenable. As we have seen, Judge Gage was the presiding judge of the court of common pleas for Berkeley county at the time the order was granted, and certainly the mere fact that he appended to his name the words "circuit judge" cannot have the effect of depriving him of jurisdiction to grant the order appealed from. The first point made by appellant must therefore be overruled.

The second point is that the defendant could not be compelled "to give her testimony on all the issues before the master while there was pending her motion for issues to the jury, under twenty-eighth rule of court." We are unable to see that this point presents

any question of law. Both of the motions (as well that of the defendant as that submitted by the plaintiffs) were addressed to the discretion of the court, and the circuit court might, in the exercise of its discretion, take any course that might seem best calculated to promote the speedy and proper hearing of the case; and, so far from there being any abuse of discretion on the part of Judge Gage, we think the course he adopted was best calculated to promote the ends of justice, and no error can justly be imputed to him in so doing. Indeed, it seems to us that the case of Bank v. Fennell, 55 S. C. 379, 33 S. E. 485, cited by counsel for respondents, is conclusive of this case; for we are unable to appreciate the distinction sought to be drawn by counsel for appellant between that case and this. As we understand it, the only issues remaining to be determined in this case were as to the amount due on the debt secured by the mortgage sought to be foreclosed, and certainly the two issues which defendant asked to have submitted to a jury for trial both involved that inquiry. The judgment of this court is that the order appealed from be affirmed; and, in view of the fact that this is the third appeal in this case, all involving preliminary questions, and delaying a trial on the merits, the clerk of this court is hereby directed to send down the remittitur forthwith.

SOUTHERN FIRE INS. CO. v. KNIGHT.

(Supreme Court of Georgia. July 10, 1900.)

INSURANCE — PROOFS OF LOSS — IRON-SAFE CLAUSE—INVENTORY—BREACH OF CONDITIONS—NONSUIT.

1. Where a policy of fire insurance set forth various requirements and conditions, a violation of which by the insured would operate as a forfeiture of the policy, and the same also contained a stipulation requiring the insured to furnish proofs of loss within 60 days after the fire, but did not make failure to do so a ground of forfeiture, and where, under the terms of the policy, the insurer was not liable to make payment until after 60 days from the receipt of such proofs of loss, the policy further providing that no suit thereon should be brought, unless commenced within 12 months after the fire, *held* that, if the insured furnished the required proofs of loss in time for at least 60 days to elapse between the date upon which they were furnished and the expiration of the 12-months limitation, the policy was not forfeited by a failure to furnish such proofs within 60 days after the fire occurred.

2. "An invoice of goods purchased is not an inventory of stock, to be produced under the iron-safe clause of a fire policy."

3. A policy of fire insurance, the consideration for which is a premium payable in a gross sum, is entire and indivisible, though the contract insures different classes of property in separate amounts. It follows from this that where such a policy insured both a building and a stock of merchandise therein contained, and provided that, in the event the insured failed to take an inventory of the goods at a time specified, "this policy shall be null and void from such date," a breach of this stipulation avoided the insurance on the building as well as on the stock of goods.

4. The plaintiffs' testimony showing affirmatively that they had failed to comply with the stipulation mentioned in the foregoing note, a motion to nonsuit should have been sustained.

Little, J., dissenting.

(Syllabus by the Court.)

Error from city court of Atlanta; A. E. Calhoun, Judge.

Action by M. A. & L. L. Knight against the Southern Fire Insurance Company. Judgment for plaintiffs. Defendant brings error. Reversed.

W. I. Heyward, for plaintiff in error. Jas. K. Hines, for defendants in error.

COBB, J. M. A. & L. L. Knight brought suit against the Southern Fire Insurance Company upon a policy of fire insurance. The case came on for trial, and at the conclusion of the testimony for the plaintiffs the defendant made a motion for a nonsuit, which the court overruled. The case proceeded to trial, and resulted in a verdict for the plaintiffs. The defendant brings the case here upon a bill of exceptions assigning error upon the refusal of the court to grant a nonsuit.

1. The policy which was the foundation of the action contained a clause which provided that, "if fire occur, the insured shall give immediate notice of any loss thereby, in writing, to this company, * * * and within sixty days after the fire, unless such time is extended in writing by this company, shall" furnish proofs of loss, of a designated character. While it appears from the evidence that proofs of loss had been submitted to the company before suit was brought, they were not submitted until after the expiration of 60 days from the date of the fire, and the time for their submission was not extended by the company. The defendant contends that the failure on the part of the insured to furnish the proofs of loss within the time specified in the policy precludes a recovery thereon. It has been often held, and may now be considered as settled law, that if there is an express stipulation in a policy of fire insurance that the furnishing of proofs of loss within a specified time shall be a condition precedent to a recovery, or that a failure to submit the proofs within the time limited in the policy shall forfeit the same, such failure on the part of the insured will be fatal to his right to recover. See 13 Am. & Eng. Enc. Law (2d Ed.) 328, notes 7 and 8. There is not in the policy involved in the present investigation either a stipulation that the furnishing of proofs of loss within 60 days shall be a condition precedent to a recovery, or that the failure so to do shall operate as a forfeiture of the policy. While the decisions of the American courts are not entirely uniform on this question, the current of authority seems to be that in the absence of a stipulation providing that the furnishing of the proofs within a designated time shall be a condition precedent to recovery, or that the failure to submit the proofs within such time shall work a forfeiture of the policy,

the failure so to do will operate simply to postpone the right of the insured to bring a suit until after he has furnished the proofs of loss required by the policy. This results from the familiar rule that forfeitures are not favored, and that a contract will not be construed to work a forfeiture unless it is manifest that it was the intention of the parties that it should have that effect. Especially would this be applicable in the case of a contract of insurance which contains many conditions, a failure to perform which are expressly stated to operate as a forfeiture of the contract, and which is silent as to the effect to be given to a failure to perform the condition relating to the furnishing of proofs of loss within a specified time. The policy is prepared by the insurer, and therefore must be construed most strongly against him. Mr. Joyce, in his work on Insurance (volume 4, § 3282), thus states the rule with reference to the failure to furnish the required proofs within the time designated: "If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose forfeiture for a failure to comply with other provisions of the contract, the insured may, it is held, maintain an action, though he does not furnish proofs within the time designated, provided he does furnish them at some time prior to commencing the action upon the policy. And this has been held to be true even though the policy provides that no action can be maintained until after a full compliance with all the requirements thereof." The above quotation and the decision made in the present case will be found to be supported by the following cases: Steele v. Insurance Co. (Mich.) 53 N. W. 514, 18 L. R. A. 85; Hall v. Insurance Co. (Mich.) 51 N. W. 524; Tubbs v. Insurance Co., 84 Mich. 646, 48 N. W. 296; Rynalski v. Insurance Co., 96 Mich. 395, 55 N. W. 981; Insurance Co. v. Brown (Ky.) 29 S. W. 313; Vangindertaelen v. Insurance Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29; Flatley v. Insurance Co., 95 Wis. 618, 70 N. W. 828; Kahnweiler v. Insurance Co. (C. C.) 57 Fed. 562; Insurance Co. v. Downs, 90 Ky. 236, 13 S. W. 882; Insurance Ass'n v. Evans, 102 Pa. St. 281; Taber v. Insurance Co. (Ala.) 26 South. 252; Rheims v. Insurance Co., 39 W. Va. 672, 20 S. E. 670; Shell v. Insurance Co., 60 Mo. App. 644; Insurance Co. v. Mattingly, 77 Tex. 162, 13 S. W. 1016.

It not being indispensable to a recovery on the policy that the proofs of loss should be submitted within 60 days, the question arises as to what lapse of time will preclude the plaintiffs from furnishing proofs of loss and asserting a liability under the policy. The answer to this is that, if the plaintiffs failed within a reasonable time after loss to furnish the proofs of loss, their right to make the proof would be gone, and their right to recover on the policy would consequently be at an end. What would be a reasonable time is to be determined by the peculiar facts of each case, and in determining this question a valid stipulation in the policy that no suit should be brought thereon after the lapse of a given time should be taken into consideration. The policy sued on in this case provides that "no suit or action on this policy for a recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months after the fire." A stipulation of this character has been held by this court to be valid. Brooks v. Insurance Co., 99 Ga. 116, 24 S. E. 809, and cases cited; Graham v. Insurance Co., 106 Ga. 840, 32 S. E. 579. The policy contains a further stipulation that "the loss shall not become payable until sixty days after the" proofs of loss have been furnished. As each of these stipulations is valid, the insured must, in any event, have submitted their proofs of loss in such a time that at least 60 days would elapse between the date of the submission of such proofs and the time that suit should be brought, under the stipulation that suits to enforce the policy must be brought within 12 months from the date of the fire. In this connection, see Steele v. Insurance Co., supra; Insurance Co. v. Downs, supra; Insurance Co. v. Evans, supra; Rheims v. Insurance Co., supra. The proofs in the present case having been submitted more than 60 days before the expiration of 12 months from the date the fire occurred, the court properly refused to grant the nonsuit on account of a failure to submit the proofs within the time fixed in the policy, as it was a question for the jury whether a reasonable time for furnishing the proofs had elapsed between the date the fire occurred and the date that the proofs of loss were submitted.

This ruling is not in conflict with any former decision of this court. A number of decisions of this court can be found where the court dealt with the case as if the failure to submit proofs of loss within the time specified in the policy would preclude a recovery thereon, and there is in the language used in some of the opinions expressions which would indicate that the judges writing the same entertained the view that such a failure would bar a right of recovery; but a careful examination has failed to disclose any case decided by this court where this question was squarely presented for decision and necessary to be decided. Some of these decisions which are apparently in conflict with the ruling now made will be referred to, as well as others which are apparently in line with the present ruling, although, as has been said, none contain authoritative rulings on the question. In Insurance Co. v. Sparks, 62 Ga. 187, it was held that an amendment to the petition sufficiently alleged, as against a general demurrer, that an absolute refusal to pay was

within the time limited for preliminary proof of loss; it being stated that no subsequent refusal would operate as a waiver of such proof. In speaking of the amendment, Mr. Justice Jackson says: "Besides, the effect and true intent thereof seem to be that the refusal was within the time, inasmuch as the allegation is that thereby the proofs were waived; these proofs having to be made in this time." It having been held that the allegation was that the refusal was within the 60 days, it was not necessary in that case to determine what would have been the effect of a refusal after 60 days, and therefore what is said on that subject is clearly obiter. In addition to this, an examination of the record in that case discloses that there was no time specified in the policy in which preliminary proofs must be submitted. The only reference in the policy to the phrase "sixty days" is that the policy shall not be payable until 60 days after notice and proof of loss, and the policy in terms provided that the proof of loss should be furnished "as soon as possible" after the fire. While in Insurance Co. v. Vining, 67 Ga. 661, the question now under consideration was not at all involved, some language of Mr. Chief Justice Jackson rather indicates that the ruling now made is correct. In referring to the two policies then under consideration, he says, in substance, that, even if nothing equivalent to an absolute waiver had occurred, there was nothing in the policies which required their forfeiture on account of failure to furnish preliminary proofs of loss. In Southern Home Building & Loan Ass'n v. Home Ins. Co., 94 Ga. 167, 21 S. E. 375, 27 L. R. A. 844, Mr. Justice Simmons, in referring to a stipulation in reference to preliminary proofs of loss, says that "it was a condition precedent to the payment of the loss that the proof of loss stipulated for should be made out and submitted to the insurance company, and within the time stipulated." The question as to whether the time stipulated in the policy was of the essence of the contract was not at all involved in that case; the sole question being whether a stipulation in a policy of fire insurance which declares, in substance, that no act or neglect on the part of the mortgagor would defeat the insurance, so far as the interest of the mortgagee was concerned, would dispense with the making of proofs of loss. In that case it did not appear that any proof of loss was submitted by either the mortgagor or the mortgagee, and it was simply held that the proofs of loss must have been submitted by either one or the other. In Insurance Co. v. Ellington, 94 Ga. 785, 788, 21 S. E. 1006, Mr. Justice Simmons says, "One of the conditions of this policy declared upon was that, if the property should be destroyed by fire, the insured should furnish the insurance company with proofs of loss within a specified time." The question as to the effect of the failure to furnish proofs within the time specified was not involved in that case, as, upon an examination of the facts of the case, it will be seen that it turned upon the effect of an absolute refusal to pay, which was held to waive the necessity for making any proofs of loss at all. In Insurance Co. v. Searles, 100 Ga. 97, 27 S. E. 779, it was held: "A statement made by such an agent to the insured, within the time during which the latter, under the terms of the policy, was allowed to furnish proofs of loss, that the company declined or refused to pay the loss, will amount to a waiver of such proofs; but, where proofs of loss were not furnished within the time stipulated, a subsequent refusal to pay would not be such a waiver." The question as to whether a failure to furnish the proofs of loss within the time specified in the policy would work a forfeiture of the policy was not directly raised in that case, and the decision was based merely upon the assumption that such was the law. In addition to this, as will appear from the language in the fifth headnote, the policy was construed as meaning that a failure to furnish the proofs within the time limited would vitiate the policy, which would make the decision directly in line with the present ruling; but the facts will show that this was not a proper construction to be placed upon the policy, as the language used in the policy in that case was exactly the same as the language in the policy involved in the present case. The case of Graham v. Insurance Co., 106 Ga. 840, 32 S. E. 579, does not conflict with the ruling made in the present case; it being simply held that when a policy stipulated that no suit should be brought thereon unless commenced before the expiration of 12 months from the date of the loss, and that the company should have 60 days after due notice and satisfactory proof of loss to pay the policy, there could be no recovery on such a policy when no notice of loss was given until such a time that 60 days would not elapse between the date of the notice and the expiration of the time for bringing suit on the policy. While not directly in point, the reasoning of the decision is in line with the reasoning upon which the present ruling is based.

2. The policy sued on contained what is commonly called the "iron-safe clause." That part of the clause which is material to the present investigation is in the following language: "The following covenant and warranty is hereby made a part of this policy: (1) The insured will take a complete, itemized inventory of stock on hand at least once in each calendar year; and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within 30 days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned. In the event of failure to produce such * * * inventories for the inspection of this com-

pany, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon." It appears from the plaintiffs' testimony that they had not taken an inventory of the stock of goods which was covered by the policy within 12 months prior to the date of the policy, nor did they take one within 30 days after the date of its issuance. The plaintiffs introduced evidence tending to prove that the insurance was written on the very first day that they opened their store, and that they had on hand that day the invoices representing all purchases made by them, and that every article contained in the invoices was on that day in the store, and that they exhibited such invoices to the agent of the company who wrote the policy. It is contended by the plaintiffs that this was at least a substantial compliance with that portion of the iron-safe clause which required an inventory, and that, as loss occurred within less than 12 months from the date the policy was written, they are not precluded from recovering on the policy merely because they failed to take an inventory within 30 days. A clause of the character designated in the policy as the "iron-safe clause" has been held by this court to be valid, and to constitute a warranty, and not a mere representation. Insurance Co. v. Stubbs, 98 Ga. 754, 27 S. E. 180. In the opinion in that case Mr. Chief Justice Simmons uses this language: "This clause constitutes a promissory warranty. It binds the assured to do certain things for the protection of the insurer, and is important, as providing a check against fraud on the part of the assured, and a mode by which the insurer may ascertain for itself the extent of the loss; and the compliance of the assured with this part of the contract is a condition upon which, by the expess terms of the contract, the validity of the policy is made to depend." The precise question presented for decision is whether a collection of invoices covering every article embraced within a stock of merchandise on a given day is an inventory of such stock, within the meaning of the clause above quoted. In other words, was the insurer bound to treat these invoices, when exhibited to it, as an inventory of the goods? An inventory is "an itemized list of the various articles constituting a collection, estate, stock in trade, etc., with their estimated or actual values." Black, Law Dict. It is a "list, schedule, or enumeration in writing, containing, article by article, the goods and chattels, rights and credits, and, in some cases, the land and tenements, of a person or persons." Bouv. Law Dict. "An itemized list of goods or valuables, with their estimated worth; specifically, the annual account of stock taken in any business." Webst. Dict. "A list or catalogue of goods and chattels, containing a full, true, and particular description of each, with its value, made on various occasions, as on the sale of goods, decease of a person, storage of goods for safety, etc." Encyc. Dict. "Invoice" has been defined to be: "A statement on paper concerning goods sent to a customer for sale or on approval. It usually contains the price of the goods sent, the quantity, and the charges upon them made to the consignee." Encyc. Dict. "A list or account of goods or merchandise sent or shipped by a merchant to his correspondent, factor, or consignee, containing the particular marks of each description of goods, the value, charges, and other particulars." Black, Law Dict. "A list sent to a purchaser, factor, consignee, etc., containing the items, together with the prices and charges, of merchandise sent or to be sent to him." Stand. Dict. A single invoice is certainly not an inventory, and it would seem to follow that a collection of invoices would not be an inventory. It may be that a collection of invoices, accompanied with a written statement, signed by the insured, that the invoices embraced every article in the store, and the actual value of each, would be a substantial compliance with the stipulation in the policy; but, be this as it may, we are clear that the invoices alone are not sufficient. It is too late at the trial for the insured to show that the invoices contained all of the goods, with the actual value of each article, for the obvious reason that the insurer would have a right to decline to receive the invoices as a proper compliance with the terms of the policy; and this, of course, is the true test as to their sufficiency. An invoice is simply a writing showing the articles sold, with the selling price of each. This may vary greatly from the actual value of the articles. That property, including merchandise, is often bought and sold at prices which do not at all represent the actual value, is a well-known fact. The invoice price of an article is a circumstance to be considered in determining what is its actual value, but it is far from conclusive in the question. To take an inventory, in common parlance, is "to take stock"; that is to say, take an itemized list of every article in the store at the time of the inventory, with the actual value of each. The supreme court of Mississippi had before it a similar question, and from that decision the second headnote preceding this opinion is taken. Home Ins. Co. v. Delta Bank, 15 South. 932. Upon a careful examination of the facts of Roberts, Willis & Taylor Co. v. Sun Mutual Ins. Co. (Tex. Civ. App.) 48 S. W. 559, the ruling there made will be found, also, to support the decision in the present case. The failure of the plaintiffs to take an inventory as required by the policy prevents a recovery by them,—at least, so far as the right to recover the value of the merchandise lost by the fire is concerned.

3. The policy sued on in the present case insured both the stock of goods and the building in which it was contained. The premium due upon the policy was a gross sum. The question arises, therefore, whether the breach of a warranty relating solely to the goods, and which precludes a recovery for this loss, would also bar a recovery for

the loss of the building. The stipulation prescribing that the insured must take an inventory of his stock provides that in case of failure so to do "this policy shall be null and void." What was the intention of the parties with respect to the question just above stated? If this intention is to be derived from the language used,—and it must be,—it would seem to be clear that the contract was entire and indivisible, and that the breach of a condition which would work a forfeiture would avoid the entire policy, and not simply a portion thereof. The parties contracted that "the policy" should be void in case of failure to comply with the iron-safe clause. The policy embraces insurance upon both the building and its contents, and the premium is payable in a gross sum. "If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." 2 Pars. Cont. *519. It was competent for the parties to make two separate and distinct contracts, one covering the goods, and the other the building, but they did not see proper to do this. They combined the two, and made the consideration moving towards the insurer a gross sum. They further provided that the contract, not a part of it, should be void under certain conditions. It may perhaps seem to be unreasonable that, simply for a failure to take an inventory of the stock of goods, the plaintiffs should be precluded from recovering the value of the building. But this does not affect the question. The question is, what have they agreed upon? If there was any room to doubt as to the intention of the parties, that construction which is most reasonable and most consonant with justice would be applied. But there is none. The parties have deliberately chosen to enter into an agreement whereby the policy shall be forfeited if the insured fails to do certain things, and he has failed to comply with his agreement. In such a case there is but one thing for the courts to do, and that is to enforce the agreement as made. The question as to whether a policy of insurance such as is involved in the present case constitutes a separable or an entire contract is no new question. It has been the subject of numerous decisions by the courts in this country, and they are in hopeless and irreconcilable conflict. The weight of authority is to the effect that the contract is entire, and that the breach of a warranty which relates solely to one class of property will avoid the entire policy, if the contract so provides. Text writers of great learning and ability have, after reviewing the decisions on both sides of this question, reached the conclusion that the contract is indivisible. We quote the following from 1 Wood, Fire Ins. p. 384: "It is difficult to understand how it can be held that these contracts are several, when a gross premium is paid for the entire insurance. The court cannot say, as a matter of law, neither can the fact be shown, that the insurer would have been satisfied to take the risk separately at the same premium. By consenting to pay a gross premium for the insurance, the assured has signified his willingness to let the policy stand as an entire contract, subject in all its parts to the conditions imposed by the insurer; and there is neither reason nor equity in permitting the assured, after he has violated one of the conditions of the policy as to a part of the risk, to turn around and say that this condition only affected that portion of the risk to which the breach related." Mr. Ostrander, after an elaborate review of the decisions, reaches the conclusion that those which hold the contract to be entire announce the sounder and better rule. Ostr. Fire Ins. § 23 et seq. See, also, 2 Joyce, Ins. § 1931; 1 May, Ins. § 277. In support of the views herein announced, we find the courts of last resort of Maine, Wisconsin, Maryland, Minnesota, Virginia, New Hampshire, Massachusetts, Vermont, Pennsylvania, New Jersey, Michigan, Indiana, Arkansas, Iowa, Alabama, and Connecticut. It would not be profitable here to do more than cite the decisions of these courts. Reduced to their last analyses, they simply hold that the premium being for a gross sum evidences an intention on the part of the parties that the contract should be treated as entire, and that the intention of the parties, when ascertained, must be enforced. See Richardson v. Insurance Co., 46 Me. 394; Barnes v. Insurance Co., 51 Me. 110; Hinman v. Insurance Co., 36 Wis. 159 (Syl., point 7); Burr v. Insurance Co., 84 Wis. 76, 54 N. W. 22, 36 Am. St. Rep. 905; Insurance Co. v. Assum, 5 Md. 165; Bowman v. Insurance Co., 40 Md. 620; Plath v. Insurance Co., 23 Minn. 479; Moore v. Insurance Co., 28 Grat. 508; Baldwin v. Insurance Co., 60 N. H. 422; Friesmuth v. Insurance Co., 10 Cush. 587; Lee v. Insurance Co., 8 Gray, 583; Kimball v. Insurance Co., 8 Gray, 33; McGowan v. Insurance Co., 54 Vt. 211; Gottsman v. Insurance Co., 56 Pa. St. 210; Trustees of Fire Ass'n v. Williamson, 26 Pa. St. 196; Martin v. Insurance Co. (N. J. Sup.) 31 Atl. 213; Insurance Co. v. Resh, 44 Mich. 55; McQueeney v. Insurance Co. (Ark.) 12 S. W. 498; Garver v. Insurance Co. (Iowa) 28 N. W. 555; Assurance Co. v. Stoddard (Ala.) 7 South. 379 (Syl., point 5); Essex Sav. Bank v. Meriden Fire Ins. Co. (Conn.) 17 Atl. 930. It is true that none of the cases above cited dealt with a breach of the iron-safe clause, but in many of them the condition in the policy which was violated had no more connection with the property for which a recovery was sought than does the iron-safe clause to the building insured by the policy herein involved. In principle the cases are exactly in point. Opposed to this view are decisions of the court of last resort of Nebraska, Colorado, Kansas, and Missouri. See Insurance Co. v. Schreck (Neb.) 43 N. W. 340, 6 L. R. A. 524; Insur-

ance Co. v. Fairbank (Neb.) 49 N. W. 711; Insurance Co. v. Barker (Colo. App.) 41 Pac. 513; Insurance Co. v. York (Kan. Sup.) 29 Pac. 586; Insurance Co. v. Saindon (Kan. Sup.) 36 Pac. 983; Loehner v. Insurance Co., 17 Mo. 247; Trabue v. Insurance Co. (Mo. Sup.) 25 S. W. 848, 23 L. R. A. 719. The courts of New York and Indiana seem to have been at different times on both sides of the question now under consideration. Smith v. Insurance Co., 25 Barb. 497; Kiernan v. Insurance Co. (Sup.) 30 N. Y. Supp. 892; Merrill v. Insurance Co., 73 N. Y. 452; Pratt v. Insurance Co. (N. Y.) 21 Ins. Law J. 146; Havens v. Insurance Co. (Ind. Sup.) 12 N. E. 137; Insurance Co. v. Pickel (Ind. Sup.) 21 N. E. 546. Our conclusion is that where an insurance policy is issued in consideration of a gross premium, and provides that the policy shall be void in the event of a breach of a certain condition therein named, and this condition is broken, no recovery can be had on the policy, though separate classes of property are therein insured, and though the stipulation violated relates solely to a matter which could have connection with but one of these classes.

4. As it affirmatively appeared from the evidence offered by the plaintiffs that they had broken one of the warranties in the policy, and as the breach thereof avoided the policy by an express provision in the same, the motion to nonsuit should have been sustained. Judgment reversed. All the justices concurring, except LITTLE, J., who dissents.

LITTLE, J. Not being able to agree to the conclusion of law expressed in the third headnote, I dissent from the judgment rendered by a majority of the court.

LUTHER v. BANKS et al.

(Supreme Court of Georgia. July 13, 1900.)

CLERK OF COURT—NEGLECT OF DUTIES—LIABILITY OF SURETIES.

The duties which the law imposes on a clerk of the superior court in relation to the record of mortgages and entries of their cancellation constitute him, as to them, a ministerial officer, notwithstanding the performance of these duties requires, to some extent, the exercise of judgment and discretion. As a ministerial officer, the clerk and his sureties are bound to any person who is injured by the failure of such clerk to perform, as well as for the improper or neglectful performance of, such duties. Accordingly, when a mortgagor presents to such clerk an original mortgage of record, and an order to the clerk, purporting to have been signed by the mortgagee, to cancel such mortgage on the record, and the clerk has no knowledge of the invalidity of the order, nor any reason to suspect the same, the act of recording the order does not render the clerk and the sureties on his official bond liable to a person injured by such entry, notwithstanding the order was forged. The possession of the original mortgage, in the absence of any circumstances charging the clerk with the duty of making inquiry, is sufficient to free him from the imputation of neglect in the performance of his official duties in placing the entry in cancellation on the record.

(Syllabus by the Court.)

Error from superior court, Fulton county: J. H. Lumpkin, Judge.

Action by S. J. B. Luther against James Banks and others. Judgment for defendants. Plaintiff brings error. Affirmed.

Candler & Thomson, for plaintiff in error. W. D. Ellis, C. J. Simmons, Arnold & Arnold, and Payne & Tye, for defendants in error.

LITTLE, J. The plaintiff in error instituted an action against the administrator of Strong and the sureties upon his official bond as clerk of the superior court of Fulton county. It is alleged that, having been elected clerk, Strong, with certain defendants named as sureties, made and executed the official bond required to be given by all clerks of the superior court, by which said principal and his sureties were bound in the sum of $3,000, subject to a condition named in said bond as follows: "The condition of the above obligation is such that whereas, the above-bound Cicero H. Strong was on the 5th of Jan'y, 1887, duly and legally elected clerk of the superior court, in and for said county of Fulton for the term of two years: Now, should the said Cicero H. Strong faithfully discharge the duties of said office of clerk of the superior court in and for said county during the time he continues therein, or discharges any of the duties thereof, then the above bond to be void, else to be in full force." It is alleged that, at the time Strong entered upon the duties of his office as clerk, there was of record in his office a mortgage from Knapp to McWilliams, dated January 2, 1884, and recorded February 25, 1884, on certain real estate belonging to Knapp in Fulton county, which mortgage was executed to secure a note of even date therewith, to be due one year after date, for $1,200, with interest and attorney's fees. It was further alleged that on the 30th day of March, 1887, Strong, as clerk, made upon the record of said mortgage an entry of which the following is a copy:

"The note for which this mortgage was given to secure has this 24th March, 1887, been satisfied in full, and the clerk of the superior court is hereby authorized to cancel said mortgage on the records for mortgages for Fulton county. [Signed] Robt. McWilliams.

"Entered March 30, 1887. C. H. Strong, C. S. C."

—Which entry, it was alleged, had the effect of canceling said mortgage of record. It was also alleged: That such cancellation was a wrongful entry, which should not have been made, and which would not have been made if the duties of said office had been faithfully discharged by said C. H. Strong; the name of Robert McWilliams having been forged, and the authority to cancel said mortgage, purporting to emanate

from him, being a forgery, which should have been known, if it was not known, to the said Strong. That petitioner, desiring to purchase the property named in the mortgage, after said cancellation was made, to wit, on the 31st of March, 1887, had the records searched, and found this entry of cancellation thereon. That afterwards petitioner, relying upon said cancellation, and believing it to be valid and duly authorized, as it purported to be, purchased a certain part of the land described in the mortgage, and took a conveyance thereof, believing that she was getting a title unincumbered by the mortgage. That she would not have made such purchase, but for said wrongful cancellation. That afterwards McWilliams instituted a proceeding in Fulton superior court to foreclose said mortgage, and, he having died pending the proceeding, his heirs at law foreclosed the same, and a fi. fa. issued and was levied upon the property, to which levy petitioner interposed a claim; and, on issue having been joined thereon, it was determined against her, and the property found subject, on June 12, 1896, in consequence of which she was compelled to pay off the execution issued on such foreclosure proceedings, to her damage. To this petition a demurrer was filed, containing a number of grounds,—among them, the following: That the petition set out no cause of action; that it did not show a breach of said bond, or a breach of duty on the part of Strong in entering said mortgage canceled; and because the petition did not allege that Strong was aware or had any knowledge of the entry of satisfaction of said mortgage being a forgery, or that he recorded said entry of cancellation with any knowledge that the same was a forgery. On the hearing the demurrer was sustained and the petition dismissed, to which ruling the plaintiff in error excepted.

The question raised invokes a decision on the liability of a principal and sureties of the official bond of a clerk of the superior court, whose duty it is to record, in suitable books to be kept in his office, all mortgages, deeds, etc., which by law are required or entitled to be recorded under the statutes regulating the recordation of such instruments. It is provided by section 256 of the Political Code that every official bond is obligatory on the principal and sureties "for the use and benefit of every person who is injured, as well by any wrongful act committed under color of his office as by his failure to perform, or by the improper or neglectful performance of those duties imposed by law"; and, construing this section of the Code, it was ruled in Markham v. Ross, 73 Ga. 105, that, if a plaintiff has been injured and suffered damage in consequence of the neglect of the clerk of the superior court, he may sue him personally, or upon his official bond, and recover the amount of the damage sustained. It is alleged in the petition that the cancellation referred to was a wrongful entry, which should not have been made. In effect, this means that the act of entering the cancellation was wrongful, for which the plaintiff was entitled to recover. Even if it be assumed that the entry was wrongful, a recovery would not follow, under this provision of the Code, because by it the right of action accrues only for "a wrongful act committed under color of his office"; and, clearly, the allegations of the petition do not make a case against the clerk for recovery because of any act done under the "color of office," which is defined, "A pretense of official right to do an act, made by one who has no such right." Bouv. Law Dict. tit. "Color of Office." See, also, Griffiths v. Hardenbergh, 41 N. Y. 464. In order to ascertain whether, under the facts alleged in the petition, any liability on the part of the defendants exists, it is necessary, under the further provisions of this section of the Code, to ascertain whether a record of a forged cancellation is either a failure to perform an official duty, or is the improper or neglectful performance of a duty imposed by law. It is worthy of notice that the petition does not allege that at the time of the entry the clerk knew that the cancellation was forged. Had such an allegation been made, the case would have presented a different aspect, and there could exist no doubt but that the demurrer should have been overruled. The only language from which such knowledge might be even remotely inferred is found in the fourth paragraph of the petition, which says, "and the authority to cancel said mortgage purporting to emanate from him being a forgery, which should have been known, if it was not known, to the said C. H. Strong." Taking the allegations most strongly against the pleader, this petition does not charge that Strong had knowledge that the cancellation, or authority to cancel, was a forgery. It distinctly charges only that the fact that it was a forgery should have been known to him. Founded on the act of 1885, our Civil Code (section 2737) declares that "any mortgagor in this state, who may have paid off his mortgage, may present the same, together with the order of the mortgagee or transferee, directing that the mortgage be canceled and record the order across the face of the record, to the clerk of the superior court of the county or counties in which the same is recorded, and such clerk shall write across the face of such record the word 'Satisfied,' and the date of such entry, and sign his name thereto officially." It will be noticed that the authority is only given to the clerk to make this entry when the mortgagor presents the original mortgage, together with the order of the mortgagee or transferee, with directions for the cancellation to be made. It could hardly be doubted that a cancellation claimed to have been made by authority of this section, when the original mortgage was not pre-

sented, would be such an improper performance of the duty imposed upon the clerk by its provisions as would entitle a person injured thereby to have redress through the official bond of the clerk. Indeed, this has been distinctly decided. In the case of Appleby v. State, 45 N. J. Law, 161, it appeared that the clerk, who was the custodian of the registry of mortgages, without having produced to him the original mortgage, canceled, or with a receipt thereon signed by the mortgagee, entered upon the registry of a mortgage a minute of payment and redemption, when the statute required the production of the mortgage, canceled, or a receipt signed by the mortgagee entered thereon, and the supreme court of New Jersey ruled in that case, where it appeared that such receipt was invalid, that such entry was negligently and carelessly made, and that the clerk and his sureties were liable. The law relating to entry of cancellation of mortgages in the state of New Jersey is similar to that which exists in Georgia.

While it is not alleged distinctly in the petition that at the time the cancellation was made the original mortgage was presented with the order for cancellation, yet a fair reading of the allegation made in the petition in this respect, and of the copy of the order for cancellation set out therein, indicates that it was. In the order for cancellation it is recited, "The note for which this mortgage was given to secure has been satisfied," etc. It is therefore inferable from the petition that the order for cancellation was written upon the original mortgage itself, and, in presenting the order, the original mortgage necessarily accompanied it. We feel at perfect liberty to give this construction to the petition, not only because of these words of the order, which we find set out in full, but also from the fact that on the argument of the case counsel for defendants in error based his contention of nonliability on the fact that the mortgage was presented at the time of the cancellation, and no issue was taken thereon in argument. So construing the petition, the naked question is presented, whether, without knowledge, reasonable grounds of suspicion, or anything which could put the clerk upon inquiry whether the order of cancellation was forged, the clerk of the superior court, when the original mortgage is presented to him by the mortgagor, with what is apparently the order of the mortgagee for its cancellation on record, is liable on his official bond for entering such cancellation on the record of the mortgage, when, as a matter of fact, such order is a forgery; and this requires at our hands some reference to the nature of the official act of recording a written instrument authorized or required to be placed upon a public record, and whether such act is judicial or ministerial in its character, as well as the rule of liability which attaches. The rule that, in the performance of duties by judicial officers, no liability exists in favor of one injuriously affected by a decision, is of universal application, regardless of the correctness or incorrectness of the decision. As was said by Beardsley, J., in Wilson v. Mayor, etc., 1 Denio, 595: "No action lies in any case for misconduct or delinquency, however gross, in the performance of judicial duties. * * *; If corrupt, he [the judge] may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done." The reason for this is strongly given by Judge Cooley in his work on Torts (2d Ed., p. 448), in the following language: "Courts are created on public grounds. They are to do justice as between suitors, to the end that peace and order may prevail in the political society, and that right may be protected and preserved. The duty is public, and the end to be accomplished is public. The individual advantage or loss results from the proper and thorough or improper and imperfect performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice as between individuals, he may be called to account by the state in such form and before such tribunal as the law may have provided. But, as the duty neglected is not a duty to the individual, civil redress, as for an individual injury, is not admissible." The same doctrine is so universally recognized that no good purpose could be subserved by a further elaboration of this rule, especially as it is clear from the nature of the duties imposed upon the clerk of the superior court, as a recorder of deeds and mortgages, that his acts are ministerial, and not judicial. It is true that in the exercise of such duties his official discretion is often involved, but this does not make the discharge of such duties judicial. The act is not necessarily taken out of the class of ministerial duties because the officer who performs it is required to judge whether the contingency has occurred in which he is authorized or obliged to do the act. Throop, Pub. Off. § 538. In the case of Grider v. Tally, 77 Ala. 422, Judge Clopton says that such is not the judgment or discretion which is an essential element of judicial action; and in the case of Spain v. Clements, 63 Ga. 786, Mr. Justice Jackson, in delivering the opinion of the court, said: "It has been argued that the exercise of his official duty in receiving and filing this bond is judicial, and therefore the clerk and sureties are not liable. The clerk is a ministerial officer. Every ministerial officer, in such matters as taking bonds, must to a certain extent judge, and thus be quasi a judicial officer," in passing judgment either on the legality or insufficiency of the bond taken. A "recorder of deeds" is defined by Mr. Mechem, in his Law of Public Offices and Officers (section 733), to be "a ministerial officer whose duties are owing chiefly to those particular individuals who have occasion to employ him, and to

whom he usually looks for his compensation," supporting the text by a great many adjudicated cases. Mr. Throop, in section 724 of his work on the Law of Public Offices and Officers, declares that the rule of law is well settled that where an individual sustains injury by the malfeasance, misfeasance, or nonfeasance of a ministerial officer, acting or omitting to act contrary to his duties, the law gives redress to the injured person by an action for damages. So that, being a ministerial officer, an action would lie against the clerk for malfeasance, misfeasance, or nonfeasance, and on his official bond, in the language of our Code, for the "improper or neglectful performance of duty."

It is distinctly alleged that the order of cancellation which the clerk entered was forged, and it is contended that the entry was such an improper performance of the duty as gave a right of action. We have before adverted to the proposition that if the clerk knew that the order of cancellation was forged, and entered it of record, there could be no question of his liability. We might go further, and say that if he had reason to believe that the order was forged, and if there was anything in the order itself, or the circumstances under which it was presented, which would have put upon him a duty to inquire as to the genuineness of the order, the record of it without such inquiry would have been an improper discharge of his duty. In the case of Spain v. Clements, supra, it was held by Justice Jackson that "important matters—great rights—depend on the careful and faithful discharge of" his duties by the clerk; and he declares that "public policy demands that they [clerks] be held to the discharge of these duties, and their sureties bargain that they will see to it that these duties are discharged." Under the far-reaching effects of our law of registration, it cannot be questioned that the recording officer should and will be held to a strict account in the performance of the duties which the law has imposed upon him, and the rule that such officers are liable in damages to any one who is specially injured by their omission to perform the duties imposed, or for a negligent performance of such duty, is clear. On the subject of an illegal record, Judge Cooley, on page 457 of his work on Torts, declares that the recorder may be responsible for recording papers not entitled to record, provided the record, when made, may cause legal injury, and provided, further, that he is aware that the record is unauthorized. As we have seen, our statute makes it the duty of the clerk, when a mortgage has been paid off, and the original is presented, with an order of cancellation, to enter the fact of cancellation on the record of the mortgage. While agreeing entirely with the principle ruled in the Appleby Case, supra, it must be recognized that the fact of the presentation of the original mortgage at the time that the entry of cancellation is made is important, in determining whether the officer was negligent in entering the cancellation. The mortgagee, whose rights would ordinarily be alone affected by a false entry of cancellation, was entitled to the possession of the mortgage. Presumably, he would not deliver it to the mortgagor without payment of the debt which it was made to secure; and so much weight is attached to such a possession that in the case of Heyder v. Association, 42 N. J. Eq. 403, 8 Atl. 310, it was ruled that if a mortgagee permits the mortgagor to retain the mortgage, and the latter fraudulently cancels it of record, the mortgagee cannot enforce it as against a subsequent bona fide grantee, and this ruling was made on a comparison of the equities between the bona fide purchaser without notice and the mortgagee who negligently permitted the mortgagor to have possession of the mortgage. While construing the law which imposes official duties upon the clerk to hold him and the sureties on his official bond to a rigid accountability for any act of negligence in the record of instruments by which the rights of third parties are infringed, and while we think these duties must be exercised with care and diligence, we know of no rule which imposes on a clerk liability for the record of an instrument which is apparently genuine, and accompanied with evidence of a high character that it was proper that such record should be made. There are but few cases which adjudicate the direct question in issue, and these rule that the clerk, under such circumstances, is not liable. In the case of Sacerdotte v. Duralde, 1 La. 482, it was ruled that a recorder of mortgages had no discretion to exercise as to the validity or effect of the acts recorded. In the case of Ramsey v. Riley, 13 Ohio, 157, it was distinctly ruled that, to maintain a suit against a recorder for recording a forged receipt for money due on a mortgage, it must be shown that the recorder knew the character of the instrument and with corrupt intent entered it upon the record. While, under our statute, we may not go to this extent, we are yet clear that a negligent discharge of his duties on the part of the clerk is not shown by the mere fact that he entered a cancellation which, as it subsequently transpired, was a forgery. To maintain the petition presented in this case, it would be necessary to so rule. Taking, therefore, all the allegations in the petition, as we have construed it, to be true, notwithstanding the fact that the plaintiff suffered loss by the entry, we are of the opinion that the clerk is not responsible on his official bond for such loss, because the circumstances under which the entry was recorded do not show an improper or negligent discharge of duty. Judgment affirmed. All the justices concurring.

CITY COUNCIL OF AUGUSTA v. OWENS.

(Supreme Court of Georgia. July 14, 1900.)

INJURY TO EMPLOYÉ—PLEADING—VICE PRINCIPAL — NEGLIGENCE — FELLOW SERVANT—DANGEROUS PREMISES—POWERS OF CITY—DAMAGES—INSTRUCTIONS.

1. The petition in this case sets forth a good cause of action, and therefore the court did not err in overruling the general demurrer thereto.

2. There was no merit in the special demurrer based upon the ground that the petition did not allege where the quarry was located. It was sufficient in this respect, because it informed the defendant of the time of the injury that occurred at this quarry, the name of defendant's superintendent of the work there, gave a general description of the quarry, and set forth such facts and circumstances as would leave no room for uncertainty or doubt in the mind of the owner, who was the defendant, as to what quarry was referred to in the petition.

3. Where a municipal corporation is engaged in operating a rock quarry which it owns, a person placed there by its authority as general superintendent of the work, with power to direct the movements of its laborers, not joining with them in the labor, and being as to this business the city's sole and only representative, is the vice principal, and not the fellow servant of the workmen under his charge; and this is so whether it was within the scope of his authority to engage the workmen or not.

4. Though the immediate cause of a physical injury to an employé may be the negligent act of a fellow servant, the master is liable, if the fellow servant did this act under and in obedience to an order given by a vice principal of the employer, if the giving of the order was itself an act of negligence as to the defendant.

5. There was no error in the court charging the jury: "It was the duty of the defendant to furnish a reasonably safe place for this man to work. It was the right of the plaintiff to assume that the place was safe when he was directed to go to it." In the light of the pleadings, testimony, and the entire charge of the court, the language quoted, which is, abstractly considered, a correct statement of a general rule of law, was not calculated to mislead the jury.

6. A request to charge on a defense not set up by the answer, either by affirmative statement, or by denial of any of the allegations in plaintiff's petition, was properly refused. There being an agreed statement of facts "that the tract of land on which this accident happened formerly belonged to the Augusta Canal Company; that the right to quarry was conveyed to the city council of Augusta, under the provisions of the act of 1849, and that the city council of Augusta has police jurisdiction over the tract; * * * that this tract comes within the provisions of the act,"—it was not ultra vires to operate the quarry for the purpose of obtaining material to repair the streets or a canal which the defendant had authority to own and operate.

7. The testimony in the present case showing that the operation by defendant of the quarry in question was a ministerial act on its part, and there being no evidence to indicate that the work in which the city was engaged was governmental in its nature, the court did not err in refusing a request of defendant's counsel to charge the jury on this subject.

8. A person whose capacity to labor has been permanently diminished by physical injury wrongfully inflicted upon him by another can recover damages therefor, notwithstanding there may have been no proof as to what such person's earnings were before or after the injury. Hence there was no error, in the light of the pleadings and the evidence in this case, for the court to charge the jury on the subject of the right of plaintiff to recover for his decreased capacity to work, if the jury found from the evidence that the injury received was permanent.

9. There being nothing either in the pleadings or the evidence which gave the jury a right to find any damages growing out of the diminished earnings of plaintiff for his labor resulting from the alleged injury, it was error for the court to charge the jury to inquire whether there would have been any increase in plaintiff's earning capacity if this injury had not occurred, and to say how much that was affected by the injury, and then allow what they believed would compensate him for that loss.

10. The above covers all the questions of importance made by the present record. While there are several other grounds in the motion for a new trial relating to requests to charge, after comparing them with the entire charge of the court actually given, they are not of sufficient merit to require notice. The charge, as a whole, except as specified in the ninth headnote above, was full and fair, and covered all the material issues between the parties. The judgment denying a new trial is reversed only because of the error therein indicated.

(Syllabus by the Court.)

Error from city court of Richmond county; W. F. Eve, Judge.

Action by Benjamin Owens against the city council of Augusta. Judgment for plaintiff. Defendant brings error. Reversed.

Wm. H. Barrett, for plaintiff in error. J. R. Lamar and E. B. Baxter, for defendant in error.

LEWIS, J. Benjamin Owens instituted in the city court of Richmond county an action for damages against the city council of Augusta, substantially making by his petition the following case: Defendant in May, 1897, at the time of the injuries to plaintiff hereinafter mentioned, owned and operated a certain quarry, from which it was engaged in obtaining rock to be used by it in making improvements on its streets, in keeping the same in proper repair, and for other like corporate purposes, within the scope of its duty and authority. It had in its employ a large number of laborers, who were engaged in getting out rock from the quarry for defendant's use as aforesaid. On said date plaintiff was engaged as one of said laborers in defendant's employ. This work at defendant's quarry was conducted under the superintendence, supervision, and control of one John Joy, who directed the same; being clothed by defendant with full power and authority, as its representative and agent, over the actual conduct of the work at said quarry. His duties were those of supervision, direction, and control. Petitioner and all the laborers and employés were, while engaged in said work, amenable to his orders,—required to obey them, and to look to him, as their superior, for direction in said work. They were thus subordinated to him, as their superior or principal. He had authority to discharge them for cause. This quarry at the time mentioned, consisted of a large, level space or area, at the back of which rose, almost

perpendicularly, to the height of 80 or 90 feet, a wall of rock, from which, by blasting, drilling, and quarrying, rock was obtained for defendant's use, and from whose face the rock, when loosened, fell to said area, whence it was removed. On said date plaintiff went to his work as usual at the quarry, and during the early portion of the morning Joy ordered him, with two other laborers, to go to the foot of said quarry, the base of said wall or rock, and there drill a hole pointed out by said Joy, in order that a blast might be placed therein, which work was in the usual line of plaintiff's employment at the quarry; his duty being, in connection with drilling said hole, to drive the drill with a hammer. One of the other two laborers held the drill, while the third was engaged with plaintiff in driving the same. While being thus occupied for a short time, and when in the act of striking the drill, a piece of rock, falling from above, struck him upon the head, inflicting injuries hereinafter set out. At the time the order was given him by Joy, the said Joy, without warning to petitioner, negligently ordered two other laborers to go to a point on the face of the quarry wall almost directly over the spot where plaintiff was at work when struck, and about 75 feet above him, and there to quarry out some rock which had been loosened by a blast. One of said laborers, in obedience to said orders, after reaching the place designated by Joy, in ignorance of petitioner's position, in the usual and ordinary method, did, with a crowbar, loosen and move, without negligence, from its place, a large piece of rock; and the same rolled down the face of said wall, and in its course broke in pieces, one of which struck plaintiff on the head. It was charged: That the act of said Joy in sending laborers to quarry out rock almost above plaintiff's head was gross negligence, was in reckless disregard of the safety of plaintiff and those working with him, and was a violation of the duty which Joy owed plaintiff. That this improper and negligent conduct of Joy rendered plaintiff's position excessively and unusually perilous, and perilous in a manner and to an extent which plaintiff could not possibly have anticipated or foreseen, and that this conduct was the cause of plaintiff being struck by the rock and injured. Plaintiff did not know or suspect, nor could he by proper diligence have known or suspected, that said laborers were quarrying above him. That he was thereby subjected by defendant, acting through Joy, to a risk not reasonably incident to his employment, and when he was hurt he was exercising all due care and diligence. The blow rendered him unconscious, and he remained so for some time. Was carried to a hospital, where he remained for several weeks under the care of a competent physician. That his skull was crushed in by the blow. That a portion of same had to be removed, and that his brain is now protected at that point only by his scalp. As a result thereof, he is constantly exposed to danger of serious injury, and even death. That he is thereby caused great and constant distress and apprehension of mind. That said condition will be permanent. That he suffered great pain after the injury, has continued to suffer ever since, and will continue to suffer such pain as long as he lives. His capacity to labor and earn money has been greatly and permanently diminished, and this condition of impaired capacity will continue. He alleges his damages to be $5,000, for which he prays judgment.

To this petition a demurrer was filed—First, on the ground that there is no cause of action set forth in the petition; and, second, because there is no allegation in the petition showing where the quarry at which the accident occurred is located. This demurrer was overruled, to which judgment exceptions pendente lite were filed, and error assigned thereon in the main bill of exceptions. The defendant at the same time answered, and in its answer admitted the truth of the allegations as to owning and operating a quarry, from which it was engaged in obtaining rock for the purposes mentioned in the petition, but it does not admit that such work was within the scope of its duty and authority. It admitted that Joy was in charge, directing the work at the quarry; that petitioner and all the laborers and employés were, while engaged in said work, amenable to his orders; and that, in so far as these facts warrant the conclusion, said employés were subordinate to Joy,—but denies that Joy had authority to discharge said laborers. It admits the truth of the allegations in the petition which state that Joy ordered two laborers to go to a point on the face of the quarry wall to loosen and throw down rock, and that one of the rocks thus thrown down broke into pieces, and one of the pieces struck plaintiff in the head. It neither admits nor denies, for lack of knowledge, that one of the laborers, in ignorance of petitioner's position, in the usual and ordinary method, did, with a crowbar, loosen and move, without negligence, from its place, a large piece of rock, but denies that the order was given said laborers without warning to petitioner or given negligently, and denies that the spot where said laborers were directed to go was almost directly over the spot where plaintiff was at work when struck. It admits that plaintiff was struck in the head with a rock. The answer further avers that while it is true that, a plane running along the face of the wall of said quarry would be almost perpendicular to the surface of the area in front thereof, the quarrying has been so constructed as to leave along the face of the wall thereof wide ledges, running at an angle from near the top to the bottom thereof, somewhat as roads are built along the face of precipices; that these ledges were so constructed as to be used as slides or ways for rock quarried from the face of the quarry, and rolling along them to the bottom; that such ledges have been used for a long time for such purpose, and are still so used; that such use was safe and proper, was known to

petitioner, was a regular incident to the work in which petitioner was engaged, and did not render the position of plaintiff unusually perilous. The answer further alleges: That on the day previous to the injury, and on the morning of the same day as the injury, rock had been loosened and thrown down from the same place whence the rock, a piece of which struck petitioner, was thrown, and petitioner and the other laborers were working in approximately the same place on the surface of the area below the wall as where petitioner was standing when injured. That such relative position of those working below and those quarrying above was usual, was known to petitioner, and was a regular incident of the work, and that the rock thus loosened or quarried from above had been descending along the ledge provided therefor, without any unusual danger or premonition thereof. The point from which the rock was being loosened was in full view of petitioner, and he did see, or could have easily, by the use of the slightest diligence, seen, the men working there. Petitioner knew the place whence the rock was being loosened, knew that the laborers had been sent there to do this work by throwing down rock, and knew as fully and as well as defendant or any of its agents the danger incident to his position. The injury to plaintiff was caused by an unforeseen accident, without fault or negligence on the part of the defendant, and this defendant should not be held liable therefor.

It is unnecessary to give in this report a synopsis of the evidence. Suffice it to say that the plaintiff by his testimony substantially made out the case alleged in his petition, and the defendant introduced testimony tending to establish the main elements of its defense. The jury returned a verdict for the plaintiff for $2,000, whereupon the defendant moved for a new trial, which was overruled, and upon this judgment error is assigned in the bill of exceptions.

1. We have no hesitancy in saying that this petition set forth a good cause of action, and that the court did not err in overruling the general demurrer thereto. The main charge of negligence which seems to be relied upon by the plaintiff in his pleadings is the conduct of defendant's superintendent of this work at the quarry in sending plaintiff to the particular place where he was hurt, and at the same time, without warning to him, sending laborers to a point almost directly over his head, some 75 feet above him, for the purpose of taking out rock that had been blasted, and tumbling the same down to the place below where plaintiff was stationed. One of the rocks thus loosened, and intended to be thrown down, doubtless, upon the ledge, broke; and one of the pieces struck plaintiff on the head, causing the injury. As to whether this was negligence, and shown to be negligence by the testimony to the satisfaction of the jury, is a question peculiarly for them to determine; and the court would have erred if it had sustained the demurrer upon the theory that the petition set forth no cause of action.

2. Nor do we think there is any merit in the special demurrer made in this case on the ground that the petition did not allege where the quarry was located. The petition does give a description of the quarry. It alleges that it was owned by the defendant (that is, the city of Augusta); that petitioner was in its employment, at work at the quarry. It further gives the name of the superintendent employed by the defendant to take charge of the work at the quarry, which was not denied. It describes the grounds, and wall of rock, and the character of the work engaged in at the quarry. It does seem that the owner of such an immense industry and enterprise as this would readily have known what particular quarry, even if it had more than one, the plaintiff was alluding to in his petition. In fact, the answer filed at the time of the demurrer shows upon its face that it knew exactly what quarry was referred to in the petition; and, even if there was any error in overruling this special ground of demurrer, it certainly worked no harm whatever to the defendant. In 6 Enc. Pl. & Prac. p. 368, this principle is announced, and the author cites a number of authorities to sustain the text. It is there said: "Although a demurrer may have been improperly overruled, yet, if the demurrant was not harmed by such ruling, judgment will not be reversed on account of the harmless error." Besides this, the principle that, in pleading, less particularity is required when the facts lie as much within the knowledge of the adverse party as in the party pleading, is so well established, and sustained by such abundant authority, that we think it useless to discuss or cite authority on the subject.

3. In the third ground of the motion for a new trial, exception is taken to the following charge of the court: "I charge you that if Joy was a foreman or boss of the city quarry where plaintiff was injured, in the sense that he had full control of the operations at the quarry, and full authority to give orders, and to direct and control, as superior, the movements and actions of the employés of the city working in the quarry; and if they were subject to his orders and directions therein; and if he took no part in the actual work at the quarry himself, but merely directed and superintended it; and if he had authority to suspend employés or discharge them, subject to the final action of a higher city official as to such discharge,—then Joy was not a fellow servant of plaintiff, but was the vice principal of defendant." The objection to this was that it took from the consideration of the jury the determination of the fact as to whether or not Joy was a fellow servant with the plaintiff, and shut out from consideration the fact that the city retained the general supervision of the quarry. We think, in the light of the pleadings and the testimony, the charge of the court complained of was entirely correct. It appears from the allega-

tions and the proof that a municipal corporation, the defendant in this case, was engaged in the business of operating a quarry. Joy was placed there by the defendant as a general superintendent of the work, with authority to direct the movements of the laborers,—not joining with them in the labor,—and, as to this particular business, was the city's sole and only representative. It necessarily follows from the facts alleged and proved that the relation he sustained to the plaintiff was that of a vice principal, and not a fellow servant. If his duties, and the power with which he was clothed, did not constitute him a vice principal, then it would be an exceedingly difficult matter to conceive of how any municipality or other corporation could be held responsible for the acts and conduct of any agent employed to superintend and control its subemployés. It is complained that this charge excluded from the consideration of the jury that the city retained the general supervision of the quarry. In one sense, that is true; but not more so in this case than corporations have occupied in many other cases in which, under repeated adjudications of this court, they have been held responsible for the negligent acts of subbosses towards employés under their immediate control. This record fails to show that any other official, agent, or employé of the city than Joy had anything whatever to do with superintending the conduct of the work, and directing the laborers engaged therein. In Bain v. Machine Works, 75 Ga. 719 (Syl., point 2), it was decided: "Although two persons were employed by the same master, yet where one of them was employed as a blaster for the purpose of removing certain rocks on the master's property, and alone had charge of the work of blasting, and the other had nothing to do with it, but was employed as a wood workman in the foundry of the master, they were not fellow servants, in the legal sense of the term; and a charge based on that assumption was erroneous, though it may have been a correct abstract statement." In Blackman v. Electric Co., 102 Ga. 64, 29 S. E. 120, it was decided: "While the person occupying the inferior position is, in a broad and general sense, a coemployé, he is not a fellow servant with the person in authority over him, in the sense he could not recover for injuries sustained by him in consequence of the negligence of such person." See the opinion of Justice Atkinson, on page 68, 102 Ga., and page 122, 29 S. E., and following, and it will clearly appear from those facts that the person there who was regarded in the capacity of a vice principal did not occupy any more authoritative relation—even if as much—to the employé than did Joy in this case to the plaintiff. See, also, Cooper v. Mullins, 30 Ga. 146; Augusta Factory v. Barnes, 72 Ga. 227, 228; Krogg v. Railroad Co., 77 Ga. 214; Cheeney v. Steamship Co., 92 Ga. 726, 19 S. E. 33; Ellington v. Lumber Co., 93 Ga. 57, 19 S. E. 21, and authorities cited. The above disposes of the questions raised by the thirteenth, fourteenth, and fifteenth grounds of the motion for a new trial, in which error is assigned upon the refusal of the judge to give to the jury certain requests of counsel for the defendant. The thirteenth ground complains of error in refusing a request to charge the jury as follows: "If you believe that Joy had not power to employ or discharge, but that his duties were only to direct and act as a foreman and boss, directing the men where to work, and engaged in a common pursuit with Owens, you will be authorized to find that Joy and Owens were fellow servants. And if you so find that they were fellow servants, and even should believe that Joy was negligent, and that his negligence caused the injury to Owens, Owens could not recover." The court gave that in charge, with this qualification: "I give you that in charge, gentlemen, with this qualification: That if you find that Joy was not in control and had authority, but was simply a foreman with control of the work assigned them, and was engaged along with the others in the actual work, then he would not be a vice principal, but only a fellow servant, and negligence on his part would not render the city liable." We question very much whether the charge of the court, even with that qualification, was correct, under the testimony in this record; for there was no evidence that Joy was engaged in the same sort of service with this plaintiff. On the contrary, the plaintiff was a common laborer, whose business it was to handle tools, engage in manual labor, and work upon the rock. Joy was not engaged in any such service. He was simply the superintendent and supervisor of the work that was carried on by the laborers in the quarry. We are inclined to think that the testimony did not authorize the charge that was given, and, if there was any error in it, it was against the plaintiff, instead of the defendant. We do not, however, decide this, as no exception thereto was filed by the plaintiff.

4. In the fourth ground of the motion for a new trial it is alleged that the court erred in giving the following charge to the jury: "The employer is liable for injuries resulting from the unsafe condition of a working place, even though brought about by the negligence of a fellow servant or fellow servants of the employé, if such fellow servant acted under the orders of the employer, and such orders were negligent on the part of the employer as to the injured party, provided the injured employé was not guilty of negligence in going into the dangerous place." The objection to this was that it prevented the jury from arriving at a conclusion warranted by the evidence,—that the proximate cause of the injury to plaintiff was the negligence of his fellow servant Elliott. From a careful review of the evidence, we are not prepared to say that there was sufficient testimony to charge Elliott with any negligence. We do not decide that question, however, but, assuming that he was negligent, we think the charge was sound law; for the evidence shows that

he was simply carrying out the instructions of Joy, for whose negligence the defendant was liable. In Railroad Co. v. Phelps, 19 S. E. 652, the supreme court of Virginia decided: "If an injury be caused by the concurring negligence of a fellow servant and a superior who is not a fellow servant, the master is liable." In Augusta Factory v. Barnes, 72 Ga. 227, 228, this doctrine is announced in the opinion of Justice Hall, which principle is embodied in the seventh headnote, on page 218. Referring to the case of Railroad Co. v. De Bray, 71 Ga. 406, the court says: "We carefully examined our previous decisions, together with the authorities in the text writers, and the cases from the English courts and the courts of this country, and came to the conclusion that, where the plaintiff used all ordinary care and diligence to avoid the injury occasioned by the negligence of the principal's other servants, with whom he was disconnected at the time, and where he was acting in obedience to the orders of another servant over him, and whose orders he was bound to obey, that he had a right to recover for the injury inflicted under such circumstances." See, also, Cheeney v. Steamship Co., 92 Ga. 726, 19 S. E. 38. This disposes of the sixth, seventeenth, eighteenth, nineteenth, and twenty-third grounds of the motion for a new trial. Considering the requests to charge in the last grounds named in the light of the entire charge, there was no error in refusing them.

5. In the fifth ground of the motion, complaint is made that the court erred in charging the jury as follows: "It was the duty of the defendant to furnish a reasonably safe place for this man to work. It was the right of the plaintiff to assume that the place was safe when he was directed to go to it." The objection to this charge was that the overwhelming weight of evidence was to the effect that practically every place in the quarry was dangerous, and that any one working there was liable to be injured, and it was claimed that this charge was without evidence to support it. As an abstract proposition of law, the charge was correct, and we do not think that in the present case it was calculated to mislead the jury. There is evidence in the record of the dangers that necessarily attend the working of a quarry, ordinary and usual in their nature, and the jury doubtless clearly understood by the charge with reference to a reasonably safe place for a man to work that it meant such a place under the circumstances and conditions attending the operation of that business. There is testimony in behalf of plaintiff tending to establish the fact that when injured he was not in a safe place. He testified that on the day before, when engaged at work there, and when the work of removing rock above them began, plaintiff and others were ordered away from that place on account of this danger, and that he knew nothing about what was going on above him when he was hurt; and we fail to find any evidence that Elliott knew he was beneath him. We think, therefore, that this charge was warranted by the evidence.

6. In the ninth, tenth, and eleventh grounds of the motion, complaint is made of the refusal of the court to give certain written requests in charge, touching what powers a municipal corporation can exercise, and any powers exercised over and beyond those granted the corporation are ultra vires; that if the jury believed the city council of Augusta had no authority from the legislature, express or implied, or indispensable to the objects of the corporation, to conduct the quarry described in plaintiff's petition, such work would be known in law as "ultra vires" (that is, beyond the scope and powers of the corporation), and, to create liability on the city in a case of this kind, it is necessary that the act done which is injurious to others must be within the scope of the corporate powers as prescribed by charter or positive enactment,—in other words, it must not be ultra vires, We do not think there was any error in refusing these requests. In the first place, in its answer the defendant set up nothing, by way of defense, charging that the city was in the exercise of ultra vires powers in the operation of this quarry, either by affirmative statement, or by denial of any of the allegations in plaintiff's petition, except that in the second paragraph of its answer it simply states that it does not admit that such work was within the scope of its duty or authority. It nowhere alleges that it was ultra vires, and, even if it did, it should have shown by its plea the reasons why the city was acting outside of its authority, and that therefore it was not responsible for the negligence of its agents in pursuit of this particular business. Besides, we think this question is controlled by the agreed statement of facts in the brief of evidence, from which it appears that it was agreed by the parties that the tract of land where this accident occurred belonged to the Augusta Canal Company, and the right to quarry the same was conveyed to the city council of Augusta under the provisions of the act of 1849, and the city has police jurisdiction over the tract. It is admitted that this tract comes within the provisions of the act. Under the act approved December 27, 1845 (Acts 1845, p. 138 et seq.), of which the court will take judicial cognizance, the Augusta Canal was incorporated by the legislature. By the act approved February 7, 1854 (Acts 1853–54, p. 252), which amends the act of 1849, it is provided "that the city council of Augusta may, at any time hereafter, by purchase or otherwise, lawfully acquire and enjoy all the estate, privileges and franchises heretofore granted to the Augusta Canal Company," etc. From this it will be seen that there has been full legislative sanction given to the city council of Augusta to own and operate the quarry in question, and therefore in its operation it cannot be guilty of any ultra vires acts.

7. In the twelfth ground of the motion

complaint is made that the court failed to charge the jury as follows: "There are two general characters of duties imposed on cities,—one public or governmental, and the other private or corporate. In the performance of the public or governmental duties the city is not liable for the negligence of its agents, officers, or employés. In the performance of its private or corporate duties it is subject to the same liability as are private corporations. If, therefore, you believe from the evidence that the work in which the city was engaged when petitioner, Owens, was injured, was governmental in its nature, the city cannot be held liable, whatever was the negligence of its officers or employés." We do not think the pleadings in this case involve this issue, and what we have said above on the subject of the exercise of ultra vires powers by the defendant will apply to this ground, also, in the motion for a new trial. There was some evidence that rock was also being gathered for the purpose of repairing the canal, as well as the streets of the city. It is contended by counsel for defendant that in the construction and maintenance of the canal the city was engaged in performing a governmental function, and therefore it cannot be liable in damages for any negligence whatever in connection therewith; that Owens, in getting out the rock, some of which might be for use on the canal, was at work in its maintenance and construction, and therefore cannot hold the city liable for its negligence. This question is settled in general terms by our Political Code (section 748), which declares: "Municipal corporations are not liable for failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of their ministerial duties, they are liable." The question then in this case is whether or not, when the city of Augusta was engaged in operating this quarry, it was exercising any legislative or judicial power, or whether it was engaged in the performance of mere ministerial duties. There can be no doubt about the proposition that, if the powers it was discharging were purely and exclusively of a governmental character, the city would then occupy the position as simply the agent of the general government to do things which devolved upon the general government. There is a vast difference in the decisions of different courts upon the subject of what does or what does not constitute governmental power; but, under the evidence in this case, we think there can be no question but that the operation by the city of the quarry which it owns is purely ministerial. It was held by this court in Love v. City of Atlanta, 95 Ga. 129, 22 S. E. 29: "The duty of keeping the streets clear of putrid and other substances offensive to the sense of smell, and which tend to imperil the public health, devolves, under the charter of the city of Atlanta, upon the board of health of that city; and the functions of this department of the city government being governmental, and not purely administrative, in their character, it follows that if, in the exercise of such functions, and in the discharge of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city." That case was evidently based upon the idea that the city, in performing such duties, was in the exercise of a governmental power in administering to the general public health. It was exercising a governmental function of a corporation, and was therefore not liable. In Fuller v. City of Atlanta, 66 Ga. 80, it was decided: "The power granted by charter to a municipal corporation to raise or alter the grades of streets involves a legislative act. After this has taken place, the mere construction of the work is ministerial." We think the decision in the Fuller Case controls the principle in this case. Should the city decide when a street should be opened, closed, or repaired, or when a sewer should be built, it is clearly exercising legislative or judicial functions; but when it engages in the work of opening, closing, or repairing a street, or building a sewer, and is thus engaged in the physical execution of the work, it is evidently in the discharge of duties purely of a ministerial nature. If this be true, then, clearly, where a city owns a quarry, and is under obligation to keep its streets, canals, etc., in repair from material obtained from quarries, it has as much right to operate its own quarry as it would have to purchase such material from others engaged in the business; and, while so operating, it is in the performance of work purely of a ministerial nature. It is contended that the use and operation of the canal by the city were for governmental purposes; but, even if there were anything in this contention, that cannot affect the ministerial work of operating a quarry for the purpose of supplying rocks for the canal and streets. Besides, the evidence fails to show for what purpose this canal was used,—whether to extinguish fire, to supply citizens with water for private purposes, or to carry on manufacturing industries; and therefore there is nothing in the record to authorize the court to charge the request with reference to whether the city was exercising a governmental function in the operation of this canal. As above stated, however, we cannot see how the operation of a quarry for the purposes indicated by this evidence can constitute that enterprise anything but the exercise of a ministerial function. It has no reference whatever to governmental powers contemplated by the statute. There is no question in this case but that the city of Augusta was working this quarry for legitimate purposes, to wit, to repair its streets, and to furnish material for repairing its canal. Such work of repairs is certainly within the purposes and ends of the corporation. Now, it is not pretended that the powers and duties of Joy were conferred or defined by law,—either statute or common

law. He was not a public officer, but his entire powers are conferred and duties defined by the city itself. It therefore necessarily follows that he was a mere servant or agent of the city of Augusta, and it was chargeable with the consequences of his acts within the scope of his authority. This principle is recognized and fully discussed in Wood, Mast. & S. (2d Ed.) §§ 457–460. A number of authorities are therein cited to sustain the text. See Grimes v. Keene, 52 N. H. 335, from which the author quotes extensively, and which is controlling upon this subject.

8. In the seventh ground of the motion, exception is taken to the following charge: "He would also be entitled to recover for his decreased capacity to work, if you find from the evidence that the injury received is permanent." The objection to this was that there was no evidence showing how much he had been earning at the time of the trial, nor was there any evidence to show that his ability to labor had been diminished. It invited the jury to enter upon an unilluminated field of damages, and put no rein upon the amount to be given, thus making the verdict excessive. Upon an examination of the evidence, we do not find that the position of counsel for plaintiff in error, that there was no evidence to show that plaintiff's ability to labor had been diminished, was sustained; for the plaintiff himself testified that his capacity to labor was diminished, that it pained him to work in the sun, and that, while he did labor after the injury, he had to do so to support his family, but that it was attended with pain. There was also evidence for defendant tending to show the character of service and labor that he performed after his injury, and it seemed about as hard and difficult as he did before he was hurt. It is true, there is no evidence as to his earnings before or after the injury. This charge we do not think authorizes the jury to have any reference to his diminished earnings, but it has reference only to his diminished ability to labor. But there is authority for the position that such permanent diminution of one's power to labor constitutes an element of damages, where it is the result of an injury sustained, though there may be no evidence that it had any effect upon the earnings of the injured party. See Powell v. Railroad Co., 77 Ga. 200, 3 S. E. 759, where the principle is laid down that one who has to live long in pain is more damaged than one who has to endure suffering but for a brief term. With reference to damages from pain, we quote the following from the opinion in that case: "It may be thought that the loss of ability to labor is not pain, but this is a mistake. There is no greater blessing of life than ability to labor, even though the proceeds may belong to another. It is better for happiness, as well as for virtue, to work for nothing, than to be idle. A physical injury that destroys the power of a human being to labor is one of the most serious injuries that it is possible to inflict. True, it is not to be measured by pecuniary earnings where the suit is by a married woman, for such earnings, as a general rule, belong to the husband, and the right of action for their loss is in him; but the wife herself has such an interest in her working capacity as that she can recover something for its destruction," etc. We do not see why this same principle would not apply to one whose capacity to labor has been diminished, and especially when such labor is attended with pain. We cannot, therefore, say that there was error in this charge which would necessitate a new trial, for both the petition and some of the evidence tend to show this effect of the injury received by plaintiff. As this was a question for the jury, we express no opinion thereon.

9. The eighth ground of exception, however, we think is open to serious objection. Complaint is made that the court erred in charging as follows: "So, gentlemen of the jury, if you find, under the evidence and the charge, that the plaintiff is entitled to recover, you determine what amount you will allow for the pain and suffering endured by the plaintiff. Then, the amount of incapacity to work. Take into consideration, in determining that, what he has been making, and what he would likely have continued to make,—whether there would have been any increase in his earning capacity if this injury had not occurred, and also, as he grew older, what the natural decrease would be,—and say how much that was affected by this injury, and then allow what you believe would compensate him for that loss." The objection to this was that it was without evidence to support it; that it encouraged the jury to enlarge its verdict beyond what was proper and justified by the evidence; that it suggested for them a measure of damage, without there being any data on which to base it. We think the objection is well taken. While the petition alleges a diminished capacity to labor, it does not allege any pecuniary loss resulting to the plaintiff in consequence of the fact of diminished earnings from labor. It does not allege what he was making before the injury, nor what he has been able to make since, and there is not a particle of evidence in the record which throws any light whatever upon the subject. The error consists, therefore, in opening up to the jury the right to investigate a matter with the view of increasing damages, by suggesting a measure of damages upon which they have no data whatever to base any finding. The jury found a verdict for $2,000. We express no opinion whatever about its excessiveness, even in view of the pleadings and evidence that were before them; but we cannot say, as matter of law, that they would have found that amount regardless of this charge for pain and suffering alone. We are aware of decisions repeatedly made by this and other courts that a new trial will not be granted by a reviewing court for error in a charge which works no injury to the complaining party. But it must be perfectly clear that a

correction of the error would not result in a change of the verdict. Where the error might have influenced the jury, a new trial should be granted. We cannot say that this was not a close case upon its facts, and therefore cannot say that the jury could not have been influenced by this erroneous charge. In Bazemore v. Davis, 48 Ga. 339, it was decided, "Material error having been committed by the court, a new trial will only be refused where the evidence demanded the verdict which was rendered." A number of decisions of this court could be cited sustaining the same principle, but this is unnecessary. In Furr v. Eddleman, 80 Ga. 661, 7 S. E. 167 (Syl., point 2), it was decided, "though an improper measure of damages be given in charge to the jury, if the verdict be for less than the damages, measured properly, would amount to, the finding need not be disturbed." But the damages involved in this case were necessarily, under the proof submitted to the jury, of a general nature, and cannot be accurately measured by the court upon any legal basis whatever. It is left almost entirely in the discretion of the jury to fix the amount of damages for pain and suffering, and their finding will not be interfered with, unless so excessive as to clearly indicate bias or prejudice. We, therefore, as matter of law, cannot say that the evidence in this case demanded a verdict for the amount found. For the erroneous charge hereinabove quoted, we feel constrained to grant a new trial.

10. The above covers all the questions of importance made by this record. There are a few other grounds in the motion for a new trial, relating principally to requests to charge; but, after comparing them with the charge of the court actually given, we do not think they are of sufficient merit to require discussion. The charge, as a whole, except as specified in the note just preceding, was full and fair, and covered all the important issues between the parties; and on account of the error in the charge hereinabove pointed out, only, the judgment denying the grant of a new trial is reversed. Judgment reversed. All the justices concurring.

CLARKE v. HAVARD.

(Supreme Court of Georgia. July 11, 1900.)

AGENCY—EVIDENCE—USURY.

1. One who received money from the owner thereof for the express purpose of lending it out at interest, and with authority so to do, either general or limited, and who afterwards did lend the money to another, taking therefor a promissory note payable to such owner, is to be regarded as his agent, although the borrower, at the time of executing the note or subsequently, signed a paper purporting to constitute the person with whom he dealt in the transaction his agent to obtain the loan.

2. When, in such a case, the agent exacted from the borrower a commission which, added to the stipulated interest, made an amount exceeding that which could be lawfully charged as interest, the transaction was usurious, if it was understood between the lender and the agent that the former was to pay nothing for the latter's services, and the circumstances were such that the lender must necessarily have known that the agent intended to charge the borrower, and did charge and collect from him, such commission for making the loan.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by Agnes Havard against M. A. Clarke. Judgment for plaintiff. Defendant brings error. Reversed.

This was a suit on a promissory note. In the court below a verdict was directed for the plaintiff. Judgment was accordingly entered for the amount sued for. The following evidence was introduced on the trial, to wit: T. A. Clarke, sworn for the defendant, testified as follows: "I am the husband of the defendant, and represented her in getting the money on the note sued on. Went to Mr. Barnett and asked for the money. He let us have six hundred and fifty-five dollars, and my recollection is that he took out fifteen dollars of that amount for searching the titles to the place. This was all I promised to pay. Can't read. Thought the note was for the amount I got, until the Georgia Loan & Trust Company wrote for the interest, and then the roocas began. Thought it was Mr. Barnett's money we were getting. He had his sign on his door, that he loaned money. Did not know the note was payable to the security and investment company until long afterwards. The note and papers were signed at the same time the money was paid. Defendant can't read. Mr. Barnett brought the papers to my wife, folded up, and told her to sign. She asked what amount she was getting, and he said $655. She then signed the papers, and that was all. They were not read over to her, and no bond for titles were given her. I signed the application for the loan in her name." Manda A. Clarke, defendant, testified as follows: "My husband, T. A. Clarke, made the arrangements for me to borrow the money. I went to Mr. Barnett's office and signed the papers for the money. Can't read. He did not read to me the papers signed. Money was paid over same time papers were signed. Never knew the note was for $750 until long afterwards. None of the papers were read to me. Mr. Barnett just brought the papers to me, folded up, and told me to sign. Never heard a word about having to pay Mr. Barnett ninety-five dollars commission." Samuel Barnett, sworn for plaintiff, testified as follows: "The defendant employed me to obtain the loan. She signed the application. Ninety-five dollars was paid me as commission for procuring the loan. I represented the borrower, and the payee of the note knew nothing of my commission. I did not know the defendant and her husband could not read. Neitner asked that the papers be read. I explained the matter to them, and did not prevent their reading. I did not notice that they did not read the

papers. I am not the agent of the lender, and did not act as such. The Georgia Loan & Trust Company got thirty dollars of the commission I charged. They and I are brokers, and do not act as agents of any lenders. We obtain money from different capitalists at different times. The interest paid on the note was sent to the Georgia Loan & Trust Company, at Macon, Ga., as a matter of convenience, and is not a payment until it reaches the lender. I had nothing to do with collecting the interest. The security and investment company, the payee of the note, is a partnership. Don't know whether the members of the firm are stockholders in the Georgia Loan & Trust Company or not. Said Georgia Loan & Trust Company did not loan the money. It was sent them by the security investment company, payees of the note, who loaned the money. The security investment company got no commissions, and only seven per cent. interest." Plaintiff also introduced the application for loan. This contained a statement that S. Barnett was constituted the agent of the borrower (defendant) to procure a loan of $750, was addressed to S. Barnett, contained the statement that applicant had no other real estate, and was dated January 18, 1896. Indorsed, "Approved," by security investment company. Plaintiff also introduced in evidence the following statement: "Atlanta, Ga., January 20th, 1896. Amanda A. Clarke, in Account S. Barnett Loan Sec. I. Co., 5 years 6 mo., 7 per cent., $750.00; to commissions, etc., $95.00; net cash, $655.00. [Signed] Manda A. Clarke." T. A. Clarke, recalled, stated that he did not know the Georgia Loan & Trust Company had anything to do with the loan until they called upon the defendant for payment of interest. On the above evidence, the court, over the objection of defendant, directed a verdict for plaintiff, and verdict and judgment were entered for plaintiff for the amount sued for, and the defendant excepted.

R. O. Lovett and Humphries & Humphries, for plaintiff in error. S. Barnett, for defendant in error.

LUMPKIN, P. J. This case turns upon the questions dealt with below. It is an action upon a promissory note for the principal sum of $750, and three coupon interest notes thereto attached. The main note is dated January 1, 1896, and due January 1, 1901, with interest from date at 7 per cent. per annum, evidenced by ten coupon notes, including those sued upon, which were, on their face, overdue when the action was brought. The large note is payable to the order of the Security Investment Company of Bridgeport, Conn., and stipulates that, if default should be made in the payment of interest, it should, at the holder's option, become due and payable, regardless of the date of maturity. The smaller notes are payable to the investment company or bearer, and stipulate for interest after their maturity at 8 per cent. per annum. The plaintiff's petition contains an allegation that all of these notes were, directly after their execution, duly assigned to her. This allegation is not denied in the answer, but the defendant therein alleges that "the contract, as made by her, was that she was to borrow of the payee of said notes the sum of $655"; that this was the amount actually loaned to her; and that "she does not owe the amount claimed in said suit as principal, because there is charged as part of said principal the sum of ninety-five dollars, the same being charged against this defendant as commissions by officers and agents of the payee of said notes, and the same is illegal, being charged under the name of 'commissions' to avoid the laws against usury." The answer further states that the amount of the usury is $89.95, and sets forth in detail the facts and figures upon which this assertion is based. It seems to have been properly conceded that the defense of usury, if well founded in fact, was good against the plaintiff, though she became a bona fide holder for value before the maturity of the notes. See Angier v. Smith, 101 Ga. 844, 28 S. E. 167. At the conclusion of the evidence on both sides, the court directed a verdict in favor of the plaintiff for the full amount of the principal and interest claimed in the petition, and the defendant excepted. The evidence is fully set forth in the official report preceding this opinion.

1. The first question for determination is, did the evidence warrant a finding that Barnett was the agent of the investment company to make the loan? We think it did. The loan was certainly made for and in behalf of that company. Of necessity, it had to be represented in the transaction by some one acting as its agent. It could not possibly make a loan in any other way. There is no evidence tending to show that it was in fact represented by any one other than the Georgia Loan & Trust Company or Barnett. He and the Georgia Company were acting in concert. He testified that it did not loan the money, and that the investment company did. But how? On this particular point his testimony is not lucid, but the real meaning of it, when taken in connection with other things stated by him, is not difficult of ascertainment. He said: "The Georgia Loan & Trust Co. got thirty dollars of the commission I charged. They and I are brokers, and do not act as agents of any lenders. We obtain money from different capitalists at different times. The interest paid on the note was sent to the Georgia Loan & Trust Company, at Macon, Georgia, as a matter of convenience, and is not a payment until it reaches the lender." He further testified that the defendant employed him to obtain the loan; that he represented the borrower; that he was not the agent of the lender, and did not act as such. As will have been observed, the written application signed by the defendant, and purporting to constitute Barnett her agent to procure the loan, was dated January 18th, though apparently the note was executed on January 1st. Barnett stated facts

and conclusions therefrom. The conclusions, however, were merely his own. Are they necessarily correct, and as such binding and conclusive upon the defendant? Would not these facts and the other facts in the case warrant other and very different conclusions? He obtained money from the investment company to lend out. For whom? Why, for the company, of course. At the time he received this money the defendant had not asked for a loan. It was on hand when she called. Up to that point, who, and who alone, was represented by Barnett? The answer is simple. Does it alter the actual facts of the transaction that the borrower signed a paper, bearing a date 17 days later than that of the note, stating that Barnett was thereby made her agent to borrow $750? Doubtless this discrepancy in dates is susceptible of explanation. Indeed, the defendant's receipt to Barnett for the money borrowed was dated January 20th. But what difference would it make that the note was dated back, which must have been the case if we accept as true the statement of the witness T. A. Clarke that "the note and paper were signed at the same time the money was paid." Could not the jury have found, and ought they not, in view of all the evidence, to have found, that the contract embraced in the application was purely colorable? The law cares nothing about the form of a transaction, but characterizes it according to its substance and results. What is the substance of this transaction? Manda A. Clarke, wishing to borrow money, applied to Barnett for a loan, supposing she was dealing exclusively with him. He had on hand money which had been sent to him by the investment company through the Georgia Company, his co-agent, to be loaned. He let the applicant have the money, taking her note payable to the investment company, after deducting $95 for commissions. The Georgia Company collected what was paid on the interest notes, and forwarded same to the owner. Against all this there is nothing to show agency for the borrower, except Barnett's statement of a mere conclusion, backed by the seemingly belated application for the loan. Certainly, it would not have required a strain to find that the loan was made by Barnett as agent of the investment company. What service did he render the defendant, as her agent, which was not directly connected with that he performed in behalf of the investment company, agreeably to his undertaking to effect for it a loan of money which it had previously sent to him for that purpose? How, under the circumstances, could it have been possible for him to do anything in her behalf in procuring the loan? He did not ask the investment company to make a loan to the defendant. All he had to do when she applied to him for the money was to let her have it. This he did, and in so doing rendered her no more service, save as to examining her titles, than every lender does when he loans money to a borrower on application. There is no question here as to Barnett's right to make a charge for examining the titles. This case is obviously different upon its facts from that of Merck v. Mortgage Co., 79 Ga. 213, 7 S. E. 265, and numerous others of its class, in which the lender received the borrower's application, passed upon it for himself, and for himself decided whether or not the security was good and the terms offered satisfactory. Here Barnett passed upon these and all kindred questions for the lender, manifestly with authority so to do, which was either general or limited by instructions not disclosed. If this does not amount to agency, we have no conception of what agency is. The trial court therefore could not properly have directed a verdict for the plaintiff on the theory that the evidence demanded a finding that Barnett was exclusively the borrower's agent, and in no sense the agent of the lender.

2. It is, however, contended that even if he was such agent, and even if he did exact a commission which, added to the stipulated interest, would make an amount exceeding the maximum legal rate of interest, the transaction was not usurious, for the reason that the lender did not receive any part of the commission, or know that a commission was charged. In this connection Barnett testified, "The payee of the note knew nothing of my commission." He did not testify that this payee was ignorant of the fact that it was his custom to charge commissions,—a custom which must inevitably pertain to the business of brokers who lend out money belonging to others. Everybody at all informed with reference to such matters knows that services rendered by such brokers are not, and in the nature of things cannot, on sound business principles, be, rendered gratuitously. The evidence in this case warranted a finding that the investment company knew Barnett was in the business of lending money; that it sent him its money to lend, and must also have known that he expected compensation for his labor. It is doubtless true, as Barnett testified, that it knew nothing of his commission; that is, it did not know the precise amount he charged when he made this particular loan. That this is really what he meant by the words, "The payee of the note knew nothing of my commission," is conclusively shown by what he says in his brief as attorney for the defendant in error. We quote therefrom: "The Security Investment Company did not know what commissions Barnett charged. They themselves received nothing,—only their 7% interest." That is, the company knew Barnett charged commissions, but did not know to how much they amounted. And, independently of the above-quoted expression, there is little room for doubting that the company, when it forwarded the money to be loaned, was not ignorant of the fact that Barnett expected to make something for placing it in the hands of a borrower. Affecting not to know this would be admitting a total disregard of the plainest principles of human

nature. So, then, the jury might well have concluded that the investment company knew Barnett was to be paid, and also that it understood it was not to do the paying, and, further, that it must have known the borrower, when he came along, was to do so. They could therefore have found that the company occupied the position of at least tacitly authorizing its agent to exact such a commission on the loan as the borrower might be induced to pay. A money lender cannot, in this state, lawfully contract for or reserve any greater rate of interest than 8 per cent. per annum, and the prohibition is just as strong against doing so indirectly as it is against doing so openly and without pretense. It is now too well settled to admit of doubt that if the agent of a money lender, with his knowledge, charges the borrower a commission, it is the same thing in law as if the lender charged it himself. This is so because he gets a benefit from the agent's services, and because in such cases there is, as to this matter, no separation of principal and agent. The payment of a commission to the lender's agent, being a part of what the borrower expends for the use of the amount he actually receives, is in effect a payment to the principal, if he gives countenance to the exaction of such commission, and is in the nature of interest on the loan. If, then, the commission so paid and the stipulated interest together exceed the lawful interest, the transaction is usurious. These are familiar principles, and should be readily accepted as sound. It only remains to show that this court did not depart from them in the case of McLean v. Camak, 97 Ga. 804, 25 S. E. 493, and in so doing make clear the distinction between that case and the one now before us. The facts of these cases are widely different. Watson was Mrs. Camak's general agent to collect and invest her funds. She paid him for making collections, and it did not appear but that she expected to pay him, also, for his services in making investments. In this connection the writer, in speaking of the making by Watson of the loan then under review, said (page 813, 97 Ga., and page 496, 25 S. E.): "She paid him for making collections for her, and it is not improbable she expected to pay him for his services in making investments for her, as well. It appears, he did not consult her about the advisability of making this particular loan, and she knew nothing of it until some time after it was made. It is certain she did not authorize him to make it only on condition that he would look to the borrower for payment for his services, and would charge her nothing. That he did not charge her anything, and that she never agreed to pay him for his services in this particular instance, is true,—most probably, for the reason that he considered himself sufficiently compensated by the commission he received from the borrower, and therefore never called upon Mrs. Camak for payment, or rendered her a bill for his services." The defendant did not probe to the bottom the question whether Mrs. Camak did or did not expect to pay Watson for lending the money to Mrs. McLean, but chose to rely on the naked circumstance that she did not in point of fact pay, as conclusive upon the inquiry whether or not she really supposed she would be asked to pay. The verdict was in her favor, and was maintainable on the theory that the evidence did not demand a finding that she either directly or indirectly authorized or sanctioned the making by her agent of a contract infected with usury. It is in the present case, as already noted, obvious that the investment company never expected a bill from the Georgia Company or from Barnett for their services in making the loan to Clarke. The McLean Case is, at best, a close one, and the doctrine of it should not be extended beyond its peculiar facts. It was carefully considered, and the court, foreseeing the danger of going too far on the line then pursued, took occasion to remark (page 808, 97 Ga., and page 495, 25 S. E.): "We do not mean to say the borrower must show that the lender expressly, in so many words, authorized his agent, before the transaction was consummated, to exact a commission. If the lender be shown to have had actual knowledge of the agent's intention to charge a commission, and, before accepting or ratifying the contract of loan, became aware of the fact that a commission had been reserved, the law would imply assent to the agent's acts from the principal's silent acquiescence." The language just quoted applies to the case now in hand; for, if our reasoning is sound, there was ample evidence to warrant and support the inferences that the investment company understood perfectly well that no commission was to be charged against it; that it was fully aware of an intention on the part of the Georgia Company and Barnett to make a charge against the borrower for their services; that, when the note was returned to the investment company, it must, under all the circumstances, necessarily have known that a commission had been taken from the maker; and that, without prosecuting any inquiry as to the amount of the commission exacted, but choosing rather not to be too well informed as to this matter, it by "silent acquiescence" assented to Barnett's act in appropriating the same. In other words, it is fairly inferable from the evidence submitted pro and con that there was a tacit understanding between the investment company and its Georgia agents that they should undertake in its behalf to effect loans of the funds which it advanced to them, looking in each particular instance to the borrower alone for compensation, which was to be realized by the exaction of such commissions as he might be willing to pay under the guise of a written agreement, signed by him, purporting to constitute the particular agent of the company with whom he dealt his agent to apply for and negotiate in his behalf the desired loan. If so, such pretended collateral agreement between the lender's agent and the bor-

rower would be but a thin and transparent cloak, ill concealing the real nature of the transaction it was intended to shield.

Before concluding, it is but fair to point out that it would have been perfectly legitimate and proper for the plaintiff to meet and overcome the defense sought to be established by introducing evidence, if available, to show that the investment company, although not agreeing to itself pay its Georgia agents anything for their services, nevertheless expressly limited their authority, in the matter of exacting commissions from borrowers, to reserving such a commission only as, added to the stipulated interest to be paid to the company, if less than 8 per cent., would not render any particular loan usurious. For illustration, if such was the limited authority of the Georgia Company and Barnett, they could not, without violating their duty to their principal, have charged the defendant a commission amounting to more than 1 per cent. per annum, for the interest which she agreed to pay on the loan was at the yearly rate of 7 per cent.; and it follows that if, without any secret understanding with or connivance on the part of the company, they proved themselves to be faithless to their trust, it would not be legally bound by any collateral agreement made between them and the defendant whereby she authorized them to reserve, as compensation for their alleged services to her, the large commission which they exacted. That this is sound reasoning will, we believe, be apparent, when considered in connection with the following extract taken from the opinion filed in the McLean Case (page 807, 97 Ga., and page 494, 25 S. E.): "It is a homely axiom that 'it takes two to make a contract.' Therefore, unless a borrower shows affirmatively that one who loaned him money at the highest legal rate assented to the exaction of a commission by the latter's agent, it cannot be said that the lender ever understood and agreed that the collateral agreement between his agent and the borrower should be considered and become a part of the contract of loan. The borrower has no right to assume that even a general agent has power to bind his principal by such an agreement; for, the same being illegal and prohibited by law, the borrower is put upon immediate notice that the agent is transcending his general powers, and going beyond the legal scope of his agency. Only by showing that the agent was in fact authorized by his principal to reserve the commission can the borrower claim immunity because of an act by the agent which he is bound by law to know was illegal and not binding upon the principal unless previously authorized or subsequently ratified by the latter. It is not enough to show that the agent reserved a commission, instead of turning over the entire amount of the principal sum which he undertook to loan in behalf of his principal, for the lender, in the absence of information as to the true state of facts, would have the right to assume that his agent would prove faithful to his trust; and, though the agent be a general one, the lender would be under no duty of anticipating that he would make an illegal contract, and consequently, if the agent actually made such a contract without the knowledge or consent of his principal, the latter would not be bound by it. * * * What we wish to be understood as holding is that, unless it be shown that the lender had knowledge of the illegal agreement between the borrower and the agent, the law will not imply any assent on the part of the lender thereto, but will treat him as authorizing and ratifying a loan on the terms communicated to him by the agent, and expressed in the instruments which the borrower has signed as setting forth the contract made by him with the agent. It certainly would seem that if, by executing and delivering these formal instruments, the borrower induced the lender to honestly part with his money in consideration of the undertakings on the part of the borrower therein set forth, the latter would be estopped from claiming that such was not the real contract assented to by the lender." In the present case it would seem that in the court below the plaintiff stood squarely upon the contention that Barnett was in no sense the agent of the investment company, but acted solely in behalf of the defendant, as evidenced by her written application for the loan. At any rate, it is certainly true that the plaintiff did not offer any evidence tending to show that the authority of Barnett in the matter of charging commissions from borrowers was in any wise limited by the company; and consequently the record before us contains no hint or suggestion that, in reserving the large commission exacted of the defendant, Barnett proved himself to be a faithless and unscrupulous agent. If the plaintiff desires to avail herself of such a contention, opportunity to do so will be afforded her by the judgment we now render, for we feel constrained to order another hearing on the ground that the trial judge erred in not submitting the case to the jury. Judgment reversed. All the justices concurring.

FORD et al. v. THOMAS et al.

(Supreme Court of Georgia. July 11, 1900.)

WILLS—CHARITABLE DEVISE—IMPOSSIBILITY OF EXECUTION—DIVERSION OF OBJECT—TRUSTEES—RETURNS TO PROBATE COURT.

1. Where a testator in one item of his will devised his real estate to designated trustees, "the annual product thereof to be by them appropriated to the erection of a poor house" in a named county, "and for the support of its inhabitants forever," and in another item made a bequest to a free school located at the county site, and the trustees, after they came into possession of the property so devised to them, by petition represented to the court that the income was insufficient to support a complete poor house, and prayed that they should be allowed to use it in establishing and supporting "such a technological, textile, manual, or other school" as they might deem advisable, "to be at all times free to the citizens of the county,"

and the court at the hearing found that it was impossible and impracticable to establish and maintain a poor house with the income, there was no error in refusing to grant the prayer of the petitioners; the scheme proposed by them not being "next most consonant with the specific mode prescribed" by the testator for the execution of his charitable intent.

2. Trustees of the character above indicated are not, under section 3168 of the Civil Code, required to make returns to the court of ordinary.

3. It was, however, erroneous to direct the trustees to distribute the annual income among charitable institutions or organizations in Richmond county whose charity was limited to particular classes of indigent people, and the beneficiaries of which were not, and could not be, chosen by the agents selected by the testator to dispense his bounty; it not appearing that it was impossible to devise a scheme which would more nearly approximate the specific mode which the testator perscribed.

(Syllabus by the Court.)

Error from superior court, Richmond county; E. L. Brinson, Judge.

Suit by De Saussure Ford and others, trustees of the Academy of Richmond County, against L. A. Thomas, Jr., administrator, and others. Decree for defendants, and plaintiffs bring error. Reversed.

This was an equitable petition for the direction and the construction of a will. The petitioners alleged as follows:

"First. That they are resident citizens of the county and state aforesaid, and trustees of the Academy of Richmond County, which institution came into being pursuant to the constitution of February 5, 1777, and the act of the general assembly of this state of July 31, 1783 (Watkins, Dig. 283), under which commissioners were appointed to lay out the reserve land in the town of Augusta, and erect an academy or seminary of learning.

"Second. That by the act of February 18, 1797, § 18 (Watkins, Dig. 664), a majority of the trustees actually being and residing in the county of Richmond were thereby declared to constitute and form a board of trustees of the Academy of the Town of Augusta, with full and ample powers to do and transact all the business of the same, any law to the contrary thereof notwithstanding.

"Third. That by act approved January 31, 1798, the city council of Augusta was incorporated, and all municipal authority over the town of Augusta vested in that body.

"Fourth. That by act approved December 18, 1816 (Pub. Laws, p. 1072), the appointment of commissioners for the academies in this state was vested in the commissioners of the respective academies, and by act of December 21, 1819 (Pub. Laws, p. 28), the trustees of the Academy of Richmond County then in office, who were named in the act, and their successors, were authorized and empowered to have and use a common seal whenever acting as a corporate body.

"Fifth. That by the act of December 8, 1820 (Pub. Laws, p. 83), the justices of the inferior court of the county of Richmond were authorized to purchase a lot of land, not exceeding 100 acres, for the purpose of erecting a suitable building for maintaining and educating the poor of the county; that by act approved December 19, 1828 (Pub. Laws p. 55), the justices of the inferior court of Richmond county were authorized to establish an asylum for the invalid poor of the said county, which act, in section 3, enacted that after the establishment of the said asylum the said justices would be entitled to apply an adequate portion of the poor-school fund appropriated to the use of the said counties to the education of the poor children residing at or near said asylum, subject, however, to the same accountability that is provided by any general law on that subject.

"Sixth. That by deed dated July 6, 1829, the executors of Freeman Walker conveyed to the justices of the inferior court of Richmond county 197 acres of land on the Louisville and New Savannah road; that upon this tract of land were erected buildings in conformity to the authority delegated under the legislative acts aforesaid.

"Seventh. That at the passage of these local acts there was of force the act of December 18, 1792 (Cobb, Dig. 346), making permanent provision for the poor by the levying annually of a tax, which, by the act of November 24, 1818, was not to exceed one-eighth part of the general tax of the county; that under these general laws the justices of the inferior court were directed to appoint overseers of the poor.

"Eighth. That the records of the inferior court of Richmond county will show that on the 2d of November, 1829, a committee was appointed to erect the necessary buildings, with power to draft rules and regulations for the institution; that, upon the completion of these buildings, Holland McTyre was placed in charge as overseer; that subsequently, by deed dated May 6, 1833, the inferior court purchased other land adjoining the original purchase; and this was the then state of affairs in Richmond county, and both the general law and the local law were carried out as to support, maintenance, and education, pursuant to the requirements thereof, of the poor of said county.

"Ninth. That on the 1st day of July, 1833, Richard Tubman executed his last will and testament, and died testate November, 1836; that this was admitted to record in the court of ordinary of Richmond county, and letters testamentary granted to Emily H. Tubman, executrix, thereunder, a copy of which will is hereto annexed, marked 'Exhibit A,' to which reference is prayed as often as may be desired.

"Tenth. That the material portion of the eighth item of this will is as follows: 'And that all the real estate that I may die possessed of in the city of Augusta after the death of my wife be, and it is hereby, given to the trustees of the Richmond County Academy and their successors, the annual product to be by them appropriated to the erection of a poor house in said county, and for

the support of its inhabitants forever;' that Emily H. Tubman, as executrix and life tenant under the will of the said Richard Tubman, remained in possession of the realty devised under the said will until June 9, 1885, when she died testate, and letters testamentary were issued to John M. Walton, as her executor.

"Eleventh. That the said John M. Walton, executor of Emily H. Tubman, qualified as the executor of Richard Tubman, and took into his possession the said realty passing under his said will, and proceeded to administer it in conformity therewith.

"Twelfth. That the justices of the inferior court of Richmond county purchased, February 25, 1868, from Alexander Deas, 125 acres of land beyond the limits of the city of Augusta, and established thereon a new county home, and kept the same in operation until the adoption of the constitution of 1868, which abolished the inferior court of the county and vested its powers in the ordinary, which continued to discharge them until the adoption of the constitution of 1877 and the act of the general assembly approved September 17, 1883 (Gen. Laws, 528), which vested the same in judge of the city court of Richmond county, as to whose conduct and management the grand jury of Richmond county, in their presentments at the April term, 1898, says: 'Everything on the place is in the best of order. The inmates are well cared for, their reasonable demands granted, and everything done to make them comfortable.' In speaking of the county farm attached to the institution, the grand jury says: 'After a visit thereto, it shows good management and careful attention at the hands of the superintendent, and the report thereto annexed shows that the institution is a source of profit.'

"Thirteenth. That after John M. Walton, as executor of Richard Tubman, had taken possession of the realty passing under his will, claims were asserted to the said realty—First, by the city council of Augusta, claiming to have been appointed trustee under the said will in the place and stead of the trustees of the Academy of Richmond County; and, second, by William F. Eve, county commissioner of Richmond county, claiming that he was the proper person to administer the trust set forth in the said will; and thereupon a bill for direction was filed by the said John M. Walton, executor of Richard Tubman, July 25, 1885, which came on to be heard upon its merits, and decree was entered June 28, 1886, directing him, as executor of Richard Tubman, to turn over to petitioner all the real estate of the testator owned at the time of his death.

"Fourteenth. That this decision of the court was excepted to by the city council of Augusta and by the county commissioners of Richmond county, and reviewed under a writ of error by the supreme court of Georgia, which, January 18, 1887 (see City Council v. Walton, 77 Ga. 517), affirmed the judgment of the court below; the court stating: 'It seems to us manifest that it was the object of the testator to knit this trust to the office of the trustees of Richmond County Academy, in order to make provision in that way for its permanent continuance, without the necessity of resorting to courts or other tribunals to supply vacancies when any happened. This power of selection and perpetuation was in the body appointing the trustees of the corporation. They were to designate the persons who were to discharge the duties it imposes.' That thereafter the property was turned over by the said executor of Richard Tubman to petitioners, and after its receipt the question arose as to the liability of the funds in their hands for taxation. Upon this question being submitted to the courts, it was held by the supreme court, in the case of Trustees v. Bohler (Nov. 15, 1887) 80 Ga. 159, 7 S. E. 633, that the entire estate was liable to state and county taxation; and this decision was subsequently extended by the court, December 22, 1892, in the case of Trustees of Academy of Richmond Co. v. City Council of Augusta, 90 Ga. 648, 17 S. E. 61, so as to make the corpus subject to municipal taxation in proportion to the relative number of the trustees who resided within the limits of the city of Augusta.

"Fifteenth. That after the receipt of the said realty the trustees deemed it advisable that it should be sold, and accordingly made application to this court, which rendered a decree April 22, 1887, authorizing such sale, which was subsequently confirmed and enlarged by the decree of June 26, 1890, to which, as they appear upon the records of this court, reference is hereby made as if copies were annexed hereto.

"Sixteenth. That under and by virtue of these decrees all the realty property in the city of Augusta has been sold, partly on time and partly for cash, and that, for the purpose of reducing the taxation on the corpus, investments have been made to a large extent in bonds of the state of Georgia; the residue of the estate consisting of bonds secured by liens on the property purchased, such as the Augusta Chronicle and the Commercial Club.

"Seventeenth. That after receiving possession of the realty in Augusta, and the making of the sales, the trustees resolved to purchase with the income a lot in or near the city, with a view of making that the situs of the institution; and, pursuant to this contemplated action, they, by deeds dated September 26, 1888, and October 13, 1888, purchased from Ellen Pike and Mary A. Newby tracts of land comprising 105 acres, more or less, which purchase has been made known to this court, and was confirmed by its decree of October 15, 1888, to which reference is made as if a copy was annexed hereto.

"Eighteenth. That, by the terms of the trust, petitioners were only authorized to use the income of the trust estate; that, on account that the same was annually reduced by

"Nineteenth. That at the annual session of the board in 1894 a committee was appointed to investigate and report in reference to the extent and character of this fund,—as to what action should be had therewith by the board. This report was submitted to the annual meeting of 1895, and, there still not being in hand a sufficient amount to justify any decisive action, the matter lay over until the 23d of September, 1897, when the trustees met to take under consideration further action looking to active administration of the trust. That a committee was appointed to investigate and report as to the propriety of erecting upon the academy grounds or elsewhere a building in which a technological institute, free to all, could be established, and also whether or not the income arising from the entire trust fund held under the provisions of the will of Richard Tubman, if applied to the support and maintenance of the pupils in such school, would be sufficient to accomplish satisfactory results in conformity to the terms of the trust.

"Twentieth. That the committee was appointed, reported progress March 12, 1898, when the matter was recommitted, and at the annual meeting of the board, July 6, 1898, a further report was made, in which the committee expressed the opinion that the income now on hand and what might arise hereafter would be most judiciously expended in the establishment of a technological, textile, or manual school of such a character as may be hereafter determined upon, the same to be free to all, but that, as it might be looked upon as a departure from the strict terms of the bequest to the trustees, the committee presented to the board, who adopted it unanimously, a resolution that application be made to the next term of this court for direction to the trustees in the proper administration of the trust, and that express authority be asked for the establishment, from time to time, when deemed advisable by the board, and for the support and administration thereof, of either a technological, textile, or manual school, free to all; that for this purpose the board be authorized to apply all the accrued income now in their hands, and that which may arise from time to time, on the corpus, with authority to the trustees to discontinue the school, and make further and other application of the said income in their uncontrolled discretion, in the event the establishment of the school so adopted does not accomplish the results expected therefrom, a certified copy of which is hereto annexed, marked 'B.'

"Twenty-First. That according to the report made by the treasurer to the board at the annual meeting July 6, 1898, the entire estate aggregated the sum of $96,184.54, and the Pike and Newby places. Of this, $76,702.72 is the corpus; the income from July 1, 1897, to July 1, 1898, being $4,731.48. That a statement showing of what the estate originally consisted, and how it has been disposed of, is hereto annexed, marked 'C.' That your petitioners respectfully call attention to the fact that the supreme court of this state, in the case hereinbefore set forth (City Council v. Walton, 77 Ga. 522), says: 'The proper inference to be drawn from this provision of the will is, as it seems to us, that the testator deliberately passed by the county corporation, and the agents selected by it for the performance of this public duty, and conferred the power upon others, whom he preferred to dispense his charity. His expressed object was to establish out of his means, to be supported by the income of the property dedicated by his will to that use, an asylum for the poor of Richmond county. There was no direct gift to the county or to the authorities empowered to direct its municipal affairs, and we have seen that none could be applied from the terms of the bequests.' In the said case (Trustees v. Bohler) in 80 Ga. 162, 7 S. E. 635, the court says, when considering the question of taxation: 'In the case of a poor house the realty might embrace, besides the lands covered with the necessary buildings, grounds for recreation exercise, for pasture of the animals, and even a farm for the inmates to cultivate. The establishment as a whole might embrace all these, with articles of personalty to any needful extent for supplying the inmates with all the comforts of life, and keeping them in a healthy, virtuous, cheerful, and contented state of existence.'

"Twenty-Third. That by the act of December 18, 1817 (Prince, Dig. p. 430), a fund was created and established for the support of free schools throughout the state; that by act of December 21, 1821, provision was made for the division of $500,000 equally between the academies and free schools; that under the act of December 22, 1823, provision was made for the investment of the latter fund, and the distribution of the annual income, amounting to between twenty and thirty thousand dollars, among the counties, in proportion to their white population, for the education of the poor children, and in the payment of their tuition; that the act of December 23, 1862, specified what persons would be the beneficiaries of the fund, and such laws were of force at the making of the will by the said Richard Tubman; that after his death, by the act of December 23, 1836, there was set apart, as a permanent free school and educational fund, one-third of the surplus revenue, amounting to $350,000, and a joint committee of five in the senate and house of representatives was appointed to adjust a plan of common-school education best adapted to the genius, habits of life, and thoughts of the people of Georgia; that by the act of December 26, 1837 (Laws 1837, p. 94, § 9), the legislature amended and modified its report, and passed an act establishing a general system of education by common schools, to take effect in 1839, and by an act approved December 29, 1838, § 2 (Pub. Laws, p. 19), it

was enacted that the governor was authorized to draw his warrant in favor of Alexander Cunningham, president of the board of trustees of the Academy of Richmond County, for all dividends on the academic fund due to the academy, and then in arrear.

"Twenty-Fourth. That the system of education so established under these laws continued in operation and without any material change until the adoption of the constitution of July 25, 1868. This provided for the establishment of a system of general education, to be forever free to all of the children of this state. After its adoption there was enacted, August 23, 1872 (Pub. Laws, p. 456), an act to regulate instruction in the county of Richmond, pursuant to which act and the amendments thereof the common-school system in this county is now in operation. That on the same day there was enacted (Pub. Laws, p. 4) an act to perfect the public-school system, and to supersede the existing school laws, section 37 of which enacted that the county board of education should have the power to organize in each county one or more manual labor schools, on such plan as shall be self-sustaining, provided that the plan be first submitted to and approved by the state board of education. That subsequently the present constitution of this state went into operation, December 21, 1877, which ordained that there should be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, and that the existing local school system should not be affected thereby. That the legislation under this constitution, as it now appears in section 1379 of the Political Code of the state, the same enactment with reference to manual schools as the act of 1872, but none have ever been established in this county, as petitioners believe, because there was no demand therefor, and they were required to be self-supporting.

"Twenty-Fifth. That, in the opinion of petitioners, in order to provide a means of breadwinning for our youths, there exists a necessity of furnishing a class of education not provided for under the constitution and general laws of this state or the local laws of this county, and that the giving of such an education is the best charity that could be now extended to them.

"Twenty-Sixth. That the trustees of the academy of Richmond County are not sufficiently endowed for this purpose in its corporate capacity, but these petitioners believe that such an education can best be given them by applying to this purpose the income arising from the corpus now in their hands, held under the will of Richard Tubman, with the future income as it may from time to time arise and be payable."

At the trial the parties made and filed, under the approval of the court, the following agreement as to the facts of the case, to wit: "(1) It is hereby admitted that the facts set forth in paragraphs 1 to 26 of the petition are true, and that the exhibits annexed to the petition are true and correct copies of the originals, admissible for all the legal purposes, subject to their proper construction and legal effect by the court. (2) That the Widows' Home is a corporation created by the order of this court of April 17, 1899, in renewal of a previous corporation by the same name, having such powers as specified in the charter. That it is located on a tract of land donated by the city council of Augusta to certain individual ladies July 10, 1871; the deed stating it is 'for the erection of a suitable home for indigent widows, and, should said property cease to be used for this purpose, then the same is to revert to the city of Augusta, and the conveyance cease to have any effect or binding force on the grantor.' The work of this corporation is that set out in paragraph 8 of its intervention. (3) That the Medical College of Georgia is a corporate institution, part and parcel of the University of Georgia, located upon land the title to which is in the trustees of the Academy of Richmond County as a corporate body; this land having been granted to the college, with the sanction of the general assembly of Georgia, pursuant to the acts of December 20, 1833, and November 13, 1893 (Pub. Laws, p. 64). That, as an adjunct to the college, the hospital was created and enlarged, pursuant to agreement with the city council of Augusta; the city council furnishing a certain amount per annum for its support and the patients therein who are unable to pay, with the right on the part of the hospital authorities to charge all pay patients; the hospital having, particularly in its enlargement under the act of November 13, 1893, pay wards, from which it derives income. (4) That the Lamar or Freedmen's Hospital, in the city of Augusta, is an institution established pursuant to the will of Gasaway B. Lamar, of New York City, formerly of Augusta, Ga., who gave a money bequest to the city council of Augusta for the purpose of affording hospital facilities to the indigent and sick, and it derives its support from municipal gifts and such patients as may be able to pay for rooms therein. (5) The King's Daughters are an unincorporated society of ladies of all religious denominations, whose objects and work are to supply, as far as their means will allow, the poor persons of the community with the necessities of life, such as food, shelter, fuel, medicine, clothing, etc. They do not control a home or institution in which the objects of their charity are quartered, but these poor are visited by the members of the King's Daughters at their homes, and assistance rendered there. The King's Daughters have, among their work, one larger charity, called the 'Day Nursery,' which consists of the maintenance of furnished rooms, in charge of a matron, where the small children of the poor factory operatives and other day laborers are taken care of and fed during the day, while their parents work at their various duties. This special charity, with all the other

On the foregoing pleadings and facts the case was submitted to the court for its decree, and afterwards the court rendered its decree as follows:

"This cause, coming on to be heard, was set down for trial by consent of all parties, and all questions of law and of fact referred to the decision of the court without the intervention of a jury. It is thereupon considered, adjudged, and decreed by the court: (1) That at the death of Richard Tubman, November, 1836, the poor of Richmond county were provided for by law with an asylum for the invalids, and educated, free of cost, out of the poor-school fund of the state distributed annually amongst the different counties in proportion to the number of free white population in each county; no child being admitted who had been taught reading, writing, and the usual rules of arithmetic, or whose parents or estate paid a tax exceeding fifty cents over and above the poll tax. That this was the state of affairs which the testator sought to improve by his beneficence. (2) That since the death of Richard Tubman further and more ample provision has been made by the county for the support and maintenance of the invalid poor at the county home established and now existing in place of the old one, and education has been made free to all, pursuant to the constitution of 1868 and the local law of this county, so that for the support of the indigent poor, and the education of all the poor in the ordinary branches of an English education, ample facilities exist. (3) That on the 28th day of June, 1886, under a bill in equity filed in this court by John M. Walton, as executor of Richard Tubman, to which the city council of Augusta and the county of Richmond, through its county commissioner, and petitioners were defendants, a decree was rendered directing the executor of Richard Tubman to turn over to plaintiffs the real estate of the testator owned by him at the time of his death, passing under the provisions of his will; this consisting mainly of realty on the north side of Broad street, between Jackson and McIntosh streets, comprising lots 719 to 729 Broad street, and also 626 and 628 Reynold street, with two other lots, the title to which was in controversy. Also, certain funds in the hands of the executor, arising from the income of the property pending the litigation. That this decree was carried into effect, and that subsequently, pursuant to decree of the court of April 22, 1897, in suit of petitioners, to which John M. Walton, executor of Richard Tubman, was defendant, sales were made of all the realty, and the corpus of the trust estate now in the hands of petitioners aggregates the sum of $76,702.72. That, in the conduct and management of the estate by the trustees, it has been increased by the income received, and now consists of 48,000 state of Georgia 4½ per cent. bonds, 12,000 state of gert, aggregating $4,567.50, and the real estate in the county known as the Pike and Newby places, comprising 105 acres, more or less. That the amount of accrued income now in the hands of the trustees, without taking into consideration the premium paid for the bonds of the state, aggregates the sum of $19,476.82, and the said Pike and Newby places, purchased out of the income, at a cost of $5,000, by order of the court of October 15, 1888. That all of this income is now at the disposal of the petitioners, to carry out the trust created under the said will of Richard Tubman. (4) That the action set out in the petition as had by the trustees in the administration of the trust, with all the sales and reinvestments made by them, is hereby ratified and confirmed; and the said trustees, in addition to the authority given to them under the order of the court, April 22, 1887, which authorized investment in such bonds, not state or municipal, as the trustees, by resolution of a majority in number thereof, may indicate and determine to be to the best interest and welfare of the trust, for the production of income to be expended as directed by the said will, shall be authorized from time to time, whenever they shall deem it best, to sell, exchange, or reinvest these securities for others, or to make loans upon real estate, taking title thereto, and giving the debtor defeasances back, under such rules and regulations as may be from time to time prescribed by the trustees. (5) The court, in construing the bequest to said trustees under the will of Richard Tubman, a copy of which is annexed to the petition, marked 'Exhibit A,' holds the trust created to be one that attaches to the individuals who may from time to time hold the office of trustees of the Academy of Richmond County. That the testator intended to vest in these individuals, while holding the said office, the free and unlimited power to dispense his charity in the establishment of such a poor house for the poor of Richmond county as would, in the judgment of the trustees for the time being, be deemed by them to be best adapted to carrying out the object of the testator's bounty. That these trustees in the administration of the trust are authorized to establish such a school for the poor whites of the county as to them seems best, and are to maintain and keep the same separate and apart from any county organization whatsoever. (6) That the resolution adopted by the trustees July 6, 1898, a copy of which is Exhibit B to the petition, in the opinion and judgment of the court was authorized under the provisions of the trust, and its adoption is hereby expressly sanctioned and approved; and the court holds that the petitioners and their successors holding the office of trustees have the authority, under the will and sanction of this court, to expend all the income now on hand, or that which may hereafter

lishment, support, and maintenance of such a technological, textile, manual, or other school as may by the petitioners or their successors be deemed advisable to establish or maintain from time to time, with the right to discontinue the same whenever, in their judgment, it ceases to be best adapted to carrying out the objects of testator's bounty. (7) That petitioners and their successors in office shall be authorized to purchase from time to time, in their names as trustees under the said will of Richard Tubman, any realty or personalty needful or necessary, in their opinion, for the establishment of such a school as may hereafter be determined upon by them, and the same to sell, exchange, or otherwise dispose of as to the petitioners or their successors may seem best from time to time, in the event of an enlargement, change, alteration, or discontinuance thereof. (8) That the said trustees shall have authority to prescribe rules and regulations for the said school, provide necessary professors and instructors therein, and generally to do whatever may be necessary to make effectual the charity created by testator's will. They shall also have authority from time to time to add such special features to the course or curriculum adopted, and to open such other departments of training and instruction therein, as they shall deem that the progress and advancement of the times require, and the income of the trust estate warrants. (9) The question of admission into the school, of any pupil, shall be left entirely to the discretion of the said trustees, as to number, qualification, sex, or otherwise, but that the same shall be free from any charge or tuition to those admitted. (10) That if the trustees of the Academy of Richmond County, as a corporate body, should indicate a willingness therefor, petitioners shall be at liberty to expend the income, or such portion thereof as may be deemed advisable, in the erection of the buildings, machinery, etc., requisite and necessary, on the academy grounds or other lots of that corporation, reserving the right of removal therefrom should the school be discontinued, or it is deemed advisable, in the progress of future events, to place them elsewhere. (11) That the realty owned by the trustees in the county of Richmond, known as the Pike and Newby places, conveyed to petitioners by deeds dated September 26, 1888, and October 13, 1888, from Ellen Pike and Mary A. Newby, are hereby authorized to be sold privately or publicly, in conformity to the decision of the trustees, and a deed in their name as trustees under the said will, countersigned by the finance committee and the president, shall pass to the purchaser a good and indefeasible title, without requiring him or her to see after the proper application of the purchase money; such sale to be made for cash or on time, for the whole or any part of the said tract, and the purchasers to be admitted into possession either under bond

tees may seem advisable. (12) That, in conducting and carrying on the schools proposed to be established by petitioners, the purchase of property therefor, and the making of sales, reinvestments, or exchanges of the trust estate, the plaintiffs are not required to make any annual or other returns of their acts and doings in the premises; being only subject to the supervision of this court in the exercise of its chancery power, to which authority alone shall petitioners be amenable. (13) That the action of the trustees in presenting this petition is ratified and confirmed as an act not done from any excess of caution, but wise and prudent under the circumstances. And it is ordered that the costs and expenses attendant hereon be paid by the trustees out of the income in their hands."

To which decree exceptions were filed, which exceptions have been sufficiently stated in the opinion of the supreme court.

Frank H. Miller, for plaintiffs in error. J. R. Lamar and Irvin Alexander, for defendants in error.

FISH, J. 1. The facts of this case will be found in the reporter's statement. We shall not deal with all the assignments of error contained in the bill of exceptions, as the view which we take of the case renders it unnecessary to do so. In this view, the questions raised by the petitioners in reference to the intervention filed by the Widows' Home and certain citizens, and those in reference to the answer of the administrator of the estate of the residuary legatee, are not material. We shall deal first with the main question; that is, whether the court erred in rejecting the scheme proposed by the trustee for executing, by cy pres, the charitable intent of the testator. The testator provided "that all the real estate that I may die possessed of in the city of Augusta after the death of my wife be, and it is hereby, given to the trustees of the Richmond County Academy and their successors; the annual product to be by them appropriated to the erection of a poor house in said county, and for the support of its inhabitants forever." Representing to the court that the annual income accruing upon the fund in their hands "is absolutely insufficient to support and maintain a complete poor house," and that, "dealing with the situation as the trustees find it, no necessity exists for such an institution as a complete poor house in or near the city of Augusta, as that maintained by the public is sufficient to meet the demand," and "that, while the income in hand is not sufficient to support and maintain a poor house in all its branches, yet it is sufficient to establish and maintain some department of a poor house or work house, as defined by the lexicographers, and as generally exists," the trustees prayed the court to be allowed to establish

free to the citizens of the county of Richmond,"—the same being, according to their contention, "one branch of a poor house." No evidence was introduced at the hearing for the purpose of showing that it was impossible, with the means at the disposal of the trustees, to establish and maintain a poor house, but the case was tried simply upon the pleadings; the allegations of the petitioners in reference to the inadequacy of the income for this purpose not being denied. It is to be observed, however, in this connection, that the only parties, other than the trustees, to the case, were the administrator of the estate of the residuary legatee, who was made a party defendant to the petition, and certain citizens, and the Widows' Home, who, by leave of the court, intervened and prayed that the trustees should be directed to pay over the income to that charitable institution, "under such terms and conditions as [might] be equitable and proper." The administrator simply contended that, if it was "undesirable or impracticable to devote the funds in the hands of the petitioners to the specific purpose expressed in the will of Richard Tubman, such funds could not and should not be applied to the support and maintenance of "a textile, manual, or other school of the character referred to in the petition," but that, according to the doctrine of cy pres, the fund should be devoted to the support of the Widows' Home, or, if that institution should be held not entitled to the benefit of the testator's charity, he suggested the city hospitals and a charitable organization known as the "King's Daughters." The petition was filed on the 27th of September, 1898, and it appears from the showing therein made by the trustees that the trust estate in their hands consists of the corpus, amounting to $76,-702.72, accrued income, amounting to $19,-476.82, and the Pike and Newby places, comprising 105 acres of land, which were purchased with income, at a cost of $5,000, and that the income from July 1, 1897, to July 1, 1898, was $4,731.48.

While we can understand how the trustees, from their point of view, may sincerely believe, as we have no doubt they do, that, with the limited means at their command, they can accomplish more good by establishing and supporting a school of the character which they propose than by erecting and maintaining a poor house, we must confess we are at a loss to see, from the showing which they make, how it is impossible and impracticable to establish and support a poor house, in which at least a limited number of destitute people could find a home and a support. There are, doubtless, many poor houses in this state, in each of which a number of indigent people are sheltered and supported, which have been erected and which are maintained with less means. But as the court below has this finding is not excepted to, the question whether there was any real necessity for invoking the doctrine of cy pres in this case is not before this court. As the case presents itself to us, this doctrine must be resorted to, and the question now to be determined is whether the scheme proposed by the trustees, and presented to the court for approval, is "next most consonant with the specific mode prescribed" by the testator for the execution of his charitable intent; for "if the specific mode of execution be for any cause impossible, and the charitable intent be still manifest and definite, the court may, by approximation, give effect in a manner next most consonant with the specific mode prescribed." Civ. Code, § 4007. In the petition and in the argument of the able and learned counsel for the plaintiffs in error much ingenuity has been displayed in endeavoring to demonstrate that "a technological, textile, or manual school" is, after all, but "one branch of a poor house"; and upon this argument is based the proposition that as it is impossible and impracticable to establish "a poor house, in all its branches," the proper thing to do, under the doctrine of cy pres, is to establish and maintain such "a branch of a poor house." While we are inclined to think that this argument, especially as applied to the poor-house system which existed in the testator's day, is more ingenious than sound, we will not stop to question its soundness here; for, whether it be sound or unsound, one thing we think is very clear, and that is that, when the testator undertook to provide for the erection of a poor house and the support of its inhabitants forever, his purpose was not to erect and maintain an institution for the technical education of the young, but to provide, in Richmond county, a home and support for those who, from their condition and circumstances in life, should be fit subjects to become the inhabitants of such an asylum as a poor house, and to be supported therein. A present home and a present support were what he intended. His intention was not that his benefaction should be used to prevent poverty or pauperism in the future, by qualifying the young to become breadwinners, but it was that it should be used for the purpose of providing shelter and support for those who should be already poverty stricken. To equip the young for the struggle of life would doubtless tend in some considerable degree to prevent poverty in the days to come, but it would not be providing for the present support of the indigent. The testator not only provided for the erection and maintenance of a poor house, but he clearly indicated the exact purpose for which he desired the poor house to be erected, and that was "for the support of its inhabitants forever." To make his intention unmistakably definite and clear, he directed that the income of the property should be for-

come a time when the trustees would think it advisable to apply the income to some cognate purpose, he clinched his intention with the sweeping word "forever." "Forever to the support of the indigent" is the keynote to his charity. Can the court, under the doctrine of cy pres, take the income which he directed should be forever applied to the support of those who should be fit subjects to be sheltered and cared for in a poor house, and apply it to free education,—free to rich and poor alike,—so long as there are a sufficient number of people in the county of Richmond, outside of the county poor house, in absolute need of the necessities of life, who are worthy objects of charity, and for whose relief a proper scheme, under this will, can be devised? We think not. But there are other items in the will which, taken in connection with the one we are now considering, show that the testator's mind was not upon education of any kind when he made the devise in question. When his thoughts were turned to higher education he made a conditional bequest "to the University of the State of Georgia," and when free education was uppermost in his mind he made a bequest "to the Free School of the City of Augusta." But when he desired to secure the protection and support of those who, by reason of age, physical infirmity, or other cause, should be unable to obtain the necessities of life, he undertook to provide for the erection of a poor house, and the support of its inhabitants forever. Clearly, to divert this last-mentioned charity from the support of the indigent to free education, even upon purely practical lines, would be to turn it and the bequest to the free school into the same channel. It would be to give both to free education, which the testator never intended, and which should not be done so long as it is possible to reach and relieve the necessities of that class of the inhabitants of Richmond county that the testator had in mind when he made the devise under consideration. If the trustees cannot establish and maintain a poor house, it seems to us that they can at least use the income of the fund in ministering to the necessities of such destitute people in the county of Richmond as they may deem most worthy of the bounty of the testator.

It is contended that, "dealing with the situation as the trustees find it, no necessity exists for such an institution as a complete poor house in or near Augusta, as that maintained by the public is sufficient to meet the demand, although the city has grown in population from 5,000 at the death of the testator to 50,000 at the present time; that, while the income in hand is not sufficient to support and maintain a poor house in all its branches, yet it is sufficient to establish and maintain some department of a poor house." This argument, if it proves anything, proves too much; for if there is no necessity for a complete

necessity to establish and maintain any branch of a poor house, where is the necessity for establishing "some department of a poor house," if the poor house maintained by the county authorities is "a complete poor house"; that is, "a poor house in all its branches"? But, with all due deference to the trustees and the learned counsel who so ably represents them, we are unable to see much force in the argument that there is no necessity for establishing a poor house. The fact that there is a poor house in Richmond county, in which the county authorities undertake to provide for the wants of the most destitute people, does not make the circumstances now so different from those which existed at the death of the testator as to render it unnecessary for the trustees of this fund to use the income in supplying the necessities of life to people in need of the same who are not cared for in the county institution. The testator made the provision under consideration with full knowledge that such a county institution existed in his day, and, in the language of this court upon a former occasion, when this clause of the will was under consideration for another purpose, "the proper inference to be drawn from this provision of the will is, as it seems to us, that the testator deliberately passed by the county corporation and the agents selected by it for the performance of this public duty, and conferred the power upon others, whom he preferred to dispense his charity. His expressed object was to establish out of his means, to be supported by the income of the property dedicated to that use, an asylum for the poor of Richmond county." City Council v. Walton, 77 Ga. 522, 523. He was the judge of the necessity then; and it can hardly be that now, when the population of the city is 10 times as large as it was at his death, there is any less necessity for the particular charity which he designed than there was when he made his will. People of the same general class as those whom the testator intended to benefit are still in existence. They have been from "time whereof the memory of man runneth not to the contrary," and, despite all the boasted advance of modern civilization, they are likely to be for an indefinite period of time in the future. They are in the city of Augusta, and doubtless elsewhere in Richmond county, as is shown by the existence there of the county poor house, and such praiseworthy private charitable organizations as the Widows' Home and the King's Daughters, and the existence and efforts of the latter two institutions show that they are not all cared for by the county authorities. So long as they do exist in Richmond county, and are in need of assistance, it seems to us that a scheme can be devised which will more nearly approximate the intention of the benevolent testator than the one proposed to the court by the trustees.

2. Another question presented for decision

returns to the court of ordinary of Richmond county. The court adjudged that they were, most probably basing his ruling upon the provisions of section 3168 of the Civil Code. In this view we do not concur. That section, we think, applies exclusively to trustees charged with the management of estates of which private individuals are the beneficiaries. We do not think it was intended to embrace trustees, created by will or otherwise, whose duty it is to manage religious, charitable, educational, or other public trusts, and who, in the course of so doing, control and manage funds.

3. While the judge did right in rejecting the scheme submitted for his approval by the trustees, we think that there are two objections to the scheme set forth in the judgment which he rendered. He found that "the charities established and maintained by the Widows' Home, the city hospitals, and other like institutions, minister to the same objects of charity as are provided for in said will," and that "by appropriating the income of the fund to the objects aforesaid, and similar objects, the court can, by approximation, give effect in a manner next most consonant with the specific mode prescribed in the will," and therefore ordered the trustees to "appropriate annually the entire annual income of the fund in their hands, arising since the filing of this bill, to the assistance and support of such public and nonsectarian charities for the relief of the poor of said county as, in their discretion, they deem most suitable, among which the court [suggested] the Widows' Home and city hospitals, and similar institutions." One objection to this judgment is that it limits the scope and purpose of the testator's charity. The charity of the Widows' Home is limited to indigent women, and the young children of such women who may reside in the home with their mothers. The charity of the city hospitals is limited to poor people, while they are undergoing medical or surgical treatment, who are unable to pay for such treatment, and their support while they are inmates of these institutions. Each of these charities, and all other like institutions, which minister to the wants of only a limited class of the destitute, fall short of the broad scope and purpose of the charity designed and intended by the testator. The charity which he intended is limited to no particular class of indigent people. It embraces male and female, old and young, married and unmarried, sick and well, Jew and Gentile, Catholic and Protestant, Christian and infidel, every individual residing in Richmond county who is a worthy object of charity, and a fit subject for a home for the destitute. Another objection to the judgment is that it takes from the agents appointed by the testator the right to select, from the general class which he indicated, the particular persons who shall be, within the limitations of the order of the court, the particular institutions which shall dispense it. The discretion in selecting the beneficiaries, which the testator intended should be exercised by the trustees, is, under the order of the court, to be delegated by them to others, who are not subject to their authority or control. The court found that it was impossible and impracticable to establish and maintain a poor house, with the means at the disposal of the trustees for this purpose; but, until it is established that it is impossible to devise a scheme by which the agents of the testator's own selection can dispense his charity in a manner next most consonant with the mode which he prescribed, their right, their power, and their duty to dispense it should not be taken from them. It may be that, by allowing the income of the fund to accumulate for a few years longer, the scheme of the testator to provide a home and support for destitute people can be carried out. If it is found that it is impossible, in this way, within a reasonable time, to establish and support such a home, it would seem that a nearer approximation to the specific mode prescribed by the testator than that indicated in the judgment of the court would be for the trustees to use the income of the fund in relieving the necessities of such people, residing in the county of Richmond, as they, in the exercise of a wise discretion, deem would be fit subjects for such a home, were one instituted. In this way the charity would not be limited to a particular class or particular classes of indigent people, and the power and duty of the agents selected by the testator to dispense it would not be taken from them.

The judgment is reversed, and direction is given that the court again, in the light of what is laid down in this opinion, and of such evidence as may be introduced, investigate the question whether or not a poor house may not be established and maintained in accordance with the testamentary scheme. To this end, any citizen of Richmond county who desires to do so may be allowed to intervene and introduce testimony. If it should still appear impossible to carry out that scheme, the court is directed to cause an inquiry to be made as to whether or not, by allowing the annual income to accumulate for a while longer, the will of the testator can be effectuated within a reasonable time, in which event the court will frame its order to that end. If, however, it should be found that it is impossible to carry out the testamentary intention, either at once or after the lapse of a reasonable period, during which the annual income shall accumulate, then the court will enter a decree directing the trustees to themselves dispense the income in the manner above indicated. Judgment reversed, with direction. All the justices concurring.

OHNSON v. CHARLESTON & S. RY. CO.
Supreme Court of South Carolina. Aug. 23, 1900.)

INJURIES—RELEASE—EFFECT—APPEAL—APPEARANCE—DIVIDED OPINION—RES JUDICATA.

1. Under Const. art. 5, § 12, providing that idgments shall be affirmed in the supreme ourt when the justices are divided equally in eir opinions, a judgment affirmed under such nditions is res judicata of the issue involved to the particular case.
2. Where plaintiff executed a valid contract release for injuries, and accepted benefits ereunder, he released defendant from liability r the injuries, though full tender of the payents due under the contract was not made.

Appeal from common pleas circuit court Charleston county; R. C. Watts, Judge.

Action by Willis Johnson against the harleston & Savannah Railway Company. rom a judgment for defendant, plaintiff apealed. Affirmed.

W. St. Julien Jerrey, for appellant. Mordeai & Gadsden, for respondent.

JONES, J. This appeal is from a judgent for defendant in an action by an emoyé for damages for injury alleged to have en caused by defendant's negligence. The nswer, with other defenses, set up a conact by plaintiff with the Relief Hospital epartment of the Plant System, whereby, ter injury, he received certain payments of oney and other benefits, and, in considera)n of such contract and acceptance of bene s thereunder, released defendant from liality for said injury. On the former trial, aintiff demurred to the defense for insuffiency on the ground that said contract was ntrary to law and against public policy. is demurrer was overruled, and on appeal om the order overruling the demurrer the dgment of the circuit court was not reversd. The members of the supreme court beg equally divided on the question, the judgent of this court was that the judgment of e circuit court stands affirmed under the nstitution. See 55 S. C. 152, 32 S. E. 2, 33 E. 174. On the trial thereafter, resulting the judgment now appealed from, the plainf requested the circuit court, Judge Gage esiding, to charge the jury as follows: "(8) ie contract on which the affirmative deise of the defendant is based is contrary to blic policy, and void. And no act of the rties can give vitality to a void contract, or tisfy the same. (9) If the acceptance of nefits under the hospital and relief departent is a carrying out or ratification of the ginal agreement, it cannot avail as a deise when the original agreement is null d void. (10) The tender and acceptance of yments under the contract do not amount an acquittance, unless such tender was in l of all claims under the contract." The st and second mentioned requests were reed, the court holding and charging that the effect of the overruling the demurrer by Judge Watts and its affirmance by an equal division of the supreme court on appeal therefrom was to decide that the said contract was not void as against public policy, and that the defense, if proven, was a good defense, and that such question was res judicata. The request numbered 10, above, was refused on the ground that as, under the ruling of Judge Watts, the contract set up was valid if plaintiff has accepted benefits thereunder, he is remitted to that contract for his remedy for full performance thereof.

We agree with the circuit court on both questions presented by this appeal. The first question is whether the affirmance of the judgment of the circuit court by an equal division of the supreme court on appeal therefrom is res judicata of the issue involved as to that case. Article 5, § 12, of the constitution provides: "In all cases decided by the supreme court the concurrence of three justices shall be necessary for a reversal of the judgment below; but if the four justices equally divide in opinion the judgment below shall be affirmed, subject to the provisions hereafter prescribed." Then follow provisions for calling together the supreme court en banc in certain contingencies, not necessary to be mentioned, as no question arises thereunder in this case. As every judgment or order of the circuit court is the law of that case until reversed by a proper tribunal, and as by reason of the equal division of the supreme court on the question the circuit court was not reversed, but by reason of such division of the supreme court was affirmed, we think that there can be no doubt that the decision of the issue so made and affirmed is final for the purposes of that case. As it is not necessarily involved here, we express no opinion as to effect of such affirmance of an issue joined and decided below as a precedent for guidance in other cases involving the same or similar questions.

The next and only remaining question is whether there was error in refusing the tenth request above stated. This question is practically settled by the foregoing, for, if the contract set up in the answer is a valid contract, and plaintiff has elected to accept and has accepted benefits thereunder, he could not escape the contract of release, because a full tender of all payments due under the contract had not been made to him. By the contract and election to accept certain benefits and payments, he released the defendant from liability. The consideration for the release was the obligation or promise of the association to do certain things, and the release was not conditioned on full performance by such association. For full performance of the contract by the association the plaintiff, as correctly ruled below, has his remedy under the contract. See, on this point, Petty v. Railway Co. (Ga.) 35 S. E. 88. The judgment of the circuit is affirmed.

(Supreme Court of South Carolina. Aug. 21, 1900.)

PLEADINGS—AMENDMENTS—ALLOWED AFTER COMMENCEMENT OF TRIAL.

Under Code, § 194, permitting amendments to pleadings in furtherance of justice, either before or after judgment, when the amendment does not change substantially the claim or defense, a case against a railroad company for damages to plaintiff's buildings and machinery from a fire set by the negligence of defendant may be withdrawn from the jury after the commencement of trial, upon objection by defendant to the admission of evidence showing any destruction of property, on the ground that the complaint does not show that plaintiff's buildings were destroyed, to enable plaintiff to amend his complaint as he may be advised.

Appeal from common pleas circuit court of Barnwell county; D. A. Townsend, Judge.

Action by Jennie Brown against the Carolina Midland Railway Company for damages from a fire set by defendant. From an order permitting plaintiff to amend her complaint, defendant appeals. Affirmed.

Robt. Aldrich and Izlar Bros., for appellant. R. C. Holman, for respondent.

JONES, J. Defendant appeals from an order allowing plaintiff to amend her complaint "as she may be advised," granted after trial begun. Omitting formal parts, the complaint was as follows: "(3) That on or about the night of the 10th of January, A. D. 1899, the plaintiff was the owner of valuable buildings known as the 'Brown Cotton and Manufacturing Co.,' with a complete corn-mill outfit; a complete cylindrical cotton-press outfit, together with cotton ginnery, consisting of 4-70 saw Winship cotton gin, feeders, condensers, fans, pulleys, shafting, conveyors, etc., complete; also fifteen bales of cotton, 500 bushels of corn, 2,000 bushels of cotton seed, several thousand tin cans and cases used for canning fruits and vegetables, two engines, boilers, shaftings, and pulleys complete, in the aggregate value of ten thousand dollars. (4) That on the night of the 10th and the early morning of the 11th (about one o'clock a. m.) of January, A. D. 1899, as hereinbefore alleged, the defendant corporation, whose depot was situated near their line of road, to wit, the usual distance (and the alleged plaintiff's buildings being situated a like distance therefrom), allowed fire to remain in or so near said depot building that the same caught or took fire, and communicated same to plaintiff's buildings, as hereinbefore alleged. (5) That among other things it was the duty of the defendant corporation to retain a night watchman at and around said depot (at night), to prevent just such conflagrations as herein complained of, which they failed (negligently) so to do. (6) That said fire would not have occurred but for defendant's carelessness and negligence in allowing same to remain in their stove or heater in said depot, and other fendant allowed a box car to stand between their depot and plaintiff's building, in a dangerous condition, to wit, a hot box being thereto attached,—all of which facts were well known, or should have been known, to said defendant; and by reason of the aforesaid facts the defendants have damaged the plaintiff $10,000." Upon the trial the court sustained an objection by defendant to evidence to show that there was any destruction of property whatever, there being no allegation in the complaint that the buildings were destroyed, and no allegation that the contents of the building were either destroyed or injured. Thereupon plaintiff's counsel asked to be allowed to amend so as to allege what was destroyed and what was injured. The court then granted an order withdrawing the case from the jury, continuing the case, and allowing plaintiff to amend her complaint as she may be advised.

The order complained of was within the discretion of the court. Section 194 of the Code provides: "The court may before or after judgment in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding * * * by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved." Allowing plaintiff to amend "as she may be advised" would not authorize an amendment so as to state a wholly different or new cause of action than that attempted to be set up in the complaint, but would permit all "other allegations material" to the case defectively stated in the complaint. The complaint alleged that the fire was communicated to plaintiff's buildings, containing machinery, etc., and this fire was referred to as a "conflagration." We do not see well how such a fire could be otherwise than injurious in some degree to buildings at least. We think it was in furtherance of justice to permit the amendment. This case differs widely from the case of Cuthbert v. Brown, 49 S. C. 513, 27 S. E. 485, wherein the court held it error, after trial gone into, to allow an amendment to an answer "by converting admissions in the verified answer into denials of facts thus admitted, and, in addition thereto, to insert allegations of an agreement between the parties at the time of making of the contract, the breach of which constituted the plaintiff's cause of action, of which agreement there was no allegation, or even hint, in the original answer." Such an amendment substantially changed the defense. In the present case, the amendment contemplated was not to change substantially the cause of action, but was for the purpose of curing a defective statement of a cause of action attempted to be set up. The judgment of the circuit court is affirmed.

DISTRESS WARRANT—DEFENSES—EVIDENCE—DIRECTING VERDICT.

1. Where a tenant against whom a distress warrant has been sued out meets the same by a counter affidavit, in which he, as the statute provides, flatly denies the whole of the alleged indebtedness, or some definite portion thereof, he may, by competent evidence, prove any fact connected with the rent contract which shows that the rent distrained for, or the portion thereof denied, is not a just demand against him. But where in such counter affidavit no distinct and general denial of the plaintiff's demand is set forth, but the defendant merely alleges that a designated portion of the rent claimed is not due, for certain specified reasons, he will, in making out his defense, be confined to introducing testimony establishing the truth of those reasons only.

2. Even if rejected evidence offered by a defendant was admissible, its exclusion is harmless error, if such evidence would in no way have strengthened the defense set up.

3. Taking the evidence for the defendant actually introduced, and the excluded evidence as to the plaintiff's alleged promise in reference to the repair of the levee, the whole of it together presented no reason in law for defeating the plaintiff, either in whole or in part, and therefore the court did not err in directing a verdict for the plaintiff.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by Florence Chambers against J. D. Hunnicutt. Judgment for plaintiff, and defendant brings error. Affirmed.

Hardeman & Moore, for plaintiff in error. Steed & Ryals, for defendant in error.

FISH, J. One ground of the motion for a new trial is that the court erred in excluding certain evidence offered by the defendant for the purpose of showing that, when he rented the place and gave the rent note, Chambers, the plaintiff's agent, agreed to furnish him with lumber with which to build two or three houses on the rented premises, so that the defendant could put subtenants in them, and that by reason of the failure of the plaintiff to comply with this agreement the defendant sustained damages amounting to several hundred dollars. The court excluded this evidence upon the ground that, as the rent note did not contain any agreement on the part of the landlord to furnish lumber, the evidence offered tended to vary the terms of the written contract. We deem it unnecessary to determine whether the ground upon which the judge based his ruling was sound or unsound, for we are clearly of opinion that the evidence was inadmissible for another reason. The counter affidavit filed by the defendant did not authorize the introduction of this evidence. Where a tenant against whom a distress warrant has been sued out meets the same by a counter affidavit, in which he, as the statute provides, flatly denies the whole of the alleged indebtedness, or some definite portion thereof, he may, by competent evidence, prove any fact connected with the rent terson, 86 Ga. 725, 13 S. E. 17, and cases there cited. The counter affidavit in this case did not contain any general denial of the indebtedness for rent which the plaintiff claimed against the defendant, nor did it contain a general denial of any definite portion of this alleged indebtedness. The amount distrained for was $818.72. In his counter affidavit the defendant alleged that he did not owe the amount distrained for, "for the reason that the said plaintiff [was] indebted to him in the sum of $542.50 by reason of her failure to keep and fulfill her cross obligations under said rent contract, and under the statute in such cases made and provided," in that she failed to repair a certain levee upon the rented premises, the purpose of which was to protect the swamp land from overflow by the waters of a creek, in consequence of which failure to repair this land was flooded, and the crops of the defendant and his tenants were destroyed. Then followed an itemized statement of the particular crops which were damaged, and the amount of damage to each, the whole footing up exactly $542.50. We think that the effect of this counter affidavit was to admit that the defendant owed the amount distrained for, less the damage which he had sustained by reason of the plaintiff's failure to properly keep up the levee. The defendant impliedly admitted that the only reason why he did not owe the full amount distrained for was because of the damages which he had sustained in consequence of the overflow of the bottom land. He denied the plaintiff's claim only to the amount of $542.50, and qualified this denial by alleging that the reason he did not owe this much of the sum claimed by the plaintiff was because of these particular damages. Standing upon a counter affidavit which denied only a definite portion of the amount claimed by the plaintiff, and denied that portion of it solely for the reason stated, the defendant, in addition to introducing evidence to support this contention, sought to attack the undenied portion of the plaintiff's claim by introducing evidence to show that he was damaged in a further amount by the failure of the plaintiff to furnish him with lumber with which to build certain houses on the rented place. Clearly, under the pleadings, he could not legally do this. To have allowed him to introduce evidence to support his claim to recoup the sum of $542.50 for damages occasioned by the overflow of the crops, and also to introduce testimony to show that he was damaged in an additional sum by the failure of the landlord to furnish him with lumber with which to build the houses, would have been equivalent to allowing him to contest in whole or in part that portion of the plaintiff's claim which he had not denied by his counter affidavit. The effect of his counter affidavit was this: "I admit that, when the plaintiff's claim for rent is reduced by the amount of the damages

ance." But when he came to introduce evidence he undertook to show that, even if the claim of the plaintiff were thus reduced, there should be a further reduction on account of the damages occasioned by the failure of the plaintiff to furnish him with lumber with which to build upon the rented place two or three houses for subtenants. We think, in introducing evidence, he was rightly confined to the specific defense which he set up.

2. Another ground of the motion was that the court erred in excluding the following evidence offered by the defendant: "At the time the rent note was written and signed, Mr. Chambers' attention was called to the levee, and the strength of it. We talked about it before, and also on that day; and he asked me if I would keep up the levee, and I said I would not keep it up for the rent of the plantation. I says: 'I want you to keep it up; for, if you tear it down, it would ruin the whole farm in the swamp. It has done it before, and without that they are not worth anything.' And I do not remember the answer. Chambers said he would attend to the levee, as he had done before." This evidence was excluded on the ground that the rent note did not contain an agreement to repair the levee, and therefore the evidence offered tended to vary the written contract. The effort of the defendant was to prove that, at the time the rent contract was entered into, the plaintiff, through her agent, Mr. Chambers, promised to repair the levee, but it will be seen that the only promise that the defendant offered to testify that Chambers made was that "he would attend to the levee as he had done before." The exclusion of the testimony to establish this promise on the part of Chambers did the defendant no harm whatever, because there is nothing in the evidence in the case which shows that Chambers did not, after the rent contract was entered into, attend to the levee as he had done before. The defendant was permitted by the court to freely testify as to the condition of the levee before, at the time, and after the execution of the rent contract. All the evidence that he offered in reference to the levee seems to have been admitted, except his statement as to Chambers' promise. We have carefully examined the evidence, and we do not find anything in it which shows that after the execution of the rent contract, and up to the time that the levee was broken and the defendant's crops injured, Chambers knew that the levee was not in as good condition as it was when the defendant rented the place. In fact, the evidence does not show that up to that time the condition of the levee had materially changed. The defendant himself testified: "At the time I rented, the levee was in the same condition as year before. Of course, it had been torn down; but we fixed it up the year before, and we did not go all over it and examine it. I contracted the year before to fix one place, and fixed it. When I made rent contract, the levee was in course, we did not go over any part of it to see." In endeavoring to ascertain whether the defendant was hurt by the refusal of the court to allow him to testify that Chambers promised to attend to the levee as he had done before, two questions naturally arise: First. How did Chambers attend to the levee before? Second. Did he comply with this promise, by attending to the levee as he had done before? Upon the first of these questions the evidence was very meager. The defendant testified that the year before, when the levee had been torn down, it was fixed up. The only other witness introduced by the defendant testified that he did not know that the levee, before the freshet which occasioned the damage to the defendant's crops, "was any worse than it was two or three years back," and that he did not think there had been any work done on it at all. The only witness introduced by the plaintiff testified that at the time of the freshet the levee "was in same condition it had been for several years, and it stood the freshets of previous years," while he lived on the place, and that "no repairs were made on the levee while [he] lived there, about eleven years, except when a big freshet tore it down in some unexpected spot, like it did this year." All that can be said, from this testimony, in reply to the first question, is that the way in which the levee had been attended to before was to repair it after it had been torn down. There is nothing to show that after the defendant rented the place the levee was torn down, until it was broken by the freshet which caused the damage to the defendant's crops. So it cannot be said that the evidence shows that Chambers did not comply with his promise—if made—to attend to the levee as he had done before. Besides, we think that the testimony clearly shows that the damage of which the defendant complained was caused by an extraordinary freshet. The defendant's witness Hicks testified that: "An extraordinary freshet in creek broke down the levee. It was a little bigger than any we had since I have been on the place." Nisbet, the only witness for the plaintiff, testified that the break in the levee was caused by "an unusual freshet,—the largest in several years." The testimony of the defendant himself does not conflict with this. He testified that "the break was caused by high water," and that "it was a freshet." So, granting that Chambers, the plaintiff's agent, made the promise which the defendant sought to prove, we think the evidence shows that the break in the levee, and the consequent damage to the defendant's crops, were not caused by a failure upon Chambers' part to keep this promise, if he had given it, but by an extraordinary freshet, and for this reason the defendant could not have been hurt by the ruling of the court.

3. Taking the evidence for the defendant actually introduced, and the excluded testimony relating to Chambers' agreement to

plaintiff of the amount in issue between the parties, and therefore the court did not err in directing a verdict for the plaintiff. Judgment affirmed. All the justices concurring.

GEORGIA RAILROAD & BANKING CO. v. SPINKS.

(Supreme Court of Georgia. Aug. 9, 1900.)

DEATH BY WRONGFUL ACT—PERSON ENTITLED TO RECOVER—DEPENDENT.

A man whose earnings are sufficient to adequately support himself is not "dependent," within the meaning of section 3828 of the Civil Code, although he may by law be chargeable with the maintenance of others, for the support of whom and himself such earnings are insufficient. (a) Accordingly, a father whose monthly wages were enough to more than afford him individually a support commensurate with his circumstances and standing in life was not, under the provisions of the section cited, entitled to recover the full value of the life of an unmarried minor son tortiously killed, and whose mother had died, although, because of the insufficiency of the father's wages to support himself and also his family, consisting of a second wife and minor children, he received contributions in money from the son while living.

(Syllabus by the Court.)

Error from superior court, Fulton county.

Action by H. D. Spinks against the Georgia Railroad & Banking Company. Verdict for plaintiff. From an order denying a new trial, defendant brings error. Reversed.

Jos. B. & Bryan Cumming and Sanders McDaniel, for plaintiff in error. Arnold & Arnold, for defendant in error.

LUMPKIN, P. J. On the trial of an action brought by H. D. Spinks, under section 3828 of the Civil Code, against the Georgia Railroad & Banking Company, for the full value of the life of his minor son, Pearl Spinks, there was a verdict for the plaintiff. A motion for a new trial was filed by the company, and to the overruling thereof it excepted. Taking the evidence most favorably for the plaintiff, which is proper, since the verdict was in his favor, the facts on which it rests are, in substance, as follows: The death of Pearl Spinks was occasioned, without fault on his part, by the negligence of the company. He had never married, and his mother died before he was killed. At and before the time of the homicide the earnings of H. D. Spinks exceeded $100 per month, and they were largely more than sufficient for his individual support. He had a family, which included a second wife and minor children, who were dependent upon him. His wages were not sufficient to afford him and them a support commensurate with their circumstances and standing in the community in which they lived, and the son before his death made contributions in money to his father, which grounds of which were abandoned, raises no controversy as to the amount of the verdict, and really presents for decision here the sole question, was the plaintiff, upon the state of facts above disclosed, entitled to any recovery at all from the defendant? This question, differently stated, is resolvable into the inquiry: Was H. D. Spinks a dependent person, within the meaning of the Code section on which his action was predicated? It declares: "A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child." After full reflection and careful deliberation, we are satisfied that the plaintiff was not "dependent," in the sense in which this word was used in framing the statute under consideration. In Smith v. Hatcher, 102 Ga. 160, 29 S. E. 162, the opinion was expressed that it is a harsh one, and should be strictly construed. But for it, a father's interest in the life of a minor child would be limited to the value of his services during minority, and the former would have no interest at all in the life of an adult child. So much, therefore, of the statute as confers upon parents the right to sue for the wrongful killing of a child is in large measure punitory, and hence the reason for holding that at least this portion of the homicide act should be subjected to strict construction. It is not, however, a purely penal act; for, if the general assembly had intended that for every death resulting from crime or negligence a right of action should arise, it would have taken care to so provide, and in no case would a plaintiff be wanting. The act therefore is, to a considerable extent, compensatory in its character. This being so, what was its design relatively to the compensation of parents? We think that in this respect its underlying principle was to provide for parents of both sexes, who, by reason of poverty, age, or physical infirmity, were incapable of supporting themselves, and especially for mothers without means, who, because of this and of their sex, were so incapable. The condition of dependence contemplated by the general assembly was that of the parent with relation to his or her personal need of aid in obtaining a livelihood. We cannot believe it was the legislative intention to assist a self-sustaining father in taking care of others, whose support he had voluntarily undertaken, or with which he was legally chargeable. The true spirit of the law was to help both mothers and fathers who were in a substantial degree themselves dependent upon a child, and not to help members of their families who were dependent upon them or the child. If the general assembly had been legislating with reference to need of aid arising from the ex-

every case where there is one; for a purpose to benefit members of a family dependent upon the head thereof, or to benefit him because under the duty of maintaining them, would have been best accomplished by conferring upon him the right to sue, even if the mother should be in life. But this is not what the law does. The father cannot sue at all for the value of the child's life if there is a mother, which shows most conclusively, we think, that the individual dependence of the mother or father, as the case might be, was what the legislature contemplated. There is no hint in the law that a brother or sister of one tortiously deprived of life shall have a right of action because of the homicide, and no implication that such brother or sister shall have an indirect benefit because of the right of action given to the parent.

The cases of Daniels v. Railway Co., 86 Ga. 236, 12 S. E. 365; Railroad Co. v. Johnston, 89 Ga. 560, 15 S. E. 908; Railway Co. v. Glover, 92 Ga. 132, 18 S. E. 406; and Railway Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553,—do not, we think, conflict with the ruling now made, or with any of the views above expressed. They are authority for the propositions (1) that, to entitle a mother to recover for the wrongful killing of her child, it is not incumbent upon her to show that she depended upon him alone for a livelihood, or that he furnished her entire support, but that partial dependence upon the child's labor, accompanied by substantial contribution therefrom to her maintenance, was sufficient; and (2) that where a family of working people, including parents and a minor child, were mutually dependent upon the labor of one another for a livelihood, and the child rendered valuable services, of which the mother got the benefit, she was dependent upon him, if he thus contributed substantially to her support. In the Glover Case, upon which counsel for the defendant in error mainly rely, the precise ruling was expressed as follows: "Where father and mother and minor children all reside together, and are mutually dependent upon the labor of the family for support, a minor child over fifteen years of age, whose labor, or the proceeds of it, come into the common stock, is to be considered as contributing substantially to the support of the mother." It is to be observed that in all of these cases the action was brought by the mother. A mother without property is an essentially dependent member of a household consisting of her husband, herself, and their children. She may render many valuable services and perform many onerous duties, but, when it comes to obtaining the necessaries of life,—food, clothing, fuel, and the other essentials to human existence,—she is, in the very nature of things, dependent upon each and every member of the family whose ordinarily quite different as to a father. Manhood, which is self-sustaining, and more than self-sustaining, is not a condition of dependency. Minority is an element of dependence in both males and females, and the female sex of itself constitutes such an element in adults, but not so as to the sex masculine. Our homestead system is illustrative of the view that fathers are independent and mothers and children dependent; and this view, so far as relates to females, is further illustrated by the cry of the age, by and in behalf of women, to widen their field of employment so that they may lessen their dependence or rescue themselves from their dependent position. The contention of counsel for the defendant in error may derive apparent support from some of the language used by Chief Justice Bleckley in the opinion delivered in the Glover Case, but what he said should be considered in the light of the facts with which he was dealing. That case, properly understood, is not authority for holding that a full-grown man, not rendered by age or disease incapable of working and deriving his daily support from his own labor, is dependent upon any one but himself. He is the very best type of a self-sufficient, self-sustaining human being, and is really much better off than he would be with money enough to produce an income equal to that which his labor yields him, but without health or strength to labor at all. In dedicating his poems to the Caledonian Hunt, Burns wrote, "I was bred to the plow, and am independent." This is good sense, good spirit, and good law. Judgment reversed. All the justices concurring.

LEWIS, J., dubitante.

LOWE v. STATE.

(Supreme Court of Georgia. Aug. 7, 1900.)

FALSE PRETENSES.

When one, by using any deceitful means or artful practice, other than those which are mentioned specifically in the Penal Code, obtains the money or goods of another, the offense forbidden by Pen. Code, § 670, is complete as soon as the owner is thus deprived of his property, and subsequent repentance and restitution on the part of the wrongdoer will constitute no bar to a prosecution against him.

(Syllabus by the Court.)

Error from superior court, Stewart county; Z. A. Littlejohn, Judge.

Dewitt Lowe was convicted of obtaining goods on false pretenses, and brings error. Affirmed.

B. F. Harrell & Son, for plaintiff in error. F. A. Hooper, Sol. Gen., for the State.

LEWIS, J. The accused was tried before a jury in the county court of Stewart county

under an indictment charging him with the offense of cheating and swindling. It alleged substantially that by deceitful means and artful practices he falsely represented to one Pugh that one Overby authorized accused to purchase for him (Overby) a peck of apples of the value of 40 cents, and two pounds of candy of the value of 20 cents, and charge same to the account of Overby; that the statements and representations were false and fraudulent, and were made by accused for the purpose of defrauding Pugh out of said merchandise, and did defraud him in the amount named. The jury returned a verdict of guilty, whereupon accused brought his petition for certiorari to the superior court of said county, and excepts to the judgment of the court refusing to sanction the same. The only ground of error insisted on by counsel for the accused is that the verdict of the jury is contrary to the evidence, in that the testimony showed the person alleged to have been defrauded did not sustain any loss or injury, the goods being sold on a credit, and not intended as a cash sale, and having been paid for before the finding of the indictment. The evidence for the state substantially made out the charges in the indictment. Obtaining the goods by the false representations of the accused as charged was proved. Some time thereafter the seller of the goods asked payment of the man whom the accused represented had given him authority to purchase the goods on his account. He was then informed that this person gave no such authority whatever to the accused, and he refused to pay the bill. Several demands were thereafter made on the accused for the money, and he failed to pay the same. Before the indictment, however, and several months after the alleged commission of the crime, the accused had a settlement with the seller of the goods, and paid him his price therefor. The accused is indicted under Pen. Code, § 670, which declares: "Any person using any deceitful means or artful practice, other than those which are mentioned in this Code, by which an individual, or the public, is defrauded and cheated, shall be punished as for a misdemeanor." It does not require either a warrant or indictment to make an offense thereunder complete. It is complete when deceitful means or artful practices are used by which an individual or the public is defrauded and cheated. There is nothing in the contention of counsel that the goods were sold on a credit, and not intended as a cash sale, for there was certainly no credit extended to the accused, but, upon the faith of his representations, to another party who was not responsible for the purchase. The crime, then, was certainly complete when the accused failed to pay for the goods after the prosecutor had become aware of his misrepresentations, and demanded payment of him; and thus being deprived of them, and without receiving any pay therefor, for several months, he was defrauded and cheated. The fact that he afterwards settled with the accused for the value of the goods is not pretended as a settlement of the crime that had been committed, even if the parties had authority to settle such a crime; but it must be construed simply as a settlement of a civil liability. It was perfectly legitimate, then, for the grand jury to afterwards find an indictment charging the accused with a violation of law upon the subject of cheating and swindling. This principle is decided in Williams v. State, 105 Ga. 606, 31 S. E. 546. It was there held that where one, for the purpose of deceiving another and obtaining a credit, makes a false and fraudulent representation to the effect that he has purchased and has become the owner of valuable property, and who in this manner defrauds the person to whom such representation is made of money or other thing of value, is guilty of being a cheat and swindler; and a settlement between such wrongdoer and the person defrauded, made after the commission of the offense and the arrest of the former upon a warrant charging him therewith, constitutes no bar to his conviction thereof upon an indictment subsequently returned. It is true it appears in that case that a warrant had issued. In the opinion it was announced, in effect, that the restitution made by the accused did not relieve him of the consequences of his violation of the criminal statute, "which was complete before his arrest." The court added: "As well might it be said that one guilty of a larceny could escape prosecution by returning the stolen goods after being arrested for the offense." Applying this principle to the facts in the present case, it follows that the court committed no error in refusing to sanction the petition for certiorari. Judgment affirmed. All the justices concurring

GAY v. STATE.

(Supreme Court of Georgia. Aug. 7, 1900.)

CRIMINAL LAW—INSTRUCTIONS—MANSLAUGHTER.

1. While a judge is not bound to give in charge to the jury any proposition of law which has no foundation except the statement of the accused, he may, if he sees proper so to do, base an instruction on the statement.

2. Under the sworn testimony in this case a verdict of murder would have been well warranted, but the statement of the accused authorized a charge on the law of voluntary manslaughter, but not on the law of involuntary manslaughter.

(Syllabus by the Court.)

Error from superior court, Emanuel county; B. D. Evans, Judge.

A. A. Gay was convicted of manslaughter, and brings error. Affirmed.

F. H. Saffold, for plaintiff in error. B. T. Rawlings, Sol. Gen., for the State.

COBB, J. The accused was tried on an indictment charging him with the offense of murder, and the jury returned a verdict finding him guilty of voluntary manslaughter.

1. "It is well settled that, in the absence of a proper and pertinent written request for instructions thereon, the court is not bound to give in charge the law of a theory of the case arising solely from the statement of the accused." Hardin v. State, 107 Ga. 718, 33 S. E. 700, and cases cited. While the judge is not bound to charge the law applicable to a theory of the case derived solely from the prisoner's statement, he has a right to do so. It is the duty of the judge to give to the jury appropriate instructions on every theory of the case presented by the evidence, and it is the best practice to give such instructions on every phase of the case presented by the prisoner's statement, though, as above stated, the failure to do so, in the absence of a proper request, will not be held to be error. While instructions on a theory of the case as derived from the statement are not required by strict law, few cases, if any, can arise where such instructions would not be dictated by every sense of justice and fairness. A careful examination of the prisoner's statement in the present case satisfies us that, if the jury credited the same, a verdict for voluntary manslaughter was authorized. It was not erroneous, therefore, for the judge to give in charge to the jury the law relating to this offense. This is true notwithstanding counsel for the accused not only did not request the law of voluntary manslaughter to be given in charge, but strenuously contended that there was nothing in the statement to authorize such charge. It is the duty of the judge to instruct the jury on the law applicable to the evidence in the case. It is the right of the judge to charge the jury in criminal cases on the law applicable to the facts set forth in the prisoner's statement. A contention of counsel on the evidence that is not well founded will not prevent the judge from giving in charge to the jury the law applicable to the evidence as it really is. Neither will an erroneous contention of counsel as to the theory presented by the statement of the accused deprive the court of the right, if he desires to exercise it, of giving in charge to the jury the theory actually presented by the statement. Under the statement of the accused in the present case, as above indicated, the law of voluntary manslaughter was applicable, and the judge did not err in charging the jury on that subject, notwithstanding that during the progress of the trial the court had asked counsel for the accused whether the law on that subject was involved in the case, and counsel had replied "that the same was not involved."

2. The evidence for the state would have well warranted a finding that the accused was guilty of a willful, deliberate, and cruel murder. The deceased was a negro, and, according to the testimony for the state, was pursued into the very home of his employer, and was not only unjustifiable, but was not attended with any extenuating circumstances. The statement of the accused would not, under any view of it, have authorized an acquittal, and, to say the most of it, contained a version of the transaction which was unreasonable and improbable, but, in one view of it, does present a state of facts which would authorize a finding that the offense committed by the accused was that for which he was convicted. The jury having taken this view of the case, we will not interfere with the decision of the judge in refusing to grant a new trial. In no view of the case was the law of involuntary manslaughter involved, and the judge committed no error in failing to charge the law on this branch of homicide.

There was no error requiring the granting of a new trial. Judgment affirmed. All the justices concurring.

CROW v. STATE.

(Supreme Court of Georgia. Aug. 7, 1900.)

CRIMINAL LAW—BILL OF EXCEPTIONS—WRIT OF ERROR—DISMISSAL.

1. When there is no return or acknowledgment of service "indorsed upon or annexed to" a bill of exceptions, the writ of error will be dismissed.

2. Service of a bill of exceptions cannot be shown in the supreme court by parol statements of counsel, or by producing detached writings purporting to evidence such service.

(Syllabus by the Court.)

Error from superior court, Whitfield county; A. W. Fite, Judge.

Charley Crow was convicted of crime, and brings error. Dismissed.

Mann & Terry, for plaintiff in error. Sam P. Maddox, Sol. Gen., for the State.

LUMPKIN, P. J. On the call of this case the solicitor general moved to dismiss the writ of error on the ground that there was no entry indorsed upon or annexed to the bill of exceptions showing service thereof. An inspection of the bill of exceptions fails to disclose any evidence whatever that it was ever served upon the solicitor general. We are accordingly constrained to hold that the motion to dismiss is well taken. Counsel for the plaintiff in error produced in this court a separate writing purporting to be an acknowledgment of service by the solicitor general of the bill of exceptions in this case. In this connection it was stated that this writing had been received from the solicitor general, filed in the office of the clerk of the trial court, and by him sent by mail to the clerk of this court. The solicitor general admitted that the writing referred to had been signed by him. We cannot, however, act upon these statements as proper evidence of service.

to transmit it to this court as such nor attempted to do so. The case of Akerman v. Neel, 70 Ga. 728, is directly in point on the question now presented. In that case it was held: "Proper service of the bill of exceptions must appear from an entry indorsed upon it or annexed thereto. When there is no entry whatever indorsed upon or attached to the bill of exceptions showing service, parol statements cannot be heard in this court for the purpose of showing that service was perfected." See, also, cases cited. Counsel for the plaintiff in error insisted that the law as thus laid down had been modified by so much of the act of December 18, 1893, as is now embodied in section 5569 of the Civil Code, which provides that: "It shall be unlawful for the supreme court of Georgia to dismiss any case for any want of technical conformity to the statutes or rules regulating the practice in carrying cases to that court, where there is enough in the bill of exceptions or transcript of the record presented, or both together, to enable the court to ascertain substantially the real questions in the case which the parties seek to have decided therein." Manifestly, failure to show in the lawful manner due service of a bill of exceptions is not a mere "want of technical conformity to the statutes or rules regulating the practice in carrying cases" to this court. Such failure amounts to no conformity at all with section 5547 of the Civil Code, which not only provides that there shall be proper service of a bill of exceptions, but also expressly declares that there shall be "a return of such service (or acknowledgment of service) indorsed upon or annexed to such bill of exceptions." That section further undertakes to deal specifically with the matter of dismissing cases for want of service, and provides merely that a bill of exceptions shall not be dismissed in the event "the party benefited by a failure to serve shall * * * waive service and agree that said case may be heard." We therefore hold that the present bill of exceptions cannot be retained for a hearing on its merits by virtue of anything contained in the section of the Code first above cited. Writ of error dismissed. All the justices concurring.

In re MADDOX, Solicitor General.

(Supreme Court of Georgia. Aug. 7, 1900.)

SOLICITOR GENERAL—FEES.

A solicitor general, for services rendered in this court in a criminal case, wherein it appears that the accused was indicted for a felony, and in the trial court convicted of a misdemeanor, is entitled to a fee of $15, and not $30.

(Syllabus by the Court.)

Application of Solicitor General Maddox for taxation of costs. Motion granted, and costs taxed.

to tax his costs, and thus presented the question whether he was entitled for his services in this court to a fee of $30 or to a fee of only $15. In that case it appeared that the accused had been indicted in the trial court for the offense of seduction, which is a felony, and that he was convicted of the offense of fornication, which is a misdemeanor. Section 1099 of the Penal Code prescribes that for services in the supreme court the fees of solicitors general shall be "in capital cases, $50.00; other felonies $30.00; all other cases $15.00." So the real question is whether the present case should be treated here as a "felony case" or as a "misdemeanor case." While the indictment was for felony, the accused was convicted of a misdemeanor, and in his writ of error sought to have this court pass upon the question whether or not he was legally convicted of an offense of that grade. Now, what was the character of the judgment of which he complained? It was one by which it had been judicially declared that he had committed a misdemeanor. This court was not called upon to determine whether or not the accused was lawfully convicted of a felony, nor was there any such conviction. We are, therefore, clearly of the opinion that the case, when it reached here, and as it stood upon the docket of this court, was one which should be classed as a "misdemeanor case," and, consequently, that the solicitor general is not entitled for his services to the fee prescribed for representing the state in "felony cases." His compensation is fixed by that clause of the fee bill which allows him in "all other cases" a fee of $15.

WESTERN UNION TEL. CO. et al. v. GRIFFITH.

(Supreme Court of Georgia. Aug. 7, 1900.)

APPEAL—BILL OF EXCEPTIONS—AMENDMENT—PARTIES—TELEGRAPH COMPANIES—INJURY BY WIRES—NEGLIGENCE—DAMAGES.

1. A bill of exceptions may, in this court, be amended by the record so as to include the names of all necessary or proper parties who might have been joined with the party excepting as plaintiffs in error; aliter as to parties defendant not named in the writ of error, who are unwilling to waive service and consent that the case be heard on its merits. (a) The test to be applied in determining whether one sought to be introduced by amendment could have been joined with the excepting party as a plaintiff in error is, were they on the same side of the controversy in the trial court? for such litigants only as were co-parties below can properly appear before this court as parties plaintiff. (b) All formal parties to the pleadings in the trial court are proper parties to a writ of error, though, since the passage of the practice act of 1881, such of them only as will really be affected by the judgment to be rendered in this court are to be regarded as indispensable parties. (c) In the present case the party brought before this court by amendment to the bill of exceptions was not a neces-

tition set forth a cause of action, and was not open to demurrer on the ground that there was a misjoinder of parties defendant. (a) The plaintiff went even further into detail than was necessary in describing the location of the wires and poles belonging, respectively, to the defendant companies, but the petition was defective in that it failed to state with sufficient particularity at what points the plaintiff expected to prove that they negligently permitted their wires to remain in contact. They were not, however, entitled to notice as to the character or extent of the evidence upon which the plaintiff expected to rely as showing knowledge on their part of facts with which they were alleged to have been acquainted.

3. The petition did not disclose facts showing that the plaintiff was not entitled to recover expenses incurred for medical attention, etc., but was subject to demurrer on the ground that the amount of such expenses was not therein alleged.

(Syllabus by the Court.)

Error from city court of Richmond; W. F. Eve, Judge.

Action by L. B. Griffith against the Western Union Telegraph Company and others. From an order overruling a demurrer to the complaint, defendants bring error. Reversed.

J. S. & W. T. Davidson and F. G. Du Bignon, for plaintiffs in error. C. H. Cohen, J. R. Lamar, and Boykin Wright, for defendant in error.

FISH, J. When this case came on to be heard at the October term of this court, counsel for Mrs. Griffith presented a motion to dismiss the writ of error on the ground that the Augusta Railway & Electric Company was a necessary party thereto, but had not been named as such in the bill of exceptions. Thereupon counsel for the telegraph company, without conceding that the railway and electric company was an indispensable party, asked leave to amend the bill of exceptions "from the record in the case," agreeably to the provisions of section 5570 of the Civil Code, by inserting the name of the latter company as a co-plaintiff in error. After argument had as to the right of the telegraph company to make the proposed amendment, we granted it permission so to do, and overruled the motion to dismiss. This was, as we shall undertake now to show, in accord with a rule of practice which has been uniformly adhered to and consistently applied during a period of more than half a century.

1. Under the procedure which obtained both in England and in this country at the time the supreme court of this state was organized, all persons affected by the judgment of a trial court, including securities upon an appeal bond, even though they might not be formal parties to the record, were indispensable parties to a writ of error sued out to review such judgment; and it was accordingly held by this court that a cessity and reasonableness of such a requirement, Judge Lumpkin, who delivered the opinion filed in the latter case, pointed out what provision was made for cases in which one only of several parties on the losing side might wish to accept, saying, in this connection (page 289): "One of several parties [cannot] be subjected to the hardship and loss of being deprived of his writ of error because the others refuse to join in it. One may sue out a writ of error in the name of all, and, if the others refuse to join in the prosecution, they may be brought before this court, and severed, at their own request, after which he or they who sued out the writ of error may go on alone. In this manner all inconvenience may be avoided, justice administered, and the harmony and conformity of the record preserved." The right to amend the bill of exceptions by the record, and thus bring before the court necessary plaintiffs not joined in the first instance, was recognized both in the case of Long v. Strickland, 2 Ga. 348, and in that of Carey v. Rice, Id. 408. Such an amendment was allowed in Beall v. Fox's Ex'rs, 4 Ga. 408, it appearing from the record in that case that the parties plaintiff thus sought to be introduced were co-defendants with the plaintiff in error in the court below. Then came the practice act of 1847, which wrought no change in the rules of procedure, save to provide that thereafter it should not be necessary to join in the writ of error securities on appeal or upon injunction bonds, but that such persons only as were formal parties to the pleadings in the lower court should be considered indispensable parties to a writ of error sued out to review a judgment therein rendered. See Carey v. Giles, 10 Ga. 8, wherein this statute was cited and construed. The court in that case declared it necessary not only to include in the writ of error all essential parties thereto, but to observe the equally important requirement that they be therein joined "in the order in which they stand in the record below." As explanatory of what was meant by the phrase just quoted, and as affording an illustration of how this requirement could and should be met, it was said (page 2): "When, therefore, one of two or more defendants against whom a decree has been rendered brings a writ of error to reverse it, it is necessary for him to join his co-defendants as plaintiffs in error, and upon the trial they may unite with him, and assign error against the decree, or they may sever, and be heard in defense of the decree. And, if such plaintiff in error has failed to make his co-defendants parties plaintiff to the writ of error, they may be added by motion, without delay or cost, with the same privilege of assigning errors or severing." Commenting upon the act of 1850, which declared that writs of error could be amended

less to talk about the mockery of adding parties here, on motion, without giving them notice to appear. * * * So far as these parties are concerned, they have * * * very little cause of complaint. The plaintiff in error now before the court could have used their names, and brought them here as parties plaintiff without their consent, and without notice. They are now being made parties upon motion, in a condition very little worse than they would have been in had the plaintiff taken that course. In neither case has the law provided for notice to them, and in both cases they are presumed to know what are the public laws; to know that under the laws they are liable thus to be made parties; and in both cases their rights are the same,—that is, they can assign errors with the primary plaintiff, and co-operate with him in procuring the reversal of the judgment below, or they can sever, and be heard in support of the judgment. It is their privilege to elect." See, also, what was said upon the same line by Bleckley, J., in McNulty v. Pruden, 62 Ga. 138. In the course of his discussion he observed that, if the case "had been brought up by the complainant below, and not by some of the defendants, other rules would apply," for there was a vast difference between introducing proper plaintiffs in error who were not entitled to notice and attempting to add by amendment necessary defendants in error who had not been made parties to or served with the bill of exceptions agreeably to statutory provisions which were imperative. For instance, where this distinction was drawn, and the writ of error was dismissed for want of proper parties defendant in this court, see Barksdale v. Bunkley, 26 Ga. 398; Curey v. Hitch, 57 Ga. 197; Bird v. Harris, 63 Ga. 433; Jordan v. Kelly, Id. 437; Brown v. Wylie, 64 Ga. 435; Maynard v. Hunnewell, 65 Ga. 281; Jowers v. Baker, Id. 611; Haines v. Clary, 66 Ga. 519; and Price v. Lathrop, Id. 247. In the case last cited it appeared that an assignee in bankruptcy, who was a necessary party defendant in error, had not been named as such in the bill of exceptions. With a view to meeting a motion to dismiss the writ of error, the plaintiffs offered to amend by making him a co-party with them, but the court refused to allow this to be done, holding: "Such assignee cannot be made a party plaintiff in error with complainants by an amendment to the bill of exceptions instanter, because he was not on the same side of the litigation in the court below, as was the case in McNulty v. Pruden, 62 Ga. 135, and Carey v. Giles, 10 Ga. 1. His interest, as well as his position in the court below, show him to have been antagonistic to the case made by complainants, and therefore he cannot be made a party on the same side of the litigation in the "Saving Act" of 1881 (Acts 1880–81, p. 123). Among other things, it provided for curing by amendment "any imperfection or omission of necessary and proper allegations" in the bill of exceptions which "could be corrected from the record in the case," and declared that no writ of error should be dismissed "on any ground whatever" which could be "removed during the term of the court to which the said writ of error is returnable." See Civ. Code, §§ 5567, 5570. In express terms this statute further declared that no dismissal should result simply "because the bill of exceptions sets forth the parties differently from the record, or discloses that some party not interested in sustaining the judgment of the court below had not been served," provided the record shows "clearly who were the respective parties to the litigation in the court below, and the bill of exceptions shows that all who were interested in the case, as presented in the supreme court, in sustaining the judgment of the court below, had been served." Id. § 5562. No change in the then prevailing practice concerning a proper alignment on opposite sides of the respective parties at interest seems, however, to have been contemplated; nor was any provision made for service of the bill of exceptions upon such parties as, under the procedure which had previously been established, were required to be brought before this court in the capacity of plaintiffs in error. Indeed, this act was essentially one of mercy, not designed to introduce a different system of procedure, or to impose any additional burdens upon one suing out a writ of error, but merely to shield him from the pains and penalties which had theretofore been visited upon those who failed to observe certain requirements of the law which this court was bound to enforce; that is to say, the established rules of practice were not dealt a mortal blow, but were merely crippled, by being thus practically declared directory, rather than mandatory. But one change therein was introduced which affected the practice as to the manner of joining parties in a writ of error. This related solely to the requirement that all parties to the record in the trial court should be made parties to the bill of exceptions, which requirement the general assembly modified to the extent of declaring that "no party shall be considered as interested in the litigation in the supreme court who will not be affected by the judgment to be rendered in that particular case, such as sheriffs upon a money rule when the contest is between various claimants of the fund and not between the sheriff and any one of them, or a receiver occupying a similar relation, or a complainant in a bill of interpleader, and other parties occupying similar positions." Civ. Code, § 5562. Recognizing that the act of 18[illegible]

age of that statute: "Where some of the defendants to a bill in equity except to the overruling of a demurrer to the bill, they need not serve their co-defendants with the bill of exceptions." Bank v. Harrison, 68 Ga. 463. It may further be observed that since that act went into effect the practice which formerly prevailed as to allowing writs of error to be amended by the record so that proper parties plaintiff might be added has also been consistently adhered to and applied in a number of instances. See Swatts v. Spence, 68 Ga. 496, 499; Sharp v. Findley, 71 Ga. 655; Epping v. Aiken, Id. 682; Fouche v. Harison, 78 Ga. 359, 407, 3 S. E. 330; Culver v. Mullally, 94 Ga. 644, 21 S. E. 895; Isbell v. Blanchard, 94 Ga. 678, 21 S. E. 720; Steele Lumber Co. v. Laurens Lumber Co., 98 Ga. 329, 24 S. E. 755; Swift v. Thomas, 101 Ga. 89, 28 S. E. 618; Bennett v. Trust Co., 106 Ga. 578, 32 S. E. 625. Many cases have, indeed, been dismissed for want of necessary parties. Allen v. Cravens, 68 Ga. 554; Craig v. Webb, 70 Ga. 188; Knox v. McCalla, Id. 725; Cameron v. Sheppard, 71 Ga. 781; Baker v. Thompson, 78 Ga. 742, 4 S. E. 107; Anderson v. Faw, 79 Ga. 558, 4 S. E. 920; Crosthwait v. James, 95 Ga. 570, 20 S. E. 494; Davis v. Peel, 97 Ga. 342, 22 S. E. 525; Hunter v. Wakefield, 97 Ga. 543, 25 S. E. 347; Capers v. Kirkpatrick, 98 Ga. 260, 25 S. E. 438; Inman v. Estes, 104 Ga. 645, 30 S. E. 800; Stroup v. Pruden, 104 Ga. 721, 30 S. E. 948; White v. Bleckley, 105 Ga. 173, 31 S. E. 147; McConnell v. West, 105 Ga. 468, 30 S. E. 654; United States Leather Co. v. First Nat. Bank, 107 Ga. 263, 33 S. E. 31; Papworth v. Ryman, 108 Ga. 780, 33 S. E. 665; Tiner v. Carter (Ga.) 34 S. E. 567; McCain v. Sutlive, Id. 1013. But in none of these cases could the fatal omission to include in the writ of error all necessary parties defendant thereto be cured by amendment; for, in view of the doctrine laid down in Price v. Lathrop, supra, one suing out a bill of exceptions cannot properly join with him as a plaintiff in error another litigant who was on the opposite side of the controversy in the court below, and the act of 1881 in terms declares that the provision therein made that no dismissal shall result merely "because the bill of exceptions sets forth the parties differently from the record" is applicable only in the event all necessary parties defendant have been duly served. Of course, no case will be dismissed for want of service when the parties entitled thereto voluntarily appear before this court, either in person or by attorney, and consent that the case may be heard. Civ. Code, § 5547, par. 3; Craig v. Webb, 70 Ga. 188. And reasonable time and opportunity will be afforded a plaintiff in error in order that he may, if possible, procure such consent during the term to which the writ of error way of amending a bill of exceptions by the record so as to include therein the name of additional parties defendant, this will avail nothing in the absence of a waiver on their part of due service, as any service upon them thereafter effected would come too late. Cameron v. Sheppard, 71 Ga. 781; Papworth v. Ryman, 108 Ga. 780, 33 S. E. 665, and cases cited. It is also proper to call attention to the fact that the right to introduce by amendment even necessary parties plaintiff is limited to those litigants only who are entitled to sue out a writ of error, and cannot be exercised for the benefit of others by one not himself injuriously affected by the judgment excepted to. Railroad Co. v. Craig, 59 Ga. 185; Healey v. Scofield, 60 Ga. 451; Railroad Co. v. Craig, 62 Ga. 362; Swift v. Thomas, 101 Ga. 89, 28 S. E. 618.

In view of the practice outlined above, it is clear that, as the railway and electric company was not a co-party with Mrs. Griffith in the court below, it did not belong on that side of the case which she occupied before this court. Certainly, it was not incumbent upon the telegraph company, if it desired to bring here for review the judgment overruling its separate demurrer, to make the railway and electric company a party defendant to the bill of exceptions. Jones v. Hurst, 91 Ga. 338, 17 S. E. 635, citing previous decisions of this court. But counsel for Mrs. Griffith contended that a new trial could not legally be granted as to one only of the joint defendants below, and accordingly argued that, as the railway and electric company was not made a party to the motion therefor, or to the present writ of error, the case should be dismissed. This position is not altogether logical. If that company was, as insisted, an indispensable party to the motion, it would simply follow, as a result of not making it a party, that the telegraph company could not, in its bill of exceptions, justly complain that the trial judge committed error in refusing to grant a new trial which could not lawfully take place, and would have to depend alone upon its assignment of error touching the overruling of its demurrer. That is to say, the mere fact that there might be no merit in one of its complaints would not justify a dismissal of its bill of exceptions, if it presented another question properly raised, which could and should be passed upon. We are, however, by no means prepared to agree with counsel as to the correctness of the premise upon which they based their argument. Although the action brought by Mrs. Griffith was against both companies as joint tort feasors, her right to recover in the case did not depend upon her ability to show that both were liable to respond in damages. She might, before trial, have voluntarily dismissed her action as to one, and

Atlanta v. Anderson, 90 Ga. 481, 16 S. E. 209. Or at any time before verdict she might, if unable to prove that both were liable, have disclaimed a right to recover as to one, and insisted upon a verdict against its co-defendant. Baker v. Thompson, 89 Ga. 487, 15 S. E. 644. And a verdict such as was actually rendered, releasing one of the companies, but finding the other liable, could lawfully be returned. Austin v. Appling, 88 Ga. 55, 59, 13 S. E. 955, and cases cited. True, if Mrs. Griffith had wished to file a motion for a new trial with a view to obtaining another hearing as to the liability of the railway and electric company, which was released by the verdict of the jury, it would have been necessary for her to make the telegraph company a party respondent. This is so for the reason pointed out in Hunter v. Wakefield, 97 Ga. 543, 545, 25 S. E. 347, 348, viz.: If, in an action like the case at bar, "brought against several defendants, the plaintiff recovers at all, the damages awarded must be for the same amount as to all of the defendants found liable"; and, therefore, where a verdict has been found "against some only of several joint defendants, and the plaintiff moves for a new trial against those of the defendants as to whom he failed to recover, if his motion is granted at all, the verdict in his favor against those of the defendants who were found liable must necessarily be set aside, for, unless this be done, there might, upon a subsequent trial, be a finding for the plaintiff for a sum totally different from that already found, and thus there would result a recovery in one amount against some of the defendants and a recovery in quite a different amount as against others of them." The plaintiff would, however, have as much right after verdict as he had before or pending the trial to abandon his case as to some of the defendants; and, this being so, it is evident that, if he elected to stand upon his partial victory, there would be no necessity, in the event the defendants found liable desired to move for a new trial, for them to join in their motion such of the defendants as were by the jury absolved from liability, and as against whom the plaintiff, by failing to move for a new trial, had voluntarily chosen not to further press his action. Obviously, where the only logical result of a trial was to release one of several defendants sued as joint tort feasors, a new trial may properly be granted at the instance of those against whom a recovery was had, without disturbing the righteous finding of the jury as to the one whom they discharged. Railroad Co. v. McConnell, 87 Ga. 756, 13 S. E. 828. This fully disposes of the motion to dismiss.

It remains only to briefly notice a point raised by the railway and electric company, which appeared before this court through its attorney, and strenuously resisted being made a party to the case on the ground that it was not a necessary party to the controversy here presented. In this connection counsel confidently made the assertion that his client was not even a proper, much less a necessary, plaintiff in error. We did not at the time, nor do we now, concur in this view. Under the facts disclosed by the record, it is, indeed, manifest that the railway and electric company had itself no right to sue out the writ of error. Collier v. Hyatt (Ga.) 35 S. E. 271; Braswell v. Mortgage Co., Id. 322. But, as the bill of exceptions was filed by a party entitled to except to the rulings therein complained of, it by no means follows that the company just mentioned was not at least a proper party plaintiff. As has been seen, the rule of force prior to the passage of the act of 1881 was that all parties to the record below were not only proper, but necessary, parties to a writ of error. That act, in providing against the dismissal in this court of bills of exceptions for want of necessary parties, went no further than to declare that, in determining who really were indispensable parties thereto, "no party shall be considered as interested in the litigation in the supreme court who will not be affected by the judgment to be rendered in that particular case, such as" mere stakeholders and others, purely nominal parties to the controversy in the court below. It cannot, therefore, be said that any formal party to the record in the trial court is not still to be regarded a proper party to a bill of exceptions, irrespective of the question whether he be an essential party thereto or not. Counsel based his argument upon the proposition that his client had been absolved from liability by the jury, whose finding was binding and conclusive, the same never having been set aside; but the record before us, by which alone we are to be governed, is silent as to whether or not any steps have been taken by Mrs. Griffith to further press her action as against the railway and electric company in the event another trial should result from the judgment rendered by this court in the present case. Accordingly, we undertake merely to say that company was a proper, though perhaps not indispensable, party plaintiff. The order passed, whereby it was introduced as a party, satisfied the demands of the telegraph company, fully met and overcame the motion to dismiss urged by Mrs. Griffith, and inflicted no hardship upon the railway and electric company; for, if it really has no further interest in the litigation, its rights in the premises cannot possibly be injuriously affected by the judgment which we render. This being so, reflection confirms us in the belief that this order was not improvidently granted, but that it provided quite a satisfactory solution of the whole difficulty presented.

2. The case made by the petition filed by Mrs. Griffith was, in brief, as follows: The telegraph company maintains in the city of

electric company has likewise erected a similar system of poles and wires used in connection with its business. At some places the wires of the telegraph company, which are strung on poles which are higher than those used by the other company, cross the wires of that company, while at other points the wires connected with the two systems run parallel with each other on the same streets. The wires of the railway and electric company are heavily charged with currents of electricity "sufficiently powerful to do great bodily harm." On or about the 2d day of December, 1896, there was a fall of sleet and snow, and "the wires belonging to and controlled by the said defendants were each and all heavily weighted by said snow and sleet." As a result "thereof, the wires of the said defendants came in contact with each other at sundry points and places in the city of Augusta and in the village of Summerville," and "by reason of such contact the powerful currents in the wires of the Augusta Railway & Electric Company were conducted to and into the wires belonging to and controlled by the Western Union Telegraph Company," of which fact "both of the defendants had knowledge." Because of "said contact, the wires of the Western Union Telegraph Company became dangerous to persons and property touching or being touched by the same, [and] both of said defendants had knowledge of said danger." The wires of the two companies were thus in contact "at and near the intersection of Walton Way and Telfair street in the village of Summerville, and at divers other places in said village and city," and this was known by both companies. On the date above mentioned a rotten and unsound pole belonging to the telegraph company, situated "in the yard of the Bonair Hotel," broke, and fell across a roadway leading to that hotel, carrying with it the wires which had been strung upon it. "Said pole was negligently allowed to remain upon the ground with the wires upon and across said roadway for a long space of time, to wit, 13 days," notwithstanding "the said defendants, and each of them, had notice of the fact that said pole had fallen, and that said wires were across said roadway," and although both "knew that the said wires so as aforesaid upon the ground were dangerous, and likely to produce injury to any person or thing passing along said roadway." On the 15th day of December "petitioner had occasion to visit the Bonair Hotel on business," and was driven thither in a vehicle through the Walton Way entrance to that hotel. Neither she nor the driver knew of the dangerous conditions of the wires across the roadway leading to the Telfair street entrance, and in attempting to return by that route one of the horses drawing the vehicle in which she was riding the vehicle to such an extent that petitioner, who was greatly alarmed, and was trying to alight, either fell or was thrown to the ground. She not only sustained serious injuries by reason of this fall, but also "received a violent burn from the electric current" with which the wires upon the ground were charged. In addition to other items of damage specifically alleged, she was "forced to incur an expense of $—— for medical attention and nursing." One of the defendants in the court below, the telegraph company, met the plaintiff's petition with a general demurrer, and also demurred specially thereto on the ground that there was a misjoinder of parties defendant therein. We now rule specifically, as was practically decided when the case was here at the March term, 1898 (104 Ga. 62, 30 S. E. 420), that the plaintiff set forth in her petition a cause of action, and properly joined therein as joint tort feasors the two corporations through whose alleged negligence she was injured.

By special demurrer the telegraph company called upon Mrs. Griffith to allege with more particularity at what points its wires ran parallel with, and at what points they crossed over, those of the railway and electric company. We have no hesitation in holding that in the respects indicated the petition was even more specific in its allegations than was necessary. There was no averment that either of the defendants was negligent in that it improperly constructed its system of wires and poles, and the sole purpose of the pleader evidently was to bring out the fact, by way of inducement merely, that the two systems were in close proximity one with the other at different points in the city and village. It was, however, the right of the telegraph company to demand, as it did in its special demurrer, that it be put upon notice as to where were the "divers other places in said village and city," besides that at the intersection of Walton Way and Telfair street, at which the plaintiff expected to prove that the company had negligently allowed its wires to remain in contact with those of the railway and electric company. Under the circumstances alleged, it was a distinct and unpardonable act of negligence to permit the dangerous agency to continue at each of the "divers other places" referred to; and under this loose and flexible allegation the plaintiff would be entitled, if not called upon to amend her pleadings in this particular, to introduce evidence concerning a contact at any point within the limits of the city of Augusta or those of the village of Summerville. This was altogether too much latitude, and gave the plaintiff an opportunity to place the telegraph company at a great disadvantage in endeavoring to make out its defense. If the plaintiff really knew, as

wires of the two companies were in contact, it would have been easy enough for her to comply with the reasonable demand made upon her to state specifically where such places were. If she did not, as matter of fact, know of or expect to prove a contact at a point other than the intersection of the two streets mentioned by name, she would have amended her petition by striking therefrom all reference to such "divers other places," for she had no right to expect to be allowed to go to trial in the hope of being able to prove by mere chance something which she was unable even to allege with any degree of certainty and particularity. Section 5048 of the Civil Code expressly declares that: "Special defects or omissions in the petition may always be taken advantage of by demurrer, and unless cured by amendment, the petition shall be dismissed." The petition under consideration was not free from "defects and omissions" calling for the prescribed remedy. Indeed, the plaintiff's disregard of the positive requirements of the law as to good pleading is so palpable as to suggest, by way of analogy, a violation of that provision of our piscatory laws now embodied in section 585 of the Penal Code, to the effect that, while a sportsman is at liberty to angle with hook and line, he cannot lawfully go after his intended victims with a drag-net. In a brief filed by her counsel, the case of Kraatz v. Light Co., 82 Mich. 457, 46 N. W. 787, is cited and relied on in support of the contention that "it is not necessary to prove the point of contact; it is impossible to have a tracing or chasing of lightning." There the evidence disclosed that Kraatz received a shock from wires which "should have been, and were supposed to be, at the time" he was working upon an electric lamp, "dead wires, or wires not charged with electricity." The wires connected with a different circuit were then charged with electricity, and there was positive proof that "there were crosses of these dead and live wires observed on the very day of the injury to plaintiff." The only question presented for decision in this connection was whether the jury were warranted in finding that the injury resulted from one of these contacts shown to exist, or was the result of negligence on the part of some employé of the company, or the act of a stranger in turning the current upon the wires of the circuit upon which the plaintiff was engaged at work. The court stated its conclusion to be that the most plausible theory presented by the evidence was that there was a "transfer of electricity from some live wire on" one of the circuits "to some dead wire on" the other circuit "at some of the crosses of these wires," and that the verdict ought to stand, notwithstanding the plaintiff did not prove with mathematical certainty at what precise spot such transfer took place. No

tiff's pleadings in this respect. The telegraph company also sought to compel Mrs. Griffith to set forth the manner in which notice was brought home to it that its wires were in contact with those of the other defendant. We think her allegation that both of the defendant companies had knowledge of the facts stated in regard to this matter was amply sufficient in point of detail. An individual would certainly not be entitled to call upon the plaintiff to exhibit to him, in advance of the trial, the particular evidence by which she expected to show such knowledge on his part. A corporation stands upon no better footing; for, theoretically at least, it has an equally good opportunity to know whether it did or did not know facts alleged to have come within its knowledge, and therefore is prepared to meet such an allegation with all the evidence at its command.

3. Two distinct points of objection were raised by the telegraph company to the allegation contained in the plaintiff's petition concerning the expense incurred by her for medical attention and nursing. One of these objections is presented by a speaking demurrer, wherein the company advances the argument that, as it appears "that Mrs. Griffith is a married woman, and it does not appear but what her husband is liv ing," she cannot recover such expenses, as the same should have been borne by him. We will dismiss this point with the suggestion that it should have been raised in the company's answer as matter of defense. Had the demurrer specifically called upon Mrs. Griffith to state whether or not she had a living husband, an altogether different question would be presented. The other objection should have been met by an appropriate amendment, for it was directed against and clearly pointed out the omission of the plaintiff to allege the amount she expended for medical attention and nursing. It is possible that her counsel looked upon this point as too trivial to require serious consideration, and would regard it a great hardship were we to reverse the judgment simply because a proper amendment to cure this defect was not offered. Yet we are by no means prepared to say we would be justified, in view of the section of the Civil Code last above cited, in holding that, were this the only objection to the petition which was well taken, a reversal of the judgment overruling the demurrer would not be demanded. We do not so rule, but take this occasion to emphasize the fact that the salutary rules of practice which require good pleading have not, as yet, been altogether abolished in this state. As furnishing an instance of what anomalous results may sometimes flow from ignoring what appear to be purely technical objections urged against pleadings which are defective in matter of form merely, we refer

on to deal ought certainly to have been sustained. Judgment reversed. All the justices concurring.

RACINE IRON CO. et al. v. McCOMMONS, Tax Collector, et al.

(Supreme Court of Georgia. Aug. 7, 1900.)

INTERSTATE COMMERCE—LICENSE—TRAVELING AGENTS—INJUNCTION.

1. The "Interstate Commerce Clause" of the constitution of the United States does not operate to prevent a state from imposing, for the purpose of raising revenue, a license tax upon persons who, as traveling agents for principals residing in other states, make executory contracts for the sale of goods, and who, when the same are shipped into this state, receive them in bulk, break the original packages in which they are contained, and distribute them among the customers with whom such contracts had been made.

2. One upon whose property an execution against another, issued by a tax collector, is levied, may, under section 899 of the Political Code, interpose a claim, and consequently has no need of an injunction to prevent the threatened sale.

(Syllabus by the Court.)

Error from superior court, Greene county; John C. Hart, Judge.

Action by the Racine Iron Company, of Wisconsin, and G. H. Pettigrew, against R. L. McCommons, tax collector, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Jas. Davison and J. S. Reynolds, for plaintiffs in error. Park & Merritt, for defendants in error.

LUMPKIN, P. J. The Racine Iron Company, of Wisconsin, and G. H. Pettigrew, filed an equitable petition to enjoin the tax collector and the sheriff of Greene county from proceeding with an execution against Pettigrew, which had been issued by the collector, and by the sheriff levied on property alleged to be that of the company. The execution purports to have been issued for a "special tax for the year 1898." It does not contain a recital that the tax was due by Pettigrew as a peddler. The petition, however, raised no objection to the execution on this ground, but expressly dealt with it as if it had embraced such a recital. Apparently, the tax sought to be collected was for the year 1899, for the facts disclosed at the hearing, about which, as will presently be seen, there was no dispute, plainly so indicated. The answer of the defendants alleges that the tax in question was for that year, and the petition distinctly avers that the "tax act of the general assembly of Georgia for 1898, so far as it applies to petitioners, or each of them, is repugnant to article 1, § 8, par. 3, of the constitution of the United States, and, as to them, unconstitutional and void." This act is the due to an error in transcribing. At any rate, it is certain that the petition squarely presents the question whether or not the paragraph of our tax act of 1898 which imposes a license tax upon certain classes of peddlers is, so far as it relates to the business carried on by Pettigrew for the iron company, violative of the interstate commerce clause of the federal constitution. Indeed, this is the main and controlling question in the case, and upon it counsel for both sides invoke a decision at our hands. The bill of exceptions alleges error in the refusal of the court to grant an interlocutory injunction upon the following agreed statement of facts: "G. H. Pettigrew sold in Greene county a lot of smoothing irons, taking the notes of the purchasers therefor. The irons sold were the property of the Racine Iron Company, of Wisconsin, and the defendant sold by sample, and subsequently had shipped from its factory in Wisconsin his entire sales, in boxes, 12 in a box, and consigned to G. H. Pettigrew as their local agent, who then delivered them to the purchasers on the sales previously made. No sales were made in Greene county after April, 1899. G. H. Pettigrew both solicited the orders and delivered the goods. G. H. Pettigrew is a resident of Louisiana. Said irons were sold for $7.75 each. Defendants in fi. fa. do not store goods in the state of Georgia, and have no warehouse or place of business in Georgia. R. L. Pettigrew, brother of G. H. Pettigrew, is the general agent of the Racine Iron Company for the South, and is a resident of Tennessee. The fi. fa. by the tax collector for $100 was issued and levied as alleged in the petition for injunction." It will be noted that according to this statement of the facts Pettigrew sold smoothing irons, "taking the notes of the purchasers therefor," and that he "both solicited the orders and delivered the goods." It makes no difference whether he took from his customers promissory notes payable to the company, or written orders upon it, or both. In each instance the contract of sale was executory, and it required a delivery of the article bargained for to complete the sale. The form of the transaction is a matter of no consequence.

1. Our tax act of 1898 imposes for each of the years 1899 and 1900, "upon each peddler of clocks or smoothing irons," a specific occupation tax of "one hundred dollars in each county of the state in which such peddler may do business." Acts 1898, p. 26. A stern sense of duty, not inclination, constrains us to enter upon a discussion of the question whether or not Pettigrew can, by virtue of the above-mentioned clause of the constitution of the United States, escape the payment of the tax imposed upon him by this act, and for which the execution in

controversy was issued. In endeavoring to find a solution of this question, we have diligently sought for such aid as could be derived from authoritative utterances of the supreme court of the United States. The result of our researches in this direction will be developed as we progress.

In Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 382, the doctrine was announced that: "The term 'import,' as used in that clause of the constitution which says that 'no state shall levy any imposts or duties on imports or exports,' does not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States. Hence a uniform tax imposed by a state on all sales made in it, whether they be made by a citizen of it or a citizen of some other state, and whether the goods sold are the produce of that state enacting the law or of some other state, is valid." To the same effect, see Hinson v. Lott, 8 Wall. 148, 19 L. Ed. 387. "A discriminating tax upon nonresident traders trading in the limits of a state other than that in which they reside cannot, however, lawfully be imposed." Ward v. Maryland, 12 Wall. 418, 20 L. Ed. 449. Such a tax was, in Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347, held to be unconstitutional. In Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754, the question was presented whether or not a sewing machine agent, who had been sent by a Connecticut corporation "into Sumner county [Tenn.] to sell machines there," was subject to a license tax imposed by a statute of that state upon "all peddlers of sewing machines and selling by sample." It appeared that while the corporation manufactured its machines at Bridgeport, in the state of its residence, it "had an agency at Nashville," Tenn., from which latter place its agent was sent into the county above mentioned. "The supreme court of Tennessee decided that the law of that state imposing" the tax in question was intended to apply to "all peddlers of sewing machines, without regard to the place of growth or produce of material or of manufacture"; and it was accordingly held by the federal supreme court, upon a review of the judgment of the state court upholding the validity of the statute, "that the law, so construed, [was] not in violation of the constitution of the United States."

Then came the now familiar, though at the time somewhat startling, decision in Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694. Robbins, a citizen of Ohio, "was engaged at the city of Memphis, in the state of Tennessee, in soliciting the sales of goods for" a Cincinnati firm, "and exhibited samples for the purpose of effecting such sales,—an employment usually denominated as that of a 'drummer.'" He failed to pay a license tax imposed by statute upon persons of his calling, and a criminal prosecution was instituted against him on the charge of doing business without a license, which the statute "made a misdemeanor, punishable by a fine of not less than five nor more than fifty dollars." His conviction followed as a matter of course, and the same was sustained by the state supreme court upon the ground that the statute in question was not unconstitutional. In reviewing its judgment, Mr. Justice Bradley, speaking for a majority of the members of the federal supreme bench, said that the inquiry presented was "whether it is competent for a state to levy a tax or impose any other restriction upon the citizens or inhabitants of other states for selling or seeking to sell their goods in such state before they are introduced therein." He further remarked, in the course of his opinion, that while the conclusion to the contrary reached by a majority of the court might, to some extent, operate to interfere "with the right of the state to tax business pursuits and callings carried on within its limits," yet this interference would be very limited in its operation, and would "only prevent the levy of a tax, or the requirement of a license, for making negotiations in the conduct of interstate commerce." Indeed, all that was decided in that case was that a state has no power to impose an occupation tax upon a commercial drummer, who, in behalf of a nonresident principal, undertakes to do no more than exhibit a line of samples, and solicit orders for goods which are at the time within the jurisdiction of another state. To this extent, and no further, did the court go in Corson v. Maryland, 120 U. S. 502, 7 Sup. Ct. 655, 30 L. Ed. 699 (decided at the same term). On the same line are the cases of Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368, and Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256, 32 L. Ed. 637. In neither was the doctrine announced in the Robbins Case in any wise extended or applied to a different state of facts.

Next came a similar decision in Brennan v. City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. Brennan, at the time the restraining hand of the law was placed upon him, was engaged in a "house to house" canvass in pursuit of customers for pictures and picture frames. He merely exhibited his samples and solicited orders. Such orders as were procured he immediately forwarded to a nonresident principal, who shipped the goods "to the purchasers" direct "by railroad freight and express." In some instances Brennan did collect "the price of said goods," but, so far as appears, he did not undertake to himself make delivery of any of the articles for which he received orders. Commenting upon this feature of the case, Mr. Justice Gray, in Emert v. Missouri, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430, said (pages 319, 320, 156 U. S., page 374, 15 Sup. Ct., and page 437, 39 L. Ed.): "In Brennan's

owner in the other state directly to the purchasers." An exhaustive and painstaking review of all previous decisions having any direct bearing upon the case then in hand was entered upon by the learned justice, and the conclusion was announced that it was distinguishable from every one of its predecessors, save only the case of Machine Co. v. Gage, 100 U. S. 676, 25 L. Ed. 754, which was "approved and followed." The importance of getting a firm and intelligent grasp upon the facts on which the decision in Emert's Case was rested is, therefore, apparent, especially in view of the fact that, so far as we have been able to ascertain, it presents the latest enunciation on the subject which the federal supreme court has vouchsafed. It is a circumstance also worthy of comment that this decision was rendered without a dissent on the part of any of the justices. The precise ruling made was as follows: "A statute of a state by which peddlers of goods, going from place to place within the state to sell them, are required, under a penalty, to take out and pay for licenses, and which makes no discrimination between residents or products of the state and those of other states, is not, as to peddlers of goods previously sent to them by manufacturers in other states, repugnant to the grant by the constitution to congress of the power to regulate commerce among the several states." In conformity to what seems to have become quite a common custom in this class of cases, Emert went to trial upon an agreed statement of facts. We gather therefrom that while, possibly, he started out innocently enough as a mere soliciting agent, carrying with him on his travels a sewing machine belonging to a nonresident principal, with the intention of doing no more with it than exhibiting it as a sample, he eventually forsook his original calling for that of an itinerant vender, who not only solicits trade, but actually sells. At all events, it was admitted that upon a specified day "he offered for sale, to various persons at different places," a sewing machine which he carried along with him in a wagon, and that he did on the same day "find a purchaser for said machine and did sell and deliver the same to" him. In dealing with the facts thus presented, Mr. Justice Gray, speaking in behalf of all the members of the court, said (page 311, 156 U. S., page 370, 15 Sup. Ct., and page 434, 39 L. Ed.): "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the state of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic; and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the state. Both the occupation and the goods, therefore, were subject to the taxing power and to the police power of the state." It was pointed out, in this immediate connection, that "the statute in question [was] not part of the revenue law," but was one looking solely to regulation, and designed, apparently, "to protect the citizens of the state against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place, and from door to door." That is to say, the statute was one passed by virtue of the police power residing in the state, and not in the exercise of its rights by taxation to raise revenue for its support.

This brings us to a consideration of the question whether or not there are in the case now before us any distinguishing features which can properly be said to differentiate it from that last cited. The two cases are not, upon their facts, identical. Pettigrew, the agent whose anomalous vocation is the cause of our present distress, first solicited orders for goods which at the time were in the hands of his nonresident principal. Then such orders as were in this manner procured were duly forwarded to be filled by the latter. Not a single order was, however, filled separately, but goods sufficient in quantity to fill the orders of a number of customers were shipped in bulk, consigned to Pettigrew himself; and on receipt of each shipment he broke the original packages in which the goods were sent, and proceeded to distribute the contents among such customers as were entitled thereto. From either a legal or a moral standpoint, it would, therefore, seem that Pettigrew belonged to a class of itinerants requiring as much police supervision as that of which Emert was a member. And, if this be true, why would it not inevitably follow that the reasons assigned by Mr. Justice Gray for upholding the police regulation which Emert called into question could very fairly be said to apply equally as well to Pettigrew and his calling, if the statute now under consideration was one designed to protect the citizens of this state against fraud and imposition? As such is not the nature of this statute, we will not indulge in further conjecture on the line just suggested, but will discuss the question actually before us, which is: Can the statute be upheld, as against Pettigrew and his principal, upon the ground that this state has not, in thus undertaking to exercise its inherent power of taxation, invaded the sacred

precincts guarded by the interstate commerce clause of the federal constitution? The purpose of the general tax act for 1899–1900 was not simply to impose taxes, but to actually raise revenue for the support of the state government; and, looking to that end, penalties were prescribed for nonpayment of the license taxes therein laid, regardless of the citizenship of the persons thereby affected. In support of the proposition that this was "an exercise, not of the police power, but of of the taxing power," of the state, we need only cite Brennan v. City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. Giving to the doctrine which was first announced in the Robbins Case the widest possible scope which can legitimately be claimed for it, we fail to see how it controls the case in hand. On principle it is certainly true that a citizen of one state, who is engaged in interstate commercial dealings, can lawfully accomplish through the means of an agent neither more nor less than he himself would have a right to do in person. It is now well settled that no tax can be laid upon the exercise by a manufacturer of his privilege of visiting a state other than that of his residence with a view to creating a demand for his goods by exhibiting a sample thereof, and securing orders therefor; i. e. seeking a market for his goods, and taking advantage of it, when found, by entering into purely executory contracts of bargain and sale to be performed in the state of his residence by making actual delivery there to a common carrier authorized to receive them in behalf of the persons who agree to buy. But what if he enters into a contract whereby he binds himself to make delivery to a customer in person within the state of the latter's residence? What if the parties expressly agree that the sale itself, as distinguished from the mere executory contract made in contemplation thereof, shall be of a wholly internal and domestic nature, having no interstate commerce feature about it? A customer has, of course, a constitutional right not only to agree to buy, but through his carrier agent to actually buy, goods the situs of which is to continue at the home of the manufacturer until the sale is consummated there; and upon the exercise by the customer of this privilege no restriction could be lawfully imposed by the state in which he resided. Scott v. Donald, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632; Vance v. W. A. Vandercook Co., 170 U. S. 438, 10 Sup. Ct. 774, 42 L. Ed. 1100. Suppose, however, the customer does not choose to exercise this right, but, on the contrary, declines to even agree to purchase save upon the express stipulation that the goods shall be brought into the state by the manufacturer, and then, and not until then, really sold. In that event, the customer would be in no wise concerned as to the methods employed by the manufacturer in order to meet his obligation to thus effect a change in the situs of the goods before calling upon the former to actually purchase the same; and if the manufacturer, as a matter of personal convenience to himself, should enter into an independent contract of carriage with a common carrier, whereby it acted as his agent in bringing the goods to the point agreed on as that where the sale should take place, this surely could not have the effect of introducing an interstate commerce feature into the transaction. In Brown v. Houston, 114 U. S. 623, 5 Sup. Ct. 1091, 29 L. Ed. 257, it was held that: "Coal mined in Pennsylvania, and sent by water to New Orleans, to be sold in open market there on account of the owners in Pennsylvania, becomes intermingled, on arrival there, with the general property in the state of Louisiana, and is subject to taxation under general laws of that state, although it may be, after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port." This decision was based upon the doctrine announced in Woodruff v. Parham, supra, to the effect that goods shipped from one state into another for the purpose of sale become immediately subject to taxation by the latter state, notwithstanding they belong to a nonresident importer engaged in interstate commerce. See, also, in this connection, Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715. The theory upon which it is held that an occupation tax sometimes operates as an unwarranted interference with interstate commerce when laid upon a nonresident merchant or manufacturer is that "a license tax required for the sale of goods is, in effect, a tax upon the goods themselves." Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347. Or, as was said in Machine Co. v. Gage, 100 U. S. 678, 25 L. Ed. 754, "a tax for a license to sell goods is, in effect, a tax on the goods authorized to be sold." When applied to a commercial drummer, who merely "sells goods by sample," the goods being at the time in the hands of a nonresident principal, there is much force in the argument that, as the state in which the drummer solicits orders has no jurisdiction over the goods themselves, and cannot impose any direct tax upon them before they are shipped within its borders, the state has no power to lay an indirect tax upon them by resorting to the expedient of requiring the drummer to pay a license fee for the privilege of pursuing a calling which is a legitimate, and oftentimes necessary, incident to commercial dealings between residents of different states. But the argument necessarily loses its force when, as in the present case, the goods, before delivery to the customer, are shipped into the state with a view to consummating the executory contract of sale. We see no reason why, as soon as the shipment is complete, and the goods turned over to an agent of the shipper, they may not be immediately subjected to a direct tax, irrespective of the fact that a resident customer had previously been found who was willing

a direct tax could be laid on the goods while yet in the possession of the shipper or his agent, the state could, by imposing a tax upon the privilege of consummating the sale of the goods, reach them indirectly. The following extract, taken from the opinion delivered by Mr. Justice Field in Welton's Case, seems to bear us out in the conclusion just stated: "The general power of the state to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the federal constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer, but, if such tax conflict with any power vested in congress by the constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license." It is true that in Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, the reviewing court took occasion to present the quære "whether the right of transportation of an article of commerce from one state to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates." But this doubt was suggested with reference to the right of a state, in the exercise of its police powers, to forbid common carriers from bringing "intoxicating liquors into the state from any other state" without first complying with certain prescribed regulations. We are also aware that it was subsequently held, in Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, that "a statute of a state prohibiting the sale of any intoxicating liquors, except" for medicinal and other like purposes, was, "as applied to a sale by the importer, and in the original packages or kegs, unbroken and unopened, of such liquors manufactured in and brought from another state, unconstitutional and void." However, this decision was put upon the ground that, in undertaking to entirely prohibit such sales, the state exceeded its police powers, and encroached upon the exclusive right vested in congress to regulate interstate commerce. That congress may itself impose restrictions upon, or entirely prohibit, interstate traffic in injurious commodities, was recognized in Rahrer's Case, 140 U. S. 540, 11 Sup. Ct. 865, 35 L. Ed. 572. The decision in Plumley v. Massachusetts, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, is authority for the proposition that a state has the power to prohibit the sale "of oleomargarine artificially colored so as to cause it to look like yellow butter," ufactured in and brought from a sister state. But when, in Schollenberger v. Pennsylvania, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, the question arose whether oleomargarine could "be wholly excluded from importation into a state from another state where it was manufactured" upon the idea that it was an injurious commodity, the court reiterated its ruling made in Leisy v. Hardin, cited above, and held that an importer had a right to sell this commodity in original packages, whether the same were "suitable for retail trade or not," and irrespective of the question whether a consumer or a wholesale dealer became the purchaser.

In referring to these several adjudications concerning the limits within which a state may properly exercise its police powers we are not, as we have already indicated, to be understood as entertaining the opinion that any one of them has any bearing whatever upon the case at bar. As matter of fact, we think directly to the contrary; and, as evidencing the correctness of our conclusion that the supreme court of the United States has never departed from the doctrine that the taxing power of a state is coextensive with its jurisdiction over property of a nonresident brought within its borders, we confidently cite Transit Co. v. Hall, 174 U. S. 70, 18 Sup. Ct. 599, 43 L. Ed. 899, wherein it was held that a state could lawfully impose a revenue tax upon transient railway cars, notwithstanding "the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce," and paid only casual visits to the state in the course of extended peregrinations covering this entire country. Our real purpose in calling attention to what that court has said in regard to the right of an importer to sell his goods in the original packages in which they were shipped is (1) to point out that he is not exempt from taxation upon such goods, and (2) to present the argument that, even were this otherwise, Pettigrew could rightly claim no immunity from taxation, for the reason that he did not attempt to dispose of goods in the original packages in which they were shipped to him, but in every instance broke such packages, and peddled the contents thereof among his customers. We use the term "peddled" advisedly. From a purely legal standpoint, at least, he was a peddler; for, in view of the definition which our Code gives to one of his vocation, it can matter little whether an itinerant trader carries along with him a "pack, and makes immediate delivery of his wares to customers," or merely "sells by sample," and waits a day, a week, or longer, before freighting himself with goods, and undertaking to fill the orders he had previously procured by his house to house canvass. In this connection, see Range Co. v. Johnson, 84 Ga. 758,

ject herein dealt with has been under discussion do we find anything which militates against the views we have above expressed. We will therefore present but a brief review of them. In the case just cited a foreign corporation and its traveling agent, Lee, joined in an equitable petition to enjoin the enforcement against them of certain executions levied upon their property. The controlling question presented was whether or not Lee was liable for the payment of a license tax imposed upon peddlers. He did no more than exhibit a sample and take orders for goods, and accordingly, in deference to previous rulings announced by the federal judiciary which were authoritative, this court held that Lee's calling was exempt from a license tax. It is perhaps inferable from the facts appearing in that case that, after he forwarded to the company at St. Louis such orders as he procured, it there filled the same, and then shipped the goods to other agents in Georgia for delivery to the purchasers, the goods sometimes being stored in warehouses located in this state until such delivery could be made. But no question was raised as to the right of these agents to thus make delivery, nor could Lee's right to pursue his inoffensive "interstate commerce" calling without paying a license fee be in any wise affected by what they did or failed to do. For aught that was disclosed, they complied with the law as to taking out licenses. If not, the executions should have been directed against them, not against Lee or the company itself, it not being a "peddler," within the meaning of the statute under consideration. Had Lee been criminally prosecuted on the charge of confederating with other agents of the company with a view to evading the laws of this state and enabling them to carry on the business in which they were engaged without paying a license tax, it may be taken for granted that this court would not have confined itself to the inquiry whether or not his vocation was one upon which a license tax could lawfully be imposed. See Duncan v. State, 105 Ga. 457, 30 S. E. 755. What has just been said also applies to McClelland's Case, 96 Ga. 749, 22 S. E. 329. It there appeared that it was sometimes the practice of the company which he represented, when it had several purchasers at one point, to send the goods to one customer, and notify "the others to call on that one for them, allowing him fifteen cents per package for delivery." McClelland was a traveling salesman, and did not himself attempt to deliver the goods for which he solicited orders. He was prosecuted on the charge of failing to take out a license, and therefore the only question presented was whether or not he should have done so. In the case of Manufacturing Co. v. Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497, it was held that: "A specific ticular business is not violative of paragraph 3, § 8, art. 1, of the constitution of the United States, as being an interference on the part of the state with commerce between the several states, where the property employed in such business has been brought into this state, and has itself become subject to taxation therein." In support of this ruling the writer ventured to suggest (pages 122, 123, 97 Ga., page 252, 25 S. E., and page 501, 35 L. R. A.) that, as the property itself was within the state's jurisdiction, and subject to a direct tax, "upon principle the business of selling it [was] alike taxable in that jurisdiction." It appeared in the case of Walton v. City Council, 104 Ga. 757, 30 S. E. 964, that the plaintiffs were "persons engaged on their own account in a 'commercial street brokerage business,' in the course of which they [took] orders for goods to be filled by nonresident dealers," who were regular "correspondents," and with whom the plaintiffs had large commercial dealings; and, upon the authority of Ficklen v. Taxing Dist., 145 U. S. 1, 12 Sup. Ct. 810, 36 L. Ed. 601, we held that they were not exempt from a municipal tax imposed upon the class of brokers to which they belonged. In Price Co. v. City of Atlanta, 105 Ga. 358, 31 S. E. 619, there was "evidence fairly warranting a finding that goods manufactured in another state were shipped in large quantities to a warehouse located in this state, and at that point divided and distributed among a number of customers, who, after such shipment, had purchased different articles of these goods from a person going from house to house in a given city in this state, exhibiting samples and taking orders, which were then filled from such warehouse or distributing point." It was accordingly held that "the sales so made did not in any sense constitute interstate commerce, and the person so selling became liable to a license tax as a canvasser." Precisely the same doctrine was also applied in Duncan's Case, 105 Ga. 457, 30 S. E. 755, and it was further ruled that: "When one person travels through the country as an itinerant, exhibiting samples of goods and taking orders for goods of like character, and another follows in his wake, delivering the goods thus sold, both should be regarded as peddlers when it appears that the business was thus conducted in pursuance of a scheme to evade the law of this state requiring peddlers to register and pay taxes." The question herein dealt with was incidentally involved in Chrystal v. Mayor, etc., 108 Ga. 27, 33 S. E. 810, but, as it was not necessary in that case to pass upon this precise point, no ruling thereon was made. There it appeared that the Chicago Portrait Company was conducting in this state, through agents, its business of taking orders for portraits and selling picture frames.

of the portraits ordered, delivered the same to customers and made collections. To each customer was given the privilege of "selecting and purchasing from" the company's agents in this state "a suitable frame for every portrait from a stock of frames shipped to Georgia for this purpose," but no customer obligated himself to purchase a frame, or was called upon to do so, until delivery of the portrait ordered by him was made. We therefore held that, in so far as the "sale of the frames" was concerned, this was "a Georgia business, pure and simple," with "no interstate feature." On the argument here counsel for the plaintiffs in error relied mainly on the decision of the supreme court of Louisiana in the case of McClellan v. Pettigrew, 44 La. Ann. 356, 10 South. 853, the facts of which were somewhat similar to those of the case at bar, wherein that court held that where goods belonging to a nonresident are not within the state at the time his agent solicits orders therefor, and are subsequently shipped direct to such agent merely for the purpose of filling the orders procured by him, "it is immaterial whether the sale is perfected by delivery" in that state. We cannot, however, regard this decision as even persuasive authority, for it was based wholly on what we conceive to be an entire misconception of the rulings of the supreme court of the United States in Machine Co. v. Gage and Robbins v. Taxing Dist., supra, and no argument whatever was advanced to show that it is sound upon principle. We do not think it is. On the contrary, it appears very plain to us that, when a traveling salesman so far departs from the vocation ordinarily pursued by a commercial traveler as to actually vend the goods for which he solicits orders, he ceases to be a mere "drummer" in the sense in which that term is used by Mr. Justice Bradley in Robbins' Case. We so hold upon principle, for not until further light on the subject is shed by the federal supreme court can we hope to better reflect its views than by assuming, as we do, that its decisions were intended to be construed with reference to the controlling facts upon which the same were based.

2. The ruling announced in the preceding division of this opinion disposes of the case in so far as Pettigrew, "the uncommercial traveler" of the Racine Iron Company, is concerned. Of course, property belonging to that company is not subject to levy and sale under an execution issued against its agent, it not being itself liable for the payment of his license tax. Range Co. v. Johnson, 84 Ga. 754, 11 S. E. 233, 8 L. R. A. 273; Bohannon v. Range Co. (Ga.) 36 S. E. 907. But it by no means follows that there was any occasion for granting the extraordinary equitable relief which the company failure to comply with the laws of this state. Assuming that the property levied on really belongs, not to him, but to his principal, it should have interposed a claim. Having, under section 899 of the Political Code, a clear statutory right to do so, it had no need whatever for an injunction. Judgment affirmed. All the justices concurring.

CARMICHAEL v. STATE.

(Supreme Court of Georgia. Aug. 7, 1900.)

CRIMINAL LAW—REVIEW—NEWLY-DISCOVERED EVIDENCE.

1. The supreme court will not pass upon assignments of error requiring a consideration of evidence, when what purports to be a brief thereof is in no sense a brief, but a full report of the examination of witnesses, embracing to a substantial extent palpably needless and irrelevant matter.

2. Newly-discovered evidence, the only effect of which, if believed, would be to show that a witness sworn at the trial afterwards made statements conflicting with his testimony, affords no cause for reversing a judgment denying a new trial.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Walter Carmichael was convicted of burglary, and brings error. Affirmed.

Felix N. Cobb, E. B. Merrell, and J. L. Cobb, for plaintiff in error. T. A. Atkinson, Sol. Gen., for the State.

LUMPKIN, P. J. The plaintiff in error was in the superior court of Carroll county convicted of burglary, and excepted to a judgment overruling a motion for a new trial. The motion contains the general grounds, and also a ground based on newly-discovered evidence.

1. The document purporting to be a brief of the evidence consists of a full stenographic report of the examination of the witness introduced at the trial. It is in dialogue form, and sets forth much irrelevant matter. Even a casual inspection of it shows that there was no attempt whatever to condense or brief the testimony as the law requires. This court will not, therefore, undertake to pass upon the assignments contained in the motion that the verdict is contrary to evidence and is decidedly and strongly against the weight of the evidence. Mining Co. v. Brown, 107 Ga. 264, 33 S. E. 73; Price v. High, 108 Ga. 145, 33 S. E. 956, and cases cited.

2. The newly-discovered evidence merely tended to show that a witness sworn at the trial in behalf of the state afterwards made statements conflicting with his sworn testimony. Consequently the ground of the motion relating to this matter is, under repeated rulings of this court, without merit here. Judgment affirmed.

SAME v. ATLANTA RAPID-TRANSIT CO.

(Supreme Court of Georgia. Aug. 7, 1900.)

STREET RAILROADS—CROSSING OTHER ROADS —ADDITIONAL SERVITUDE—CONDEMNATION PROCEEDINGS.

1. Even if the provisions of Civ. Code, § 2219, are applicable to the crossing by a street railroad of any other railroad, the phrase, "heretofore or hereafter chartered by the legislature of this state," embraces a street-railroad company whose charter, though granted by the secretary of state, has been confirmed and made valid by an act of the general assembly. A company having such a charter may properly be termed one "chartered by the legislature."

2. No new burden or servitude is imposed upon a public street or highway by constructing and operating therein a street railway for the transportation of passengers, the cars of which are propelled by electric power.

3. That a street-railway company has, under its charter, authority to use steam as well as electricity as a motive power, is a matter of no consequence in testing its right in a given instance to cross a railway on a street under a municipal grant restricting the company to the use of electric power, and where it is not seeking to employ steam power.

4. A railroad corporation which is permitted to construct its tracks across an existing city street or public road does so subject to the condition that it must submit to the increased inconvenience to it which may result from the growth and development of the city or country, and the consequent increase of travel in the usual methods along such street or road.

5. A company owning and operating a street railway of the character above indicated may, under the permission of the proper municipal or county authorities, construct its lines across the track of a steam-railroad company, and use the same, without instituting condemnation proceedings, or being required to pay damages.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Actions by the Southern Railway Company against the Atlanta Railway & Power Company and the Atlanta Rapid-Transit Company. From judgments dissolving the injunction, plaintiff in both cases brings error. Affirmed.

Dorsey, Brewster & Howell and H. A. Alexander, for plaintiff in error. Goodwin & Hallman, John L. Hopkins & Sons, Rosser & Carter, King & Spalding, and Brandon & Arkwright, for defendants in error.

LEWIS, J. The Southern Railway Company brought suit in the superior court of Fulton county against the Atlanta Railway & Power Company and the Atlanta Rapid-Transit Company, corporations owning and operating lines of street railway in Fulton county, and in the city of Atlanta. The petion, in substance, alleged that plaintiff was in possession of, owned, and operated two lines of railroad, among others, leading from the city of Atlanta in a southeasterly direction, one running to the town of Ft. Valley, in said state, and the other to the city of Brunswick, Ga., and each ran through Fulton county, and crossed what is known as the Fulton. In the transaction of its business it was obliged to run and does run across said McDonough public road upon the lines of its railway a great many passenger and freight trains every day, and this renders Henderson's crossing an exceedingly dangerous and hazardous one. It alleges that the Atlanta Railway & Power Company, owning and operating a system of street railways in the city of Atlanta and Fulton county, was preparing and intending to lay its tracks across the line of plaintiff's railroad at Henderson's crossing on the McDonough road; that it had prepared everything for this purpose, and it would be accomplished unless enjoined from so doing. To permit this, it was charged, would render the use of the public crossing a constant menace of danger to the traveling public, and would at the same time do petitioner an irreparable injury in retarding the work and business in which it was engaged; would cause irreparable and perpetual damage to petitioner, resulting in delay to its business, and in accidents to both persons and property while crossing at said point. It was charged that the Atlanta Railway & Power Company was operating its street railway and proposing to cross plaintiff's track by virtue of a certificate of the secretary of state issued on May 16, 1891, which certificate was affirmed by the legislature on August 31, 1891, and denies the power and authority of the defendant, under its charter and under the law by which it is operating, to cross the track at a grade level without its consent; that the purpose to cross the track would be consummated unless it is restrained by the court; and plaintiff prayed for an injunction restraining defendant from in any manner laying its track across the lines of railroad of petitioner at Henderson's crossing, in the county of Fulton. Upon this petition a temporary restraining order was granted by the court. An amendment was added to the petition to the effect that the Atlanta Railway & Power Company was chartered by the secretary of state, and not by the legislature, and that the general law of the state regulating the crossing by one railroad of the track of another, as embodied in Civ. Code, § 2219, restricts the right of crossing the track of another railroad to those railroad companies which are chartered by the legislature, and that, therefore, defendant is forbidden by law from crossing the track of petitioner. The right of plaintiff to cross McDonough road constitutes an easement of inestimable value vested in petitioner, and that, as the owner of such easement, it has a right to operate its road on said crossing, free from any hindrance or molestation whatever, save such as is incident to the ordinary use of said road by the public. The petitioner then specifies the damages which would result to plaintiff by increased delay of its business, wear and tear of its machinery,

the facts set up therein as to Henderson's crossing being dangerous and hazardous, as alleged. So far as any danger is concerned, it is caused by plaintiff's trains and traffic crossing over a public highway which existed 35 or 40 years prior to the building of its railroad. Defendant claims a right to cross the track under and by virtue of the provisions of its charter, granted in the first instance by the secretary of state on May 16, 1891, in compliance with the general law for the incorporation of railroads, approved September 27, 1881, and subsequently confirmed by chapter 343, Laws Ga. 1890–91, p. 169, approved August 31, 1891. It denies paragraph 8 of the petition, and says the language quoted in that paragraph from the act therein referred to was not in force on May 16, 1891, when it was first incorporated, nor on August 31, 1891, when its charter was confirmed by the general assembly of Georgia. It denied that its crossing plaintiff's road will have the effect of adding to the dangerous condition of the crossing; alleges it will only have the effect of diverting the travel on said highway from private vehicles and persons traveling on foot and horseback to and upon its cars, and, as a matter of fact, the result will be to largely minimize the chances for accidents; and that the building of its street railway on said public road will not create any additional burden upon said railway, and none upon said public road. It has a legal right to cross plaintiff's tracks with its street railway at grade level along and upon said McDonough road at Henderson's crossing. Defendant prays that plaintiff be enjoined and restrained from interfering with it in the construction of its railway on said public road at Henderson's crossing, and that the temporary restraining order granted against the defendant be dissolved. The answer, as amended, also denies the material charges in the amended petition of the plaintiff. A like petition was filed by the Southern Railway Company against the Atlanta Rapid-Transit Company to enjoin it from crossing its road on a street in the city of Atlanta. It appears that this road procured a franchise from the city of Atlanta to construct and operate its line along Decatur street and across the tracks of plaintiff to the city limits. Both these street railways procured like franchises from proper authorities to operate their railroads in Atlanta, and beyond the limits of the city of Atlanta to the city of Decatur. It was conceded that the issues in these two cases were practically the same; the only difference being that the Atlanta Rapid-Transit Company also had in its charter the power to use steam, but the city conferred upon it only the power to use electricity, and it did not propose to use any other motive power in the operation of its road. After hearing the evidence for plaintiff and defendants, the court denied the injunction grounds of error alleged are as follows: (1) Under the constitution and laws of Georgia private property cannot be taken or damaged unless just compensation has been first paid; and the right of petitioner to cross Henderson's crossing was a valuable property right subsisting in it, and was embraced within the term "property" as used in the constitution; and the construction of the street-railroad tracks across the tracks of petitioner was a taking and damaging of petitioner's said property right. (2) Although it was thus preparing and threatening to take and damage petitioner's property, it had neither paid nor offered to pay, nor had it taken any steps to ascertain, the damages that petitioner would suffer by such crossing of its tracks. (3) The acts of the defendant of building its tracks across the tracks of petitioner without first paying just compensation for damages inflicted was an unlawful trespass upon petitioner's rights, and without authority of law. (4) For the acts complained of petitioner was remediless at law, and could receive adequate relief only in a court of equity. (5) The evidence and pleadings show that the defendant, the Atlanta Railway & Power Company, had been incorporated by act of the secretary of state, and under the law of Georgia only those railroad companies which were chartered by the legislature have the right to cross the tracks of another railroad company at grade. The same questions were raised in the case against the transit company, except the one last mentioned; and as to this company the point as to its charter power to use steam was insisted upon.

1. One point made by the petition in this case against the Atlanta Railway & Power Company is that this company, in the light of the history of its charter, has never been incorporated by the legislature of this state, but was incorporated by certificate from the secretary of state, and that, therefore, under Civ. Code, § 2219, as the privilege of one railroad company crossing another is only given to such companies as are chartered by the legislature of this state, this defendant company has no right at all to cross plaintiff's road. We do not think, however, that a street railroad constructed on a public highway, with consent of the proper authorities having jurisdiction over such highways, needs any benefit from the provisions of section 2219. Being a public highway, it has, independently of that section, a right to cross the tracks of a railroad crossing the public road, just as any other vehicle or mode of transportation on such public road might cross the same, provided it duly obtains a license from the proper authority in charge of the street or road it proposes to use. But, even if the provisions of section 2219 are applicable to the crossing by a street railway of any other railroad, we are quite confident that the phrase, "heretofore

or hereafter chartered by the legislature of this state," embraces a street-railroad company whose charter, though granted by the secretary of state, has been confirmed or made valid by an act of the general assembly. While this defendant company originally obtained its charter from the secretary of state, the same has since been confirmed by an act of the legislature of August 31, 1891 (Acts 1890–91, p. 169). It is therein declared: "That all charters heretofore granted by the secretary of state to street and suburban railroad companies are hereby confirmed and declared to have had full effect from their dates." See Almand v. Railway Co., 108 Ga. 423, 34 S. E. 6 et seq., where the charter powers of this defendant company were thoroughly discussed by this court, and where the act of August 31, 1891, above cited, was recognized by the court as confirming by direct act of the legislature all charters theretofore granted by the secretary of state.

2. The main contention in behalf of plaintiff in error in these cases is that the defendants have no right to cross its track even on these public highways without first making compensation for the damages which would result therefrom. It is obliged to be conceded that no such damages can be claimed unless the acts of the defendants complained of would amount to an invasion of some property right of the plaintiff resulting in its injury and damage. It appears from the record that many years before plaintiff's line of railway was constructed over the highways in question they had been in use for travel by the public. The only right the railway company acquired was necessarily simply an easement to cross these highways with its lines of railway, and to transport across the same its freight and passengers. It acquired no fee-simple title whatever to any portion of the road, but necessarily received its easement subject to the right of the public to continue to freely use the highway for travel. This, of course, does not imply that the government authorities having control of these highways cannot, as the public exigencies and convenience may require,—for instance, by an increase of population in cities or towns,—add to the facilities for travel over such roads. These authorities would have as must right to grant licenses and privileges to others to use vehicles and conveyances propelled by different kinds of power for the purpose of accommodating the public, and for the public benefit, as the plaintiff company would have to increase the number of cars and engines on its line of railway, and the frequency of trips across these highways, whenever this would be demanded by the increase in its business. If, for instance, in this case, it should happen that the present business of the plaintiff company requires twice as many cars and engines now as it did soon after its first construction, can it be pretended that either the county or the municipal authorities would have a right to exact of it any pay for such further privileges before they could be exercised? Now, if these electric car companies impose no new burden or servitude upon the public streets or highways by constructing and operating thereon street railways for the transportation of passengers, the cars of which are propelled by electric power, it will necessarily follow that passing over a railway track crossing a public highway does not make them liable for any damages. As to whether or not a company engaged in the operation of electric cars upon the streets of a city or the public roads of a country would thereby impose a new servitude upon such roads, and would, therefore, be liable to damages which others might sustain in consequence thereof, seems to be an open question in this court. In the case of Floyd Co. v. Rome St. R. Co., 77 Ga. 614, 3 S. E. 3, it was decided that a railroad operated by horses on a public highway is not an appropriation of that highway to a different use. It will be seen from the facts in that case that the county of Floyd had constructed a bridge which spans a river at the foot of Howard street, in Rome, Ga., and placed it under the control and management of the authorities of the city of Rome. The Rome Street-Railroad Company was empowered by its charter to lay out, construct, equip, use, and employ street railroads in the city of Rome and Floyd county, and was given power to cross the bridge in question. That bridge was afterwards washed away. The county constructed a new one, and then sought to enjoin the street-railroad company from running its track over the bridge without paying compensation therefor. The injunction applied for was refused, which was affirmed by this court. On page 618, 77 Ga., and page 4, 3 S. E., Hall, J., delivering the opinion, said: "The laying of railroad tracks in a public highway or street does not subject it to a new use or servitude. Its use is not confined to the precise mode or kind of use which was in view at the time of the taking, but may extend to other modes which were then unpracticed and unknown." It was further announced: "A railroad operated by horses on a public highway is not an appropriation of that highway to a different use;" and it was recognized that in some states the decisions go so far as to hold that the appropriation of a highway to the use of a railroad propelled by steam would not change the use to which it was originally dedicated, while in others the contrary was held as to steam railroads. It is true this decision had reference to street railroads operated only by horse power; but we cannot conceive how, if the cars are operated by electric power, they can produce any more burden or servitude than those operated by horse power. The latter certainly, with the horse and car com-

the facilities for stopping and avoiding accidents are certainly not any greater than they would be when electric power is used. This question, however, has been passed upon by courts of last resort in other states, and we have failed to find a single case where it has ever been held that a street-car company, it matters not by what power its cars are propelled, did not have a right, after receiving a grant from proper municipal or government authorities, to use streets, and to pass over the lines of other railways that may cross such streets, without being liable in damages to such other railway companies. There is, however, abundant authority to sustain the contrary view. In Chicago & C. Terminal Ry. Co. v. Whiting, H. & E. C. St. Ry. Co., 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, it was held: "Since it is the settled law of this state that a street railway is not an additional burden to that of the easement which the general public has in the street, and that the street-railway company's right to use the street is founded on that easement, it must be held that the right of a street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. Hence it is not error to enjoin a steam-railway company from interfering with a street-railway company where the latter is proceeding to construct a proper crossing at its own expense." In that case it appeared that the steam-railway company sought to interfere with a street-railway company, which was operated by electricity, and to prevent it from proceeding to construct a crossing over the railway of the former. The street-railway company applied for an injunction and the grant of the same was sustained by the supreme court of Indiana. It was further decided in that case that the same principle applies where the crossing is in a public highway not a street. See this same case reported in 151 Ind. 577, 46 N. E. 999, in which the principle above announced was adhered to and reaffirmed. In Chicago, B. & Q. R. Co. v. West Chicago St. R. Co., 156 Ill. 255, 40 N. E. 1008, 29 L. R. A. 485, it was held: "The fact that the tracks of a railroad company are laid across city streets, and its cars permitted to pass over them, gives the company no exclusive use of the crossing, but only use to be enjoyed with the public. Erections upon a public street impose no additional servitude where they aid and facilitate its use for the purposes of travel and transportation. Permission to a street-railway company to lay its tracks in a public street is not a grant of an additional easement in the soil of the street, such road being merely a modification of the existing public use, adding thereto an additional mode of conveyance, and inflicting no damintended to lay its tracks and operate its cars by animal power only, although it had the right to use cable, electric, or other motive power. In Elizabethtown, L. & B. S. R. Co. v. Ashland & C. St. Ry. Co., 96 Ky. 347, 26 S. W. 181, it was held: "When a railroad company has obtained the right to pass over a turnpike by the permission of those controlling the road, the right thus acquired is not exclusive of the rights of the public, or of such uses and purposes as those for which public highways and streets are established, among which uses are the establishment and operation of street railways. Therefore the railroad company has no such property rights in the crossing as entitle it to compensation from a street-railway company crossing its track at that point, the progress of the cars of the former not being unreasonably impeded or interfered with." It seems from that case that the charter of the street railway empowered it to use steam, horse, or other propelling power for the transportation of its passengers. Counsel for plaintiff in error seek to distinguish that case from the one at bar by reason of general and special legislation, and special grants to the street-railway company; but we fail to see from the record and report of that case that the street railway had any more special grant of power to use the streets and highways where it had its road in operation than the defendants in this case have under the law and the licenses granted them to use the street and highway in question. In Railroad Co. v. Steel, 47 Neb. 741, 66 N. W. 830, it was held: "A railroad company which has by ordinance acquired a permanent easement in the streets of a city is not entitled to compensation from a street-railway company as a condition to the crossing of its tracks by the latter under a grant of power from the city." See the able opinion of Post, C. J., on page 746, 47 Neb., and page 831, 66 N. W., et seq., and authorities he cites. The following is the conclusion of his opinion: "The doctrine of the cases cited, and which to us appears altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets crossed by its tracks with the consent of the city or other municipal body, but must enjoy the right so conferred in common with the general public; that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities; and that any mere inconvenience suffered by it on account of the crossing of its lines by the tracks of street railways by permission of the proper authorities is damnum absque injuria." See the same principle enunciated in Texas & P. Ry. Co. v. Rosedale St. Ry. Co., 64 Tex. 80, where it was held: "Streets are acquired, establish-

, and maintained for the accommodation d convenience of the inhabitants and the neral public, and may be used for the nvenience of the public by the ordinary ides of conveyance operated upon such eets, the chief of which, in this case, was : street railway. Railroad companies ve not the exclusive right to a public ssing, but are restricted by public conlience and necessity." In the case of nsas City, St. J. & C. B. R. Co. v. St. ieph Terminal R. Co., 97 Mo. 457, 10 S. 826, 3 L. R. A. 240, it appears that a raild company obtained from the city the ht to keep and maintain its tracks and itches upon certain land, and to construct h other tracks, switches, and turnouts n the land and across a street, when ned, as it deemed necessary for the nsaction of its business. It was there d that such reservation was not the grant an exclusive privilege, but only equivat to the usual permission to occupy the et with its tracks, and plaintiff was not itled to compensation from the defendant road company laying its track along the et by permission of the city, and across intiff's track therein; nor can it enjoin endant from so laying its track, when horized by the city to do so. See, also, Bois Traction Pass. Ry. Co. v. Buffalo & P. Ry. Co., 149 Pa. St. 1, 24 Atl. 179. eral of the states whose decisions are ctly in point, and which are cited above, e provisions in their constitutions sim- to ours, to the effect that private prop- shall not be taken or damaged for pub- purposes without just and adequate comsation being first paid. The states red to are Nebraska, Illinois, Missouri, tucky, and Texas. Authorities might nultiplied to sustain the principle herein ounced, but we deem it entirely unnecry.

It is contended, however, that one of e defendants in error, to wit, the Atlanta id-Transit Company, has in its charter ority to use steam as a propelling power its cars, and that the weight of author- s that steam railways constitute a bur- and servitude upon a public street. A plete answer to this is that by the li- e or franchise granted by the city of At- a to this company it is authorized only se electric power, and there is nothing in record to indicate that it ever intends to anything else. We do not mean to say its use of steam instead of electricity as propelling power would necessarily deprive the right to cross this track at the point uestion without being liable in damages ne plaintiff railroad company. Whether ot a street or suburban railway consti- a burden upon streets or highways in a or country does not depend so much upon motive powers used in propelling the as it does upon the character and nature siness it transacts. For instance, what nown as a "commercial railway," which carries not only passengers, but quantities of freight, from one portion of the state to the other, and even from one state to another, in traversing public highways of the country or streets of a city would necessarily constitute a greater burden and servitude upon such highways or streets than an ordinary car of a street or suburban railway, whether propelled by steam, cable, electricity, or otherwise, which has for its purpose simply the transportation of passengers from one point to the other on the streets of a city, or to adjacent places in the contiguous country. A marked difference between the two systems is that the former often carries long trains of passengers and freight cars over its line, and is not intended at all for the accommodation of the public desiring to go from one portion of the city to the other, while the latter ordinarily uses one car, and facilitates the transportation of passengers desiring only to go short distances between different points in the city. Hence it is that the decision of this court in Georgia Midland & G. R. Co. v. Columbus Southern Ry. Co., 89 Ga. 205, 15 S. E. 305, and which was relied on by counsel for plaintiff in error, has no application whatever to the facts in the present case. It was there decided in the headnote: "Without first making compensation for the damages which will result therefrom, one railway company cannot lay and use its track across the track of another railway company located in a public street of a city." It will be seen from the facts in that case that it was a contest between two commercial railway companies, and the city of Columbus constituted a terminus of each of these lines of railway. It was complained in the case that the petitioner constructed its depot, roundhouses, etc., on the depot grounds. The lands for terminals of defendant, with its depot site, side tracks, etc., lay east of petitioner's property, and that it was entirely unnecessary for it, in order to make its proper connections, to construct a side track just north of petitioner's depot grounds at a point where is located the travel and entrance to petitioner's grounds, thus unnecessarily increasing damage, delay, hindrance, inconvenience, and risk of accidents to the plaintiff at a point where its traffic of every sort passes. It will thus be seen that there is no analogy whatever between that case and the present one, where the defendant roads, under grant of authority from proper sources, are running their lines along the streets and public highways for the benefit of the public itself. Neither has the case of Campbell v. Railroad Co., 82 Ga. 320, 9 S. E. 1078, any application whatever to the case we are now considering. It was there decided: "The construction and operation of a horse railway in the public streets of a city by authority of the legislature and the consent of the city government, whether it be a new burden upon the streets or not, does not entitle a private individual to compensation therefor, unless the construction or operation of such railway works

be shown to have damaged the property, they should be considered in arriving at the amount of the recovery; but, if they amount merely to inconvenience or discomfort to its occupants, they are not an element of damages, and should not be so considered." It appears in that case that the railroad company had permission from the legislature and the city council to lay its track in the streets where it pleased. In this particular place it elected to lay its track near the sidewalk of plaintiff's residence, and it was contended that the unceasing passage of cars so near the entire front of petitioner's property would effectually cut off all safe entrance to or exit from the front of said property to any kind of vehicle. The marked difference between that case and the present one is that the plaintiff there owned the absolute title to the abutting lot. We think the principle therein decided was correct. Under the provisions of the constitution which requires compensation to be paid not only for property taken in the exercise of eminent domain, but also for property damaged thereby, this necessarily implies that for a direct invasion of any legal right of property pertaining to its ownership and enjoyment which results in material damage to the property the owner must first be compensated, whether it has been seized or not. One of the rights pertaining to the ownership of a home, for instance, is free and comfortable ingress and egress thereto; and this right cannot be interfered with, even for the public good, to the extent of causing material damage to the market value of the property itself, without compensation being paid in advance to the owner.

4, 5. But in the present case we fail to see that the defendants have invaded, or were seeking to invade, any legal right of plaintiff. As above indicated, when the plaintiff was permitted to construct its track across an existing street or public road, it did so subject to the condition that it must submit to the increased inconvenience which might result from the growth and development of the city or country, and the consequent increase of travel in the usual methods along such street or road. It acquired only an easement; that is, a privilege of crossing this street and road in the transportation of its freight and passengers. It may be that the crossing of defendant's tracks over this street and highway will cause inconvenience to the plaintiff, but, as we have above demonstrated, this use thereof by the defendants, instead of constituting any burden or servitude upon them, is intended for the convenience and benefit of the traveling public on these streets. The question as to whether or not their construction was necessary and important in order to accomplish such a purpose has been passed upon by tribunals constituted by law to decide such issues. There is nothing in the record to show any abuse whatever of the exercise of that power. the same subject to any increased inconvenience which might arise by reason of the demands or wants of the public for greater facilities for traveling. Cleveland v. City Council, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638. We are at a loss, therefore, to see how any legal right of property of the plaintiff will be invaded, or in any wise affected, by the exercise of the rights and franchises which the street-railway companies are attempting to use in the present instance. It follows from the above that no legal right of plaintiff has been encroached upon, and none of its property has either been taken or threatened to be taken or damaged in contemplation of law. The companies, therefore, owning and operating street railways of the character above indicated, may, under the permission of proper municipal or county authorities, construct their lines across the track of the plaintiff, and use the same, without instituting condemnation proceedings, or being required to pay damages. The court did not err in denying the injunctions prayed for or in dissolving the restraining orders which had been previously granted. Judgment in each case affirmed. All the justices concurring.

CAMP et al. v. DIXON et al.

(Supreme Court of Georgia. Aug. 7, 1900.)

TRESPASS TO REALTY — INJUNCTION — TITLE OF PLAINTIFF—DEED—POWER OF ATTORNEY.

1. In order to bring an application for injunction within the provisions of section 4927 of the Civil Code, as amended by the act of December 20, 1899 (Acts 1899, p. 39), it is essential for the plaintiff to show either that he "has perfect title to the land upon which the timber is situated," or that he "has perfect title to the timber" thereon. The "perfect title" must appear upon the face of the paper or papers, an abstract of which the plaintiff tenders for the purpose of showing such title; and, unless it does so appear, the requirement that the plaintiff should allege insolvency of the defendant, or that the damages will be irreparable, is not dispensed with.

2. When, therefore, as a part of the plaintiff's chain of paper title, it appears that a deed constituting a part of the same was executed under a power of attorney, in which there was a recital to the effect that the maker thereof had empowered the attorney in fact therein named to convey the title to the timber on the land therein referred to, subject to a time reservation in the maker's favor, the papers in question did not show a perfect title.

3. The plaintiffs in the present case did not show a perfect title, and neither alleged nor proved insolvency of the defendant, nor that their damages would be irreparable. There was, therefore, no error in denying the injunction; the more especially as the judge required of the defendant a bond which was, in his judgment, sufficient to protect the rights of the plaintiffs.

(Syllabus by the Court.)

Error from superior court, Echols county; A. H. Hansell, Judge.

[redacted]

firmed.

J. L. Sweat, for plaintiffs in error. S. T. Kingsberry & Son, Charlton & Charlton, and W. M. Hammond, for defendants in error.

COBB, J. The general rule is that equity will not interfere to restrain a trespass unless the injury is irreparable in damages, or the trespasser is insolvent. Civ. Code, § 4916. An exception to this rule is found in section 4927, Id., which declares that in all applications to enjoin the cutting of timber for sawmill purposes, railroad ties, and bridge timbers for railroad purposes, or the boxing or otherwise working the same for turpentine purposes, it shall not be necessary to aver or prove insolvency, or that the damages are irreparable, "provided, the petitioner has perfect title to the land upon which the timber is situated, and shall attach an abstract of his title, stating the name of grantor and grantee, date, consideration, and description of property, names of witnesses, when and where recorded, to his petition, and produce the original titles before the judge"; the petitioner being required to give such bond as the judge, in his discretion, shall deem proper to answer the damages which the defendant may sustain by reason of the granting of the injunction. By an act approved December 20, 1899 (Acts 1899, p. 39), the section just referred to was amended so as to make the provisions of the same apply not only to cases where the petitioner has perfect title to the land, but also to cases where he may not have perfect title to the land, but still have "perfect title to the timber upon" the land. In Lumber Co. v. Bullock (Ga.) 35 S. E. 52, it was held: "The 'perfect title' which will, under section 4927 of the Civil Code, relieve an applicant for an injunction from averring and proving the insolvency of the defendant, or that the threatened damages will be irreparable, must be a duly-executed paper title, the exhibition of which will show both the 'right of possession' and 'the right of property' in the plaintiff. A paper title not meeting these requirements, or a title resting in parol, will not bring an injunction case within the provisions of this section." The "perfect title" to the timber necessary to bring a case within the provisions of section 4827 of the Civil Code, as amended by the act of 1899, is exactly the same character of title as was required before that act was passed, when the petitioner was the owner of the land. What was such a title when the petitioner was the owner of the land is clearly set forth in the case above cited. In the present case the title to the timber produced before the judge consisted of a grant from the state to Thomas Taylor to the land upon which the timber was situated; a deed from the heirs of Taylor to Rollin J. Nelson to the land upon which the timber was situated; above mentioned, the power of attorney containing the following recitals: "It is understood that I, said Rollin J. Nelson, heretofore conveyed timber on all said land now situated in Clinch county, Georgia, to Alma S. Cleveland, by a bill of sale dated January 23, 1898, with time limited as therein stated; also that I conveyed to Ebenezer Wakely the timber on said land in the other said county of Echols, heretofore mentioned, in the state of Georgia, with time limited as therein stated and in the renewal attached to this bill of sale; and this power of attorney is subject to the rights of said Alma S. Cleveland and Ebenezer Wakely, and to their vendees, if any, holding by and through such bills of sale from me to said Cleveland and said Wakely, to which reference is had." The next link in the chain of title was a lease from Nelson, by Wakely, as attorney in fact, to the plaintiffs, conveying the timber upon the lots in Echols county referred to in the power of attorney. Applying the rule laid down in the case above cited, this did not constitute a "perfect title" to the timber, there being an interest in the same outstanding in Wakely. It was sought to remedy this defect by an affidavit of Wakely to the effect that the time limitation referred to in the power of attorney had expired, and that he disclaimed all title and right to the timber in question. The evidence contained in this affidavit could not be looked to for the purpose of curing the defect in the paper title. In order to authorize an injunction to issue in such a case as the present without an allegation of insolvency or irreparable damage, the plaintiff must show a perfect title upon the face of the papers presented by him, and constituting his chain of title. If such papers do not show upon their face a perfect title, aliunde evidence will not be admitted to explain the defects in the title apparent upon the face of the papers, and the injunction must be denied when the plaintiff has failed to aver and prove either the insolvency of the defendant or that the threatened damage will be irreparable. In the present case there was no error in denying the injunction; especially so as the court required of the defendants a bond which was, in its judgment, sufficient to protect the rights of the plaintiffs. Judgment affirmed. All the justices concurring.

FLOYD v. FLOYD.

(Supreme Court of Georgia. Aug. 7, 1900.)

TROVER—EXEMPTIONS—PROPERTY SET APART TO WIFE.

When, on application of a husband, personal property belonging to him was set apart as an exemption for the benefit of his wife, no change in the title of the property occurred. While by such exemption the wife, as beneficiary, was entitled to have the proceeds of such

of the husband is that of a trustee; and while, by proper proceedings, the wife may subject the income of the exempted property to her support, she is not entitled to recover possession by an action of trover.

(Syllabus by the Court.)

Error from superior court, Wayne county; Joseph W. Bennett, Judge.

Action by Rosa Floyd against Mose Floyd. Judgment for defendant, and plaintiff brings error. Affirmed.

Jas. R. Thomas and L. L. Thomas, for plaintiff in error. Jas. W. Poppell and D. M. Clark, for defendant in error.

PER CURIAM. Judgment affirmed.

MUTUAL LIFE INS. CO. OF NEW YORK v. INMAN PARK PRESBYTERIAN CHURCH.

(Supreme Court of Georgia. Aug. 7, 1900.)

UNINCORPORATED CHURCH—RIGHT OF ACTION.

An action in the name of an unincorporated "church," purporting to be brought "by" named persons as its officers and trustees, is not maintainable, nor can the petition in such a case be so amended as to make it an action in the name of those persons for the use of the church.

Little, J., dissenting.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by the Inman Park Presbyterian Church, by George E. King and others, against the Mutual Life Insurance Company of New York. Judgment overruling a demurrer, and defendant brings error. Reversed.

Jas. H. Gilbert, for plaintiff in error. Rosser & Carter, for defendants in error.

LEWIS, J. Suit was brought in the city court of Atlanta in the name of the Inman Park Presbyterian Church, of Fulton county, by George E. King and others, certain of its officers and trustees, against the Mutual Life Insurance Company of New York, for the sum of $1,339.54 principal, $515.00 of which indebtedness was upon an open account, and the remainder thereof was upon 19 promissory notes, aggregating $836.64 principal. To this petition the defendant demurred on the general ground that it sets forth no cause of action; and on the special grounds that it does not appear from the petition that the Inman Park Presbyterian Church, named as plaintiff, has capacity to sue; and, further, because it affirmatively appears upon the face of the petition that the account and notes upon which the suit is based were and are not the property of plaintiff, but were at the time of filing said suit therein alleged to be the er the privilege of amending its petition to meet the special grounds of the demurrer. In the amendment the first paragraph of the petition was stricken. It was admitted that the Inman Park Presbyterian Church was not a corporation, but was an unincorporated association, the business affairs of which were conducted for the church by the officers named in the original petition; and they asked to be allowed to proceed with the case for the benefit of the Inman Park Presbyterian Church, and that they might have judgment against the defendant for the amount of principal and interest that might be shown to be due by defendant on the claims sued upon. This amendment was allowed, and error is assigned on the judgment of the court overruling the demurrer and allowing the amendment.

We think the court clearly erred in not sustaining the demurrer and dismissing the plaintiff's petition. This was a suit originally instituted in the name of a certain designated church, which was suing by certain of its alleged officers. The record shows that the association named as a certain church in the petition was never incorporated. A suit can only be maintained by or in behalf of a natural or artificial person. The plaintiff in the present case evidently was neither, and it follows from this that, the action being instituted by no one having capacity to sue, there was nothing in the petition to amend by, and hence the court erred in allowing the amendment. The demurrer should have been sustained, and the petition dismissed. This principle is decided in the case of Wilkins v. Episcopal Church, 52 Ga. 351, where it was held: "A religious society, which is not incorporated according to law, or which has not recorded its name and objects, * * * cannot be sued as such. Its members are liable on its contracts as joint promisors or partners." See, also, Jones v. Watson, 63 Ga. 679, 680, where the amendment offered was similar to the one in the case at bar. The case of Barbour v. Albany Lodge, 73 Ga. 474, was a suit against certain lodges of Masons, designating them by name. The petition did not allege either that the defendants were corporations or that the members were partners, so as to be sued as such. It was there held by this court that there was no party defendant in the case, and a demurrer was properly sustained. It was further held that, as no person was sued, no case was in court, and there was nothing to amend by. We do not think there is anything in the case of Lumber Co. v. Rogers, 85 Ga. 587, 11 S. E. 867, at all in conflict with our decision in this case. That was a suit brought by the plaintiff for the purpose of recovering for material furnished for and used in the erection of a college

lding. Whether the college had been ac-
lly incorporated or not could have had
effect upon the equity of plaintiff's claim,
) certainly had an equitable lien upon the
perty which had been improved by the
nishing of material, and the building
premises were liable for the payment
he debt. Neither is the case of Josey v.
st Co., 106 Ga. 608, 32 S. E. 628, in
it. It was there held: "A voluntary
ciation of persons organized for reli-
is purposes, which has regularly ap-
ted trustees to hold and manage its
perty, is liable to have such property
ected to the payment of money furnish-
'or the use of such trust estate, under
eedings authorized by statute." We do
mean to say that an association organiz-
is a church, although unincorporated,
not, through its regularly appointed
tees, institute a suit for the recovery or
ection of its property. How the trus-
in this case were appointed does not ap-
. Civ. Code, § 2357, seems to imply that
societies may, upon the conditions
in named, be capable in law of suing
being sued in any action involving their
s, but the condition is expressly there-
id down that such societies "shall have
ded the name, style, and objects of
association." This act was in force
the decision of Wilkins v. Episcopal
ch, 52 Ga. 351, above cited, was ren-
l, and that decision was based upon a
ruction of that act. See Acts 1855–56,
2. We know of no decision of this
which takes this case out of that rul-
t not appearing in the present instance
the church suing as plaintiff has ever
such a record as required by that
te. Judgment reversed. All the jus-
concurring, except LITTLE, J., dis-
ng.

'HERN BELL TELEPHONE & TELE-
GRAPH CO. v. CASSIN et al.

reme Court of Georgia. Aug. 9, 1900.)

N FOR WRONGFUL DEATH—RELEASE BY PARTY INJURED—EFFECT.

n action for the homicide of a husband or
, alleged to have been occasioned by a
nl injury, is not maintainable when it
's that he, while in life, voluntarily set-
ith the wrongdoer therefor, and dischar-
e latter from all liability for the dam-
esulting therefrom.
nat a husband or father who, in conse-
of the negligence of a telephone company,
d personal injuries from which he died,
hile in life, received from the company
mpensation for the tort to himself, does
eat the statutory right of the widow or
n to bring an action against the company
homicide. Per Cobb and Lewis, JJ., dis-

the trial of such an action the plaintiff is
to recover the full value of the life of the
d, irrespective of any amount which may
een paid to him by the company. Per
nd Lewis, JJ., dissenting.
nbus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by G. A. Cassin and others, by next friend, against the Southern Bell Telephone & Telegraph Company. Judgment for plaintiffs, and defendant brings error. Reversed.

Burton, Smith, Dorsey, Brewster & Howell, for plaintiff in error. Arnold & Arnold and Bray & Arnold, for defendants in error.

SIMMONS, C. J. George Cassin was injured by the plaintiff in error May 6, 1892. He instituted suit, and while the action was pending the company paid him $2,500, taking a receipt stating that it was "in full settlement of my action against said company now pending in the city court of Atlanta, and also in full settlement of all and any claim for damages on my part arising out of the injury received by me on or about May 6th, 1892." More than five years after the injury, Cassin died, and his widow thereupon brought suit against the company for his homicide, alleging that his death was caused by the injury negligently inflicted by the company. She, too, died, and the suit was then continued in the name of the children. The evidence as to the cause of the death of Cassin was conflicting; one physician testifying that it was due to apoplexy, superinduced by Cassin's habit of body, and great mental distress, caused by domestic afflictions. Another physician testified that it was caused by the blow from the fall of the telephone cable. The company offered in evidence the receipt given by Cassin in settlement of the damages, and the court excluded it.

The technical rule of the common law, preventing a wife or child from recovering damages for the death of a husband or father, was a great hardship. There was a crying demand for the enactment of a law which would give a cause of action against "the person who would have been liable if death had not ensued," and in 1846 was passed Lord Campbell's act,—the first of a series of acts giving such remedy. At the present time like statutes exist in nearly all of the states of the Union, and none more liberally protect the rights of the wife and children than does that in Georgia. In many of the states, while there is no limit to the amount of damages recoverable for personal injury, there is a limit in case of death; some providing that the verdict, in case of death, shall not exceed $5,000, and some that it shall not exceed $10,000. In others, while there is no statutory limit to the amount of the verdict, the widow or children are only entitled to recover the "pecuniary value" to them of the father or husband, and in arriving at this pecuniary value the jury must consider and deduct at least what he would have spent on himself. But so liberal to the wife and children are the provisions of our law, that, when the

life of the deceased, without deduction for his necessary and personal expenses,"- a provision which, "to say the least, is a harsh rule, and must be strictly construed." Smith v. Hatcher, 102 Ga. 160, 29 S. E. 163. The proposition relied on by defendants in error, if correct, exactly doubles the operation of a statute which has already gone a bowshot beyond that of any other state; for it is claimed that this act gives the widow the full value of the life of the husband, even though he in his lifetime had received from the defendant compensation for the injury inflicted, and that evidence of the release cannot be introduced, either as a bar to her recovery, or to be considered by the jury in reducing the amount of the verdict. A decision which would announce, to persons who have settled with parties injured, that the settlement, instead of being in full, was only partial; that, if death ensues as a result of the injury, they must pay again, and this time the full value of the life of the deceased,—will be justly regarded as a great hardship, and it will come to the widow and children, not as the grant of a right heretofore unjustly withheld, but as a second payment of a claim already satisfied.

Examining the decisions in England under Lord Campbell's act, and the decisions under similar statutes enacted by the various states in the Union, we find that sometimes the right of action is vested in the injured party, and survives to his personal representatives or family. Sometimes a cause of action for the death is given to the personal representatives, who sue for the benefit of his estate, or sometimes for the benefit of persons who are dependent on him. In such cases the personal representative is trustee for these beneficiaries, and not for the estate. In other cases the widow or children are given directly the right of action for the death of the husband. But these differences are all incidental. Tiff. Death Wrongf. Act, § 24. Each of these statutes had the same purpose as our own. Differing as to details, they are all intended to give the personal representatives, or the members of the family, or whomsoever the plaintiff might be, a right to recover against "the person who would have been liable if death had not ensued." In Littlewood v. Mayor, etc., 89 N. Y. 24, 42 Am. Rep. 271, the court had under consideration an act giving the personal representative a cause of action for death, and said: "The main purpose was to deprive the wrongdoer of the immunity from civil liability. The entire gist of the first section is that the wrongdoer shall be liable to an action for damages notwithstanding the death of the person injured. It does not provide that the wrongdoer shall be liable notwithstanding * * * any other defense he might have had at the time of death, but merely that the death of the party statutes are absolutely silent as to the effect of settlements made by the husband in his lifetime, and yet notwithstanding this silence the courts have generally held that such settlement was a bar to another suit against the same party, as the act was not intended to "give two actions for a single injury." Sawyer v. Perry (Me.) 33 Atl. 660. Some of these decisions had been rendered before our act of 1887, and are fairly to be presumed to have been within the knowledge of the legislature when revising the law on the subject of death by wrongful act. If that body had intended to change this well-known construction as to the effect of settlement, it would have said so. Its silence is to be taken as more indicative of approving than disapproving this line of cases. For many years the court has permitted a widow, and, if no widow, the children, to recover for the homicide of the husband or father. During that period hundreds of instances have occurred in which the husband was injured, and has received compensation therefor. In the very nature of things, many of these physical injuries impaired health, and probably hastened death, and yet no suit therefor has until within recent years been brought by the widow of such person. Evidently, by the common understanding of the community, payment to the husband—accord and satisfaction between him and the defendant—was regarded as a settlement of all liability growing out of the negligent act. See Lubrano's Case (R. I.) 32 Atl. 207, 34 L. R. A. 797. We feel safe in saying that many adjustments have been made upon this idea which would not otherwise have been made, and that giving to the statute the effect now insisted upon would not only be a great hardship upon defendants who, relying and acting upon the heretofore generally accepted view of the law, have paid their money and bought their peace, but it would be giving to widows something which they did not expect, where a settlement had been made by the head of the family.

But it is said that no decision that a release by the husband bars a subsequent suit by or for the wife is of any value in this case, unless it was rendered by a court which holds that the survival and death acts create new and distinct causes of action. This, therefore, must be borne in mind in estimating the weight of the authorities cited. In reading them with this prominently in view, it is remarkable to note the various expressions used in the effort to define the relation which the action by or for the widow bears to the action in favor of the injured husband. Some—in fact, all—of the courts may be said to call it a "new cause of action," as in Railroad Co. v. Bass, 104 Ga. 390, 30 S. E. 874. Some call it a "new, but not an independent, cause of action." Cooley, Torts, 264, speaks of it as an "en-

tinguished during the life of the injured party, it survives, and may become two causes of action. Others say, "The cause of action for the homicide is contingent on the death of the injured party without having satisfied his claim for damages." But, notwithstanding this variety of expressions, there is substantial unity in holding that a release by the husband bars the wife; this view being taken even by those courts which insist most strongly that the two acts create two causes of action, and by courts, also, which rule that concurrent suits may be maintained. However new it may be, in the very nature of things it cannot be independent. It is inherently rooted and grounded in the injury to the husband. It grows out of it, and is a part of it, having almost complete identity of substance, and subject to the same defenses. More than a dozen courts have directly passed upon the effect of a release by the husband, and all except those of Massachusetts and Kentucky have held that it bars a suit after his death. Com. v. Boston & L. R. Corp., 134 Mass. 211; Com. v. Vermont & M. R. Co., 108 Mass. 7; Donahue v. Drexler, 82 Ky. 157; Railroad Co. v. McElwain (Ky.) 34 S. W. 236, 34 L. R. A. 788; Littlewood v. Mayor, etc., 89 N. Y. 24, 42 Am. Rep. 271; Legg v. Britton (Vt.) 24 Atl. 1016; Hill v. Railroad Co. (Pa. Sup.) 35 Atl. 997, 35 L. R. A. 196; Hecht's Case (Ind. Sup.) 32 N. E. 302; Fowlkes v. Railroad Co., 9 Heisk. 829; Holton v. Daly, 106 Ill. 131; Price v. Railroad Co. (S. C.) 12 S. E. 414; Town of Walkerton v. Erdman, 23 Can. Sup. Ct. 352; Read v. Railway Co., L. R. 3 Q. B. 555, decided in 1868, and other English cases. To which may be added the positive dicta in the Sweetland Case (Mich.) 75 N. W. 1066, 1078, 43 L. R. A. 568, both in the concurring opinion of Long, C. J., and in the dissenting opinion of Hooker and Montgomery, JJ., and the equally positive statement of the supreme court of Wisconsin in Brown v. Railroad Co., 78 N. W. 773.

The right of the plaintiff to recover in this case notwithstanding the release is said to grow out of the language of our statutes, creating two causes of action,—one for the injury, and the other for the homicide,—and that a settlement of one is not a settlement of the other; it being urged that the survival act of 1889 (Code, § 3825), when construed in connection with the death act (Code, § 3828), logically supports the theory that the two suits may proceed concurrently, and that a recovery for the injury would not be a bar to a recovery for the death. And Railroad Co. v. Phillips, 64 Miss. 693, 2 South. 537, and Davis v. Railway Co., 53 Ark. 117, 13 S. W. 801, which are relied on, certainly sustain the proposition that "concurrent suits may be maintained." But the right to maintain concurrent suits is not involved in this case. What are we to determine the cause of action, neither single nor concurrent suits can spring therefrom. If, however, no release has been signed, and the injured party dies, leaving in force a live cause of action, there might arise the question whether from this living germ only one suit, or concurrent suits, could spring. If a release wipes out the wrong done by the defendant, and makes it as though no injury had been suffered, then upon the death of the injured party there would be no cause of action, just as though there had been no injury; and it would not be a question as to the right to maintain two concurrent suits, but as to the right to maintain any suit at all. It is perhaps improper to consider the act of 1889 (Code, § 3825) as strictly a survival statute; for it does not create or preserve a cause of action, as such, though it does preserve pending suits. It is not so much a survival statute as one to prevent the abatement of cases actually in court; for, if the injured party dies before bringing suit, his administrator could not institute an action for the pain, suffering, and diminished capacity to labor, as was expressly held in Frazier v. Railroad Co., 101 Ga. 79, 28 S. E. 662. The act of 1889 is by no means so broad as the survival statutes of some of the other states, which do preserve the cause of action for an injury, whether a suit had been brought thereon, or not, in the lifetime of the injured party. But, even if we treat the act of 1889 as being a survival statute, in the fullest sense, and then undertake to discuss the right to maintain concurrent suits, we would be no nearer a solution of the difficulty, so far as the authorities are concerned; for it will appear the courts have been frequently called on to determine what effect the survival act has upon the death act, and vice versa,—whether the remedy under one is exclusive, or whether the two acts confer two remedies, with the right to maintain concurrent actions. The cases are more in conflict than those which pass upon the effect of a release,—at any rate, are far more evenly balanced. Some of them hold that under the survival act and the death act "two separate and distinct causes of action are created, which may co-exist, but have no connection, and that these two actions may be prosecuted concurrently." This view is forcibly presented in Needham v. Railway Co., 38 Vt. 294,—a view which is followed and elaborated in Davis v. Railway Co., 53 Ark. 117, 13 S. W. 801, Brown v. Railroad Co. (Wis.) 78 N. W. 771, and Railroad Co. v. Phillips, 64 Miss. 693, 2 South. 537. The contrary view is quite as strongly presented in Legg v. Britton (Vt.) 24 Atl. 1017 (overruling the Needham Case), Lubrano v. Atlantic Mills (R. I.) 32 Atl. 205, 34 L. R. A. 797, and Railroad Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263, where it is held that concurrent suits

the wrongful act before the judgment, the death act, and not the survival act, must be relied on. Fellers v. Fellers (Neb.) 74 N. W. 1078, col. near bottom. The Kansas court (McCarthy v. Railroad Co., 18 Kan. 46; Martin v. Railroad Co., 49 Pac. 605) and the Michigan court (Sweetland's Case, 75 N. W. 1066) are divided, so that we may fairly say the authorities are so evenly balanced on this point as to settle nothing, if it were necessary to rule as to the right to maintain concurrent suits.

The assignments of error call only for a ruling as to the effect of a release, and upon that point, also, there is some conflict, which, however, is not only more apparent than real, but the preponderance is so great as to remove all doubt,—at least, so far as it can be removed in any case by weight of authority. The Massachusetts court holds that "the husband cannot, by a settlement, bar the wife's rights"; but in that state the statute is highly penal,—the damages being limited, and recoverable by indictment, the fine being for the use of the family. Therefore in Com. v. Vermont & M. R. Co., 108 Mass. 7, it was held that "conditions on a ticket could not relieve the road from liability under a penal statute for gross negligence"; and in Com. v. Boston & L. R. Corp., 134 Mass. 211, for the same reason, it was held that want of due care in a passenger would no more be a defense to an indictment for damages than it would have been in a prosecution for murder. And where the suit was in tort, instead of by prosecution by indictment, the result was the same, for "the fact that the statute is penal must be borne in mind. * * * The remedy by indictment was extended to an action of tort. The amount in either case goes to the widow and children. * * * It is, in substance, a penalty given to them, instead of the estate, and, as such, the intestate could not release the defendant from liability for it." The same distinction must be borne in mind in considering Donahue v. Drexler, 82 Ky. 157, where the court held that a release by the husband did not bar the wife of her action given by statute, "where the husband was killed by the criminal or malicious use of firearms or other deadly weapons," and "* * * in such action the jury may give vindictive damages." The court does say that it "creates a new cause of action," but it emphasizes the fact that "this is a highly penal statute, * * * to prevent the perpetration of such acts by awarding vindictive damages." It cites the cases of Schlichtling v. Wintgen, 25 Hun, 627, since overruled, and Whitford v. Railroad Co., 23 N. Y. 467. If the fact that the statute is penal is not the underlying reason for the decision in Donahue v. Drexler, then the state of the authorities in Kentucky is in some services, the statute also gave a remedy for her homicide; the damages to be for the use of the husband. The husband insisted on both remedies, but the court held "there was no intention to multiply actions," and that the husband's action was defeated by a judgment in favor of the wife's representative for larger damages than were recoverable under the old form of action. In Leggott v. Railway Co., 1 Q. B. Div. 599, an administrator had recovered damages for the homicide, under Lord Campbell's act. Afterwards the administrator brought suit for damages to the estate arising from the "breach of the contract of carriage"; claiming that he was entitled to "recover the expense of the decedent's sickness, nursing, medical attendance, and the like." The court held that the recovery in tort did not bar the action for the breach of the contract; for, as stated by Lord Denman in Pulling v. Railroad Co., 9 Q. B. Div. 110, "there was a distinction between actions of contract and actions of tort." Pym v. Railway Co., 2 Best & S. 761; Bradshaw v. Railway Co., L. R. 10 C. P. 189; Barnett v. Lucas, 5 Ir. C. L. 140; Id., 6 Ir. C. L. 247; and the Leggott Case,—have sometimes been cited to show that they overrule or weaken the authority of the Read Case, cited supra, but without success. In Littlewood v. Mayor, etc., 89 N. Y. 24, and in Lubrano v. Atlantic Mills (R. I.) 32 Atl. 205, this was carefully considered, and the Read Case shown to be unshaken. See, also, Railroad Co. v. Clarke, 152 U. S. 237, 14 Sup. Ct. 579, 38 L. Ed. 422. Even Brown v. Railroad Co., which follows the Needham, Arkansas, and Mississippi cases, treats the Read Case as authority, and concedes that the Leggott and Bradshaw Cases are to be distinguished therefrom, and are not in conflict with it. The statement by Long, C. J., in Hurst v. Railway Co. (Mich.) 48 N. W. 46, that "satisfaction of one claim would be no bar to the other," is said by him in Sweetland v. Railroad Co. (Mich.) 75 N. W. 1068, to have been obiter.

We think the cases above cited are the very strongest which can be found in favor of the position taken by the defendant in error. It will be seen that they are based either upon penal statutes, or upon decisions which have been overruled, or that they are discussing the effect of concurrent remedies after the death of the injured party, or that the decisions themselves have been weakened by conflicting decisions in the same jurisdictions. To begin with, the English courts have held that Lord Campbell's act created a new cause of action; and yet, in the Read Case,—the first decision as to the effect of a release,—it was pointedly held "that a plea of accord and satisfaction with the deceased in his lifetime was a good bar to an action by his legal representatives." The New

rk court, in Whitford v. Railroad Co., 23 Y. 465, positively and unmistakably ruled it "the statute created a new cause of ac- n"; that "it was not a mere continuation the right of action which had been in the eased." This was reaffirmed and followed the Littlewood Case, and yet it was ruled t "this new cause of action was barred there had been a previous judgment for injury." Judge Rapallo begins the deci- n by admitting that it was a "new cause action," but says: "This is not the point which the case turns. The true question whether in enacting the statute the legis- ure had in view a case where the deceased, his lifetime, brought his action, recovered nages for the injury, which subsequently ulted in his death, and whether it was in- ded to superadd to the liability of the ongdoer, who paid damages for the in- y, the further liability in case the party erwards died from such injury." In an e and carefully considered opinion, the rt held that the payment to the deceased red the suit in favor of the wife. In g v. Britton (Vt.) 24 Atl. 1016, constru- a statute admittedly like our own, the rt said: "It is contended that the statute es a new cause of action. Strictly, it is ew right of recovery." But it was nev- eless held that where the injured party d, and pending the suit died from his in- es, and the administrator continued the and recovered judgment, that was a bar n action for the benefit of the widow. he recovery was in the right of the in- ate while living, such "recovery, in legal ct, would antedate his death, exhaust his t of action, and nothing would remain survive for the subsequent action. It ld exhaust the liability of the wrong- r, and no liability would remain, to be rced in the subsequent suit." In Penn- ania, in Fink v. Garman, 40 Pa. St. 103, court held "that the section created a r cause of action,' wholly unknown to the mon law, and the right of action was given to the person suffering the injury, e no man could sue for his own death, to his widow and personal representa- s." Yet, after quoting this language, in v. Railroad Co. (Pa. Sup.) 35 Atl. 997, as held that "the widow did not have an independent action for injuries caus- her husband's death that he could not, is lifetime, release or compound it." The e of action is the same in both cases, "a new remedy is given the widow, h had no previous existence. If he es an action and obtains judgment, which id, it must be conceded that this is the of the case. The defendant's negli- e has been tried and adjudged, and, n the judgment has been discharged by ment, it has been satisfied for all pur- s. The consequences of the transgres- have been suffered, and the penalty The statute preserves the right of re- ry, but does not give another and ad- ditional remedy to other parties for the same injury." The decision cites the Read Case, holds that a release by the injured party was a bar to an action given for the benefit of the widow, and concludes by saying, "The person injured has such a right in the cause of action as he may release the offend- ing party from all damages." In the Hecht Case (Ind. Sup.) 32 N. E. 302, it was "claimed that the statute gave a new right of action. This is true, in a certain sense. Without the statute the action could not be maintained. The right to sue is purely statutory, and in derogation of common law, and must be strictly construed." A settlement by the husband was held to bar a suit for homicide. In Fowlkes v. Railroad Co., 9 Heisk. 829, cited in the Hecht Case, it was held that as the injured party had recovered a judgment, or made a settlement or release, his personal representatives could not sue. It was ruled in Holton v. Daly, 106 Ill. 131: "If the in- jured party has released his claim for dam- ages, his personal representatives cannot sue for the homicide." In Town of Walkerton v. Erdman, 23 Can. Sup. Ct. 352, and in Price v. Railroad Co. (S. C.) 12 S. E. 414, it was held that releases executed by the injured party barred a subsequent suit for the ben- efit of the wife; the South Carolina court distinctly declining to discuss whether the statute gave a new cause of action or con- tinued the original cause of action. To these should be added the Sweetland Case (Mich.) 75 N. W. 1066, 1078, and Brown v. Railroad Co. (Wis.) 78 N. W. 773. The Brown Case most distinctly asserted the right to main- tain concurrent suits, because there were two causes of action. And yet it recognized that, though concurrent suits might be maintained, they could not be if the party injured, dur- ing his life, had satisfied the cause of ac- tion; for "the extinguishment of the primary cause of action leaves the statute with no office to perform, and only in the absence of such extinguishment are there two causes of action." The supreme court of Michigan, in the Sweetland Case, was divided as to the right to maintain concurrent actions, but there was no disagreement as to the effect of a release. There were three counts in the declaration. One for the common-law liability for pain and suffering endured by the deceas- ed prior to death, which, it was claimed, was not instantaneous, and the right of action for which, it was claimed, survived by vir- tue of the statute. The second count was for damages to certain personal property, and the third count was for the benefit of a de- pendent brother under the death statute. There was a verdict in favor of plaintiff on each count. One of the judges held that, as death was instantaneous, there could be no cause of action for pain and suffering which could survive. Long, C. J., in concurring, elaborately discusses the question as to whether survival acts and death acts cre- ate two causes of action, or only one, and reaches the conclusion that there was only

injuries, and a separate suit for the homicide. "The fact that the common-law right of action which survives is for the benefit of the deceased's estate, and that the right of action under the death act is given for the benefit of the decedent's heirs, can make no difference in the construction. It was not the intention of the legislature to give two rights of recovery for the same injury, which results in death. * * * If such judgment obtained by her in her lifetime, or settlement so made by her, is a bar to a recovery by the heirs, under sections 8313, 8314, 2 How. Ann. St. Mich., then a judgment obtained by the heirs for a cause of action accruing to them by survival under section 7397 would be a bar to the right to recover for his death under sections 8313 and 8314." Montgomery, J., in his dissenting opinion, said: "It is generally held, and we think properly, that if the deceased settles for the injury received in his lifetime, or recovers his damages in an action, an action cannot be maintained after his death under Lord Campbell's act;" citing, among others, the article in 28 Am. Law Reg. (N. S.) 385, 513, 577, where the various statutes are reviewed, and the conclusion reached "that the right of action under Lord Campbell's act was a new cause of action, and both may be maintained after the death of the injured person, supposing him not to have recovered damages in his lifetime." Hooker, J., in his dissenting opinion, said: "We find that the courts generally hold that the recovery is a bar to a subsequent action by the administrator, and we think the legislature intended that it should be. The greater number of cases discussing the question deny the dual right of recovery. * * * The various cases under different statutes are supported by different reasons, but, as already stated, they generally agree in holding that there is a single remedy." Tiffany, in his work on Death by Wrongful Act (section 124), after giving all the acts of the different states, and citing all the cases, including Lord Campbell's act and decisions thereunder, lays the rule down as follows: "If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. Thus, a release by the party injured of his right of action, or a recovery of damages by him for the injury, is a complete defense in the statutory action."

Having now fully attempted to consider the state of the authorities outside of Georgia, let us see what are the rulings of our own court. It has never had the exact question involved in this case before it, but it can be positively stated that it has never used an expression which could suggest that there might be two recoveries for the same negligence. On the contrary, every ruling ing, he too could have recovered against the defendant. The Bass Case, 104 Ga. 292, 30 S. E. 874, makes this plain. While holding that the widow's cause of action does not accrue until the death of the husband, and that therefore the statute does not begin to run until his death, yet that decision contains this distinct declaration: "What we now rule is evidently not in conflict with the adjudications of this court to the effect that, where a widow sues for the homicide of her husband, the defendant may set up any defense which might have been pleaded to the merits of the issue if the suit had been brought by the husband for the injuries to his person." This court has construed sections 3828 and 3829 of the Civil Code to mean that if the husband was an employé, and if under the fellow-servant rule, or if by reason of contributory negligence, he had no cause of action, neither has the wife. So, in a number of other carefully considered cases, these sections have been construed to prevent a recovery by the wife if the husband himself could not have recovered. Why? The statute does not say so. It simply provides that the widow may recover for the homicide of the husband, caused by crime, or criminal or other negligence. A man may be injured by the negligence of a defendant. His death may be directly attributable to that negligence, and yet, if he consented to the injury, or if by ordinary care he could have avoided the injury or gotten out of the way of the death-dealing negligence, he could not have recovered for the injury, nor could his wife recover for his death. These sections prolong or continue an old cause of action, or they enlarge the old cause of action, or they substitute a new remedy, or it may even be conceded that they give a new cause of action, but they do not deal with defenses to that cause of action. The law applicable to defenses is drawn from other sources, and in applying that law this court has repeatedly and consistently held that the wife stood in the shoes of the husband. "The widow is bound by relations they had established by contracts not illegal. The wrong she sues for must be a legal wrong,—a wrong which the law recognizes as a breach of the duty the road owed her husband. She stands in his shoes, has his rights, and takes his responsibilities." Railroad Co. v. Strong, 52 Ga. 467. In the succeeding case (Hendricks v. Railroad Co., Id. 468), the court says: "Any relation existing by contract or law between the person killed and the company which would bar a recovery by him for damages, in case he had not died, apply to and govern the right of the wife. * * * The principle which allows a defendant, when sued by a widow for the homicide of her husband, to set up any defense which would prevent or lessen the husband's re-

(Syl., point 1), that "a widow may recover for the homicide of her husband; she will have a right of action when the husband, had he lived, had such a right, and whatever would have been a good defense to his suit, had he lived, will be equally good against one brought by her." In Railroad Co. v. Maloy, 77 Ga. 242, 2 S. E. 943 (Opinion, point 6), the mother sued for the death of a minor son, and the court said: "The suit being by the parent to recover damages for the killing of a minor, she cannot recover unless, if he were in life, he could recover. She stands in no better condition than the deceased would have stood in, had he not been killed, and was present before the court."

In all these cases there is a recognition of the privity between husband and wife, or parent and child, as to the circumstances attending the killing, out of which the liability can grow. Outside of the mere acts of the deceased, the courts have recognized that this privity existed. In Lord v. Refining Co. (Colo. Sup.) 21 Pac. 148, after deciding that declarations not part of the res gestæ are not ordinarily admissible, the court held "such declarations are competent when offered by the defendant. They affect the plaintiff [widow] in a case of this kind in the same way they would have affected the deceased if he had lived and brought an action for the same injury." A similar ruling was made in Hughes v. Canal Co. (Pa. Sup.) 35 Atl. 190, in a suit by a widow for the homicide of her husband, "since the plaintiff derived her action from the deceased." "At the time his statement was made, the only right of action there was, was in him. The plaintiff had no claim until he died, and then the foundation of her claim was the injury to him. If defendant would not have been liable to him in the first instance, it was not made liable to her by his death. We are not aware of any case in which a widow has recovered for an injury to her husband where he could not have done so himself if he had survived, and, on principle, it is perfectly clear that she can never do so; for the original right of action is in him, and hers is but the succession or substitution of his, where he has not asserted it himself." In Railroad Co. v. Venable, 67 Ga. 700, the mother was injured and sued, but died before verdict. The child then brought suit for the homicide of the mother, and sought to use the mother's interrogatories, which had been sued out in the first case. The court allowed it upon the ground, among others, that the mother represented her child, both suing for injuries in the same transaction, the substantial cause being the same. In Railroad Co. v. Fitzgerald, 108 Ga. 507, 34 S. E. 316, it is distinctly ruled that the wife and husband are in other grounds. That is true, and the court so ruled, but that the controlling reason was the privity appears from the decision itself. We quote: "Her right to a recovery must necessarily depend upon a determination of the question whether or not 'the husband, had he lived, would have had such a right; and whatever would have been a good defense to his suit, had he lived, will be equally available against one brought by her.' Berry v. Railroad Co., 72 Ga. 137. In other words, she is to be considered in privity with the husband in so far as her right to complain of the homicide is concerned. It follows necessarily that the company should have been allowed to show, by any competent evidence at its command, that the injuries sustained by him were occasioned, not by the alleged acts of negligence on its part, of which complaint is made, but by other and wholly different causes. Section 5181 of our Civil Code provides, in terms, that 'the declarations and entries of a person, since deceased, against his interest, and not made with a view to pending litigation, are admissible in evidence in any case,' while section 5193 undertakes to state the rule that the admissions of privies in blood, privies in estate, and privies in law are admissible as against all persons with whom they are in privity. Accordingly, we think that in the present case the defendant company should have been permitted to prove that the plaintiff's husband, in undertaking to state the cause of his injuries, had stated that 'he was making an effort to couple cars, and that his foot struck an obstacle on the track and he fell.'" Railroad Co. v. Fitzgerald, 108 Ga. 508, 34 S. E. 317.

The Fitzgerald Case logically leads to the conclusion that the widow is barred by the settlement. To hold otherwise would be to say that the wife could be barred by what her husband said, but not by what he did; that she might be concluded by words, but not by money; that the evidence of her husband, given in the suit for his personal injuries, might be used against her in a suit for his death, but that the more solemn judgment against him would not conclude her. If the wife is in privity with her husband, it is conceded that his settlement will bind her; but, if there is no privity between them as to this class of cases, then, if the husband should sue and fail to recover, the wife, after his death, would not be bound by that judgment. She may bring suit and obtain a verdict notwithstanding the husband failed in his suit. So that not only is a settlement no bar, but neither is a verdict against the husband a bar. This would not only make the statutes penal, but it would not allow the defendant to buy his peace by paying money; nor could he secure peace by making a successful defense immediately after the in-

But, as in this case, five years after the injury, upon proof, that can oftentimes be only too easily secured, that the old injury has been the cause of the recent death, the defendant is again called into court. What is it to do? How is it to perpetuate its evidence? How is it to know whether the suit is ever to be brought or not? How is it to know whether it is liable or not? It has been acquitted of liability to the husband, but years after it is sought to make it liable to the wife. In many cases it would be perfectly easy for the wife to make out a prima facie case,—rely, say upon the presumptions against railroads,—and recover against the defendant, who was not at fault, who has been adjudged not to be in fault, but whose witnesses may have died or moved away, or otherwise become inaccessible. These are not improbable results. They are certain to follow if the contention of the defendants in error is sound. There is a reasonable bar provided by law for small claims,—for notes, for accounts, which require little or no evidence, or only written evidence; but the contention of defendant in error, if correct, will open the door of the court, years after an injury has happened, to determine questions of the most intricate character, requiring the nicest proof of exactly where the dead man was, what he was doing, what he was employed to do, who hurt him, the exact manner of the injury, and all of that elaborate and complicated balancing of conflicting evidence which is an almost invariable accompaniment of a suit for personal injuries. We cannot characterize it better than by using the language of Judge Bleckley in Telegraph Co. v. Nunnally, 86 Ga. 505, 12 S. E. 578, in discussing a statute allowing a penalty of $100 against a telegraph company. The force of what he there said is to be multiplied, because, while he was considering a statute which allowed $100, we are considering cases in which the damages will not be hundreds, but thousands. "To leave the company exposed to suits for the almost innumerable transactions of this kind for twenty years would be simply absurd." See, also, Railroad Co. v. Clarke, 152 U. S. 237, 14 Sup. Ct. 579, 38 L. Ed. 422. It is true that, even now, under the ruling in the Bass Case, these results may follow. But such cases will be exceedingly rare. Where the husband is fatally injured, and the defendant is liable, there will generally be prompt settlement or a suit. The defendant will be put on notice, and can prepare for his defense. The serious consequences to which we have referred would result from a ruling that where the husband fails to recover a verdict, or where he makes a settlement or obtains a verdict, years after, when he dies, the widow may sue, in spite of the previous trials and accord and satisfaction, when the witnesses

terposing a statute of repose; for, if the settlement is not a bar, there is practically no statute of limitations, and oftentimes no person with whom the defendant can settle. and,, even after a settlement, marriage, birth of after-born children, death of the wife, minority of the children, and the possibility that the children themselves may die during the lifetime of the injured party, all make the defendant liable to an uncertain extent as of an uncertain date, to unknown and unknowable persons.

In the nature of things, one who claims as a wife is bound by the husband's conduct. His freedom from fault inures to her benefit, but his negligence is imputed to her, when, as a quasi substituted plaintiff, she asks the court to investigate the circumstances of his killing. If his negligence in the act is imputed to her, should not, also, his conduct after the injury be imputed to her? In spite of all the recent statutes, "the husband is still the head of the family." his life is his own, and whatever right in that life the law gives to the wife must be subject to the superior right of the husband. While the law gives her the full value of that life, she takes it as he left it. If it was a valuable life, in a pecuniary sense,—if his health, his strength, his habits, were such as to give it a great earning capacity,—then great is her recovery. But if, on the contrary, he had so lived as to lessen these elements of pecuniary value,—if by idleness and vice and dissipation he had shorn himself of his strength,—the wife's right therein must be taken burdened by what he has done in his lifetime. While he lives, his life and his person belong to himself, and he must use that life and body for the support of his family. He must be left free, when injured, to settle for the wrongs which were to him, and to him alone; he must be at liberty to adjust that wrong without the amount of his settlement being diminished by the possibility or probability that the person dealing with him will have to pay a second time for the same act. The family stand to him in the relation of heirs, and, like all heirs, have no rights which can interfere with those of the living. They take what he leaves. They take under him and subject to him, and not adversely to him. Under this statute the cause of action primarily grows out of the relation between the husband and the wrongdoer, and his rights against the wrongdoer. The full value of action is in him. Only secondarily is it in the wife, and it comes to her, if it comes at all, burdened and incumbered by his conduct, his settlement, and whatever else he did in his lifetime in reference thereto. It is true, she may recover the full value of his life, but that value depends on what he was and what he did in his life-

tion into dollars and cents, and deprived his family of any further value growing out of the negligence complained of. Let us take an instance. A husband loses a limb under circumstances which entitle him to recover. He brings suit. On the trial the judge charges the jury that they may allow the plaintiff compensation for his pain and suffering, for the mortification of living as a maimed man, for all damages arising from the impairment of his health and from the shock to his nervous system; in addition, they will, from the tables, determine what was his expectancy of life at the time of the injury, and how much his earning capacity had been diminished. They will multiply the amount of this diminished capacity by the number of years he would have lived according to the table, reduce that to its present value, and that sum, plus what they allow for pain, suffering, etc., would be the amount of their verdict. Now, in the language of Judge McCay in Railroad Co. v. Johnson, 38 Ga. 409, "it is impossible to estimate the value of a life." Still, the law is obliged to measure pain and suffering and life in dollars and cents, and according to rules which are not intended to bankrupt the defendant. In all cases of this class the plaintiff himself consents that the injury shall be valued in money. When he gets a verdict the law has done all it can to make him whole. The limb and the health have been valued in the only way possible to the law. Theoretically, after he gets a verdict he has got them back, valued upon the theory that he would have lived out the full term of his life. The jury does not give him the value of his hand for one day, but for twenty years. The jury treats him as though, by a legal certainty, he would live out his allotted span, and thus restores him to himself and family sound and well. Exactly the same results flow from a settlement, because our Code (section 3935) so encourages adjustments that it "will not force parties to litigate in order to have done what they ought, and are willing, voluntarily to do." The settlement or the verdict has atoned for the wrong of the defendant. After that he may claim that whatever injury was done has been cured, and that he is no longer liable to the injured person or those who claim under him.

The substantial grounds on which the courts must hold that the husband's settlement bars the wife are based upon the fact that the wife's right in the life of the husband is subordinate to what he himself has done with his life; that, as his negligence is imputable to her, so his ratification and condonation of the wrong done him estop her; that his acceptance of payment ratifies the act, and admits that he has been made whole of his injury; that thereafter the defendant can say he has not harmed the husband, but bar, upon considerations of a public policy encouraging compromises, which would be rendered difficult, if not impossible, under the view contended for by defendants in error. The contention of the defendants in error means that, if a settlement takes place, the defendant may be called upon to pay a second time in case of death. It means double damages. It means that the statute is to be treated as penal, and not compensatory. It means that we are to lay at the door of our statute the reproach which was so often and so justly uttered against the statutes of some of the other states, as to which it was said that it was actually "cheaper to kill than to hurt." With us, hereafter, it would mean the same thing, because for the death of the husband there would only be one recovery. For his injury and subsequent death, there could be two recoveries. We have seen that statutes identical with ours in substance, having the same object in view, and intended to give the same rights, have all, or very nearly all, been construed to mean that where the husband was injured, and subsequently settled for the injury, and thereafter died from the effect of the injury, there could be no recovery by his wife for his death. She stands in his shoes. She recovers if he could have recovered. She fails if for any reason he would have failed. If he consented to the injury, she cannot recover. If he ratifies the injury by accepting compensation, she cannot recover. If by ordinary care he could have avoided the injury, she cannot recover. If he obtains judgment against the defendant, she cannot recover. What would have estopped him estops her. Not only would it be a hardship to require a defendant to pay double damages, but there are questions of public policy which cry out against such a construction,—a public policy so pronounced that it would require every reasonable doubt to be resolved in its favor. If the defendant is to pay the injured man full damages, and subsequently is to pay the full value of his life, it becomes manifest that settlements are impossible. It would operate to deprive the injured party "of the power of settling his claim or realizing anything from it in his lifetime. It would naturally, if not inevitably, prevent settlements and procrastinate litigation until it could be determined whether death would ensue from the injury. There could be little inducement to settle without suit, because whatever might be paid to the injured party would neither bar nor diminish the claim of his widow or children should death ensue. The statute should not be strained to bring about such a result, nor should it be reached unless required by the plain language of the enactment." Littlewood v. Mayor, etc., 89 N. Y. 24, 42 Am. Rep. 276, 277. Under such a construction the law, by its own act, would en-

that there should be an end of litigation." It would make it impossible to obey the injunction, "Agree with thine adversary quickly whilst thou art in the way with him;" for the defendant can properly ask, "Who is mine adversary?" He might be willing to settle, he may have agreed on terms, and yet he would be compelled to say to a husband and father: "It is impossible to say whether you will die as a result of these injuries or not, or whether when you die your wife and your children will then be living or not, or whether you will be wifeless and childless. She may consent to the settlement, but she may also die, and you may marry again. Or the wife may die and leave you children. It is impossible to settle with them, because they are minors, and, even if that were legally possible, there may be after-born children; and all of these uncertainties must be considered in our negotiations." Surely the law does not intend that any case shall be so inchoate that the person liable does not know to whom he may be ultimately liable, and cannot adjust and settle, even when he admits liability and is willing to pay. Judgment reversed. All the justices concurring, except COBB and LEWIS, JJ., who dissent.

COBB, J. (dissenting). Mrs. M. B. Cassin brought suit against the Southern Bell Telephone & Telegraph Company, alleging in her petition that she was the widow of George S. Cassin, who departed this life on the 10th day of December, 1897; that on the 16th day of May, 1892, while her husband was walking along the sidewalks of one of the streets of the city of Atlanta, the servants and employés of the defendant, who were engaged in placing a cable wire weighing about 500 pounds upon poles which were above the sidewalk upon which her husband was walking, negligently allowed such cable wire to fall to the street and strike her husband upon his head; that he was knocked insensible, and remained in that condition for some time; that the blow produced concussion of the brain and spinal cord, producing at the time partial paralysis, greatly impairing his power of locomotion; that the injuries thus inflicted impaired his mind; and that from them his death resulted. It was further alleged that from the sidewalk to the point on the post at which the cable wire was being fastened was a distance of 30 feet, and that the employés of the defendant negligently failed to hold the same securely and firmly, or to take any measures to keep the same from falling, having failed to fasten or hook the same in any manner whatever while handling and placing it in position on the poles, and negligently allowing it to slip from its fastening and from their grasp. The defendant filed an answer denying the allegations of negligence, and that the death of the husband of plaintiff was caused by the injuries be hereinafter referred to. The case came on for trial, and resulted in a verdict against the defendant for the sum of $3,500. Although it does not distinctly so appear, it is to be inferred from the record that Mrs. Cassin died pending the action, and that the children of the deceased were made parties plaintiff, as the motion for a new trial which appears in the record states the parties plaintiff as "Georgia A. Cassin et al., by next friend." This motion for a new trial was overruled, and to this judgment the defendant excepted.

1. The defendant filed a special plea in which it was set up that the deceased, prior to his death, brought suit against the defendant for the injuries alleged in the declaration, and on the 19th of January, 1893, the defendant settled his claim, paying him in full settlement the sum of $2,500, and taking from him a release, in which it was recited that the sum above named was received in full settlement of the suit against the company then pending in the city court of Atlanta, and also in full settlement of any and all claims for damages on his part arising out of the injuries received by him on or about May 16, 1892. These facts were pleaded as an accord and satisfaction of all claims growing out of the right of action now instituted by the plaintiffs, and in bar of the suit now prosecuted by them. Upon demurrer the court struck the plea, and this is one of the errors assigned. This assignment of error presents for decision the question whether a person who has been injured by the wrongful act of another, from which death does not instantaneously ensue, can, by a contract entered into by him with the wrongdoer, defeat the right of his widow or children, as the case may be, to bring an action for damages growing out of the homicide, if death should finally result from the wrongful act of which he has been the victim. Impressed with the importance of this question, and realizing the serious consequences which will result from a decision either way, I have endeavored to make a thorough investigation into the history of the law under which the present action was brought, as well as into the decisions of the courts of this country and of England on statutes of a similar nature.

In 1845 Lord Campbell introduced into the house of lords what he termed a bill "for giving compensation to the families of persons killed by negligence." The bill passed the house of lords, but was lost in the house of commons. See 10 Camp. Lives Ld. Ch. p. 149. In 1846, however, the bill did pass both houses of parliament, and was passed for the purpose, says the author in his autobiography, of "giving a compensation by action to the families of those who are killed by the negligence of others." 12 Camp. Lives Ld. Ch. p. 265. That act is known to history as "Lord Campbell's Act," and that

a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." 1 Shear. & R. Neg. § 126. In this connection, as a part of the history of this law, showing the chief objection which was raised to it at the time of its passage, and the importance with which the author regarded it, the following is extracted from 10 Camp. Lives Ld. Ch. pp. 153, 154: "The latter [that is, the death by negligence compensation bill] was now a good deal discussed, and Lyndhurst [the lord chancellor] showed some disposition to cavil it. He pretended, rather, to stand up for the old common-law maxim that 'the life of man is too valuable to allow of any estimate of the damages to be given for the loss of it.' I said: 'If a lord chancellor were killed by an accident on a railway, there might certainly be a difficulty in estimating the sum his family should receive by way of compensation for the pecuniary loss. This would depend much upon the probable tenure of his office if he had survived; for he might be likely to retain it for twenty years, or he might be on the point of being ejected from it by an inevitable change of ministry.' Lord Lyndhurst: 'There is a much more difficult case which may arise than that which my noble and learned friend has had the kindness to suggest. If my noble and learned friend should unfortunately himself fall a sacrifice to railway negligence, being at present without office and without retired allowance, how would a jury be able to estimate the value of his hopes?' The bill, however, did pass both houses, notwithstanding a powerful exertion of railway interest to crush it, and it has been the most popular of all my efforts at legislation."

It was the settled doctrine of the common law that no one could maintain a civil action for damages on account of the death of a human being. "The multiplication of fatal accidents in later times, and the practical impossibility of securing the punishment of mere carelessness by means of criminal proceedings," has been assigned as the reason for the passage by the British parliament of Lord Campbell's act. 1 Shear. & R. Neg. § 125. Statutes of a similar nature have been passed in nearly all of the different states of the Union. The first legislation on the subject in this state was an act passed in 1850, which was in the following words: "In all cases hereafter where death shall ensue from the injury, the legal representative of such deceased shall be entitled to have and maintain an action at law against the person committing the act from which the death has resulted—one-half of the recovery to be paid to the wife and children, or the husband of the deceased, if any, in case of his or her estate being insolvent." Cobb, Dig. p. 476. In 1856 an act in the following words became a law: "If any one shall be killed by the carelessness, negligence or improper conduct of any of said railroad companies, their officers, agents or employés, by the running of the cars or engines of any of said companies, the right of action to recover damages, shall vest in his widow, if any, if no widow, it shall vest in his children, if any, and if no child or children, it shall vest in his legal representatives." Acts 1855–56, p. 155. The acts of 1850 and 1856 above quoted were not carried into the first Code in the exact language in which they were enacted, but in lieu of such acts the following section appears: "A widow, or if no widow a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former, or one of the latter, dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children." Code 1861, § 2913. The sections of the Codes of 1868 and 1873 dealing with this matter are in exactly the same language as that just above quoted. Code 1868, § 2920; Code 1873, § 2971. In 1878 the section of the Code of 1873 above cited was amended by adding thereto the following words: "The plaintiff, whether widow or child, or children, may recover the full value of the life of the deceased as shown by the evidence. In the event of a recovery by the widow, she shall hold the amount recovered, subject to the law of descents just as if it had been personal property descending to the widow and children from the deceased." "No recovery had under the provisions of this act, and the law of which it is amendatory, shall be subject to any debt or liability of any character of the deceased husband or parent." Acts 1878–79, p. 59. The section as thus amended appears in the Code of 1882, § 2971. This latter section was amended by an act passed in 1887 (Acts 1887, p. 44), and the provisions of the section as thus amended appear in sections 3828 and 3829 of the Civil Code in the following language:

"Sec. 3828. A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The hus-

jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother and father shall be entitled to recover the full value of the life of said child."

"Sec. 3829. The word 'homicide,' used in the preceding section, shall be held to include all cases where the death of a human being results from a crime or from criminal or other negligence. The plaintiff, whether widow, or child, or children, may recover the full value of the life of the deceased, as shown by the evidence. In the event of a recovery by the widow she shall hold the amount recovered subject to the law of descents, as if it had been personal property descending to the widow and children from the deceased, and no recovery had under the provisions of this section shall be subject to any debt or liability of any character of the deceased husband, or parent. The full value of the life of the deceased, as shown by the evidence, is the full value of the life of the deceased without deduction for necessary or other personal expenses of the deceased had he lived."

In 1889 an act was passed, which is now embodied in section 3825 of the Civil Code, which declared that "no action for a tort shall abate by the death of either party where the wrong-doer received any benefit from the tort complained of; nor shall any action for the recovery of damages for homicide, injury to person or injury to property abate by the death of either party; but such cause of action, in case of the death of the plaintiff, shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff, and in case of the death of the defendant, shall survive against said defendant's personal representative." Acts 1889, p. 73.

In the light of this history, what intention must be ascribed to the general assembly in making the changes in the law from time to time, finally culminating in the acts of 1887 and 1889? Was it their intention by this legislation to create one cause of action when a person received an injury as a consequence of the wrongful act done by another, this cause of action to be in the person injured, to deal with as he pleased, to the exclusion of every one else, if he survived the wrongful act, and the cause of action to survive to some other person in the event death was instantaneous, or that the person injured had failed to secure, by suit or settlement, com- and independent causes of action,—the one to be in the party injured, for whatever damages he might sustain, and to survive to his legal representatives in the event he died without receiving compensation; the recovery by the administrator to be assets of the estate of the deceased, to be administered according to law; and the other a cause of action in the widow or children or other person named in the statute as authorized to sue for the homicide of another, with the right to recover the full value of the life of the deceased? The general assembly have a right to impose upon a wrongdoer any penalty suitable as a punishment for the wrong he has committed, which is not prohibited by some constitutional provision. It is therefore within the province of the general assembly to impose double damages upon one who has by his wrongful act damaged another. In order, however, to authorize a holding that the general assembly has inflicted upon a wrongdoer a penalty amounting to double damages, it must appear clearly from the legislative acts that such was the intention of the lawmaking body. A law authorizing a widow to recover damages from one who wrongfully takes the life of her husband, the amount of damages to be recovered being either a specific sum, as is the case in the statutes of some of the states, or an amount to be ascertained by a stated rule, as is the case with the statute in this state, is nothing more or less than a legislative imposition upon a person who is the negligent cause of the death of another of a punishment for this negligent act, and the penalty inflicted is allowed to go to the person who sustained loss by the wrongful act, as compensation for the damage done him. While such legislation is punitive so far as the defendant is concerned, it is remedial so far as the plaintiff is concerned. That the legislature in such cases may impose double damages upon a wrongdoer, seems to be unquestioned. Littlewood v. Mayor, etc., 89 N. Y. 24, 27. The act of 1850 created a cause of action in the legal representative of the person whose death was brought about under circumstances which would have entitled him, "if death had not ensued," to a right of action. The amount recovered in this case was assets in the hands of the administrator for administration according to law, unless the deceased was insolvent at the time of his death, in which event one-half of the recovery was to be paid over to the widow and children. As the general assembly would have the right, as has been seen, to impose a double penalty upon a wrongdoer, and as this intention must be clearly apparent from the terms of the statute, it may be that a proper construction of this act would be that it was a survival statute, and gave to the legal representative a right to bring a suit only in the event no set-

him and was pending at the date of his death, and for that reason had abated. The act of 1856 provided that if any one should be killed by the carelessness, negligence, or improper conduct of a railroad company in the running of its cars or engines, the right of action to recover damages should vest in his widow; if no widow, in his child or children; and, if no child or children, then in his legal representatives. While the words of this statute do not clearly indicate that it was intended by the general assembly as a survival statute, as is the case with the act of 1850, still, keeping in mind the rule that the infliction of a double penalty by legislative enactment must be clear and unequivocal, a proper construction of this act would probably be that the right of action of the widow or child or legal representative, as the case might be, would depend upon whether the deceased had received compensation for the wrongful act which resulted in his death. It is to be noted that under the act of 1850 the right of action was in the legal representative, although in one contingency a part of the recovery belonged to the widow and children, to the exclusion of creditors. Under the act of 1856 the right of action was in the widow or children, if there were either, and the recovery was had to the exclusion of all other persons interested in the estate of the deceased; and, if there was no widow or no children, there was still a right of action in the legal representative, the amount recovered in such a case being subject to administration as any other assets in the hands of the legal representative. These two statutes seem to connect the cause of action which the deceased had in his lifetime with the cause of action which was allowed to be asserted under the acts. While under the act of 1850 the widow and children are entitled to rights in the recovery which they would not be entitled to in the ordinary assets of the estate of the deceased, still the power to assert the right is in the legal representative, who would be recognized in law as the successor to the right of action which was in the deceased. And although under the act of 1856, as we have seen, the right of action was vested primarily in the widow, eo nomine, still a strict construction of this act might require that it be construed to be a survival statute, and not one creating a cause of action independent of that which could be asserted by the person injured. The provisions of the Code of 1861 which are quoted above, and which have been carried into all the Codes, and are now the law of this state, in the exact language which appears in the first Code, while evidently taken from the acts above referred to, are materially different in language from the old law. There is now no distinction in regard to this matter between the liability of natural persons and corpora-

of 1850 as one given to recover where death ensued under circumstances which would have entitled the deceased, had death not ensued, to sue and recover for the injury to him; nor, as in the act of 1856, as one to recover for the carelessness, negligence, or improper conduct of the wrongdoer; and what is intended to be accomplished by these expressions is embraced in the present law in the one word "homicide." The person authorized to bring the suit is the widow, and, if no widow, the child or children. If the widow brings the suit, and dies pending the same, the action survives to the child or children; and, if there were no widow and no child or children, there was, prior to the act of 1887, no right of action in any one, and prior to the act of 1889 a suit brought by the widow would, upon her death, abate, if there were no children, and, if brought by the children, upon their death would abate. In no event, either under the law as it was prior to the act of 1887, or as it is since the passage of that act, can a legal representative bring a suit for the homicide of his intestate. It does seem to us clear that the changes by the Code of 1861 in the acts of 1850 and 1856 manifest an intention to separate the right of action which is in the person for the wrongful act committed upon him from the right of action which is, under the law, in the widow or other persons if death results from such wrongful act. If one survives the injury inflicted upon him by the wrongdoer, he is to have a right to demand compensation for this wrong, and this is independent of any right which any other person might have to make claim upon the wrongdoer either in the lifetime of the person injured or after his death. If death results, or, in the language of the law, if there is a homicide, then the widow of the deceased, or other person named in the statute, is entitled to demand compensation under the terms of the statute; and this right is entirely separate, distinct, and independent from the right which the deceased could assert in his lifetime. A right of action under the act of 1850 in the legal representative, and a right of action in a certain contingency under the act of 1856 in the legal representative, would seem to be intended by the legislature as a means of transmitting from the deceased to the widow or other person the right of action of the deceased. Such being the case, if the right of action was settled during the lifetime of the deceased, there was nothing to be transmitted through the medium of his legal representative to his widow, or other persons who might sustain loss by his death. When the legislature sees proper, as it has done, to eliminate the legal representative from the statutes authorizing suits for homicide, and leave the person injured with full right to bring his suit for damages and demand com-

tion for the homicide, and there being no words whatever in the statute which could be strained to connect the right of the deceased to bring an action during his lifetime with the right of the widow or other person named to bring an action after his death, but one conclusion can be arrived at, and that is that it was the intention of the general assembly to create two separate and distinct causes of action, which may be asserted independently of each other; and this would be true notwithstanding in some cases the effect of it would be to impose upon the wrongdoer a double penalty as a punishment for the injury which he has inflicted. This view of the case is strengthened when we consider the act of 1889. Prior to that act a suit brought by a person during his lifetime abated upon his death. In other words, the right of one to demand compensation for the injury done him existed as long as he lived, and, when he did not succeed in securing a settlement of the demand during his lifetime, the right of action did not pass to his legal representatives. The act of 1889 provides that no action for the recovery of damages for injury to the person suing shall abate by the death of either party, but shall survive to the personal representatives of the deceased plaintiff. In such case the amount of the recovery by the legal representative would be assets in his hands for administration according to law. There is no provision, as in the act of 1850, that such recovery should be for the benefit of the widow and children, and therefore it cannot be properly held that it was the intention of the general assembly by this act to provide that when this cause of action survived it would defeat the right of the widow to bring suit for the homicide; and it certainly cannot be held that the widow's suit for the homicide could be pleaded in abatement of this suit, which survived to the personal representative. As the law giving an action to the widow for the homicide says nothing at all in reference to the right of the husband to bring an action during his lifetime for the injury to him, so the act which provides that the husband's suit, in the event of his death, shall survive to his legal representative, says nothing at all in reference to the right of the widow to bring a suit in the event he dies. If the pendency of a suit by the legal representatives for the injury to the deceased could not be pleaded in abatement of the suit of the widow for the homicide of her husband, I am at a loss to understand how it could be contended that the judgment in favor of the deceased during his lifetime could be so pleaded; and for a similar reason it would seem that an accord and satisfaction entered into between the deceased and the wrongdoer during his lifetime would not be a bar to the suit by the widow after his death. I can arperson was negligently injured, and death did not immediately, but did finally, result from the injury received; that is, the one which the person injured would have under the common law, and the other one which the widow or other person named in the statute would have under the Code of 1861 as amended by the act of 1887.

I have been unable to find any ruling by this court which would be either directly controlling upon this question, or which would have such a bearing upon the same as would be recognized as persuasive authority either way. It is proper, however, in this discussion, to allude to the rulings and utterances of the court in some of the cases which have been brought under the different statutes above referred to. So far as I have been able to ascertain, the only case brought under the act of 1850 which ever reached this court was the case of Railroad Co. v. Paulk, 24 Ga. 356. No ruling was made in that case which would have any bearing upon the question now under consideration. No case brought under the act of 1856 seems ever to have reached this court. The first time that this court was called upon to deal with the law as contained in the Code of 1861 was in 1868, after the Code of that year went into effect. This was in the case of Railroad Co. v. Johnson, 38 Ga. 409, where it was held that, if the deceased by the exercise of ordinary diligence could have avoided the injury, his widow could not recover damages, and also that, if both the deceased and the wrongdoer were at fault, the damages would be diminished in proportion to the negligence or want of ordinary care on the part of the deceased. It is to be noted that this decision was prior to the act which declared that the measure of damages should be the full value of the life of the deceased. In the case of Railroad Co. v. Strong, 52 Ga. 461, Judge McCay uses this language: "But by our law the right is given by statute to the wife generally for the 'homicide' of her husband. Cases of self-defense, of inevitable accident, of execution by command of the law, etc., must, from the nature of things, be excepted. And it seems to us that the true inquiry is, has the defendant violated any of the public or private obligations he was under to the deceased? Whether those obligations or duties were implied by law or existed by express contract is immaterial, but that some duty, public or private, was violated by the homicide, would seem to follow from the very nature of a wrong, and from the principles of justice and equity. And our original act giving this action puts the right precisely on this ground, to wit, whenever the husband, had he lived, would have had a right of action, then the wife has it in case of his death." In the case of Hendricks v. Railroad Co., 52 Ga. 467, it was held that,

with the killing, or any relation existing by contract or by law between the deceased and the defendant which would bar a recovery by him for damages in case he had lived, apply to and govern the right of the wife. A similar ruling was made in the case of Railroad Co. v. Ayers, 53 Ga. 12. In the case of Cottingham v. Weeks, 54 Ga. 275, it was ruled that the fact the defendant had been tried upon an indictment charging him with the offense of murder and had been acquitted could not be pleaded in bar of the widow's suit for the homicide. When the case came before this court a second time, in 56 Ga. 201, it was held that a widow could recover for the homicide of her husband, whether the homicide be the act of a natural or artificial person, or the result of intention or criminal negligence. The ruling in the Hendricks Case, supra, was followed and approved in the case of Railroad Co. v. Johnson, 60 Ga. 667. In the case of Railroad Co. v. Roach, 64 Ga. 635, it was held that a suit by a widow against a railroad company for the homicide of her husband, who was an employé of the road, could not be maintained unless it was shown that, in the transaction resulting in the death of the employé, he was free from fault. In Daly v. Stoddard, 66 Ga. 145, it was held that, in order to authorize a recovery by a widow for the homicide of her husband, his death must have been caused by some act amounting to a crime, or by the criminal negligence of the defendants. This case was decided before the passage of the act of 1887. In Cook v. Railroad Co., 72 Ga. 48, it was held that a contract entered into by a husband who was an employé of the company, which waived the right to sue for injuries resulting from criminal negligence on its part, was void, and could not be pleaded in bar of the widow's right to recover. In Berry v. Railroad Co., Id. 137, it was held that a widow had a right of action for the homicide of her husband whenever the husband, had he lived, would have had such right, and that whatever could have been a good defense to his suit would be equally available against one brought by the widow. An examination of that case, however, will show that the defense relied on was that the deceased could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. In Railroad Co. v. Brantley, 93 Ga. 259, 20 S. E. 98, the rule that a widow of an employé of a railroad company could not recover against the company for the homicide of her husband, if the husband was at fault, or if he could have avoided the consequences of the defendant's negligence by the exercise of ordinary care and diligence, was recognized. In Railroad Co. v. Fitzgerald it was held that an admission by a person tending to show that an injury which was admissible in evidence in a suit brough by the widow to recover for the homicid See, also, in this connection, Railroad Co. v Roach, 70 Ga. 434; Railway Co. v. Stewar 71 Ga. 427.

It clearly appears from the present law o the state governing rights of actions of th character involved in the present case, a well as from the decisions of this cour above referred to, that a widow or othe person named in the statute is not entitle to recover unless the homicide is brough about as a result of a crime, or criminal o other negligence of the party occasioning it and that no recovery can be had for the homicide if the negligence of the deceased was of such a character as would have precluded a recovery by him, or if during his life he had done any act or entered into any contract which would have the effect of rendering the act which brought about his death one which was either lawful in the person committing the same, or one for which he would not be legally responsible. In other words, the right of a widow to recover is not because the death of her husband has been brought about by an act of some person, but his death must be the result of some act of commission or omission on the part of the defendant which the law would declare to be negligent, and under such circumstances that, had death not resulted, he would have been entitled to demand compensation. It is, therefore, clearly right that the widow should be deprived of her right to bring a suit if the deceased could have avoided the consequences of the defendant's negligence by the exercise of ordinary care, as well as in the case where the deceased had entered into a contract which had the effect of making the act of the defendant lawful as to him, and also in all of those cases where the facts and circumstances surrounding the killing, as well as those leading up to and preceding it, were such as to show either that the defendant had been guilty of no wrongful act, or that the deceased was the victim of his own folly in matter of contract, or of his carelessness in matter of conduct. All of the cases which we have cited above (being all we have been able to find in our Reports dealing with the question under consideration) relate to some act done by the deceased prior to or concurrent with the injury which he received. When a person is injured by the wrongful act of another, a foundation is at once laid for a cause of action in favor of those entitled under the law to demand compensation for his death, and the moment that his death results from such wrongful act the cause of action is full and complete. Nothing the person injured can say or do between the date of the wrongful act and his death can defeat the cause of action for the homicide. The Fitzgerald

poses a wrongful act resulting in the death of the person wronged. In the Fitzgerald Case, evidence of an admission of the party injured was allowed, to show that no wrongful act had been committed by the defendant, but that the act complained of, as to the person injured, was lawful. Hence it tended to establish that no wrongful act was committed, and therefore no cause of action arose in favor of anybody. For the purpose of admitting such evidence, the deceased and the widow might be considered in privity. But, even if this is not true, the admission of the evidence in the Fitzgerald Case was predicated upon another principle; and that is that a declaration against interest by a person since deceased, under well-established principles, as recognized by the authorities there cited, is admissible in a controversy between third persons. It would seem that the ruling made in that case was better supported by the latter reason than by the former. In the case of Railroad Co. v. Bass, 104 Ga. 390, 30 S. E. 874, this court had before it the question as to when the statute of limitations began to run against the widow's right of action to recover for the homicide of her husband. It was held that, as such right did not exist until he was dead, the statute of limitations began to run from his death, and not from the time that the injury was inflicted which caused his death. In the opinion Mr. Justice Fish uses this language: "The plaintiff's action, however, was not for injuries done to the person of her husband. She had no right under the law to sue for such injuries. No one except the husband himself could maintain an action for them. If, however, such injuries resulted in his death, then, under section 3828 of the Civil Code, a right of action accrued to her. That section provides that a widow may recover for the homicide of her husband, and plaintiff's suit is based upon the cause of action therein given her. This statute does not profess to revive the cause of action for the injury to the deceased in favor of his widow, nor is such its legal effect; but it creates a new cause of action, in favor of the widow, unknown to the common law. The right of action given by the statute is for the homicide of the husband, in all cases where the death results from a crime, or from criminal or other negligence, and is founded on a new grievance, namely, his homicide, and is for the injury thereby sustained by the widow and children, to whose exclusive benefit the damages must inure." While the question now under consideration was not directly involved in that case, the argument made by Mr. Justice Fish in demonstrating the correctness of the conclusion as to the question then before him directly bears upon the present question, even if it is not conclusive of the same.

England, and, while the decisions are not altogether in accord, some of them are authority for the conclusion which I have reached in the present case. Those holding the contrary are based on statutes more nearly similar to Lord Campbell's act, and it may be conceded, for the sake of the argument, that the cases which hold that and similar statutes to be survival statutes were correctly decided. See, in this connection, Tiff. Death Wrongf. Act, § 24. This, however, did not seem to be the opinion of the author of that act, as is shown by the above-quoted extracts from his Lives of the Lord Chancellors. In the case of Needham v. Railway Co., 38 Vt. 294, it was held that, under statutes which are very similar to ours, two causes of action arose out of the wrongful death of another,—one in favor of the decedent, for his loss and suffering resulting from the injury in his lifetime; the other founded on his death, or on the damages resulting from his death to the widow or next of kin of the deceased,—and that each cause of action was to be prosecuted independently of the other; the damages allowed to be recovered in the two statutes being given upon entirely different principles, and for different purposes. Under statutes of a similar nature the supreme court of Mississippi held that a right of action in the administrator to prosecute a suit for personal injuries begun during the lifetime of his intestate was distinct from and independent of the right of action given by statute to the next of kin to recover for the death of the person, caused by the wrongful or negligent act of another; that the two sections could co-exist; and that they had no connection with each other. Railroad Co. v. Phillips, 64 Miss. 693, 2 South. 537. The court of appeals of New York held that a statute very similar to Lord Campbell's act was not simply remedial, but created a new cause of action in favor of the personal representative of the deceased, which was wholly distinct from, and not a revivor of, the cause of action which, if he had survived, he would have had for his bodily injury. Whitford v. Railroad Co., 23 N. Y. 465. Judge Denio, in his opinion, uses this language: "But the suggestion that the present action is brought to enforce the right which the common law gave to the deceased, and that the provisions of our statute should be considered as affecting only the remedy, which may always be regulated by the lex fori, is not, in my opinion, sound; for it is not a simple devolution of a cause of action which the deceased would have had which the statute effects, but it is an entirely new cause of action which is here sought to be enforced. The system of the statute as well as of the common law is that the right of action for damages on account of his bodily injuries, which

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elonged to the deceased while he lived, was ttinguished by his death. The statute does ot profess to revive his cause of action in vor of the executor or administrator. The ompensation for the bodily injuries reains extinct, but a new grievance of a dist nct nature, namely, the deprivation sufferl by the wife and children or other relaves of their natural support and protection, ises upon his death, and is made by the atute the subject of a new cause of action favor of these surviving relatives, but to e prosecuted in point of form by the exntor or administrator. The reference in ie first section of the statute of 1847 to ie ability of the deceased to maintain the ction if death had not ensued is inserted olely for the purpose of defining the kind ad degree of delinquency with which the efendant must be chargeable in order to ubject him to the action. The act, neglect, r default must be such as would, if death ad not ensued, have entitled the party inured to maintain an action," etc. The sureme court of Arkansas held, under statutes similar to ours, that two causes of acon could be maintained for the wrongful eath of an individual,—one for the benefit f his estate, and the other for the benefit f his next of kin. Davis v. Railway Co. Ark.) 13 S. W. 801. Section 18, c. 52, of ie Public Statutes of Massachusetts proides that if a person suffers bodily injury r damage to his property through a dect in a highway, townway, causeway, or ridge, which defect might have been remeied, or which damage or injury might have een prevented, by the exercise of reasonble care and diligence on the part of those bliged by law to repair the same, he might ecover against the wrongdoer for such inury or damage. Section 17 provides that, life is lost on account of an injury reeived in the manner described in the foreoing section, an action may be brought gainst the county, town, or person obliged y law to make the repairs, by the personal epresentative of the deceased, for the benfit of the widow and children, to recover sum not exceeding $1,000. In Bowes v. ity of Boston, 29 N. E. 633, 15 L. R. A. 65, the supreme court of Massachusetts eld that the action provided for in section 8 survived the death of the person injured, nd was independent of the action provided or in section 17, and that "both actions ay proceed at the same time, on independnt ground, and for different purposes." A tatute of Kansas provides that causes of ction for personal injury survive the death f the person injured. Comp. Laws 1879, § 20. Another section provides: "When the eath of one is caused by the wrongful act r omission of another, the personal repreentatives of the former may maintain an ction therefor against the latter, if the forier might have maintained an action, had e lived, against the latter for an injury or the same act or omission." Id. § 422. The section further provides that the damages recovered in such a case shall not exceed $10,000, and shall inure to the exclusive benefit of the widow and children, if any, or next of kin. In McCarthy v. Railroad Co., 18 Kan. 46, it was held that the action for personal injuries survived only in the event the death did not result from such injuries, and that, where death resulted from the injuries, only the action for the homicide, for the benefit of the next of kin, could be maintained. This decision was followed by the circuit court of the United States for the district of Kansas in Hulbert v. City of Topeka, 34 Fed. 510. Mr. Justice Brewer delivered the opinion, and, while he felt bound by the decision, he criticised adversely the ruling therein made, as the following extract from his opinion will show: "I was a member of the supreme bench of Kansas at the time this opinion was filed, and concurred in it. I feel constrained to follow that decision; and yet I may be permitted to say that my examination of this case has led me to doubt the correctness of that conclusion, for the measure of damages and the basis of recovery under the two sections are entirely distinct. Section 422 [the homicide section] gives a new right of action,—one not existing before; an action which is not founded on survivorship; an action which takes no account of the wrong done to the decedent, but one which gives to the widow or next of kin damages which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly, or lived months; whether he suffered lingering pain or not; whether or not he was put to any expense for medical attendance and nursing. None of these matters are to be considered in an action under section 422, and the single question is, how much has the wrongful taking away of his life injured his widow or next of kin? It is an action to recover damages for the death, and in no sense a survival of an action which the decedent himself had in his lifetime." In Railway Co. v. Bennett's Estate, 47 Pac. 183, a decision rendered in 1896, the court of appeals of Kansas, in a well-considered opinion by Garver, J., repudiated the doctrine laid down in the McCarthy Case, and put itself in line with the above-quoted language of Mr. Justice Brewer, and with other decisions referred to in the opinion. It will be noticed that the Kansas law is very similar to Lord Campbell's act. In Adams v. Railway Co. (C. C.) 95 Fed. 938, it was held that the statutes of Washington and Idaho, which are very similar to Lord Campbell's act, created an entirely new cause of action, independent of the right of the deceased to recover for the injuries to him.

The following decisions, while not directly in point, in their reasoning tend to support the conclusion I have reached in the

69 Ill. App. 256; Railroad Co. v. Wymore, 40 Neb. 645, 58 N. W. 1120; The Oregon (D. C.) 73 Fed. 846; Com. v. Metropolitan R. Co., 107 Mass. 236; Railway Co. v. Hosea (Ind. Sup.) 53 N. E. 419, decided in 1899; Railroad Co. v. Clarke, 152 U. S. 230, 14 Sup. Ct. 579, 38 L. Ed. 422; Martin's Adm'r v. Railroad Co., 151 U. S. 695 et seq., 14 Sup. Ct. 533, 38 L. Ed. 311; Doyle v. Railroad Co. (Mass.) 37 N. E. 770, 59 Am. & Eng. R. Cas. 118; Donahue v. Drexler (Ky.) 56 Am. Rep. 886; Hurst v. Railway Co. (Mich.) 48 N. W. 44; Westcott v. Railroad Co. (Vt.) 17 Atl. 745; Railroad Co. v. Kuehn, 70 Tex. 582, 8 S. W. 484; Munro v. Reclamation Co. (Cal.) 24 Pac. 303; Putman v. Southern Pac. Co. (Or.) 27 Pac. 1033; Belding v. Railroad Co. (S. D.) 53 N. W. 750.

It has been ruled in England that the cause of action under Lord Campbell's act was the defendant's negligence, and that, if the deceased had in his lifetime accepted a sum of money in full satisfaction and discharge of his claim against the defendant, this would bar the right of the legal representative to recover for the homicide, the death of the person injured not creating "a fresh cause of action." Read v. Railway Co., L. R. 3 Q. B. 555, 9 Best & S. 714. See, also, Griffiths v. Earl of Dudley, 9 Q. B. Div. 357; Haigh v. Packet Co., 52 L. J. Q. B. (N. S.) 640; Wood v. Gray [1892] App. Cas. 576. The decisions, however, in England, even under Lord Campbell's act, have not been uniform. In Bradshaw v. Railway Co., 10 C. P. 189, it was held that where a person was injured on a railway by an accident, and after an interval died, his executor might maintain an action for damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. In making the decision the court found it necessary to construe Lord Campbell's act, and in reference thereto Grove, J., uses this language: "The intention of the act was to give the personal representative a right to recover compensation as a trustee for children or other relatives left in a worse pecuniary position by reason of the injured person's death, not to affect any existing right belonging to the personal estate in general. There is no reason why the statute should interfere with any right of action an executor would have had at common law. In the case of such right of action he sues as legal owner of the general personal estate which has descended to him in course of law. Under the act he sues as trustee, in respect of a different right altogether, on behalf of particular persons designated in the act." The decision in the Bradshaw Case was questioned, but followed, in Leggott v. Railway Co., 1 Q. B. Div. 599, 45 L. J. Q. B. (N. S.) 557. In that case suit was brought by the widow, as the personal loss by reason of inability to attend to business, etc.; and it was held that the recovery by the plaintiff in a former suit, brought in her representative capacity, for the benefit of herself and children, to recover for the homicide of the deceased, did not abate the action. In that case it was contended that an admission made in the former suit by the plaintiff operated as an estoppel in the latter, but the court were agreed that this contention could not be maintained, while they doubted whether a proper construction of Lord Campbell's act authorized the bringing of a second action at all. See, also, in this connection, Pym v. Railway Co., 2 Best & S. 759. In Town of Walkerton v. Erdman, 23 Can. Sup. Ct. 352, it was held that where an action was brought by a person injured, in which his evidence was taken de bene esse, such evidence was admissible in a subsequent action brought under Lord Campbell's act. From this proposition two judges dissented, but the court was of opinion that the principle of the decision in Read v. Railway Co., supra, was controlling. The construction of Lord Campbell's act made in the decision last cited has been followed by the courts in many of the states of the Union where the statutes on the subject are in the same or similar language as that contained in that act. See Littlewood v. Mayor, etc., 89 N. Y. 24, 27, 42 Am. Rep. 271; Dibble v. Railroad Co., 25 Barb. 183; Hecht v. Railway Co., 132 Ind. 507, 32 N. E. 302; Goodsell v. Railroad Co., 33 Conn. 51; Price v. Railroad Co. (S. C.) 12 S. E. 413; Birch v. Railway Co. (Pa. Sup.) 30 Atl. 826; Sawyer v. Perry (Me.) 33 Atl. 660; Railway Co. v. Long (Tex. Sup.) 27 S. W. 113, 24 L. R. A. 637; Railroad Co. v. McElwain (Ky.) 34 L. R. A. 788, and notes (s. c. 34 S. W. 236); Hill v. Railroad Co. (Pa. Sup.) 35 Atl. 997, 35 L. R. A. 196; Hansford's Adm'x v. Payne, 11 Bush, 380; Fowlkes v. Railroad Co., 9 Heisk. 829; In re Taylor's Estate, 179 Pa. St. 254, 36 Atl. 230; Andrews v. Railroad Co., 34 Conn. 57. In this connection, see 1 Jag. Torts, p. 310; Tiff. Death Wrongf. Act. § 124; Cooley, Torts, p. *264.

In Legg v. Britton, 24 Atl. 1016, the supreme court of Vermont held that where the plaintiff in an action for personal injuries died from such injuries pending the action, and his administrator recovered judgment therein, such a judgment was a bar to an action by the administrator for the benefit of the widow or next of kin under the statute of that state. This decision is directly in conflict with the decision made in the case of Needham v. Railway Co., cited supra; and Ross, C. J., in the opinion, says that what is said on the subject in the Needham Case is obiter. In Illinois, where there was a statute passed in 1853 very similar in language to Lord Campbell's act, and one passed in 1872 which provided that

ctions to recover damages for injuries to ie person, except slander and libel, should irvive, it was held that the act of 1872 did ot repeal the act of 1853, but that the for- ier act simply referred to cases where ie death was not the result of the wrongful ct complained of in a pending case. Hol- n v. Daly, 106 Ill. 131. The supreme court Kentucky held that under statutes of that ate two causes of action—one for the men- l and bodily suffering of the person in- ired, and the other for the loss of life— d not survive, when the suffering and ath were caused by the same wrongful t, and that the party entitled to sue must ect whether he would bring the one or the her, and that the pendency of one action as a sufficient reason for the abatement of e other. Conner's Adm'x v. Paul, 12 Bush, 4. In 8 Am. & Eng. Enc. Law (2d Ed.) 0, the rule by which it can be determined hether the statutes authorize two actions, one by the legal representative for the ben- t of the estate of the decedent, and the her by the widow or next of kin,—or only e action, which may be commenced by the rson injured in his lifetime and survive his legal representatives, or be commen- d by them after his death, is clearly stat- in the following language: "When the ght of action given by the statute is mere- such as the deceased would have had if had survived the injury, a release prop- ly executed by him in his lifetime is a mplete defense to an action by his per- nal representative or others to recover mages for his death. The same rule is ie where the statute is not a survival stat- e, but creates a new and distinct cause action in favor of certain beneficiaries, it provides that the right of action shall ist only in cases where the deceased him- if might have maintained the action had lived." Applying this rule to our stat- e, what is the result? It is clear that the ht of action given to the widow or other rson therein named is not merely such as e deceased would have had if he had sur- ved the injury, for the simple reason that is right of action, by the terms of the t of 1889, survives to the personal repre- ntative of the deceased. Neither is the tute a survival statute. The personal rep- sentative of the deceased has no connec- n with the cause of action or with the it, and is not mentioned in any way in e statute. The statute creates a new and tinct cause of action, as has been ruled the case of Bass v. Railroad Co., supra, d it is not distinctly provided that the ht of action shall exist only where the eased himself might have maintained the ion had he lived. If the act of 1850 were ll of force, with the language in it, which similar to the language in Lord Camp- l's act, then the ruling made by the court queen's bench in Read v. Railroad Co., ich has been followed by so many Amer- n courts in construing similar statutes, might be looked to as persuasive authority in determining what is a correct construc- tion of that act. But the general assembly has seen fit to change the language of the statute in such a way that it cannot be con- nected in any way with Lord Campbell's act, except that that act was doubtless the origin of our legislation on the subject. The language of Lord Campbell's act was not strictly followed in the act of 1850. It was departed from materially in the act of 1850, and, as has been seen, the Code of 1861 made radical changes in the act of 1856. I am aware of the hardship that may result from the interpretation thus placed upon this law, but this fact should not be considered when the intention of the general assembly to pass a law which would work such hardship is clear and manifest.

2. During the progress of the trial the defendant offered in evidence the receipt giv- en by Cassin during his lifetime for $2,500, which recited that it was in full satisfac- tion of all claims that Cassin had against the company. Counsel for the defendant contended that, even if the receipt was not admissible for the purpose of showing that the action was barred, it was admissible as a bar of all damages for decreased earning capacity up to the moment of the death of the deceased. The court ruled that the measure of damages was fixed by statute, which declares that the measure of dam- ages is the full value of the life of the de- ceased, as shown by the evidence, and re- fused to admit the receipt in evidence. If the deceased cannot by contract discharge the defendant from liability to the widow, it is difficult to see how the amount that is paid to him in discharge of the claim which the law allows him to assert could be used as evidence to diminish the recovery to which the law says the widow is entitled. It is true that the conduct of the deceased at the time that the wrong is inflicted which results in his death may be such that the damages which his widow would recover would be diminished, as was held in the case of Railroad Co. v. Johnson; supra; but it has never been held that anything done by the deceased after the injury was com- plete would have the effect of diminishing the damages which the law declares the widow shall recover in the event her hus- band died from the effect of the wrongful act. Judge Reid, in his charge to the jury, uses the following language: "The meas- ure of damages in this case, if the plaintiffs are entitled to recover, would be the present cash value of the financial value of the life of their father, calculated from the time of his death." This is the correct rule to be applied. Of course, there should have been no recovery in this case for any damages sustained by Cassin, such as loss of time, pain and suffering, decreased ability to la- bor, and the like; and the plaintiffs in the present case were therefore not entitled to recover any loss which accrued to their

determine what was the full value of his life to his children, and therefore their loss growing out of his death, what was the condition of his health and his earning capacity prior to the injury. The full value of the life is not to be determined by the condition of the injured person after the wrongdoer has disabled him. Any other rule would bring about this result: If the wrongful act was of such a nature as to entirely destroy the injured person's capacity to labor, and still he survived the injury, the persons entitled to sue upon his death resulting from such injury could recover nothing, because his life between the date of the injury and the date of his death would have no pecuniary value. It cannot be seriously contended that this is the law. If it is, a person who commits an injury to the person of another tending to destroy his life should be diligent to see that death does not ensue immediately, and that his victim should survive a reasonable length of time in a totally disabled condition. In a case like the present the recovery should be the full value of the life of the deceased, taking into consideration what would have been his earning capacity at the time of his death if he had not sustained the injury which resulted in his death.

The foregoing sets forth fully the reasons which constrain me to dissent from the conclusion reached by a majority of the court. I believe the conclusion I have reached is founded upon absolutely sound reasons, and is abundantly supported by authorities, both English and American; and the current of American cases which have dealt with statutes at all similar to ours is with the conclusion I have reached. When it is conceded that the statute of this state giving a cause of action for the homicide creates a new cause of action, separate and distinct from the one which the injured party had in his own behalf at common law, —and I understand the majority of the court to so concede,—it seems to me that no argument is necessary to show that there can be a recovery in the case upon this new cause of action by the person in whose favor it is vested, notwithstanding the common-law cause of action in favor of the injured party has been released by him in his lifetime. Such a construction of the statute as is given by the court would make the legislature guilty of doing an absurd and vain thing when it enacted the law. When this court reached the conclusion, as it did in the Bass Case, that the statute providing for suits in cases of homicide created a new cause of action, the present case was, in principle, decided; and, to my mind, no argument was needed to establish the soundness of the position for which I now contend. I am authorized by Mr. Justice LEWIS to say that he concurs in the views above presented.

ACTION ON CONTRACT—JURY TRIAL—JUDGMENT—VALIDITY—EXECUTION SALE—DISTRIBUTION OF PROCEEDS.

1. When an action is founded upon an unconditional contract in writing, the judge has power to render a judgment thereon without the intervention of a jury.

2. If the plaintiff's petition in such an action alleges that the contract of the defendant therein sued on was secured by a deed to land executed by him, and prays for a special judgment against the land, and the judge, in rendering his judgment upon the note, incorporates therein a special lien upon the land, this latter part of the judgment, even if erroneous or void, does not invalidate the entire judgment, for the remainder of it is good, and, by operation of law, constitutes a lien upon the land, effectual from the date of the deed.

3. Where, after obtaining such a judgment, the plaintiff filed and had recorded a deed to the land, and had the land levied on and sold, and the fund was brought into court for distribution, other judgment creditors, whose judgments were older than the one above mentioned, but younger than the deed given to secure the note, could not attack the younger judgment on the ground that the deed given to secure the note was infected with usury.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Action by the Bank of Thomasville against one Clifton. Judgment for plaintiff. C. C. Bush, trustee in bankruptcy on sale of defendant's land under execution, intervenes, as did also some other creditors. Judgment for the bank, and Bush and others bring error. Affirmed.

W. C. Worrill and R. H. Powell & Sons, for plaintiffs in error. B. B. Bower and A. L. Hawes, for defendant in error.

SIMMONS, C. J. It appears from the record that Clifton borrowed from the Bank of Thomasville $7,000, for which sum he gave his promissory note with a stipulation for the payment of $700 liquidated damages (presumably attorney's fees) in case the note had to be collected by suit. For the purpose of securing the note, he made the bank a deed to certain land on November 14, 1892. In 1898 the bank brought suit against Clifton on the note, and prayed for a judgment on the note, and also for a special lien on the land. No defense was made, and the judge rendered a judgment on the note, and granted the prayer of the petition for a special lien on the land. This was done without the intervention of a jury. In 1893 and 1894 other creditors obtained common-law judgments against Clifton. Subsequently Clifton was adjudicated a bankrupt, and Bush was appointed trustee. In 1899 the bank had its execution based on the judgment rendered in 1898 levied on the land. Bush filed a bill in the United States court seeking to enjoin the levy and sale under this execution. A restraining order was granted by the judge of that court, and subsequently he issued an order

owing the sheriff and Bush, the trustee, sell the land under the bank execution, d requiring them to deposit in another signated bank the proceeds of the sale. ; ordered that the trustee, representing ; other judgment creditors, litigate in the ıte courts with the bank as to the prior- of their judgments. The bank filed a ıtion in the superior court of Decatur ınty praying that the fund arising from ; sale be turned over to it, setting up the ts in regard to the loan, the deed, and ; judgment, and claiming a lien superior that of the other creditors. Those cred- rs—some through Bush, the trustee, and ne independently—filed interventions, in ıich they claimed that their judgments re superior to the judgment of the bank, because the judgment in favor of the ık and granting a special lien on the land s rendered by the court without the in- vention of a jury, and (2) because the d made by Clifton to the bank was in- ted with usury, and therefore void, and y had the right, as Clifton was insolvent, suggest usury in his stead. The court ıtained a demurrer to these interventions, l awarded the fund to the Bank of Thom- ville. The trustee and intervening cred- rs excepted.

, 2. The suit by the bank against Clif- was a common-law action predicated ın an unconditional contract in writing. der the constitution and laws of this te the judge has power, without the in- vention of a jury, to render a judgment ın such contract where no issuable de- se is filed by the defendant. There was ıe filed by Clifton to the suit by the ık. It was clearly the duty of the judge render judgment upon the contract. It s claimed, however, by the plaintiffs in or that the judgment granting a special ı upon the land could not be rendered by judge without the intervention of a jury, l that the judgment was therefore void. ın if the verdict of a jury should have n had setting up the special lien, we ık the fact that the judge rendered it hout a jury would not make the judg- ıt void. Unless it plainly and palpably ıears that the court had no authority to der the judgment, the latter would not void. If there is doubt as to whether the ge has jurisdiction to render the judg- ıt, and he decides in favor of his power, ile such ruling may be erroneous, the gment will not be void. If the judge's ıntion had been called to the matter ın he rendered the judgment, and he had ided in favor of his jurisdiction, although may have decided that question erro- usly, the judgment would not be void, if unexcepted to, and unreversed, is a d and binding judgment. Railroad Co. Pendleton, 87 Ga. 751, 13 S. E. 822; Ev- ıt v. Westmoreland, 92 Ga. 673, 19 S. E. Crow v. Mortgage Co., 92 Ga. 815, 19). 31; Manning v. Weyman, 99 Ga. 59, 26 S. E. 58; Griffin v. Smyly, 105 Ga. 475, 30 S. E. 416. Even assuming, for the sake of argument, that this is not sound, we still think the judgment rendered by the court on the note, and the facts that appeared on the trial of the question of the distribution of the money, would give the bank a lien superior to that of the other creditors. The deed to the bank was executed in November, 1892. The judgments of the other creditors were subsequent to that date. It appeared at the trial that the deed was made for the purpose of securing the payment of the note. "Where one took a deed to land to secure a debt, and gave bond to reconvey upon its payment, and subsequently brought suit, and recovered a general judgment against the debtor, and filed and had record- ed a deed reconveying the land, and there- upon caused it to be levied on and sold, such judgment was entitled to the fund arising from the sale in preference to an older judgment rendered since the convey- ance to secure the debt was made. It is not necessary that such a judgment should set forth any specific lien or right of priority; but, where the facts appear from the untrav- ersed answer of the sheriff, the fund will be awarded to such judgment." McAlpin v. Bailey, 76 Ga. 687. See, also, Bennett v. McConnell, 88 Ga. 177, 14 S. E. 208. Moreover, the law as it stood at the time (section 1970, Code 1882) expressly declared that such a judgment upon a note which a deed had been given to secure should take lien upon the land prior to any other judg- ment or incumbrance against the defend- ant.

3. The next question which arises for consideration is whether a creditor holding a common-law judgment can attack an- other common-law judgment obtained by another creditor on the ground that there was usury in it. The trial judge held that this could not be done, and we think his ruling was correct. There are cases, some of which were cited by counsel for the plaintiffs in error, holding that one cred- itor can, in the distribution of the estate of an insolvent debtor, suggest and show usury in the claim or demand of another creditor. Upon reading these cases it will be seen that none of them involved a judg- ment at law, except those cases involving judgments foreclosing mortgages. These latter decisions are put upon a section of the Code, and do not contravene the general principle that a judgment obtained without fraud or collusion settles every question which could have been made or litigated by the defendant; or, as was said by McCay, J., in Gatewood v. Bank, 49 Ga. 45, 48, quoting with approval an opinion in 2 Hill, Law, 474: The original "contract has been merged into the judgment, which imports absolute verity; and it is conclusively pre- sumed that the parties made all the de- fenses allowed by law, and that the judg- ment is the conclusion of law on the true

matter of course, if there be fraud in any of the other grounds for equitable interference, there is no difficulty; but, if the only objection to the judgment is that the original debt was usurious, the doctrine seems to be settled that it is too late to ask even chancery to interfere after a regular judgment at law. Nor are we able to see how the case is strengthened when the complainant is a creditor of the defendant, instead of the defendant himself. He is clearly a privy of the defendant. His only interest in the matter is that the defendant is his debtor. He comes into the controversy through the defendant, and it would entirely upset the whole doctrine of the conclusiveness of judgments if they were liable to be attacked on their merits by other creditors of defendant. * * * So far as I have been able to find cases of interference against a judgment by others than the defendant, they are all for want of jurisdiction, or for fraud and collusion. And but a moment's consideration will show that this must be the proper rule. There never would be an end of litigations if, after the defendant has had his day in court, and a judgment has been pronounced, every creditor shall have his day also, and have the issues re-examined." See, also, Phillips v. Walker, 48 Ga. 55; Foster v. Thrasher, 45 Ga. 519. There being in the present case no charge of fraud or collusion between the bank and Clifton, and no allegation of any accident or mistake, we think the judgment is valid, and binding on Clifton. He, therefore, could not attack it on the ground that there was usury in the note on which the suit was founded, for that question is settled against him by the judgment. His creditors, standing in his shoes by reason of their privity with him as debtor, cannot attack the judgment on any ground on which he is concluded. The record does not show any usury upon its face, and the judgment, as to him, imports absolute verity, and concludes him on the question of usury. For these reasons we think the court was right in sustaining the demurrer and awarding the fund in controversy to the Bank of Thomasville. Judgment affirmed. All the justices concurring.

BUSH et al. v. BANK OF THOMASVILLE. BANK OF THOMASVILLE v. BUSH et al.

(Supreme Court of Georgia. Aug. 7, 1900.)

ACTION ON CONTRACT—JUDGMENT.

This case is controlled by the principles announced in the case of Bush v. Bank (this day decided) 36 S. E. 900.

(Syllabus by the Court.)

Error from superior court, Miller county; H. C. Sheffield, Judge.

Action between the Bank of Thomasville and others. From the judgment rendered, Bush and others bring error. The bank assigns cross error. Judgment on bill of exceptions affirmed, and cross bill dismissed.

W. C. Worrill and R. H. Powell & Son, for plaintiffs in error. B. B. Bower and A. L. Hawes, for defendant in error.

PER CURIAM. Judgment on main bill of exceptions affirmed; on cross bill dismissed.

MORRISON v. STATE.

(Supreme Court of Georgia. Aug. 7, 1900.)

LANDLORD'S LIEN—SALE BY TENANT—INTENT TO DEFRAUD.

1. In order to render penal a sale by a tenant of personalty which is subject to a landlord's lien for rent and advances, it must appear that such sale was made without the consent of the landlord, with intent to defraud him, and that in consequence of such sale he sustained a loss.

2. It was, on the trial of one accused of violating the provisions of Pen. Code, § 672, erroneous to charge that if a tenant was indebted to his landlord for rent or supplies, and if, being so indebted, he sold crops raised on the rented premises, without the consent of the landlord, and to his injury, and if loss accrued to the latter by reason of such sale, the accused would be guilty; the vice of the charge being that it failed to state that, in order to render the accused guilty, it should appear that the sale was made with intent to defraud the landlord.

(Syllabus by the Court.)

Error from superior court, Hart county; S. Reese, Judge.

J. T. Morrison was convicted of crime, and brings error. Reversed.

Asbury G. McCurry, for plaintiff in error. R. H. Lewis, Sol. Gen., and Harrison & Bryne, for the State.

LEWIS, J. The accused was tried in the superior court of Hart county under an indictment charging him with the offense of a misdemeanor, for that he did "unlawfully, wrongfully, and fraudulently, after having made a rent contract for the year 1898 with one R. T. Buffington, on which rent contract he was due said R. T. Buffington twenty-nine and $^{81}/_{100}$ dollars for rent and advances made upon the crops grown upon said rented land, for which he was due the said R. T. Buffington, landlord, on a landlord's lien, sell and otherwise dispose of a bale of cotton grown on said rented premises before the payment [of] the landlord's lien, without the consent of, and with the intent to defraud, said R. T. Buffington, the landlord, and loss was sustained by said R. T. Buffington in the sum aforesaid." The jury returned a verdict of guilty, whereupon the accused made a motion for a new trial, which was overruled, and he excepts.

1, 2. This indictment was founded upon

for rent and advances made upon crops by landlords, employers, or others, as authorized by law. A violation of the provisions of this section shall be a misdemeanor. Section 671, referred to above, provides: "If any person, after having made a mortgage deed to personal property, shall sell or otherwise dispose of said property before the payment of the mortgage debt, without the consent of, and with intent to defraud, the mortgagee, and loss shall thereby be sustained by the holder of the mortgage, the offender shall be punished as for a misdemeanor." In one of the grounds of the motion for a new trial error is alleged upon the following charge of the court: "If you believe, under the law as given you in charge and the evidence in this case, beyond a reasonable doubt, that this defendant sold crops raised upon the premises rented from Buffington for the year 1898, without his consent, and to his injury, and that loss accrued to him by such selling of the cotton alleged to have been disposed of and sold by him, being indebted for rent or supplies to Buffington at the time of selling the same, I charge you he is guilty, and you should so find." Error is alleged further upon the following charge of the court: "It is wholly immaterial to you, in considering this case, whether this defendant disposed of the crop for the payment of any other debt, either with or without the consent of Buffington, provided you believe that after such disposition there was any of the crop left, which he, without the consent of Buffington, sold, being then in debt to the landlord, Buffington, for supplies or rent, and loss accrued to Buffington." The ground of objection set forth in the motion to these charges of the court was that they were not the correct law of the case, and should have been qualified by instructions that such sale, to render defendant guilty, must have been made with intent to defraud the landlord. In the bill of exceptions it is alleged that, upon the hearing of the motion for a new trial, in addition to the amendment allowed by the court, defendant duly offered an additional ground, to wit: "The court, as movant contends, should, in addition to the other elements necessary to make out the case for the state, have instructed the jury that, before they would be authorized to find the defendant guilty, they must be satisfied beyond a reasonable doubt that the sale of the crop on which the landlord had a lien was done by defendant with intent to defraud the landlord, and the court nowhere in his charge instructed the jury that, before they would be authorized to find the defendant guilty, they must be satisfied beyond a reasonable doubt that such sale was made with intent to defraud the landlord." The court refused to allow that necessary for a proper review of the case by the supreme court, upon which ruling defendant assigns error in his bill of exceptions. We have carefully examined the entire charge of the court, and fail to discover in it that the court gave any instructions whatever to the effect that they must believe that defendant's intent was to defraud the landlord before they would be authorized to convict him. Hence we think that the amendment refused by the court should have been allowed, as none of the other grounds of the motion for a new trial specifically set forth that the court failed entirely to give such instructions to the jury in other portions of the charge. We make no special ruling in the headnotes on this point, but in this opinion refer to it and the entire charge of the court with the view of showing that even upon the amendments to the motion for a new trial above quoted, as allowed, the court should have granted a new trial; and in the light of the record the principles decided in the headnotes necessarily control the case. There is no question but that one of the elements necessary to constitute this offense is an intent by a defendant to defraud his landlord, for all the provisions in Pen. Code, § 671, are adopted by the law making the crime charged in this indictment a misdemeanor, and among these provisions it is expressly stipulated that the defendant shall not only sell or otherwise dispose of the property before payment of the debt, without the consent of the mortgagee (landlord in this case), but he shall do it with intent to defraud. We cannot say that the evidence in the present case absolutely demanded a finding by the jury that there was an intent on the part of the accused to defraud. To say the least of it, it is clearly inferable from his statement that there was no such intent, and it was contended with some plausibility by his counsel that even the evidence in behalf of the state was not clear and definite enough to demand a finding, if they believed all of the state's witnesses, that the accused was guilty of a fraudulent sale of this property. We express no opinion on the general ground that the verdict was contrary to the evidence, nor do we mean to intimate that there was not sufficient evidence to have sustained a verdict of guilty had the court committed no error in the omission to charge of which complaint is made. It is sufficient simply to decide that we cannot say the evidence demanded a verdict of guilty, and therefore failure to enlighten the jury upon the law touching a valid defense to the charge in the indictment is reversible error. Judgment reversed. All the justices concurring.

NONSUIT—TROVER—FORTHCOMING BOND—ESTOPPEL—EVIDENCE—RECOUPMENT—DIRECTING VERDICT.

1. There was no error in refusing to grant the nonsuit.

2. The execution of a recognizance, payable to the plaintiff, for the forthcoming of personal property, where bail has been required, in an action of trover, does not estop the defendant from denying that he ever was in possession of the property to recover which the suit was instituted.

3. Evidence offered to establish, by way of recoupment, damages sustained by the defendant, though growing out of the same contract, is inadmissible in an action of trover, unless some special equity, such as the nonresidence or insolvency of the plaintiff, is shown to exist.

4. The direction of a verdict under the facts of this case was error.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Action by the G. Ober & Sons Co. against J. L. Bell. Judgment for plaintiff, and defendant brings error. Reversed.

A. H. Russell and M. E. O'Neal, for plaintiff in error. Townsend & Westmoreland, A. L. Hawes, and Harrison & Bryan, for defendant in error.

LITTLE, J. The G. Ober & Sons Company instituted an action of trover against J. L. Bell for the recovery of 7,590 pounds of lint cotton, of the value of $664, and also 18 promissory notes, of the value of $100, fully described in the petition. An affidavit for bail was made, and Bell, with certain securities, entered into a bond in the sum of $1,600, as prescribed by section 3418 of the Civil Code, conditioned that the said Bell should produce on the trial all of said cotton and notes sued for, and for the forthcoming of all of said property to answer such judgment, execution, or decree as might be rendered or issued in the case. The defendant answered that he was not guilty; that the present suit arose out of business transactions between plaintiffs and defendant for the year 1890, and that, relying on certain representations of the plaintiffs, he had entered into a written contract with them, and executed and delivered his note for 19,158 pounds of cotton, payable November 1, 1890; that said note and contract were obtained by fraud, etc. He denied any indebtedness to the plaintiffs. Plaintiffs introduced in evidence a note of defendant, dated May 9, 1890, for 19,158 pounds of cotton, to be due November 1st after date; also, two contracts made with the defendant, covering the subject-matter of the note. The stipulations of the contracts, in brief, are: That Bell was appointed agent for the sale of plaintiffs' fertilizers at two places in Decatur county. Plaintiffs agreed to consign to him, for sale on commission, fertilizers to the value of a named amount. Such fertilizers were to be consigned to defendant, and subject to their order. That defendant should keep an accurate account of sales, and render a statement of same, together with the names of purchasers, etc., and should protect the goods unsold. That for all time sales made by the defendant, whether for cotton or currency, notes were to be taken on forms furnished by plaintiffs, and should be forwarded to plaintiffs by a given date, together with a statement of such sales and of goods remaining unsold. These notes would thereafter be returned to defendant for collection, and were to be held in trust for plaintiffs. That for cash sales defendant should promptly remit. The names, prices, and amounts of fertilizers agreed to be shipped to the defendant under this contract were then set out. Defendant was allowed until the 1st of May thereafter to elect whether he would pay for the fertilizers shipped in currency or cotton. If the former, he was then to forward his note, accompanied with farmers' notes as collateral. The compensation to be received by the defendant was the difference between the net prices for which the goods were charged and the prices at which the defendant should sell the goods. It was further stipulated that the defendant should guaranty all sales made, etc. The plaintiffs' evidence tended to show: That the defendant had paid 11 bales of cotton on his note at one time, and 4 more at another, leaving a balance of 10,940 pounds of cotton due. That cotton was worth 8½ cents per pound at the date the note matured. Defendant also held notes of the value of $100 given by various named parties, all of which belonged to the plaintiffs. That on the 4th of November he owed plaintiffs 10,940 pounds of cotton, and at that time had on hand notes uncollected to the amount of $400. That the defendant reported this to the agent of the plaintiffs by a printed list. Plaintiffs demanded a settlement of the defendant, which he declined to make unless plaintiffs would settle all differences which existed between them. Plaintiffs then demanded the cotton and notes sued for, which defendant refused to deliver. A witness for plaintiffs, who was their agent in the transactions with the defendant, on whose evidence plaintiffs relied to make out their case, testified: That the way he arrived at what amount of cotton Bell collected was by taking what notes the latter had on hand, and deducting them from the balance of the cotton due. That Bell told him that the ones sued for were the only notes he had on hand uncollected. It is possible that the defendant might have taken stock in payment of some of the notes, but plaintiffs had nothing to do with the stock. What they wanted was for their notes to be collected. When he demanded

give him up this note and settle some old matters that did not have anything to do with this case. "We brought suit for the cotton that he had on hand, and the balance of the notes that had been collected." This suit is instituted to recover the balance due on defendant's note, and the list of notes presented contained all that the defendant said he had on hand uncollected. Prices of cotton were then shown. The defendant testified: That there were some 15 or 20 notes in the list, which he had, and which were worth about $100. That he had not collected any of these. He tried, but could not. Does not think the money could be made on such notes by suit. At the conclusion of the evidence for the plaintiffs, defendant's counsel moved the court to award a nonsuit. This motion was refused, and the defendant excepted.

1. No error was committed in refusing to grant the nonsuit. It was very clearly shown by the evidence, both for the plaintiffs and defendant, that the latter was in possession of certain notes described in the petition; that they belonged to the plaintiffs; that they had demanded them from the defendant, which demand had been refused; and also the value of such notes. This was clear proof of conversion of the notes, and entitled the plaintiffs, in any event, to recover such notes or their value. Under the evidence in the case, the plaintiffs were not entitled to recover the cotton for which they sued. The defendant offered to show that he had collected 3,000 pounds of cotton, but this evidence was objected to, and the evidence excluded, and there was no evidence of any character which showed that the defendant had collected and converted to his own use any part or portion of the cotton for which the action was instituted. It seems to have been the theory of the plaintiffs that inasmuch as the defendant was intrusted by them with certain notes to collect, and these notes were payable in cotton, when they demanded a settlement, and received from the defendant a statement of the notes uncollected, this was an admission of the conversion of the cotton represented by the notes not included in the list of those uncollected, and sufficient to authorize a recovery in the action of trover. Not so. There is nothing in the evidence which distinctly shows that the defendant collected any of the notes in cotton, and, as the plaintiffs chose to bring their action to recover the cotton alleged to have been collected and converted, it was incumbent upon them to show that the defendant had been in possession of the cotton for which they sued at some time prior to the institution of the action. This was necessary to prove conversion. The evidence was certainly sufficient to show the existence of a debt due by defendant, but in this action they were not seeking to collect a debt, but to recover cer-

defendant for any part of the cotton for which they brought suit, yet they did make out a case for the recovery of the promissory notes. Hence the court did not err in refusing to grant a nonsuit.

2. It was offered to be proven by the defendant that he never did collect but 3,000 pounds of cotton on the notes sent to him by the plaintiffs, and that he had not collected the amount sued for by the plaintiffs. To the admission of this evidence plaintiffs' counsel objected on the ground that by giving bond in the case the defendant was estopped from denying that he had the property in possession. We think this ground untenable, and that the court erred in rejecting the evidence. The gist of the action of trover is the conversion of the plaintiffs' property by the defendant; that is to say, that the defendant wrongfully deprived the plaintiff of possession. In this case the possession, according to the evidence of the plaintiffs, depended entirely upon whether the collection of the promissory notes sent to the defendant by the plaintiffs had in fact been made in cotton by the defendant. Evidence that they were not collected, or that they were not collected in cotton, or how much cotton was collected on the notes, was certainly admissible. Without some proof of this character, or admission waiving necessity of such proof, the plaintiffs were not entitled to recover the cotton, or any part of it. The defense to the action was that the defendant had not converted the property; that he had never collected, or been in possession of, the cotton for which suit was instituted. The claim that this evidence ought not to be admitted, because the defendant, by giving bond in the case, was estopped from denying that he had the property, cannot be maintained. Civ. Code, § 4605, prescribes that, when an affidavit for bail is made in connection with the action of trover, it is the duty of the sheriff to take a recognizance, payable to the plaintiff or complainant, with security in double the amount sworn to, for the forthcoming of such personal property to answer such judgment, execution, or decree as may be rendered or issued in the case. It is difficult for us to see any reason why the execution of a bond of this character, when given by the defendant to keep him out of jail, should estop him from denying that he had possession of the property. In the case of Phillips v. Taber, 83 Ga. 570, 10 S. E. 272, this court, in referring to the liability of a defendant in an action of trover, where he had given a bond of this character, said: "The defendant in a trover case is not liable by reason of having given a bond for the eventual condemnation money, but for damages in consequence of having converted the plaintiff's property." As we construe the condition of the bond, it simply binds the principal and sureties to produce the property sued for, to answer any judgment or decree

ever having been in possession, or having converted the property. Such was not its purpose, nor does it have such a legal effect. Neither the ruling nor language used in the opinion in the case of Commission Co. v. McElhannon, 98 Ga. 394, 25 S. E. 558, establishes such a proposition. In our opinion, the court erred in rejecting the evidence which was offered.

3. It is also complained that the court rejected evidence of the defendant to the effect that, at the time of the sale of the fertilizers to him, the agent of the plaintiff stated that he was selling to the defendant these fertilizers as cheap as to any other agent in the county; that, believing these representations to be true, he entered into the contract; that said representations were untrue; and that the plaintiffs did sell to other agents in the county the same grade of fertilizers sold to defendant, at prices very much lower than those given to the defendant in his contract of purchase. This evidence, we think, was properly rejected. It was, in effect, an effort to recoup the damages which the defendant contended he sustained by reason of the fraud of the plaintiffs. But recoupment in the nature of damages cannot be pleaded by the defendant, nor adjudicated, in an action of trover, unless some special equity, such as nonresidence or the insolvency of the plaintiff, is shown, concerning which both the plea and evidence are silent. Harden v. Long, 110 Ga. —, 36 S. E. 100. See, also, Barrow v. Mallory, 89 Ga. 76, 14 S. E. 878.

4. After the evidence closed, the court directed a verdict in favor of the plaintiffs for $740 principal, besides interest and costs, to which direction the defendant excepted. From what has been said, it is clear that the direction of a verdict in favor of the plaintiffs was error. As we have attempted to show, the plaintiffs were not entitled to recover any part of the cotton for which they sued, and, of course, were not entitled to recover the value of it. Judgment reversed. All the justices concurring.

SMITH v. TOWNS et al.

(Supreme Court of Georgia. July 14, 1900.)

EJECTMENT—PLEADING.

This case is controlled by the decision of this court in Ewing v. Shropshire, 7 S. E. 554, 80 Ga. 374, and it follows that the court erred in overruling the demurrer to the plaintiffs' petition.

(Syllabus by the Court.)

Error from superior court, Floyd county; W. M. Henry, Judge.

Action by C. M. Towns and others against Halsted Smith. Judgment for plaintiffs, and defendant brings error. Reversed.

This was an action of complaint for land. The petition contained the following allenor 17 years of age. (2) That Halsted Smith, of said county, by his tenant, Ben Prior, is in possession of the following tract or parcel of land, with the improvements thereon, in the Fifth ward of the city of Rome, in said state and county, to wit, known as "Lot 97," in Butler's addition to the town of South Rome, according to the survey, stakes, and map of said addition; the same being S. W. portion of land lot No. 277, 23d district and 3d section of Floyd county, Ga., fronting on Dunlap (now Forrest) street 67 feet, and running back 160 feet, more or less; and that said lands are worth one thousand dollars. (3) That your petitioners are the true owners in fee simple of three-fourths undivided interest in said land; that said Halsted Smith owns in fee simple one-fourth of said land. (4) That James H. Cooper, on the 22d day of June, 1885, executed to 'Mary W. Towns and the heirs of her body, born and to be born,' a deed to the lands hereinbefore described. (5) That petitioners are the heirs, and the only heirs, of the body of said Mary W. Towns; and that said Mary W. Towns departed this life on the 2d day of June, 1894. (6) That by the deed before described said Mary W. Towns and your petitioners held and owned each jointly an undivided one-fourth interest in said lands. (7) Petitioners further show that on the —— day of ——, 1893, said Mary W. Towns executed to said Halsted Smith a deed to said lands; that by said deed she conveyed to said Smith her interest in said land, to wit, an undivided one-fourth interest; and that said Smith went into possession of said lands on that date, all of petitioners being minors; and that said Smith's title or claim of title is under said deed only, and therefore through a common grantor with petitioners, to wit, J. H. Cooper. (8) That said Smith from said —— day of ——, 1893, has received all the rents and profits of said land, which are and have been of the annual value of one hundred dollars. (9) Petitioners further show that the money invested in the purchase of said lands was a trust fund for the benefit of the said Mary W. Towns and her said children, born and to be born, and was invested in accordance with the parol trust imposed on it by Gerome Harris and Mrs. Harris individually and as administrator and administratrix of Jas. D. Harris, deceased, for the benefit of the said Mary W. Towns and the said heirs of her body, born and to be born. (10) Petitioners further show that after the execution and delivery of said deed by said J. H. Cooper, during petitioners' minority, petitioners' names and interest were stricken from said deed, and the same, so erased, was delivered to said Halsted Smith, who now holds the same, if it is not destroyed. (11) That said Halsted Smith had full notice of peti-

that Halsted Smith be required to bring said deed into court, but waive further discovery by him. (13) Petitioners further pray: (a) That guardians ad litem be appointed for Mary Eugenia Towns and Eunice Belle Towns; (b) that the deed under which they hold, a copy of which substantially is hereto attached, marked 'Exhibit A,' be set up and established; (c) that writ of possession issue in their favor for the lands in dispute; or (d) that by proper proceedings in such cases made and provided said lands be partitioned by the appointment of commissioners, who shall sell said lands, setting aside to each in severalty his or her portions of the proceeds of said sale, and they be given judgment against defendant for three-fourths of the rents and mesne profits received by him." To said petition a demurrer was filed as follows, to wit: "Now comes defendant in the above-stated case, and demurs to the petition of said plaintiffs, and for grounds of demurrer says: (1) That said petition sets forth no legal cause of action against said defendant, nor any legal ground upon which to base recovery of said land, or a prayer of reformation of the deed of James H. Cooper to Mary W. Towns. (2) Defendant demurs to the third paragraph of plaintiffs' petition because said paragraph sets out no facts which show ownership of the land referred to therein; nor is there any abstract of title attached to said petition showing title as alleged in said paragraph. (3) Defendant demurs to the fourth, fifth, and sixth paragraphs of said petition upon the ground that the language quoted in the fourth paragraph conveys no title to any other person than said Mary W. Towns. (4) Defendant demurs to the seventh paragraph of said petition upon the ground that the allegations in said paragraph show that said Mary W. Towns executed to said defendant a deed to said lands; said allegations show that said defendant received the whole title to said lands, and not to any portion thereof, and no allegation in the said seventh paragraph sets forth any legal reason to the contrary. (5) Defendant demurs to the ninth paragraph of plaintiffs' petition upon the ground that a parol trust cannot be set up in opposition to the express terms of a written instrument; and further that no notice of such parol trust is alleged to have been received by defendant before his purchase of the land. (6) Defendant demurs to that portion of the prayer marked "(b)" in the twelfth paragraph of plaintiffs' petition, and moves to strike Exhibit A, referred to in said subparagraph, because said paragraph and said exhibit are not set up as a part of the allegations in said case, but as a prayer in consequence of other allegations which do not embrace said ex-a ground for action." Said demurrer was overruled, and the defendant excepted.

Halsted Smith, in pro. per. Nat. Harris and J. H. Hoskinson, for defendants in error.

PER CURIAM. Judgment reversed.

BOHANNON, Tax Collector, et al. v. WROUGHT-IRON RANGE CO.

(Supreme Court of Georgia. Aug. 7, 1900.)

PEDDLERS' TAX—LIABILITY OF TRADING CORPORATION.

1. Since only a natural person "who itinerates for trading purposes" can, under the statutes of this state, be regarded as a "peddler," there is no authority of law for issuing or enforcing against a trading corporation an execution for a special tax alleged to be due by it as a peddler. Range Co. v. Johnson, 11 S. E. 233, 84 Ga. 754, 8 L. R. A. 273.

2. It follows, from an application of the foregoing to the facts of the present case, that the court did not err in granting the injunction.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Action by the Wrought-Iron Range Company against J. M. Bohannon, tax collector, and others. From a judgment granting an injunction the tax collector brings error. Affirmed.

Sam P. Maddox, Sol. Gen., and J. M. Terrell, Atty. Gen., for plaintiff in error. J. M. Neel, for defendant in error.

PER CURIAM. Judgment affirmed.

CONEY v. STATE.

(Supreme Court of Georgia. April 17, 1899.)

RAPE—CORROBORATION OF WITNESS—INSTRUCTIONS.

When on the trial of an indictment for rape the state depended for a conviction solely upon the evidence of the alleged victim of the crime, and there was evidence strongly tending to impeach her, and no evidence whatever of any facts or circumstances in any manner tending to corroborate her, it was erroneous to charge upon the subject of corroboration. Such an error in such a case requires the granting of a new trial.

(Syllabus by the Court.)

Error from superior court, Dodge county: Smith, Judge.

One Coney was convicted of rape, and brings error. Reversed.

Roberts & Milner, for plaintiff in error. J. F. De Lacy, Sol. Gen., for the State.

PER CURIAM. Judgment reversed.

1900.)

ADMINISTRATOR — NONRESIDENT — FOREIGN APPOINTMENT—EFFECT—EVIDENCE—REVIEW.

1. The appellate court will not consider facts which appear only in the exceptions, or in the argument of counsel, and which do not appear in the record.

2. Where appellant had been appointed administrator by a court in Florida, the appointment of another administrator for the same estate by a court in South Carolina was not in violation of Const. U. S. art. 4, § 1, providing that full credit should be given by one state to the judicial proceedings of other states.

3. The finding of fact by a court in Florida that appellant was a fit and proper person to administer an estate was not binding on a South Carolina court in appointing an administrator for the same estate.

4. Payment for burial clothes, with the purpose of obtaining administration thereby, is not sufficient to give a right to the appointment as administrator.

5. Under Rev. St. 1893, § 2067, providing that, if an administrator moves out of the state, his letters shall be revoked, a nonresident cannot be appointed as an administrator, since such an appointment is forbidden by implication.

6. One who petitioned for letters of administration could testify that he paid a doctor's bill for the deceased, notwithstanding Code, § 400, providing that a party to an action against an administrator, etc., cannot testify in his own favor regarding a transaction with the deceased, since the testimony was not given in an action against any of the parties named in the section.

Appeal from common pleas circuit court of Charleston county; George W. Gage, Judge.

Proceeding to appoint an administrator for the estate of William Neubert, deceased. From a judgment of the circuit court dismissing his appeal from the probate court, and sustaining an order appointing J. S. Pinkhussohn administrator of the estate, L. J. Burkhim appeals. Affirmed.

The following are appellant's exceptions: "(1) That the decree is in contravention of section 1, art. 4, of the constitution of the United States, requiring that 'full faith and credit shall be given, in each state, to the public acts and records and judicial proceedings of every other state,' in this: that it repudiates the appointment of L. J. Burkhim as administrator of the estate of William Neubert, deceased, by the proper court of Alachua county, in the state of Florida, the residence of the deceased. (2) That the decree is in contravention of said section 1 of article 4 of the constitution of the United States in finding that the administrator, L. J. Burkhim, so appointed by the proper court of Alachua county, in the state of Florida, as a proper person for said administration, 'is not a proper person to be intrusted with the administration of William Neubert.' (3) That there is no evidence that the said L. J. Burkhim was not a proper person. (4) Because L. J. Burkhim was the largest creditor of William Neubert, deceased, and entitled to the administration. (5) Because Mr. Pinkhussohn, the claim by his own oath, contrary to section 400 of the Code; (c) because the probate judge refused to subpœna Miss Swan, a witness, to disprove said claim."

W. H. Thomas and Robert E. Davis, for appellant. J. N. Nathans, J. N. Nathans, Jr., and Huger Sinkler, for respondent.

McIVER, C. J. For reasons that will hereinafter appear, we deem it necessary to set out the "case" in full, which is as follows: "J. S. Pinkhussohn, a resident of Charleston, S. C., on the 3d November, 1898, filed his petition in the probate court for Charleston county alleging that William Neubert, a resident of Charleston, South Carolina, and of Gainesville, Florida, died intestate, leaving personal property in Charleston of the value of $25,000, and no relatives in this city; and the petitioner is a creditor, and praying letters of administration, etc. L. J. Burkhim, a resident of Gainesville, Florida, on the same day filed his petition alleging: That Wm. Neubert, of Gainesville, Florida, died 29th October, 1898, intestate, leaving a brother and sister in Germany; the petitioner is a creditor; that deceased had $40 in a bank in Charleston, and perhaps other assets; that petitioner has applied for letters of administration upon this estate in Alachua county, Florida, and has received preliminary papers for the administration thereof. He asks letters of administration. Burkhim also filed a caveat against the granting of letters of administration to Pinkhussohn, because he denies that Pinkhussohn is a creditor, and as a stranger he cannot be appointed; that he (Burkhim) has been appointed administrator ad bona colligenda from the domiciliary court in Florida; that any administration in this county will be only ancillary, and that by granting him (Burkhim) the administration it will prevent circumlocution and expense. Publication of citation was made in regular form for 17th November, 1898, and, the parties appearing upon that day, at the request of Burkhim it was postponed until the 16th December, 1898, when the case was heard and determined. The letters of administration to Pinkhussohn were issued to him on the 17th, reciting, 'Whereas, Wm. Neubert, late of Gainesville, Florida, died intestate, * * * leaving property in this state,' etc. The testimony of J. S. Pinkhussohn (objected to by Mr. Thomas for Burkhim) was that at Neubert's request he had paid $2 to Dr. Edwards, a bill for medical attendance on Neubert, some time before Neubert's death, and that he had not been repaid; that Neubert spent three, four, and five months in Charleston, and kept almost all his property here, to wit, securities, moneys in bank, etc.,—some $20,000. He introduced judgments against Burkhim for $2,000. L. J. Burkhim testified that he was a creditor of the estate to the extent of about

that he (Burkhim) is a resident of Gainesville, Florida. He also produced his letters of administration from Alachua county, Florida, by the proper court, giving him (Burkhim,—'in whose fidelity in this behalf I very much confide') the administration of said estate on the 15th December, 1898. The general findings of the probate court, among other things, were: The probate judge of Charleston finds that the assets in Florida are far more than enough to pay all Florida debts; that Pinkhussohn is a creditor, and that Burkhim is not, and that his action in paying for the burial clothes was intended to obtain administration; and, further, that he has unsatisfied judgments against him, and 'I do not regard him as a suitable person to be intrusted with the administration of so large an estate. He is also a nonresident of this state.' He also finds that the heirs of Neubert reside in Germany, and that they have given C. O. Witte, consul of the German empire in Charleston, power of attorney to represent them in all matters pertaining to the estate, and to receive their shares of the estate for them, etc. From this decree Mr. Burkhim appealed to the circuit court, because Burkhim, being the domiciliary administrator of Alachua county, Florida, the residence of the deceased, should be appointed ancillary administrator in this state, and that after his appointment in Florida, without discrediting evidence here, his right is unquestionable; because the court refused to hear testimony of the domicile; because Pinkhussohn was allowed to establish his creditorship by his own oath; because the administration of Pinkhussohn is clearly in the interest of the debtors of Neubert; because Pinkhussohn, not being a creditor, could only be given [letters] ad bona colligenda; and because he ignored the transcript from Florida proven before him. On the 7th April, 1899, the present respondent moved before Judge Klugh, after due notice, to dismiss the appeal, but on that day his motion was refused, and he served notice of appeal to the supreme court, and finally abandoned his appeal. [While we do not see that this paragraph has any relevancy whatever to any of the questions which this court is called upon to determine, yet, as we find it in the "case," which we proposed to set out in full, we did not feel at liberty to omit even this irrelevant paragraph.] The cause came before Judge Gage at the December term, 1899, and he made the following decree: 'This is an appeal from the decretal order of the probate court granting letters of administration to the respondent, J. S. Pinkhussohn. The order of the probate court sets forth the facts upon which his judgment was based, and, after hearing counsel for appellant and respondent, I am satisfied, among other reasons, that the appellant, L. J. Burkhim, is not a proper person to be intrusted with the probate judge, dated December 16, 1898, be, and is hereby, sustained as the judgment of this court, and that this decree be certified by the clerk of this court to the said probate court for such other proceedings as may be necessary to enforce the same.'" From this judgment the said L. J. Burkhim gave due notice of appeal to this court, basing the same upon the several exceptions set out in the record, a copy of which the reporter will insert in his report of this case.

Before proceeding to the consideration of the exceptions, we find it necessary to say that some facts which may possibly be material are stated in the arguments of counsel which are not to be found in the "case" as prepared for argument here, and which, therefore, cannot be considered by the court. For this reason we thought it best to incorporate in this opinion the whole of the "case" as we find it printed in the record, and shall base our conclusions upon facts which we find in the "case," without regard to any additional facts which may be stated in the exceptions or in the argument of counsel, which, under the well-settled rule, this court is not at liberty to consider. Ever since the case of State v. Wilder, 13 S. C. 344, decided as far back as November, 1879, and uniformly followed ever since, it has been the settled rule that this court cannot consider any fact which does not appear in the "case" as prepared for argument here, and which appears only in the exceptions or in the argument of counsel. In the light of this rule, so long and so well settled, we will proceed to the consideration of the several exceptions. We are unable to discover from the "case" anything tending to show that section 1 of article 4 of the constitution of the United States, requiring that "full faith and credit shall be given in each state, to the public acts, records and judicial proceedings of every other state," has been violated, as is claimed in the first exception; for there is nothing in the "case" which shows that the action of the court in Florida appointing Burkhim administrator there was repudiated, or even disregarded, either by the probate judge or the circuit judge, here. The rule that the judgments and decrees of the court of any state have no extraterritorial force is too well settled to require the citation of any authority. While, therefore, the action of the court in Florida may have had the effect of investing Burkhim with all the rights and powers of administrator in that state, it certainly had no force and effect in this state. If he desired to become administrator here, his duty was to do exactly what he did do,—apply to the proper authority here for letters of administration in this state; and upon such application it was not material to inquire what the court in Florida had done. The first exception must, therefore, be overruled.

For a somewhat similar reason the second

ed with the administration of the estate there was in no way binding upon the court here. See Overby v. Gordan, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. —, and the cases therein cited.

The third exception, based as it is upon an allegation of fact which does not appear in the "case," cannot be sustained. We do not know what evidence was before the probate judge, as the "case" does not show or purport to show all of the testimony which was before the probate judge.

The fourth exception, based as it is upon the assumption that Burkhim was the largest creditor of the intestate, cannot be sustained, because it is directly contradicted by the finding of fact by the probate judge, concurred in by the circuit judge, that the appellant was not a creditor of the intestate. Indeed, it appears from the testimony of Burkhim, as stated in the "case," that he does not pretend to have been a creditor of Neubert at the time of his death; but his claim to be a creditor is based upon the fact that after the death of Neubert he bought a suit of clothes in which to bury the deceased, for which he paid "about $20." It is true that in 19 Am. & Eng. Enc. Law, at page 195, it is said, "A claim which accrued after the death of the deceased, as for funeral expenses, is sufficient to give the right to administer." But this is based upon only two cases, which seem to admit that this is a doctrine only to be applied in exceptional cases. Certainly it should not be applied in a case like this, where the probate judge finds as a fact that Burkhim's action "in paying for the burial clothes was intended to obtain administration." And when to this is added that the attempt is made in this case to apply this exceptional doctrine in favor of an applicant for administration who is a nonresident of the state, who is incumbered with debts to a large amount, which have been reduced to judgment, we are certainly satisfied that the probate judge was right in declining to issue letters of administration to the appellant. It is true that the case of Jones v. Jones, 12 Rich. Law, 623, has been cited as holding that administration may be granted to one residing beyond the limits of the state. But, as was well argued by counsel for respondent, that case was decided prior to the passage of the act of 1878, now incorporated in Rev. St. 1893 as sections 2067 and 2068, which necessarily implies that a nonresident of the state cannot be granted letters of administration; for that act provides that, if an executor or administrator, since the grant of letters testamentary or of administration, shall change his domicile to a place beyond the limits of the state, his letters shall be revoked. Of course, this necessarily implies that a grant of letters of administration to one who is a nonresident at the time would not be lawful. (1) That his claim was a pretext; (2) because he was allowed to establish his claim by his own oath, contrary to the provisions of section 400 of the Code; (3) because the probate judge refused to subpœna Miss Swan, a witness, to disprove said claim. The first of these grounds is clearly untenable, as there is no testimony whatever to sustain it, and is in direct conflict with the concurrent findings of the judge of probate and the circuit judge. The second ground is likewise untenable. In the first place, it does not appear that the objection to Pinkhussohn's testimony was based upon the ground now insisted upon. But, waiving that, the general rule now unquestionably is that interest does not disqualify, and the question is whether the testimony objected to falls within any of the exceptions. The only one within which it can possibly be claimed to fall is that which forbids a person who is a party to an action or proceeding from testifying in his own favor against a person prosecuting or defending such action as executor or administrator, etc., in regard to a transaction or conversation between such witness and a person deceased. Here, while it is true that the witness was testifying as to a transaction with a person deceased, he was not so testifying in an action against the administrator or other person named in the section as bearing certain relations to such deceased. See Norris v. Clinkscales, 47 S. C., at pages 493, 494, 25 S. E. 799. It is clear, therefore, that there was no violation of section 400 of the Code in receiving the testimony in question. The third ground upon which this exception rests is without a shadow of foundation in the testimony to sustain it; for it does not appear in the "case" that the probate judge was ever asked to subpœna Miss Swan, or any other witness, in the case; and certainly it does not appear that he ever refused to do so. The fifth exception must likewise be overruled. The judgment of this court is that the judgment of the circuit court be affirmed.

JARRELL v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina. Aug. 23, 1900.)

CARRIERS OF PASSENGERS — PROXIMATE CAUSE OF ACCIDENT — NEGLIGENCE — PRESUMPTION — CONTRIBUTORY NEGLIGENCE — AMENDMENT OF PLEADING.

1. Where the complaint alleged the negligent delay of the train on which the plaintiff was a passenger for several hours, and that such train was negligently stopped for over half an hour on a high trestle, where plaintiff, on account of the darkness and the poor lights furnished by defendant on the train, missed his footing, and fell to the ground, a demurrer for failure to state a cause of action was properly sustained, since the complaint failed to show defendant's negligence to be the proximate cause of the injury.

2. Where the complaint failed to show that aintiff's fall from the train was caused by an t of defendant, there is no presumption of gligence by the defendant from the mere fact the fall.

3. Where the complaint alleged that defendit negligently stopped the train on which aintiff was a passenger for over half an hour a high trestle, and that while there, on acunt of the darkness and the poor lights furshed by defendant on the train, plaintiff missd his footing, and fell to the ground, but did t allege plaintiff's ignorance that the train as on the trestle, a demurrer for failure to ate a cause of action was properly sustained, ice the complaint showed contributory negliice by plaintiff which would defeat a recovy.

4. Leave to amend the complaint after susining a demurrer is discretionary in the trial urt, and, unless abused, the exercise of such scretion in refusing to allow amendment will t be interfered with on appeal.

Appeal from common pleas circuit court Hampton county; D. A. Townsend, dge.

Action by G. H. Jarrell against the arleston & Western Carolina Railway mpany. From an order sustaining a deurrer to the complaint and refusing perssion to amend, plaintiff appeals. Affirm-

Julius P. Youmans, for appellant. James . Moore, for respondent.

JONES, J. This appeal is from an order staining a demurrer to the complaint on e ground that it failed to state facts suffint to constitute a cause of action. The ecific grounds of objection to the comint were: "(1) That the allegations in the nplaint do not show negligence on the rt of the defendant; (2) that the allegans in the complaint do show contributory gligence on the part of the plaintiff." re is the complaint, omitting the first ragraph, alleging that defendant is a corration: "(2) That on the 5th day of July, 7, this plaintiff, at Fairfax, one of the ular stations on said railway, purchased m the defendant company, and paid for, ticket, which entitled this plaintiff to sage on the cars of the defendant comy from Fairfax, in the county of Barnl, and said state, to Augusta, state of orgia, and return; and plaintiff, after ing purchased said ticket from defend, took passage on a train of cars belongto said company to Augusta. (3) That l defendant carelessly, and negligently, in violation of its contract with this ntiff, delayed the said train upon which plaintiff was to return to Fairfax in gusta, and failed to start the same on its rn trip until about 10 o'clock at night, ch was three hours past its advertised edule time; and when the said train reing reached the Savannah river trestle, was upon the same, this plaintiff being oard the said train, with his ticket paid as aforesaid, the said train was carely and negligently stopped and kept ding on said dangerous trestle for half an hour or more by the servants and agents of the defendant company who were in charge of said train and running the same for said company. (4) That while the said train was standing on said dangerous trestle in the aforesaid careless and negligent manner, on account of the darkness of the night and poor lights furnished by the defendant company on said train, the plaintiff missed his footing, and fell from the said train a distance of 30 feet, from which fall this plaintiff was badly bruised and injured, by having his breast bone and three ribs broken, his back wrenched and sprained, the muscles and tendons of his arms, side, and back badly torn and bruised, and his nervous system fearfully shocked; so that the plaintiff, on account of said wounds, bruises, and shock, was confined to his bed for six weeks or more, and has ever since experienced great pain and suffering. (5) That the injuries of the plaintiff aforesaid were caused by the wrongful acts, negligence of defendant, in the manner before mentioned, whereby the plaintiff has suffered great and long-continued bodily pain, is permanently injured in his person, and rendered unable to pursue any active calling, or to perform hard labor, which is necessary for the support of himself and family; and by such injury plaintiff has been damaged $10,000."

It will be seen that two acts of negligence are specifically alleged: (1) Delaying the train beyond the schedule time; (2) stopping the train and allowing it to remain for half an hour or more on a trestle. Then it is alleged that while the train was so standing, the plaintiff, on account of the darkness of the night and poor lights furnished by defendant on said train, missed his footing, and fell, thereby causing the injury. To constitute a cause of action for negligence, the complaint must not only show that the defendant was negligent, but that the negligence of the defendant was the proximate cause of the injury. We cannot see, from any allegation in the complaint, what possible connection the failure in starting the train on time had with the injury as a cause thereof. The negligence in stopping the train and allowing it to remain on the trestle for a time could not have produced the injury if plaintiff had remained in the car, where the defendant had reason to believe he would remain. The complaint does not show that plaintiff went out upon the platform of the car by any order or invitation of the defendant; nor does it state any excuse or necessity warranting plaintiff being upon the platform at the time; nor does it show that defendant, with knowledge of plaintiff's danger, failed to warn. There is nothing in the complaint from which a reasonable person could infer that plaintiff's going out upon the platform and falling therefrom was a natural and probable result of the stopping of the train upon the trestle. As to the matter of "poor lights," even if it be granted that the

platform under the circumstances. The train was not at any station or place where persons are invited to use the platform as a means of entering or leaving the car, when, as to such persons, the defendant would owe the duty to so light the platform and landing as to insure safety in their use. Under the circumstances in the case the defendant owed no duty to plaintiff to light up the platform and adjacencies outside the cars for his benefit.

A presumption of negligence from the fact that plaintiff fell from the train and was injured could not arise. The case of Steele v. Railroad Co., 55 S. C. 389, 33 S. E. 509, cited by appellant, as well as other cases referring to the matter of presuming negligence by the fact of injury to a passenger on a railroad, shows that such presumption arises on proof of the fact of injury to a passenger caused by some agency or instrumentality of the railroad company. In this case, as shown, it does not appear from the complaint by any proper averment that plaintiff's injury was caused by the defendant. If so, then the presumption is rebuttable, and the complaint itself contains matter in rebuttal, which, under the demurrer, the court must consider. For this reason we will notice the second ground of objection to the complaint, viz. that the complaint shows contributory negligence by plaintiff. The question of contributory negligence cannot properly arise except when the negligence of the defendant is a proximate cause of the injury. Therefore, for the purpose of this question, we assume that the complaint shows negligence of defendant as a proximate cause of the injury. We may also say that, while contributory negligence is ordinarily a matter of defense, yet, if the complaint shows contributory negligence by plaintiff, that would render the complaint demurrable for insufficiency, since it contained allegations that would defeat the cause of action alleged, or prevent a recovery thereon. The complaint alleges the fact that the train stood upon the trestle for a half an hour or more, and does not allege that plaintiff was ignorant of this fact. The inference is that he knew the train was on the trestle when he went upon the platform. He was aware of the condition, also, that there were poor lights on the train, and that the night was dark. Nevertheless he went out upon the platform, without excuse or necessity. This was certainly negligence, which, if not the only proximate cause of his injury, was a proximate cause concurring with the negligence of the defendant.

It is also excepted that the circuit court erred in refusing plaintiff's motion to amend. This refusal was within the discretion of the court, and we cannot say such discretion has been abused. The judgment of the circuit court is affirmed.

(Supreme Court of South Carolina. Aug. 21, 1900.)

MORTGAGES—FORECLOSURE SALE — FAILURE OF TITLE TO PORTION OF LANDS—RIGHTS OF PURCHASER.

A purchaser of land at a master's sale under foreclosure is entitled to an abatement in the price bid, on discovery after the sale, and before a deed has passed, that a portion of the lands described in the decree and advertisement of sale had been recovered from the mortgagor by title paramount.

Appeal from common pleas circuit court of Greenville county; D. H. Townsend, Judge.

Action by the People's Bank of Greenville, S. C., against W. A. Bramlett and another. From a judgment in favor of plaintiff, defendant Ella M. Townes appeals. Affirmed.

W. H. Irvine and L. K. Clyde, for appellant. L. O. Patterson, for respondent.

JONES, J. This appeal is from a decree of the circuit court allowing a purchaser at a foreclosure sale of land an abatement in the price on account of a defect in the title to a part of the land sold. The case is thus stated in the circuit decree: "This case comes before me upon the master's report, which shows that H. J. Haynsworth had purchased one of the tracts of land ordered to be sold at the price of $2,500, but that after his bid he ascertained that a certain portion of the land had been recovered from the mortgagor by title paramount in the case of Spillors v. Bramlett, and he claimed an abatement of one hundred and fifty dollars from the price because of the failure of the title to said portion. The affidavit of Mr. Haynsworth shows that he did not know that a good title to said portion of the land would not be conveyed by the master's deed, and that the lands were worth about fifteen dollars an acre. The record in the case of Spillors v. Bramlett shows a recovery of a portion of this Jenkins tract, said to contain about twelve acres. The decree of foreclosure and the advertisement under which the land was sold describe it as the Jenkins tract, and state specifically the lines, metes, and bounds, and describe it as containing 166 acres, more or less. The portion recovered by Spillors is included within these lines. On learning the situation, Mr. Haynsworth deposited in the hands of the master enough money to cover the cash portion of the bid, making due allowance for the above deficiency. This was not made as a payment upon his bid, but was a mere deposit to await the determination of the court upon the matter. I find from the evidence before me that the abatement applied for, to wit, one hundred and fifty dollars, is reasonable, and should be allowed, unless there is some rule of law forbidding it. The land was sold at a full price, and it seems just that the purchaser should not be required to pay for a portion which he cannot get. The appli-

sale under a decree of foreclosure is not entitled to any relief where there is a deficiency or a failure of title as to a portion of the property. This position may be correct after the contract has been executed and the deed of conveyance made, and the authorities cited by the attorneys for the mortgagees tend to support such contention. But there is quite a difference where the contract is executory. The general doctrine is that one who agrees to purchase land will be allowed a reasonable opportunity to investigate the title, and if he finds that the title fails as to a portion, or there is a defect in the title, he will be allowed to rescind the trade, or an abatement from the purchase price. After the contract has been executed, however, and the deed actually made, the purchaser must look to the warranty contained in his deed, and he is entitled to only such remedy as he has under that warranty. The present case is one where the contract is wholly executory, and I think that the general rule applies to this case, and entitles the purchaser to an abatement of the price."

1. The first exception imputes error in allowing the abatement when there was no evidence offered to prove such deficiency, or to show that the purchaser would not, under the master's deed, get 166 acres, as claimed by him, there having been no survey made of the land. The affidavit of the purchaser was before the court, which stated "that a part of this land was recovered by A. Spillors about 1890, thus taking a part of the land included within the lines, metes, and bounds by which it was sold to deponent, and deponent has been unable to get possession of said portion, although it is included within said metes and bounds." The master reported that the purchaser, Haynsworth, claims a reduction upon his bid of $150, for the reason that it appears from the record of the case of Spillors against Bramlett that a portion of the tract bid off by him, containing about 12 acres, was recovered by the plaintiff in that action by title paramount prior to the institution of this suit of foreclosure. The circuit court found that "the record in the case of Spillors v. Bramlett shows a recovery of a portion of this Jenkins tract, said to contain about twelve acres." It is stated in the argument of appellant that the record in the case of Spillors against Bramlett was not put in evidence, and no evidence was offered at the hearing of the master's report except the affidavit of respondent. But the findings by the circuit court as to what the record in Spillors against Bramlett shows is not specifically excepted to, and we cannot assume that such finding was without evidence. The fact of a deficiency by reason of the recovery in Spillors against Bramlett was shown by respondent's affidavit, which was not in any way disputed, and appellant made this matter. It was not at all necessary to have a survey to ascertain whether respondent might not acquire 166 acres by his purchase notwithstanding said deficiency. The respondent bid for a tract described by designated boundaries. The deficiency arose from a failure of title to a portion within those boundaries; and the circuit court has found that an abatement to the extent of $150 on the purchase price of $2,500 would be reasonable, to which there is specific exception.

2. The second exception assigns that it was error to allow such abatement when said tract was sold as a body, for a sum in gross; the number of acres stated in the advertisement being used as a part of the description of the property as evidenced by the advertisement and the use of the expression "more or less." The tract involved was described in the mortgage, complaint, decree, and advertisement for sale, as follows: "The Jenkins tract, containing one hundred and sixty-six acres, more or less, conveyed to D. A. Bramlett by O. H. Jenkins, November 4, 1876, recorded in R. M. C. office book II., page 223, described as follows [giving a minute description by courses and distances and corners], adjoining lands of Goghill, Hyde, and others." It is true that the tract was sold as a body for a sum in gross; but it will be observed that the deficiency in question is not a mere deficiency in quantity arising from a mistake or variation in calculation of the acreage contained in specified boundaries, but the deficiency arises from failure of title to a part of the land within the given boundaries. If the deficiency was merely due to an error or variation in a surveyor's calculation, and the purchaser could nevertheless take the land within the specified boundaries, such deficiency, being only 6 per cent. of the acreage mentioned, would be guarded against by the words "more or less" in the description, and would not be such a gross variation as would call for redress, as shown in such cases as Lyles v. Haskell, 35 S. C. 391, 14 S. E. 829, and Erskine v. Wilson, 41 S. C. 198, 19 S. E. 489. But in this case the purchaser cannot get the land specifically defined by metes and bounds and corners, since a portion of it is not in the power of the court to convey, it having been taken from the mortgagor by title paramount. The purchaser bought the "Jenkins tract," whatever its acreage, but cannot receive a title for the whole of said tract.

3. It is excepted that the purchaser is estopped to claim abatement, because with knowledge of said deficiency he paid a part of the purchase money, went into possession of the property, and rented the same for the year 1899. This exception has no basis in the facts as shown by the record

that the purchaser refused to comply with the terms of sale unless an abatement of $150 was allowed.

4. It is contended that the purchaser ought to be denied any relief, because he had constructive notice of the judgment recovered in the case of Spillors against Bramlett, and recorded in Greenville county prior to the execution of the mortgage. The purchaser swears positively that he had no knowledge of the deficiency at the time of purchase or bid. Whether a purchaser at an equity sale shall be held bound by constructive notice of all recorded judgments affecting the property sold, so as to defeat relief for defect of title actually discovered after the sale and before compliance, will depend upon whether it is the policy of the court of equity in this state to allow purchasers at sales under its order a reasonable time to examine into the title before compelling compliance. In Mitchell v. Pinckney, 13 S. C. 212, it was stated, "Reasonable time is always given for the examination of title, and, if necessary, a reference will be ordered." We take it that this expresses the policy in this state, and it is a fair and just one to all concerned, and is well calculated to inspire confidence and promote competition at equity sales. Such being the rule, we do not well see how purchasers at equity sales should be denied relief for defect of title, on the mere ground that they are bound by constructive notice of such defect, unless it be that relief is never to be afforded for defect of title which a full examination of the records would disclose, which would for most practical purposes be a denial of relief for defective title. If one has actual notice of the defect in the title, or has before his bid discovered such defect by an examination of the record, there would be good grounds for denying him any relief, but, if he has no actual notice, and bids in reliance on the rule allowing him a reasonable time to examine into the title, he ought not to be denied relief merely because he had constructive notice of the records at the time of his bid. Then, from the facts before us, we cannot affirm with certainty that the record in Spillors against Bramlett would disclose in itself the fact of the deficiency claimed, for it may be that some evidence aliunde was necessary to identify the land recovered in that case as a portion of the tract sold. This evidence was furnished the circuit court by the affidavit of the purchaser, who, after showing the identity, swore that he did not know of the deficiency at the time of his bid.

5. The fifth exception imputes error in holding that said purchaser had a right to time in which to investigate title after sale, when the decree under which these lands

the question. As a matter of fact, the master did not resell, and no questions are before us growing out of a resale at the risk of a purchaser. The master has seen fit to repeat the matter to the court for guidance, instead of attempting to resell; and the court, by its decree, has again instructed the master in the premises. Notwithstanding the direction to resell on noncompliance, it was competent for the court in the proceedings to direct acceptance of the purchaser's bid, less the abatement allowed.

6. The remaining question is covered by the eighth exception, which assigns error in allowing said abatement, or any abatement of the purchase price of land sold at a forced judicial sale for the collection of money, in which there are no implied warranties, and to which the doctrine of caveat emptor applies, in the absence of fraud or misrepresentation. In execution sales by the sheriff the maxim of caveat emptor is rigorously applied. A sheriff under an execution is not directed to sell specifically described property, is governed by general laws, and is not the agent of the court in such sale. The court does not confirm his sales, and exercises no supervision over them, as it does with reference to sales under its own order. A sheriff selling under an execution cannot be said to represent in any way the defendant in execution, except in so far as by general law he is made the organ by which the interest of the defendant in execution in the property sold is conveyed to the purchaser. Hence it has been long settled that a purchaser at an execution sale by a sheriff buys at his peril, in the absence of fraud or misrepresentation. This in a large degree accounts for the sacrifices often attending execution sales, for it is reasonable to suppose that a prudent purchaser will make allowance in his bid for the contingencies of his purchase. In some jurisdictions this stern maxim of the common law is applied to all judicial sales at law or in equity, but in this state a more liberal and reasonable rule prevails. In equity sales the court is the vendor. Its order of sale acts on specifically described property. Purchasers are invited by the court to bid, and it is well known that bidders at such sales feel a greater sense of security that they will get the described property, or be treated with equity. This tends to make property bring its value,—a thing to be desired and encouraged. Now, if one who seeks equity must do equity, ought not a court of equity becoming a vendor of property at the instance and for the benefit of the parties concerned do equity, and render appropriate relief to a purchaser, when the court finds itself unable to convey what it advertised to sell? Surely the court will not do less than it would compel any other

purchaser for defect of title. The purchaser at such sale will not be compelled to perform his contract to purchase if his title is doubtful. Fuller v. Missroon, 35 S. C. 326, 14 S. E. 714; McMichael v. McMichael, 51 S. C. 555, 29 S. E. 403. In the case of Monaghan v. Small, 6 S. C. 177, this principle was applied to a sale under proceedings to sell lands of a decedent in order to apply the proceeds to the payment of his debts and for distribution. I see no good reason why a rule applicable to partition sales and sales for the payment of the debts of a decedent is not also applicable to a sale under foreclosure of a mortgage. In all such sales the court is vendor at the instance and for the benefit of the parties in the enforcement of a right. In the case of Bolivar v. Zeigler, 9 Rich. (S. C.) 287, the court made a broad path for equity in these words: "Whatever doubts may have been once entertained as to whether the doctrine of caveat emptor applied to sales by the commissioners in equity, those doubts were finally settled by the principles established in the case of Commissioners v. Smith, 9 Rich. Law, 515, and there can be no doubt that this maxim does not apply to such sales, and therefore that the defense here set up, if established on the trial, will be a sufficient defense to the action." For although the sale in this case was made by the sheriff, yet it was not a compulsory sale under process of execution, where the rule of caveat emptor does apply, but a sale for partition at the instance of the parties, and must be governed by the same principles as applied to such sales when made by the commissioners in equity." That able and learned annotator, Mr. A. C. Freeman, in a note to Burns v. Hamilton's Adm'r, 70 Am. Dec. 575, fortifying the statement by numerous citations, says: "It is held in some states that the rule of caveat emptor applies to mortgage, partition, and other equity sales, and that in the absence of fraud or warranty a failure of title to the property sold is no ground for the relief of the purchaser. But the better rule is that in equity sales the purchaser is entitled to receive a title free from equities and incumbrances of which he had no notice, and if, by the sale, he will not receive such a title, he will not, upon his making objection, be compelled to complete his purchase, but will be released therefrom, unless the title can be made good, or other just relief awarded." The case of Latimer v. Wharton, 41 S. C. 508, 19 S. E. 855, contains some language from which it might be inferred that the court regarded the rule of caveat emptor applicable to an executed sale under foreclosure for debt on the grounds that such a sale was compulsory, and so would come under the rule applicable to execution sales by the sheriff. But the point decided in that case was that: "If the purchaser of land mortgage for the purchase money, if upon default in payment he is sued, but fails to plead failure of consideration in defense, and judgment is obtained; and if before payment the land so purchased is recovered by title paramount, and execution on such judgment is levied on the other property of the purchaser,—an injunction will not issue to enjoin a sale under such levy upon the complaint of the purchaser, who made no allegation of fraud or misrepresentation by which he was induced to accept the deed to the land, enter into possession thereof, or execute the bond and mortgage to secure the credit of the purchase money." That case was very different from this case, where the contract is executory, and where no element of waiver or estoppel enters. In that case the court recognized a great difference between enforcing an executory contract and giving relief after it has been executed, referring to several cases where the distinction was recognized, viz.: Evans v. Dendy, 2 Speer, 9; Fuller v. Fowler, 1 Bailey, 75; Prescott v. Holmes, 7 Rich. Eq. 1. See, also, Parker v. Parlow, 12 Rich. Law, 683. So that, even if the rule of caveat emptor should apply at all to sales by the court of equity, it should only apply after the sale is executed. The contract of a bidder at a sale in equity is not executed until he has complied with the terms of sale, and received the officer's deed of conveyance, or done something which should estop him from asserting that the contract was not executed. If a purchaser at a sale in equity, after discovery of the defect in title, complies with his bid, and goes into possession of the land, it might with force be contended that such purchaser is estopped to assert such defect afterwards, but no such case is presented here. The contract of the purchaser in this case is executory merely. But, further, we think it may be said in this case that there was a misrepresentation as to the property sold, for which cause relief would be granted even after an executed contract, if no element of waiver or estoppel interposed to prevent. It is not essential that such misrepresentation be intentional. It appears that the land was conveyed to the mortgagor in 1876. In 1888 a portion of the land was recovered from the mortgagor by title paramount in the case of Spillor against Bramlett. After this the mortgagor, with knowledge of this recovery, but probably not thinking of it at the time, executed the mortgage on land a part of which he did not own. This misrepresentation so incorporated in the description in the mortgage went likewise into the complaint, decree, and advertisement, which followed the description in the mortgage. This minute description in the mortgage and advertisement, already referred to in this opinion, giving courses, distances, and corners, was as if a plat of the land had been made by a surveyor, and ex-

of caveat emptor does not apply to sales by the master in chancery, for, he being the agent of the parties for whose benefit the sale was made, they are as much bound by his representations as they would have been by their own, further decides that where a tract of land has been sold by the master in equity, and represented upon a map as containing more acres than it was discovered upon a resurvey to have, an abatement will be allowed for the deficiency in the quantity according to the nature and extent of the defect. To the same effect is Barkley v. Barkley, 3 McCord, 269. The judgment of the circuit court is affirmed.

LACHICOTTE et al. v. FORD.

(Supreme Court of South Carolina. Sept. 13, 1900.)

WATER AND WATER COURSES—FLOODING LAND—DAMAGES—COMPLAINT.

Plaintiffs alleged that defendant owned a plantation lying on a certain river, and between such river and plaintiffs' plantation; that the banks of such river bounding on defendant's plantation, and the openings in the same, were solely within defendant's control; that in the spring of 1898, when plaintiffs were in possession of their plantation, defendant unlawfully, and with the malicious desire to injure plaintiffs, so operated the banks of such river and its canals as to cause the rice fields of plaintiffs' plantation to be overflowed, which fields plaintiffs had prepared for cultivation at much expense, and so maintained such nuisance as to prevent all cultivation of plaintiffs' plantation during the year 1898, and to render the same utterly useless; that, by reason of defendant's conduct, plaintiffs suffered damages, hereinbefore alleged, etc. *Held*, that the complaint states a cause of action, as it shows plaintiffs' right to the unobstructed use of their plantation, and the invasion of that right by defendant, in flooding such plantation by means of a water course.

Appeal from common pleas circuit court of Georgetown county; J. C. Klugh, Judge.

Action by St. Julien Lachicotte and A. A. Springs, co-partners under the firm name of S. M. Ward & Co., against Frederick W. Ford, for damages for flooding plaintiffs' plantation by means of a water course. From a judgment for plaintiffs, defendant appeals. Affirmed.

Mitchell & Smith, for appellant. Walter Hazard, Trenholm Rhett, Miller & Whaley, and Gilland & Pyatt, for respondents.

JONES, J. The circuit court overruled defendant's demurrer to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, and the defendant now seeks to reverse said order. The complaint attempted to state two causes of action, each of which was demurred to; but it will be sufficient for this appeal to state the allegations as to one of said causes, which are substantially as follows: (1) That possession of a tract of land in said county known as "Woodside." (3) That the defendant owned and was in possession of a tract of land in said county known as "Rice Hope," lying on the waters of North Santee river, and between said river and said Woodside plantation. (4) "That the banks of said river, its creeks and canals bounding on Rice Hope plantation, and the trunks and openings in the same, were at the time mentioned hereinafter solely within the care, management, control, and operation of the defendant." (5) Alleged certain expenditures incurred in the preparation, etc., of said Woodside plantation in 1897 and 1898 for cultivation. (6) "That in the spring of the year 1898, when, as hereinbefore alleged, these plaintiffs were in the lawful possession of the said Woodside plantation, and in the exercise and enjoyment of their legal rights in and upon the same, the said defendant, as these plaintiffs are informed and believe, and upon such information and belief allege, unlawfully, and with the willful and malicious desire to annoy, harass, injure, and oppress these plaintiffs, so used the said Rice Hope plantation, and so controlled, handled, maintained, and operated the said banks of said river, and of its canals and its creeks, as also the trunks and openings therein, as to cause the rice fields of said Woodside plantation to be overflowed, which fields, as hereinbefore alleged, had been prepared for cultivation at much expense by these plaintiffs, and so caused and maintained such nuisance as to hinder and prevent any and all cultivation of said Woodside plantation during the said year 1898, and to render the same utterly useless to these plaintiffs during the said two years. (7) That by reason of the willful, unlawful, and unreasonable conduct of said defendant as aforesaid in the use and management of his said Rice Hope plantation, and in the use, management, care, control, maintenance, and handling of the banks of said river and of its canals and creeks, as also of the trunks and openings therein, these plaintiffs, in the manner aforesaid, suffered the special injuries and damages hereinbefore alleged, as well as the loss of the crops intended to have been cultivated on said Woodside plantation, in all to the damage of these plaintiffs in the sum of at least fifteen hundred dollars." (8) Some allegations as to exemplary damages.

We think that the complaint states a cause of action. A cause of action is stated when the facts alleged show some right of plaintiff, and the invasion of that right by some delict or breach of duty by defendant. The complaint shows plaintiffs' right to the unobstructed use and enjoyment of Woodside plantation, and the invasion of that right by the defendant, in flooding said plantation by means of a water course. Admitting the defendant's right to use the water of North

license, or prescription authorizing the same. The case presented is one of flooding by means of a water course, and not a flooding through freshet, tide water, or surface water. While it is true that, in determining a demurrer for insufficiency, the court will treat as alleged all the facts of which the court should take judicial notice, as the facts that the tide ebbs and flows, and the general geographical areas subject thereto, still we cannot assume, as one of such facts, that Rice Hope and Woodside plantations are so subject, and argue therefrom that the flooding complained of was due to the action of tide water, and that the complaint failed to allege any duty which the defendant owed to the plaintiffs, to protect their land therefrom. The judgment of the circuit court is affirmed.

BRITISH & AMERICAN MORTG. CO., Limited, v. BATES. SAME v. PEACOCK. SAME v. ALL. SAME v. KNEPTON.

(Supreme Court of South Carolina. Sept. 15, 1900.)

APPEAL—FINDING OF FACTS—EXCEPTIONS—NOTE—PLACE OF CONTRACT—USURY.

1. A finding of fact cannot be reversed in the absence of a specific exception assigning error therein.

2. A note and a mortgage securing the same, written in New York and made payable there, were sent to South Carolina for execution. The maker of the papers, after signing the same, made a draft for the amount of the loan on the payee of such papers, in New York, and the same was cashed by a bank in South Carolina. The papers were then sent to New York. *Held*, that a finding that the papers were made in the state, and not in New York, was proper.

3. Where a contract is made in one state, to be performed in another, the parties may stipulate in good faith for the rate of interest allowed in either; and where they have contracted with reference to the laws of one state, there being no evidence that they intended to evade the usury laws of the other state, the contract must be enforced, where it is not usurious.

Appeal from common pleas circuit court of Barnwell county; D. A. Townsend, Judge.

Actions by the British & American Mortgage Company, Limited, against James W. Bates, S. L. Peacock, W. Riley All, and L. P. Knepton, respectively, to foreclose four mortgages. From judgments for plaintiff, defendants separately appeal. Affirmed.

R. C. Holman, for appellants. T. O. Patterson, for respondent.

JONES, J. These four actions for the foreclosure of four several mortgages were heard together. One of the defenses made was that the contract was made in New York, and payable there, and was void for usury under the laws of New York. The circuit court found as a fact that the notes were made in the state of South Carolina, and not in New York, and that the mortgages were executed in South Carolina, and not in New York, and that the contracts were governed by the laws of South Carolina, and not by the laws of New York, and that the defendants were not guilty of usury under the laws of South Carolina. The plaintiffs appeal from so much of the decree as holds that the contracts were governed by the laws of South Carolina, and not by the laws of New York, and that the defendants were not guilty of usury under the laws of either state, and that the preponderance of the evidence was that, while the notes were payable in New York, that place of payment was merely a convenience; and that the parties contracted with direct reference to the laws of South Carolina. The appellants' exceptions impute error (1) in holding that the notes and mortgages were made in South Carolina, and in not holding that they were made in New York; (2) in holding that the parties could contract in reference to either the laws of New York or the laws of South Carolina; (3) substantially as the first; (4) in decreeing for foreclosure, when he should have held that the contracts were governed by the laws of New York, and so void for usury.

In reference to the first exception: One of the notes given by defendant Bates was as follows: "Barnwell, S. C., July 10, 1896. $140.00. On the first day of November, 1896, I promise to pay to the order of the British and American Mortgage Company, Limited, one hundred and forty dollars in United States gold coin, of present standard of weight and fineness, at the National Bank of the Republic of New York, N. Y., for value received, with interest at the rate of eight per cent. per annum after maturity. The payment of this note and interest is secured by a mortgage, which is recorded in the public records of Barnwell county, in the state of South Carolina. Witness my hand and seal. J. W. Bates. [L. S.]" The note appears on its face to have been signed at Barnwell, S. C. Bates was a resident of Barnwell county, and the mortgage, which was an essential part of the contract or transaction, covered lands in Barnwell county. The notes and mortgage, while written in New York, were sent to Patterson & Holman, in Barnwell, S. C., for execution by Bates, and were actually signed and sealed by Bates in Barnwell, S. C., before requisite witnesses. The "case" does not show the date of the record of the mortgage, but it is a just inference from the recital in the note, to which plaintiffs and defendant are parties, that the mortgage was at least filed for record in Barnwell on the day of the execution of the papers. It appears that, on the day of the signing of said papers by Bates in Barnwell, he made a draft upon Hoffman, in New York, through whom the loan by plaintiff was negotiated, for the amount of the loan, and that this draft was collected through a bank in the usual course of business. The draft was cashed by a bank in Barnwell, and with the proceeds, excepting a small amount, Bates on the same day discharged a prior incumbrance on the property. It appears that the papers were sent to Hoffman, in New York, through whom the loan was negotiated with plaintiff, along with the said draft for the amount of the mort-

gage loan, and was by Hoffman turned over to plaintiff. But this delivery to the plaintiff in New York was not the consummation of the execution. The execution was complete, so far as the question before us is concerned, when the papers, in the form they now have, were mailed in South Carolina for plaintiff, pursuant to the agreement under which the loan was negotiated. The circuit court found, as matter of fact, that the parties contracted with reference to the laws of South Carolina. This finding of fact cannot be reversed unless (1) there be a specific exception assigning error in such finding, and (2) after such exception it must appear that the preponderance of the evidence is against such finding. No exception is made to such finding. But, if there had been an exception thereto, the preponderance of the evidence is not against such finding. Where a contract is made in one state, to be performed in another state, the parties may in good faith stipulate for the rate of interest allowed in either. This is the law as settled in this state (Thornton v. Dean, supra), and in other jurisdictions (Jackson v. Mortgage Co. [Ga.] 15 S. E. 812; Dugan v. Lewis [Tex. Sup.] 14 S. W. 1024, 12 L. R. A. 93; Scott v. Perlee, 48 Am. Rep. 421). See, also, cases cited in note to Martin v. Johnson (Ga.) 8 L. R. A. 170 (s. c. 10 S. E. 1092). The parties having the right to so contract, and having, as matter of fact, contracted with reference to the laws of this state, and there being no evidence that the parties intended any shift to evade the usury laws, the contract must be enforced here, since it is not usurious under our laws. The judgment of the circuit court is affirmed.

McDONALD et al. v. WOODWARD.

SAME v. STEWART et al.

(Supreme Court of South Carolina. Sept. 13, 1900.)

LIFE ESTATES—POWER OF LIFE TENANT—MORTGAGE.

The life tenant has no power, at the time of the conveyance to him, to so mortgage the land for the purchase price as to bind the interest of the remainder-men, who are in no way parties to such mortgage.

Appeals from common pleas circuit court of Fairfield county; George W. Gage, Judge.

Actions by Sallie E. McDonald and another, as remainder-men, against William B. Woodward, and against John R. Stewart, executor of Robert McCarley, deceased, and Thomas L. McCarley, respectively, to recover certain lands. From judgments for plaintiffs, defendants respectively appeal. Affirmed.

Jas. W. Hanahan and J. E. McDonald, for appellants. A. S. & W. D. Douglass, for respondents.

JONES, J. In each of these actions the plaintiffs, as remainder-men, after the death of the life tenant, sue the defendant as grantee of the life tenant for recovery of the land described. While not disputing the facts showing plaintiffs' title, the defendants seek to defend by showing that at the time of the conveyance to the life tenant and remainder-men the life tenant executed a bond and mortgage for the purchase money on said land; that said mortgage bound the interest of the remainder-men; that defendants, after taking title from the life tenant, paid said money in consideration of the conveyance to them under the agreement that it should remain open for their protection, and that by reason thereof they were equitable assignees of said mortgage, entitled to be subrogated to the rights of the mortgagee, and that such mortgage should be foreclosed for their benefit. The facts, in the concrete, are thus stated in the circuit decree: "One Thomas W. Erwin was the common source of title. He conveyed by deed to Mary J. Hemphill February 1, 1873. Thereafter Mary J. Hemphill, on the 13th of February, 1879, conveyed by deed 92.4 acres to Robert McCarley; and on the 19th of February, 1879, conveyed by deed 124½ acres to William B. Woodward. The said Mary J. Hemphill died December 1, 1898, leaving her surviving the plaintiffs as her only children then alive. The habendum in Erwin's deed to Hemphill is: 'To have * * * unto the said Mary J. Hemphill * * * and during the term of her natural life, and after her death to such of her issue as she may leave living at the time of her death, the child of a deceased child, if any, to take the share to which their parent would have been entitled if living; and to their heirs and assigns, forever.' The consideration of the deed is expressed to be 'two thousand five hundred dollars by securities given and now paid me by Mary J. Hemphill. * * *' On the same day the deed from Erwin to Hemphill was executed, Hemphill executed to Erwin her bond for the penal sum of $[illegible], conditioned to pay the just sum of $2,[illegible] therewith, and to secure the payment thereof a mortgage on the premises the same day conveyed. It does not expressly appear either in the bond or mortgage that they were given to secure payment of the purchase money, but that fact is not seriously contested. I find that such was the fact. The mortgage employs apt language to convey the fee to Erwin, with clause of defeasance. It is proper to add, the deed, bond, and mortgage were prepared in the office of James H. Rion. Thomas W. Erwin hypothecated the bond and mortgage with the National Bank of C[illegible] to secure the payment of his own note to bank for money borrowed. The bank pressed for its money, and Robert McCarley and William B. Woodward undertook to pay, and did pay, the bank the amount of the Erwin note. Thereabouts, on February 13, 1879, for $[illegible], and on February 18, 1879, for $096, respectively, they had purchased two parcels of land from Mary J. Hemphill. The purchase money therefor was to be paid and was paid to the Erwin note, and on the collateral [illegible]

liam B. Woodward for an amendment of the pleadings and fuller testimony thereon. We agree fully with the circuit court that the life tenant had no power to so mortgage the land as to bind the remainder-men, who were not in any way parties to such mortgage. It is therefore immaterial how may be decided the issue of fact whether it was the intention or agreement of parties to leave open for the benefit of defendants. The circuit court was quite correct in saying: "Admitting that the lien of the mortgage was preserved intact for the benefit of McCarley and Woodward, it could not survive the body which it held, to wit, the life estate of Mary Hemphill. That estate terminated at the death of Mary Hemphill in December, 1898, and with it ended the incumbering mortgage. There is, therefore, no opportunity to apply the equitable doctrine of assignment and subrogation." The case of Robinson v. Lowery, 52 S. C. 464, 30 S. E. 487, is much like this case in principle. The judgment of the circuit court in each case is affirmed.

CHESTERFIELD & K. R. CO. v. JOHNSON.

(Supreme Court of South Carolina. Sept. 17, 1900.)

EMINENT DOMAIN—CONSTRUCTION OF RAILROAD—COMPENSATION—APPEAL.

Under Rev. St. § 1747, relating to the condemnation of lands for a railroad, providing that from the verdict of the jury assessing compensation either party may appeal to the circuit court, giving the opposite party 15 days' notice of such intended appeal, with the grounds thereof, and, if the court shall be satisfied of the reasonable sufficiency of the grounds, an issue shall be ordered, and the question of compensation shall be submitted to a jury, an order of the circuit court granting an appeal from an assessment of compensation, and ordering an issue to be tried by a jury, which recites that the court was satisfied of the reasonable sufficiency of the grounds of appeal, cannot be reviewed by the supreme court, since it cannot say that the circuit court was not satisfied of the reasonable sufficiency of the grounds.

Appeal from common pleas circuit court of Kershaw county; W. C. Benet, Judge.

Proceedings by the Chesterfield & Kershaw Railroad Company against J. H. Johnson to condemn land for a railroad. From an order of the circuit court granting an appeal from the verdict of a jury impaneled by the clerk to assess compensation, and ordering the issue of compensation to be submitted to a jury, plaintiff appeals. Affirmed.

W. M. Shannon, for appellant. W. D. Trautham, for respondent.

McIVER, C. J. This railroad company, desiring to obtain, for the construction of its road, a right of way through the lands of the defendant, Johnson, situate in Kershaw ute. From the verdict of the jury impaneled by the clerk, finding the proper compensation to be $100, the defendant, Johnson, gave notice of appeal to the circuit court, accompanied with the grounds thereof. That appeal was heard by his honor, Judge Benet, presiding at the February term, 1900, of the court of common pleas for Kershaw county, who granted an order, reciting that "it appearing to the court the grounds are reasonably sufficient," and ordered an issue to be framed and submitted to a jury to determine the amount of compensation to which appellant was entitled. From this order the Chesterfield & Kershaw Railroad Company appeals to this court on the following grounds: "(1) That his honor erred in holding that the grounds of appeal were reasonably sufficient to sustain the appeal; (2) that his honor erred in framing an issue and submitting it to a jury on the showing made by the appellant."

This is a statutory proceeding provided for by Rev. St. §§ 1743–1747, both inclusive, and the question presented by this appeal must be determined by the provisions of the statute. These sections, after making provisions for the initiatory steps to be taken where a corporation desired to obtain a right of way over the lands of another for the construction of a railroad, whereby, among other things, it is provided that the clerk of the court shall impanel a jury to determine, in the first instance, the amount of compensation which shall be made to the landowner, and render their verdict in writing for the same, proceed, in section 1747, to declare as follows: "From the verdict so rendered it shall be the right of either party to appeal to the first term of the circuit court next ensuing in the county, giving to the opposite party fifteen days' notice of such intended appeal, with the grounds thereof; and upon the hearing of such appeal, if the court shall be satisfied of the reasonable sufficiency of the grounds, an issue shall be ordered, in which the appellant shall be the actor, and the question of compensation shall be thereupon submitted to a jury in open court," etc. From this language it will be seen that at least two conditions must be complied with by the person desiring to make such an appeal: (1) He must give 15 days' notice of such intended appeal. (2) That such notice must be accompanied with the grounds thereof. But there is but one condition upon which the appeal shall be granted, and an issue shall be ordered for trial by a jury in open court, and that is that the court to which the appeal is taken "shall be satisfied of the reasonable sufficiency of the grounds." Now in this case no question is raised as to the fact that the respondent herein complied with both of the conditions required for taking the appeal, by

to be tried by a jury in open court, has been complied with. That requirement, as we have seen, is that the court shall be satisfied of the reasonable sufficiency of the grounds of appeal; and, as it is distinctly recited in the order appealed from that the court was satisfied of the reasonable sufficiency of the grounds of appeal, we do not see by what authority this court can question such a declaration of the circuit court. That court, speaking through its presiding officer (Judge Benet), had declared that the court was satisfied that "the grounds are reasonably sufficient," and we do not see how this court can undertake to say that the court to which the appeal was taken was not satisfied of the reasonable sufficiency of the grounds. It will be observed that the person who desires to appeal to the circuit court from the verdict of a jury impaneled by the clerk, in a case like this, and thus to obtain a trial by a jury, in open court, of an issue as to the amount of compensation to be allowed, is not required by the statute to satisfy this court that his grounds of appeal are reasonably sufficient, but the only requirement is that he shall satisfy the circuit court of the reasonable sufficiency of the grounds; and when that is done, as in this case, the statute makes it the duty of the circuit court to order the issue to be tried by a jury in open court, "whose verdict shall be final and conclusive unless a new trial shall be ordered by the supreme court." See section 1747, Rev. St. Indeed, we may say (though the point has not been raised in this case, and therefore is not properly before us for decision) that it is at least doubtful whether, under the provisions of section 20, art. 9, of the present constitution, a person who has taken an appeal to the circuit court in the manner prescribed by the statute, in a case like this, can be denied the right to have the issue of the amount of compensation which should be allowed him tried "by a jury of twelve men, in a court of record, as shall be prescribed by law." The case of Atlantic Coast-Line R. Co. v. South-Bound R. Co., 35 S. E. 553 (to be reported in 57 S. C. 317), cited and relied upon by the counsel for appellant herein, differs materially from the present case. In that case the appellant failed to comply with one of the conditions required by the statute for taking the appeal, by failing to serve any grounds for the appeal proposed to be taken from the verdict of the jury impaneled by the clerk; and therefore that appeal never was properly before the circuit court, and hence the circuit judge had no authority to grant the order appealed from. Here, however, both of the conditions required by the statute were complied with, and the appeal was properly before the circuit court. The case above re-

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GARLINGTON et al. v. FLETCHER et al.

(Supreme Court of Georgia. Aug. 8, 1900.)

RES JUDICATA—JUDGMENT IN CLAIM CASE—ANSWER.

1. Judgments are conclusive between parties and their privies as to all matters put in issue, or which under the rules of law might have been put in issue, in the cause wherein the judgment was rendered. Civ. Code, § 3742.

2. As a purchaser at sheriff's sale is the privy of the plaintiff in execution, a judgment in a claim case wherein the property has been found subject to the execution levied thereon estops the claimant from setting up title to the same in an action subsequently brought against him for its recovery by one who purchased it at sheriff's sale under the execution. Cosnahan v. Johnston, 33 S. E. 847, 108 Ga. 235, and cases cited.

3. In such an action it was not erroneous to strike, on demurrer, an answer filed by the defendant, in the nature of a cross petition, setting forth matters which, even if they ever had any merit, should have been put in issue by him in the trial of the case wherein he was claimant of the property.

4. As, for the reasons above indicated, the answer filed by the defendant was without merit, and was therefore rightly stricken, the defendant has no reason to complain of the overruling of a motion made by him to continue the case.

(Syllabus by the Court.)

Error from superior court, Henry county; John C. Hart, Judge.

Action between J. L. Garlington and others and R. M. Fletcher and others. From the judgment, Garlington and others bring error. Affirmed.

John A. Wimpy, for plaintiffs in error. Jas. S. Boynton and R. L. Berner, for defendants in error.

PER CURIAM. Judgment affirmed.

SAMUEL BENEDICT MEMORIAL SCHOOL et al. v. BRADFORD.

BRADFORD v. SAMUEL BENEDICT MEMORIAL SCHOOL et al.

(Supreme Court of Georgia. Aug. 8, 1900.)

PUBLIC SCHOOLS—EXERCISES—PUNISHMENT OF PUPIL.

1. The authorities of a public school have full power to make it a part of the school course to write compositions, and enter into debates, and to prescribe that all pupils shall participate therein.

2. Whether a particular subject given by such authorities for composition or debate is suited to the age and advancement of the pupil is a question for determination by such authorities, and not by the courts. See, in this connection, Board v. Purse, 28 S. E. 890, 101 Ga. 422, and cases cited.

3. Where a pupil, who has been instructed to prepare a paper on such a subject, does not do so, but reads a paper prepared by her father, and containing expressions which are improper, and disrespectful to the teacher, the offense is

wofold; and, although the school authorities may excuse and condone the preparation by the father of the paper actually read, and also its reading by the pupil, the latter may still be punished for her failure to herself prepare a paper in compliance with instructions. (a) If the punishment imposed be the preparation of a paper on the same subject at a later date, and the pupil refuse to prepare it, such pupil may be disciplined by expulsion, or suspension, or other proper punishment.

(Syllabus by the Court.)

Error from superior court, Polk county; L. G. Janes, Judge.

Action by William Bradford against the Samuel Benedict Memorial School and others. From the judgment, defendants bring error, and plaintiff assigns cross error. Judgment on main bill of exceptions reversed, and cross bill affirmed.

Blance, Irwin & Wright, for plaintiff in error. Sanders & Davis, for defendants in error.

PER CURIAM. Judgment on main bill of exceptions reversed; on cross bill affirmed.

NORWOOD v. STATE.

(Supreme Court of Georgia. Aug. 8, 1900.)

APPEAL—REVIEW.

There was no error of law, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from city court of Dawson; James L. Parks, Judge.

Henry Norwood was convicted of crime, and brings error. Affirmed.

Frank L. Parks, for plaintiff in error. M. J. Yeomans, for the State.

PER CURIAM. Judgment affirmed.

ZIPPERER v. ZIPPERER.

(Supreme Court of Georgia. Aug. 8, 1900.)

NEW TRIAL—CONFLICTING EVIDENCE—APPEAL.

The grant of the new trial in this case being the first, and the verdict not having been demanded by the evidence, which was conflicting, the judgment must be affirmed.

(Syllabus by the Court.)

Error from superior court, Effingham county; Paul E. Seabrook, Judge.

Action between J. C. Zipperer and H. P. Zipperer. From an order granting a new trial, J. C. Zipperer brings error. Affirmed.

D. H. Clark, for plaintiff in error. A. C. Wright, for defendant in error.

PER CURIAM. Judgment affirmed.

MOORE v. HENDRY.

(Supreme Court of Georgia. Aug. 8, 1900.)

EXEMPTIONS—LABOR.

1. The record disclosing that the sum due by the garnishee to the defendant was not for daily, weekly, or monthly "wages," but for labor performed under a contract by the terms of which his compensation was measured by the amount of work done, the jury correctly found that the sum thus due was not exempt from the process of garnishment; and this is so although it appeared that payments were made to the defendant at the end of each period of four weeks.

2. It follows that the superior court did not err in overruling the certiorari.

(Syllabus by the Court.)

Error from superior court, Liberty county; Paul E. Seabrook, Judge.

Certiorari by Perry Moore against T. E. Hendry. From a judgment overruling the same, plaintiff brings error. Affirmed.

Ben A. Way, for plaintiff in error. W. G. Warnell, for defendant in error.

PER CURIAM. Judgment affirmed.

SEABOARD & R. R. CO. et al. v. SPENCER.

(Supreme Court of Georgia. Aug. 8, 1900.)

RAILROADS—ACCIDENT.

The evidence showing that the plaintiff's injuries resulted from a pure accident, and not from any act of negligence chargeable to the defendants, the verdict in his favor cannot be lawfully upheld, and the court erred in not setting it aside.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action by Lessie Spencer against the Seaboard & Roanoke Railroad Company and others. Judgment for plaintiff. Defendants bring error. Reversed.

Erwin & Brown and H. J. Brewer, for plaintiffs in error. Hoke Smith, H. C. Peeples, and Asbury G. McCurry, for defendant in error.

PER CURIAM. Judgment reversed.

MAYOR, ETC., OF WASHINGTON v. CALHOUN.

(Supreme Court of Georgia. Aug. 8, 1900.)

TRIAL—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

The evidence in this case was not such as to demand, in the absence of a special request therefor, a charge upon the law of contributory negligence, and it was sufficient to support the verdict.

(Syllabus by the Court.)

Error from superior court, Wilkes county; S. Reese, Judge.

Action by J. F. Calhoun against the mayor and council of Washington. Judgment for plaintiff. Defendant brings error. Affirmed.

Wm. Wynne and S. H. Hardeman, for plaintiff in error. Colley & Sims, for defendant in error.

PER CURIAM. Judgment affirmed.

(Supreme Court of Georgia. Aug. 8, 1900.)

APPEAL—REVIEW.

There was no error in any of the rulings complained of, and the judgment excepted to was manifestly right.

(Syllabus by the Court.)

Error from superior court, Wilkes county; S. Reese, Judge.

Action between the Washington Exchange Bank and the Rock Hill Buggy Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Wm. Wynne and S. H. Hardeman, for plaintiffs in error. Colley & Sims and H. McWhorter, for defendant in error.

PER CURIAM. Judgment affirmed.

STATE v. SALLADE.

(Supreme Court of Georgia. Aug. 7, 1900.)

EXECUTION—AFFIDAVIT OF ILLEGALITY—DISMISSAL.

1. A defendant in execution cannot file an affidavit of illegality until the execution has been levied upon his property. Consequently, where an execution against an individual has been levied upon property of a corporation, and the defendant interposes an affidavit of illegality, upon the ground that the execution is proceeding illegally against the property of such corporation, the court to which the execution and affidavit of illegality are returned has no jurisdiction to try the issue thus sought to be made, and for this reason the affidavit of illegality should be dismissed.

2. An affidavit of illegality is a remedy which lies only in favor of a defendant in execution, and, if filed by one who is not a defendant, the court to which the issue thus sought to be made is returned, being without jurisdiction to try it, should dismiss the affidavit of illegality.

(Syllabus by the Court.)

Error from superior court, McIntosh county; Paul E. Seabrook, Judge.

Levy of execution by the state on a tax judgment against F. T. Sallade, agent for the L. B. Price Company. Defendant, as such agent, filed an affidavit of illegality. Judgment for claimant. The state brings error. Reversed.

J. M. Terrell, Atty. Gen., and Livingston Kenan, for the State. C. L. Livingston, for defendant in error.

FISH, J. The tax collector of McIntosh county issued an execution against "F. T. Sallade, Agent for the L. B. Price Company," for the sum of $100, alleged in the execution to be "due for special state tax for peddling clocks in" that county "for the year 1899." The sheriff of the county levied this execution upon certain personal property "as the property of F. T. Sallade, agent of L. B. Price Co.," whereupon F. T. Sallade, agent for the L. B. Price Mercantile Company, of Kansas City, Mo., "filed an affidavit of illegality, in which he alleged that the execution was" proceeding of McIntosh county. The case went to trial upon an admitted state of facts, and "upon oral motion of counsel for defendant in fi. fa. the court directed the * * * jury to return a verdict for the defendant in fi. fa., sustaining the illegality and dismissing the levy made under said execution," and the jury returned a verdict accordingly. The state excepted, pendente lite, to the direction of the verdict, and subsequently made a motion for a new trial, which was overruled, whereupon it brought the case to this court for review.

We think that the court erred in directing a verdict for the defendant in execution. The execution was not against the L. B. Price Company, but it was against Sallade in his individual capacity. The words, "Agent for the L. B. Price Company," which followed Sallade's name in the fi. fa., were merely descriptio personæ. The same may be said with reference both to the levy and the affidavit of illegality, if we take them as they are set forth by copies in the record. From the copies of the levy and the affidavit of illegality it appears that the goods were "levied on as the property of F. T. Sallade, agent of L. B. Price Co."; and Sallade, who made the affidavit of illegality, did not swear that he was the agent of the L. B. Price Company, but was merely described as such in the affidavit. McDuffie v. Irvine, 91 Ga. 748, 17 S. E. 1028; Ice Co. v. Bluthenthal, 101 Ga. 541, 28 S. E. 1003; Music House v. Wynn, 107 Ga. 402, 33 S. E. 415. In the agreed statement of facts, however, it was admitted that the execution was levied upon certain goods "in the possession of F. T. Sallade, as the property of the L. B. Price Mercantile Co.," and "that an affidavit of illegality was filed by F. T. Sallade as agent of Price Co., upon the grounds therein stated." Considering the case as made by the execution, the levy, and the affidavit of illegality, copies of which appear in the record, we have a defendant in execution filing an affidavit of illegality upon the ground that the fi. fa. is wrongfully proceeding against the property of another party. The remedy by affidavit of illegality against an execution which has been issued illegally, or which is proceeding illegally, is purely statutory, and, except to the extent that the statute provides, there is no such remedy. We think it is clear from the statute that a defendant in execution can only file an affidavit of illegality when his property has been levied upon. Civ. Code, § 4736. He cannot interpose such an affidavit when the execution has been levied upon the property of some one else, and when, in such a case, he does so, the court has no jurisdiction to try the issue which he seeks to make. The court has jurisdiction only to try a case which the statute authorizes a defendant in execution to make, and the statute does not authorize a defendant to make such a case.

ment, the execution was against Sallade, and not against the Price Company. So then Sallade, as agent of the Price Company, made an affidavit, the effect of which, when considered in connection with the execution, was that an execution against himself had been levied upon, and was proceeding illegally against, the goods of the Price Company. The Price Company, not being the defendant in execution, could not interpose an affidavit of illegality to the levy of the fi. fa. "An affidavit of illegality is a remedy which lies only in favor of defendants in execution, and, if filed by persons who are not defendants, it will be dismissed." Artope v. Barker, 72 Ga. 186; Clinch v. Ferril, 48 Ga. 365; Civ. Code, § 4736. So, whether we view the case as made by the execution, the levy, and the affidavit of illegality, or as made by the agreed statement of facts, we reach the same result, viz. that the court had no jurisdiction to try the case made, and for this reason should have dismissed the affidavit of illegality. It does not appear that any motion was made to dismiss the affidavit of illegality for the want of jurisdiction. "Consent of parties, however, cannot give a court jurisdiction of a subject-matter when it has none by law; and when this court discovers from the record that a judgment has been rendered by a court having no jurisdiction of the subject-matter, and the case is brought here for review upon writ of error, this court will, of its own motion, reverse the judgment." Smith v. Ferrario, 105 Ga. 53, 54, 31 S. E. 38. Judgment reversed. All the justices concurring.

GORDON v. EASTERLING et al.

(Supreme Court of Georgia. Aug. 7, 1900.)

PLEADING—AMENDMENT—NONSUIT.

1. There was no error in refusing to allow the amendment offered to the original petition.
2. The evidence introduced by the plaintiff failed to show any right to the relief for which she prayed. There was, therefore, no error in granting a nonsuit.

(Syllabus by the Court.)

Error from superior court, Tattnall county; B. D. Evans, Judge.

Action by Mary S. Gordon against J. J. Easterling and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. T. Burkhalter, for plaintiff in error. P. W. Williams and Jas. K. Hines, for defendants in error.

PER CURIAM. Judgment affirmed.

SHEAROUSE v. WOLFE.

(Supreme Court of Georgia. Aug. 7, 1900.)

JUSTICE OF THE PEACE—JUDGMENT.

Where, in a suit in a justice's court, the summons names only a certain man as defendpleaded.

(Syllabus by the Court.)

Error from superior court, Effingham county; Paul E. Seabrook, Judge.

Action by A. J. Shearouse against C. C. Wolfe. Judgment for defendant, and plaintiff brings error. Affirmed.

D. H. Clark, for plaintiff in error. A. C. Wright, for defendant in error.

PER CURIAM. Judgment affirmed.

CHIPMAN v. CORNWELL.

(Supreme Court of Georgia. Aug. 8, 1900.)

DISMISSAL—EFFECT—PLEADING—AMENDMENT—BILL OF EXCEPTIONS.

1. When the court passes an order sustaining a motion to dismiss a case on the ground that the petition does not set forth a cause of action, and in such order allows the plaintiff a specified number of days within which to amend his petition, the effect of the order is to take the case out of court, and finally dispose of the same, unless a proper amendment is filed within the time named in the order.
2. If such amendment is not so filed, it is too late to thereafter except pendente lite to the order of dismissal, but the same should be made the subject-matter of a direct bill of exceptions to the supreme court, which should be sued out within the time allowed by law for excepting to a final judgment.
3. The bill of exceptions in the present case was not sued out in due time, and accordingly the writ of error must be dismissed.

(Syllabus by the Court.)

Error from city court of Savannah; T. M. Norwood, Judge.

Action by E. B. Chipman against F. M. Cornwell. Judgment for defendant, and plaintiff brings error. Dismissed.

Isaac Beckett and Geo. W. Beckett, for plaintiff in error. Saussy & Saussy, for defendant in error.

PER CURIAM. Writ of error dismissed.

HOWARD v. WALKER.

(Supreme Court of Georgia. Aug. 8, 1900.)

CUSTODY OF CHILD.

Under the evidence submitted, there was no abuse of discretion in awarding the custody of the children to the mother, instead of to the father.

(Syllabus by the Court.)

Error from city court of Dawson; J. G. Parks, Judge.

Action between Will Howard and C. A. Walker. From the judgment, Howard brings error. Affirmed.

M. C. Edwards, Jr., for plaintiff in error. Yeomans & Raines, for defendant in error.

PER CURIAM. Judgment affirmed.

INJURY TO TRAVELER—DEFECTIVE STREET.

1. It is apparent from the evidence that the proximate cause of the injury which the plaintiff received was the defective condition of the street, and that the plaintiff in error was negligent in not repairing or protecting the same.

2. There was no error in the rulings, charge, or failure to charge which requires a reversal of the judgment overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Baldwin county; John C. Hart, Judge.

Action by Farish Wood, by his next friend, against the mayor of Milledgeville. Judgment for plaintiff, and defendant brings error. Affirmed.

Allen & Pottle, for plaintiff in error. Roberts & Hines, for defendant in error.

PER CURIAM. Judgment affirmed.

BRANTLEY et al. v. MEYER et al.

MEYER et al. v. BRANTLEY et al.

(Supreme Court of Georgia. Aug. 7, 1900.)

BRIEF OF EVIDENCE—APPROVAL.

An entry made by the presiding judge on a brief of evidence presented with a motion for a new trial in the following language: "The within brief of evidence is hereby approved as correct, subject to such additions as either side may desire, as taken from entries on the fi. fas. mentioned herein, as the fi. fas. are not now accessible,"—did not serve as a legal approval of the brief of evidence.

(Syllabus by the Court.)

Error from superior court, Johnson county; W. M. Henry, Judge.

Levy of execution in favor of Meyer, Reinhard & Co. against T. J. Brantley & Bro. Affidavit of illegality filed. Verdict directed for plaintiffs, and defendants bring error. Motion to dismiss brief of evidence denied, and plaintiffs bring cross error. Judgment on cross bill reversed. Main bill of exceptions dismissed.

Vernon B. Robinson, for plaintiffs in error. A. F. Daley, for defendants in error.

LITTLE, J. An issue was formed on an affidavit of illegality interposed by Brantley to the levy of a certain execution issued on a judgment rendered in the superior court of Johnson county in favor of Meyer, Reinhard & Co. against T. J. Brantley & Bro. Both the plaintiff in execution and the defendant introduced evidence, and, the case having been closed, the court directed a verdict for the plaintiff. The defendant, during the same term of court at which the verdict and judgment were rendered, made a motion for a new trial upon a number of grounds. The date of the hearing of the motion was fixed by the presiding judge as the 1st of November, 1899, and, by a proper he have five days after the hearing to file the brief of evidence. At the time and place set for the hearing, the movant presented his brief of evidence, upon which the judge then and there entered the following order: "The within brief of evidence is hereby approved as correct, subject to such additions as either side may desire, as taken from entries on the fi. fas. mentioned herein, as the fi. fas. are not now accessible. This November 1, 1899." The plaintiff in fi. fa. then moved to dismiss the motion because the brief of evidence presented was not a full and complete brief of the evidence submitted on the trial of the case. The court overruled the motion. The hearing was then had, and the motion for a new trial refused, and the movant excepted, and sued out a bill of exceptions to have the same reviewed by this court. The defendant sued out a cross bill of exceptions, assigning as error the ruling of the court in refusing to dismiss the motion for new trial, and in approving the brief of evidence before the same was perfected. The main and cross bills of exceptions were argued together in this court, and, under the view we take of the ruling assigned as error in the cross bill of exceptions, it is only necessary to consider that assignment, in order to properly dispose of the case. It will be noted that a direct exception was taken to the action of the judge in approving the brief of evidence before the same was perfected, as well as to the direction given by the judge, in his order of approval, that certain omissions should be supplied after the hearing. It was ruled in the case of Mann v. Railway Co., 99 Ga. 117, 24 S. E. 871, that it was not cause for dismissing a motion for new trial that the judge improperly approved, as a brief of the evidence, a paper purporting to be such, but that the proper practice in such case is to except directly to the order of approval, or else move to vacate that order, and, if the motion is refused, to except directly to such refusal. The error assigned in the cross bill of exceptions, that the judge erred in approving the brief before it was perfected, comes within the rule here laid down as being the proper practice. It would seem almost unnecessary to say that there can be no legal motion for a new trial without a brief of evidence, and that there can be no hearing on a motion for a new trial until the brief has been perfected and approved. A partial or incomplete brief is not such a one as is contemplated by the statute, which requires a brief of all the evidence to accompany a motion for a new trial; nor does a brief of evidence become a part of the record until approved by the presiding judge, which approval must necessarily include an assertion that the paper presented contains a brief of all the material

a brief of evidence accompanying a motion for new trial had this entry indorsed on it by the judge: "Examined and approved, subject to future corrections if necessary." It appeared that, after this qualified approval, corrections were made in the brief, and after such corrections were made the judge finally approved the brief. This court ruled, under such circumstances, that the motion for a new trial should not have been dismissed, but the ruling was based on the fact that subsequent to the qualified approval the brief was corrected and approved in full by the judge. In that case the qualified approval was not a matter for consideration, inasmuch as the brief, when corrected, was fully approved, and this came up to the rule. In the case of Turner v. Wilcox, 65 Ga. 299, the judge indorsed on the brief of evidence, "Revised and approved, subject to corrections," and when the case was called in this court the writ of error was dismissed; the court ruling that, if it affirmatively appeared that the judge subsequently finally passed upon the brief and approved the same, it would not be subject to dismissal. And in the case of Iron Works v. Angier, 66 Ga. 634, the court dismissed the writ of error where the judge had thus approved the brief of evidence: "The within brief of evidence is hereby revised, approved, and ordered filed. Let the clerk copy the interrogatories of S. A. Echols, as a part of the evidence." It was intimated in that decision that if a copy of the evidence of Echols had been authenticated by the judge as true, and had accompanied the brief of evidence to this court, the writ of error might not have been dismissed. In the case of Railroad Co. v. Mitchell, 75 Ga. 144, there was an agreement between the counsel that the brief presented was correct, and, if the case was carried to the supreme court, that certain interrogatories and tables and other documentary evidence might be copied with the record by the clerk. Under this agreement the judge of the superior court approved and ordered the agreement filed with the record, and directed the clerk to copy the documentary evidence referred to in the agreement. This court ruled in that case that it was not a compliance with the rule for parties to agree, and the court to order, that a part of the evidence may be omitted from the brief, and, if the case should be brought to the supreme court, that the clerk might copy such evidence in the record, and accordingly dismissed the writ of error. These cases are cited to show that the jurisdiction of the trial judge is limited to an approval of the brief of evidence as it is finally made up, and that an approval of a brief which contemplates an addition thereto is not such an approval as is required by law, unless after the additions are made the judge again approves it. In the present case the approval is made subject to such addition as either side may desire, as taken from certain papers described. It was not, therefore, a proper and legal approval; and, if additions were made to this brief of evidence after such qualified approval, we have no means of knowing whether the same are or not correct. A brief of evidence can be authenticated alone by the judge, and this court is not authorized to consider any brief not fully approved. For these reasons, the court erred in entering this qualified order of approval, and, the plaintiffs in error having properly excepted thereto, the judgment on the cross bill of exceptions is reversed, and the main bill of exceptions dismissed. Judgment on cross bill of exceptions reversed. Main bill of exceptions dismissed. All the justices concurring.

ROUSEY v. MATTOX.

(Supreme Court of Georgia. Aug. 9, 1900.)

LANDLORD—LIEN FOR SUPPLIES—RIGHTS OF LABORER.

1. An agreement by a tenant with a laborer that the latter shall have as compensation for his services all the cotton raised upon a designated field included in the rented premises, the landlord having no knowledge of such agreement, and in no way assenting thereto, cannot, of itself, and without more, operate to defeat his statutory lien for supplies on all the crops produced upon the entire tract of land rented to the tenant. Consequently, where, in such a case, the tenant delivered to the landlord crops raised on such field, and the latter in good faith accepted the same in satisfaction of his lien for supplies, the laborer could not, in an action at law, recover from the landlord the value of such crops.

2. It follows from the above that, even if a landlord's special lien for supplies on the crop of the year is inferior to a laborer's special lien for work done in the making of such crop, the laborer cannot assert such lien by bringing an ordinary suit at law against a landlord, who had in good faith, by agreement with the tenant, taken the crop in settlement of his lien, for the value of so much of the crop as would equal the amount due the laborer by the tenant.

3. The charges complained of, being in substantial accord with the rule above announced, were not erroneous, and there was ample evidence to warrant the verdict.

(Syllabus by the Court.)

Error from city court of Elberton; P. P. Proffitt, Judge.

Action between S. F. Rousey and W. H. Mattox. From the judgment, Rousey brings error. Affirmed.

Jos. N. Worley, for plaintiff in error.

PER CURIAM. Judgment affirmed.

LONG et al. v. HARRISON et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

APPEAL—ASSIGNMENT OF ERROR.

This case was submitted to the trial judge for decision without a jury. The bill of ex-

above indicated, there was no attempt to assign error. It follows that the writ of error must be dismissed for want of a specific assignment of error. See Collins v. Carr (this day decided) 36 S. E. 959, and cases cited.

(Syllabus by the Court.)

Error from superior court, Hancock county; S. Reese, Judge.

Action by A. S. and J. C. Long against Amanda Harrison and others. Judgment for defendants, and plaintiffs bring error. Dismissed.

F. L. Little and Allen & Pottle, for plaintiffs in error. Hunt & Merritt, for defendants in error.

PER CURIAM. Writ of error dismissed.

MATTHEWS v. RALEIGH & G. R. CO. et al.

(Supreme Court of Georgia. Aug. 7, 1900.)

INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

The controlling questions at issue being whether or not there were two methods for doing the work in which the plaintiff was engaged, the one safe and the other dangerous; and whether or not, if this was true, he negligently chose the latter; and the evidence not being such as to demand findings on these questions adverse to the plaintiff,—it was error to grant a nonsuit.

(Syllabus by the Court.)

Error from superior court, Elbert county; S. Reese, Judge.

Action by Walter Matthews against the Raleigh & Gaston Railroad Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

C. T. Ladson and Geo. C. Grogan, for plaintiff in error. Erwin & Brown and H. J. Brewer, for defendants in error.

COBB, J. When an employé of a railroad company has his choice of two ways in which to perform a duty, the one safe, and the other dangerous, though convenient, he is bound to select the safe method. Railway Co. v. Head, 92 Ga. 723, 18 S. E. 976; Railway Co. v. Harbin (Ga.) 36 S. E. 218; Quirouet v. Railroad Co., Id. 599. It is true that in the two cases last cited the court had under consideration cases founded upon causes of action arising in the state of Alabama, but the principle ruled is the law of this state. If there is no dispute about the facts, and the only lawful verdict that could be rendered would be one finding that there were two ways in which to perform the duty, the one safe and the other manifestly dangerous, and that the employé had negligently chosen the latter method, then the court would be authorized to set aside a verdict finding otherwise, as was done in the Head and Harbin Cases, supra; or to direct a verdict for the defendant, as was done in the Quirouet Case. If, under the gerous, and whether in the latter case the employé chose that method, or whether there were two methods, one attended with less danger than the other, and the employé chose the more dangerous, then the issues thus raised should be submitted to a jury, and it would be error to grant a nonsuit. Railroad Co. v. De Bray, 71 Ga. 406 (Syl., point 15), 424. Applying the principles above referred to to the present case, the judge erred in granting a nonsuit. Even if it be conceded that the evidence in behalf of the plaintiff established that there were two ways in which the duty he was endeavoring to discharge at the time of the injury could be performed, and one of them was safe, the evidence raised an issue as to whether the method adopted by the plaintiff was one that was manifestly dangerous. It not being at all clear from the evidence that either method was entirely safe, or which was the more dangerous, it was a question for the jury to determine whether, under the circumstances, in adopting the method which he employed, the plaintiff was free from fault. Judgment reversed. All the justices concurring.

HARTLEY v. McGEE.

(Supreme Court of Georgia. Aug. 9, 1900.)

TRIAL—PROCEDURE—PLEADING—ISSUES OF FACT—APPEAL.

1. In determining whether or not an answer filed to a petition raises an issue of fact which should be passed upon by a jury, it is not proper practice for the judge to propound to the defendant any question or questions, either with a view to eliciting from him a fact not stated in the answer, or to ascertaining the real meaning of the allegations in the answer. An error of this kind will not, however, if it has no material bearing upon the result reached, necessitate a reversal of the judgment.

2. When a petition distinctly and affirmatively alleges that a specified sum of money was placed in the hands of the defendant, as county school commissioner, for the purpose of paying the same to his predecessor in office, and the answer does not deny these allegations, but, in effect, admits the same to be true, no issue of fact is thus presented, although the answer may make the point that as matter of law the former school commissioner was not entitled to receive the fund in question. The issue thus raised is one of law, and not of fact.

3. As the present bill of exceptions assigns no error, except that the court erred in holding that no issue of fact had been raised for a jury to pass upon, and as the point thus made was not well taken, no cause for reversing the judgment has been shown.

(Syllabus by the Court.)

Error from superior court, Crawford county; W. H. Felton, Jr., Judge.

Action by C. W. McGee against J. F. Hartley. Judgment for plaintiff. Defendant brings error. Affirmed.

M. G. Bayne, for plaintiff in error. Hardeman & Moore, for defendant in error.

PER CURIAM. Judgment affirmed.

CHATTEL MORTGAGE—WIDOW'S ALLOWANCE—PRIORITIES.

1. The instrument construed in this case was plainly a mortgage conferring upon the mortgagees power to seize and sell the property, and the right to become purchasers thereof at their own sale.

2. A widow's right to a year's support is superior to the lien of a mortgage given by her deceased husband upon personal property to secure the purchase money of the same. See Ullman v. Loan Co., 24 S. E. 409, 96 Ga. 625, and cases cited.

(Syllabus by the Court.)

Error from superior court, Bulloch county; B. D. Evans, Judge.

Action between Puffer & Sons and Elizabeth Caldwell and others. From the judgment, Puffer & Sons bring error. Affirmed.

H. B. Strange, for plaintiffs in error. Groover & Johnston and Brannen & Moore, for defendants in error.

PER CURIAM. Judgment affirmed.

HELMLY v. DAVIS.

(Supreme Court of Georgia. Aug. 7, 1900.)

NEW TRIAL—DISMISSAL.

Where a motion for a new trial is made in term, and ordered heard on a certain day in vacation, and, through no fault on the part of the movant, is not heard on the day appointed, and no order is taken extending the time, such motion is, by operation of law, returned to the court, and remains until called up in its order. It is error to dismiss such a motion because it was not heard at the appointed time. "Jurisdiction to proceed in term is not lost by an order to hear at chambers." Higginbotham v. Campbell, 11 S. E. 1028, 85 Ga. 639; Civ. Code, § 5485; Dozier v. Owen, 63 Ga. 541; Brantley v. Hass, 69 Ga. 748; West v. Jones, Id. 763; Carroll v. Railway Co., 10 S. E. 103, 82 Ga. 452, 6 L. R. A. 214; Railroad Co. v. Pool, 22 S. E. 631, 95 Ga. 410.

(Syllabus by the Court.)

Error from superior court, Effingham county; Paul E. Seabrook, Judge.

Action between C. H. Helmly and J. F. Davis. From an order dismissing a motion for a new trial, Helmly brings error. Reversed.

D. H. Clark, for plaintiff in error. H. B. Strange, for defendant in error.

PER CURIAM. Judgment reversed.

WILLIAMS et al. v. E. E. FOY MFG. CO., Limited.

(Supreme Court of Georgia. Aug. 7, 1900.)

MORTGAGE—TITLE OF MORTGAGOR—CONVEYANCE—REDEMPTION—CONTRIBUTION.

1. When one has borrowed a sum of money, and conveyed land to the lender as security for the payment of the debt, and received from the grantee a bond conditioned to reconvey on the payment of the debt, the interest pertaining to such land which the grantor thereafter possesses is a mere equity of redemption.

2. This right to redeem is an equitable estate in the land, and may be sold and conveyed, subject to the paramount right of the original grantee to have all of the land appropriated to the payment of his debt. 1 Jones, Mortg. §§ 6, 8.

3. When, therefore, the original grantor, after the execution and delivery of the security deed, for a valuable consideration conveys to a third person, with notice of the first conveyance, all the timber growing on the land, subject to the rights of the first grantee, the legal effect of such second conveyance is to give the grantee therein named the right to the timber if the grantor redeems the same, and also the equitable right to redeem the land, for the purpose of having the title to his timber unincumbered. 2 Story, Eq. Jur. § 1023.

4. When, however, the grantor subsequently sells to still another person, with notice of the prior conveyance of the timber, his right to redeem the land, and transfers to him his bond for titles, and such person redeems the land by paying up the indebtedness originally created, and receives from the lender a conveyance of the land in his name, such person takes the title subject to the right of the grantee of the timber to pay a proportionate part of the original debt, and convert into a legal title the equitable interest in the timber originally conveyed.

5. In such a case, before redemption, each of the parties having an equitable interest in the land, acquired subsequently to the execution of the security deed, were possessed of equal equities,—one as to the timber, and the other as to the land without the timber. When the grantee of the land paid the debt to secure which the outstanding deed was given, and took a conveyance of the land to himself, the equity of the grantee of the timber was not destroyed; but the grantee of the land was entitled to hold both estates thus redeemed, until, under the doctrine of contribution, the grantee of the timber reimbursed him by paying such proportion of the amount he paid to redeem as the value of the timber at the time of the redemption bore to the value of the land including the timber. Barney v. Myers, 28 Iowa, 472; Aiken v. Gale, 37 N. H. 501; Carpenter v. Koons, 20 Pa. St. 222. An analogous equitable principle is embodied in Civ. Code, § 3902.

6. The verdict was contrary to the evidence, and the charge in some particulars antagonistic to the rulings made. Therefore a new trial should have been awarded.

(Syllabus by the Court.)

Error from superior court, Bulloch county; B. D. Evans, Judge.

Action between Williams & Bessinger and others and the E. E. Foy Manufacturing Company, Limited. From the judgment, Williams & Bessinger and others bring error. Reversed.

H. B. Strange, for plaintiffs in error. Brannen & Moore, for defendant in error.

PER CURIAM. Judgment reversed.

SHEAROUSE et al. v. MORGAN.

(Supreme Court of Georgia. Aug. 7, 1900.)

APPEAL—REVIEW—CERTIORARI—NOTICE OF SANCTION—SERVICE—WAIVER.

1. When the question whether or not written notice of the sanction of a petition for certio-

rari had been given in due time depended upon a direct conflict in the testimony of two witnesses respecting the correctness of a date appearing in an acknowledgment of service, this court will not undertake to say the trial judge erred in accepting as true the testimony of one of the witnesses, rather than that of the other.

2. Where in such a case the witnesses were the attorneys at law of the parties, and each attorney, after making in his place an oral statement as to the issue in controversy, was permitted to file an affidavit setting forth the facts embraced in his oral statement, a judgment dismissing the certiorari on the ground that notice of the sanction was not given in due time will not be reversed merely because the judge acted on the motion to dismiss without giving the attorney for the plaintiff in certiorari an opportunity to inspect and "reply to or rebut" the affidavit filed by the attorney of the other party; it not appearing that the plaintiff in certiorari was thus deprived of any substantial right, or that, if such opportunity had been extended, any additional reason for not sustaining the motion to dismiss would have been submitted.

3. Merely acknowledging service of a written notice does not estop the person making the acknowledgment from setting up that the notice was, under the law thereto relating, served too late.

4. There was not, in view of the facts appearing in the present record, anything in the conduct of either the defendant in certiorari or her counsel which amounted to a waiver of the point that the notice in question was not served within the time prescribed by statute.

5. There was no error in dismissing the certiorari for want of proper notice, nor in refusing to allow the proposed correction of the date of service.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Petition of J. H. Shearouse & Co. for a writ of certiorari against R. A. Morgan. Writ denied. Petitioners bring error. Affirmed.

A. C. Wright, for plaintiffs in error. D. H. Clark, for defendant in error.

PER CURIAM. Judgment affirmed.

FLORIDA CENT. & P. R. CO. v. USINA.

(Supreme Court of Georgia. Aug. 7, 1900.)

CORPORATION—CONVEYANCE—EVIDENCE—WITNESS—COMPETENCY.

1. A bill of sale purporting to show the conveyance of title to A., "president of" a designated corporation, "his executors, administrators, and assigns," is inadmissible for the purpose of showing title in the corporation. (a) If, however, such a bill of sale be admitted in evidence, it is competent for the person to whom it was given to explain by parol that its real purpose was to secure a debt, and not to convey the absolute title.

2. A party to a case founded upon an alleged contract with a corporation is incompetent to testify that the contract in question was made by the defendant through an agent of the latter, since deceased.

3. When, in the trial of an action against a corporation for the breach of an alleged contract, the terms of a contract between the defendant and a deceased individual, not a party to the case, are collaterally relevant, an agent for the defendant, who acted for it in making this latter contract, is not, because of the death of the other party thereto, incompetent to testify with respect to the same.

(Syllabus by the Court.)

Error from city court of Savannah; T. [illegible] Norwood, Judge.

Action by Michael P. Usina against the Florida Central & Peninsular Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Denmark, Adams & Freeman, for plaintiff in error. Saussy & Saussy, for defendant in error.

COBB, J. Michael P. Usina brought suit against the Florida Central & Peninsular Railroad Company to recover for services alleged to have been rendered to that company in the capacity of captain of the steamboat Farmer, alleged to have been owned by it. The petition contained two counts, the first founded upon an express contract by the defendant to pay the plaintiff a stated sum per month for his services; the second a count alleging that the services were rendered at the request of the defendant and were reasonably worth the sum sued for. The jury returned a verdict in favor of the plaintiff for the amount sued for. The defendant's motion for a new trial having been overruled, it excepted.

1. There was no evidence authorizing a finding that the defendant had made with the plaintiff an express contract, under the terms of which he was to receive a stated amount per month. The plaintiff relied for a recovery upon the second count in the declaration, in which he claimed that he had rendered the services at the request of the company, and that they were reasonably worth the amount sued for. In order to make out a case on this count, he endeavored to prove that the steamboat upon which he had rendered the services as captain was the property of the defendant. For this purpose he offered in evidence a bill of sale executed prior to his term of service, in which the South Carolina Steamboat Company conveyed the steamboat in question to "H. B. Duval, president of the Florida Central & Peninsular Railroad Co., his executors, administrators, and assigns"; the bill of sale being one in the ordinary form, and in which whenever the name of Duval was mentioned it was followed by the words above quoted. It appears from the record that the purpose for which the bill of sale was offered was to show title in the defendant. It did not do this. The words, "president of the Florida Central & Peninsular Railroad Company," which followed the name of Duval, are words merely descriptive of the person who was a party to the contract, and are not to be taken to for any other purpose; such words in no way characterizing the capacity in which Duval was contracting with the other party to the bill of sale. Lester v. McIntosh, 3 Ga. 675, 29 S. E. 7; And. Law Dict. "Descriptio Personæ"; Com. v. Lewis, [illegible]

lass.) 101. While such words would in no ise limit the title of the party to the con- act, the principle is especially applicable in e present case. Here, wherever the name Duval, president, etc., appears, it is fol- wed by the words, "his executors, adminis- ators," etc., which indicate that he was act- g in his individual capacity. The purpose r which the bill of sale was offered being show title in the defendant, and the same t having this effect, the court should have cluded it from evidence, upon the objec- ns made by the defendant. If it had been own that the steamboat in question was tually purchased with the funds of and erated by the defendant, then perhaps the l of sale would have been admissible for purpose of showing that the defendant s the real owner, and Duval held the title nply in trust for it. But, if it had been ered and admitted for this purpose, it uld have been competent for the defend- t to prove, as it sought to do, in explana- n of this apparent ownership of Duval in ir behalf, that the title was taken in him, as owner of the vessel, but to secure a t due to him, or the company which he resented, by the real owners of the ves- ; that it had no other interest in the perty than that of a creditor, did not rate or control the steamboat, and had no er connection with the boat or its opera- n.

. Complaint is made that the court erred permitting the plaintiff to testify as fol- s: "It was the F. C. & P. that employed and paid me $150 a month. That was on the Farmer. I got $100 on the Farm-

The objection to this evidence was that the plaintiff had no written contract of loyment, and as the party who employed was Maj. Williams, an agent of the de- lant, since deceased, evidence as to any tract made with Williams was inadmissi- because, if made with him as agent of defendant, he was dead, and, if made h him individually, it was irrelevant. ly construed, we think the evidence ad- ed would convey to the minds of the jury impression that the defendant had em- ed the plaintiff at a salary of $150 per th at some time, but not on the Farmer, that the plaintiff had been transferred he Farmer by the defendant at a lower ry, being the amount sued for in the ent case. So construing the testimony, it clearly inadmissible, for the reasons set n in the objections to the same. Civ. , § 5269.

The defendant offered the testimony of al, its president, and of other officers of company, to show that Maj. Williams his associates were the owners of the nboat Farmer, and that under a con- made with the company and the own- through Williams, the steamboat was ated merely as a freight connection of company, and that it had no further in- t in the steamboat or its operations. The evidence of these witnesses was object- ed to by the plaintiff on the ground that, Williams being dead, they were not com- petent to testify as to any communications with him. Such a case does not fall within the letter, reason, or spirit of the evidence act of 1889, embodied in section 5269 of the Civil Code. The contract between Williams and his associates and the defendant was not the one which was sought to be enforced in the present case, but, even if it had been, there is nothing in the act which would have rendered the officers and agents of the de- fendant incompetent to testify as witnesses. See Rosser v. Georgia Pac. Ry. Co., 102 Ga. 164, 29 S. E. 171. It was never contemplated that the act of 1889 should be so construed as to render a party to a case incompetent to testify to a contract made with him by one since deceased, whose legal representa- tives are not parties to the case, and whose estate is in no way to be affected by the judgment to be rendered, when the fact of such a contract was a relevant and material fact in a controversy between the living party and a third person.

The errors committed by the judge in his rulings on evidence were of such a character as to require us to order a new trial. As there is to be another hearing, and as the evidence may be different on that hearing, we will not now rule on the motion to nonsuit, or express any opinion as to the sufficiency of the evidence. Judgment reversed. All the justices concurring.

ATLANTA JOURNAL v. BRUNSWICK PUB. CO.

BRUNSWICK PUB. CO. v. ATLANTA JOURNAL.

(Supreme Court of Georgia. Aug. 8, 1900.)

GARNISHMENT—FAILURE TO ANSWER—PROCEDURE.

When a garnishee fails to answer within the time prescribed, the general rule is that the plaintiff is entitled to have a judgment against the garnishee; but in a case where, within three days after the plaintiff had obtained judgment against the defendant, the garnishee filed an answer denying any indebtedness to the defendant, and set forth therein good and sufficient reasons for not answering in due time, which reasons showed that the garnishee was guilty of no laches, but acted in good faith, and therefore was, in justice and right, entitled to an opportunity to answer, it was error to strike the answer and enter a judgment against the garnishee.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Garnishment by the Brunswick Publishing Company against the Atlanta Journal. From the judgment the Atlanta Journal brings error, and plaintiff assigns cross error. Judgment reversed, and cross bill affirmed.

Hoke Smith and H. C. Peeples, for plaintiff in error. Geo. S. Jones, H. A. Alexander, and A. E. Eve, for defendant in error.

the city court of Macon in its favor against Kennedy. A certified copy of the affidavit and bond was filed in the clerk's office of the city court of Atlanta. A judgment was obtained against Kennedy on June 12, 1899. On the 21st day of January, 1899, a summons of garnishment was served on the Atlanta Journal, which garnishment, it is claimed by the publishing company, was returnable to the March term, 1899, of the city court of Atlanta. The garnishee, according to the averments in its answer to the rule, filed an answer to the summons of garnishment in the city court of Atlanta on June 15, 1899, in which it denied any indebtedness to the defendant. Afterwards the publishing company filed a petition alleging that it had brought suit against Kennedy in the city court of Macon; that on the 12th of June, 1899, it had obtained a judgment against him; that prior thereto, and after the commencement of the suit, it had caused a summons of garnishment to be served on the Journal, returnable to the March term, 1899,—and prayed that the answer filed by the garnishee in June, 1899, be stricken, and that petitioner have judgment against the garnishee for the amount of the judgment it had obtained against the principal defendant, and that the garnishee be required to show cause why the petition should not be granted. In response to a rule served upon this petition, the garnishee answered that it did not have notice that the proceeding was pending in the city court until the day previous to that on which it filed its answer; that the summons of garnishment served upon it required the garnishee to appear at the February term, 1899, of the justice's court for the 1026th district, G. M., Fulton county, to answer, and that during that term of the justice's court, through its vice president, it did appear there and make answer to the summons, a copy of which answer is attached to this answer; that the original summons of garnishment was lost; that on the 14th of June it was notified that the case was pending in the city court of Atlanta, and after investigation the garnishee at once filed its answer in that court. It averred that a mistake was made in writing the summons, and prayed to be discharged. This answer was verified by an officer of the Journal Company. Much evidence was had on the question whether the summons of garnishment really directed the garnishee to answer to the city court, or to the justice's court. Without going into this evidence, it is sufficient to say that, while that offered by the Journal Company was positive and explicit that the summons required it to appear and answer at the justice's court, that of the movant tended to show that the summons required the garnishee to answer in the city court. After the evidence was heard the trial judge sustained the prayer of the petition, and rendered a judgment against the cepted to this ruling, and the same is alleged in this court to be error. The publishing company sued out a cross bill of exceptions, in which it alleged that the garnishment papers, with all entries thereon, including the return of the constable, being before the court, and it not appearing that any traverse had been filed to the return of the constable, nor that officer had been made a party, a motion was made to strike the answer to the petition, and for a judgment against the garnishee because the answer to the petition was insufficient in law,—that no traverse was filed to the return of the officer, and the officer was not a party to the proceeding,—and because the answer offered to be filed to the garnishment was too late; that the court overruled this motion, and the publishing company excepted. The main and cross bills of exceptions were argued together, and treated as one case, and will be so considered here.

It is claimed by the publishing company that the question made in the cross bill of exceptions has been decided in its favor by the recent case of O'Neill Mfg. Co. v. Ahrens & Ott Mfg. Co. (Ga.) 36 S. E. 66. Some of the points decided in that case are controlling as to similar points here. As an example, under the case cited it must be ruled that the return of the constable made in the case at bar meant that the summons of garnishment which he served directed the garnishee to file its answer in the city court of Atlanta. If the present case depended on the question whether or not the summons did so direct the garnishee, then the case cited would be conclusive of the question in favor of the publishing company. It is also true that that part of the answer of the garnishee which declared that the summons of garnishment served upon it directed it to make answer in another court was, under the ruling made in the Ahrens Case, a traverse of the truth of the officer's return, and, in order to have the issue raised by such traverse passed upon, it would have been necessary to make the constable a party; and it is also true that this the garnishee in the present case did not do. So far the two cases are analogous, but the main issues of law involved in the two cases are essentially different, and therefore the two cases are clearly distinguishable. In the Ahrens Case, above, the company filed a petition against the garnishee, alleging that it had obtained a general judgment against the defendant; that on this it had sued out a summons of garnishment on December 4, 1896, returnable to the January term, 1897, of the superior court, and had the same served on the garnishee; that no answer had been filed in response to the summons; and that the case was in default since the July term, 1897, of the superior court. It prayed for an order that the garnishee show cause why the plaintiff should not have judgment

nishment that had been served upon it, and that it had filed its answer at the time directed by the summons; that the summons of garnishment served in that particular case, according to its best recollection and belief, required it to make answer in the city court; and that it had made answer thereto. This answer then denied that the summons of garnishment was properly served upon it. It then tendered an answer denying indebtedness, and prayed that it be allowed to file the same nunc pro tunc. Moreover, it distinctly appears from the record of that case that the garnishee was offered an opportunity to traverse the officer's return, and failed to do so. In the case at bar, while the garnishee affirms under oath that the summons it received directed it to answer in the justice's court, and it did not make the officer serving the summons a party, it sets up additional and distinct reasons why the judgment prayed for should not be rendered against it. While, therefore, the garnishee did not in this case occupy the advantageous position to which it would have been entitled had the traverse been filed, let us inquire if the reasons just referred to were not good and sufficient to defeat the motion for a judgment against it. These are that it acted in good faith; that it did appear at the justice's court in response to the requirement of the summons and answered the garnishment, a copy of which it attached to the answer to the rule; that it owes the defendant nothing; that it discovered on the 14th of June that the garnishment case was really in the city court; and that it appeared in said court on the 15th and filed its answer. For aught that appears, this answer, while out of time, was made before the calling of the garnishment case on the docket; and as it is provided by section 4726 of the Civil Code that the plaintiff shall not have judgment against the garnishee until he has obtained judgment against the defendant, under no circumstances could the plaintiff have obtained a judgment against the garnishee until the 12th of June, three days before the garnishee answered. The delay to the plaintiff could not have been very material. It is true that section 4551 of the Civil Code provides that, if the person summoned as garnishee fails to appear and answer at the first term, the case shall stand continued until the next term, and that, if he should fail to appear and answer by the next term, the plaintiff may, on motion, have judgment against the garnishee for the amount of the judgment he has obtained against the defendant. It is likewise true that the rights of the diligent creditor require a prompt compliance with the law on the part of the garnishee. It has, however, been repeatedly ruled by this court that circumstances may arise in which the garnishee ought not to have judgment rendered against him for failure to answer at the exact time required. Garnishee fails to appear and answer by the next (second) term, the plaintiff may, on motion, have a judgment, etc. It is not an indefinite rule that he shall. While the courts will and ought to require a prompt compliance with the garnishment, the repeated rulings of this court authorize further time to be given the garnishee under exceptional circumstances. In the case of Carhart v. Ross, 15 Ga. 186, it was ruled that the answer being actually filed within a few days after the time limited in the order, and before the case was reached on the docket, accompanied by the affidavits of the parties and their counsel, that it was impossible to have access to the original papers which were withdrawn from the clerk's office, was sufficient. In the case of Clark v. Chapman, 45 Ga. 486, Judge McCay, delivering the opinion of the court, says: "The law requires the answer to be at the first term. We see no objection to giving time until the judgment goes against the principal debtor, and have several times ruled that the court may indulge the garnishee till that time. Perhaps there is no objection to indulgence, for good reasons, up to a reasonable time before the dismissal of the juries." In the case of McCallum v. Brandt, 48 Ga. 439, a defaulting garnishee moved the court, after the discharge of the juries, to be allowed to file his answer denying indebtedness, and, for cause why the answer was not filed before, showed that the original defendant had been before that time, in a case of involuntary proceedings in bankruptcy, adjudged a bankrupt; that a new trial had been granted; and that the proceedings in bankruptcy were still pending. It was ruled there that the court did not abuse its discretion in permitting the answer to be then filed. In delivering the opinion, Judge Trippe says: "When a party, under the advice of counsel, fails to file his answer in time, not believing that the court would proceed further in the main suit, shall he be adjudged in contempt (for it is as a quasi contempt), and be adjudged to pay the whole debt? Though the last day of grace in such cases may seem to have passed, it is not always that the door is finally closed." In the case of Russell v. Bank, 50 Ga. 575, this court ruled that when a garnishee failed to answer through a mistake as to his legal duty, and judgment was rendered against him for a much larger sum than he had in hand, the discretion of the court in setting aside the same, on motion made during the term, will not be controlled; and Judge Warner, in delivering the opinion in that case, said: "The general rule undoubtedly is that the court will not set aside a judgment against a garnishee who fails to answer, unless some good and satisfactory reason be shown therefor, to be judged of by the court." In the case of Bearden v.

term of the city court, and no answer was filed at that term, and at the December term the case was reached in its order, and still no answer was filed, and no reason was assigned for such failure, it was error to allow counsel for the garnishee "further time to look into the matter," and to refuse to strike the answer of the garnishee, subsequently filed, and to enter up judgment against it as in case of default. The previous adjudications of this court were reviewed in the case last cited, and the conclusion of our present Chief Justice, who delivered the opinion, after a consideration of the rulings made theretofore, was: "All these cases go upon the principle that where the garnishee has failed to answer, but gives a good and sufficient reason for the failure, it is then within the discretion of the court as to whether he will allow judgment against him or not. But there is no case that we can find where the judge has allowed the garnishee time, after the case is called, to look into the matter and ascertain whether he has a defense or not, without giving any reason or explanation for his failure to file his answer up to that time. In such a case the law seems to us peremptory, and there is no discretion left to the judge." With this statement of the rule we are in entire harmony, and are of the opinion that the trial judge ought not to have stricken the answer of the garnishee in this case, and entered a judgment against it in favor of the plaintiff. As we view the record, there is no evidence of bad faith upon the part of the garnishee. If it be assumed (which it must, under the ruling in the Ahrens Case) that the summons of garnishment in fact directed the Journal Company to answer in the city court, there can still be no question but what the garnishee in good faith understood the summons differently, because it did appear at the time named in the summons in the justice's court and file its answer. While, therefore, concluded by the fact that the summons was as stated, it surely was not estopped to deny that it made an honest mistake as to this fact, and that because of this mistake it in good faith made answer in the magistrate's court, and failed to answer in due time in the city court. It is not the object of the law to make one man pay the debt of another. The purpose of the garnishment law is to impound property belonging to a debtor in the hands of a third person, and, while such third person must promptly respond to the call of the plaintiff to answer, if he is prevented from doing so on the day named, by accident, mistake, or any unavoidable circumstance for which the law will have regard, but does appear and file his answer in time for the plaintiff to reap the reward of his diligence, and without putting the plaintiff to any unnecessary delay, in the soon as the circumstances will admit, there is no equitable reason why the answer should not be allowed to stand, and the rights of the parties determined on the merits as they shall be made to appear by investigation. Judgment reversed. Cross bill affirmed.

CITY OF ATLANTA et al. v. STEIN.

(Supreme Court of Georgia. Aug. 9, 1900.)

MUNICIPAL CORPORATIONS—CONTRACTS—MONOPOLIES.

A municipal corporation, though not required by its charter to let contracts for public work to the lowest bidders, and though clothed, as to such matters, with the broadest discretionary powers, has no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a specified class. Such an ordinance is ultra vires and illegal, because it tends to encourage monopoly and defeat competition, and all contracts made in pursuance thereof are void.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by George Stein against the city of Atlanta and others. Judgment for plaintiff. Defendants bring error. Affirmed.

J. A. Anderson, J. T. Pendleton, Lumpkin & Colquitt, and C. T. Ladson, for plaintiffs in error. C. W. Smith and Arminius Wright, for defendant in error.

LUMPKIN, P. J. The mayor and general council of the city of Atlanta adopted the following ordinance:

"An ordinance requiring the union label of the Allied Printing Trades Council on all city printing.

"Section 1. Be it ordained by the mayor and general council that all printing, of whatever character, used for or by the city of Atlanta, shall bear the Allied Printing Trades Council union label of Atlanta, Georgia, as registered with the secretary of state.

"Sec. 2. Each and every city official when advertising for bids for printed matter shall specifically state in said advertisement and shall notify bidders that all bids shall be made in accordance with this ordinance.

"Sec. 3. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed."

This ordinance went into effect March 9, 1900. In obedience to its requirements, the city comptroller made a contract with the Pease Printing Company, a member of the union, to do certain printing at an agreed price. Stein, a citizen and taxpayer of Atlanta, filed an equitable petition to enjoin the municipal authorities and the Pease Company from carrying this contract into effect, and the former from further enforcing the ordi-

ıce mentioned. At the hearing it appear- that there were in the city four union and een nonunion printing establishments, and it the comptroller, solely because of this linance, refused to entertain bids for print- from the proprietors of any of the latter. e evidence was conflicting as to the value the work embraced in the contract with Pease Company, but the preponderance of was to the effect that it was worth less n the price to be paid that company; and t the city, if the nonunion printers had n allowed to compete for it, could have de a more advantageous contract. The rter of the city does not require the mayor general council to let contracts for pub- work to the lowest bidders, but, under its visions, the municipal authorities are, as uch matters, invested with a wide discre- . The injunction was granted, and the endants excepted. As the contract was le strictly in pursuance of the ordinance, validity of the former depends upon that the latter. If, therefore, the ordinance void, and it was right to enjoin the fur- enforcement of it, there was certainly no r in preventing by injunction the consum- lon of the contract. The fall of the ordi- ce necessarily carries with it the agree- t, which had no other source of vitality. ur judgment, the ordinance was void, and injunction was properly granted. It can- be seriously denied that the ordinance led to defeat competition and encourage opoly. Indeed, the evidence introduced re the trial judge fully warranted a find- that such was not only the tendency, but actual effect, of the ordinance. It is not in the power of municipal authorities to t legislation of this kind. On the con- y, with all respect to the members of the council, we are constrained to hold that so g is an unwarranted act, which calls for ial interference. We cannot agree with able and distinguished counsel for the that "the ordinance attacked and enjoin- elow amounted only to a direction by the or and general council to the ministerial ers of the city to place the orders for pub- inting with printers using a union label." ordinance is something more than a "direction." It has the form, and was ded to have the effect, of law; and, if , would, until repealed, bind the mem- of council as much as it would the sub- ate officials of the city. These mem- could not, with propriety, disregard it so as they permitted it to stand upon the icipal statute book; and the mere power peal it certainly did not prevent its opera- on all concerned. If, in the absence of an ordinance, the contract in question been let to the Pease Company, it could properly be said that the making of it an abuse of discretion on the sole ground the price of the work was too high. It d require an extreme case to justify the s in setting aside a municipal contract ich a ground, when made under a charter like that of Atlanta. With respect to agree- ing on prices, securing good work, prompt service, etc., the municipal discretion must and should be allowed a wide scope; and, when exercised, the courts should be exceed- ingly slow and reluctant to interfere. Cer- tainly, they should never undertake to substi- tute their judgment, in matters of judgment, for that of the city's governing authorities.

This court, in Semmes v. Mayor, etc., 19 Ga. 471, held that "a body corporate is not answerable for an erroneous exercise of a dis- cretion, though the consequences be injuri- ous," and that "inadequacy of price, unless so great as, of itself, to be evidence of fraud, is not a sufficient ground for impeaching" a contract for the sale of property belonging to a city. In Wells v. Mayor, etc., 43 Ga. 67, it was decided that, where a municipal cor- poration is acting within the scope of its pow- ers, a court will not "interfere to restrain or control its action on the ground that the same is unwise or extravagant," and that, "to sustain such interference, it must appear either that the act is ultra vires, or fraudu- lent, or corrupt." Again, in Danielly v. Ca- baniss, 52 Ga. 212, it was ruled that "when a town council is authorized by law to do a particular act at its discretion, the courts will not control this discretion, and inquire into the propriety, economy, and general wis- dom of the undertaking, or into the details of the manner adopted to carry the proj- ect into execution." The case of Mayor, etc., v. Eldridge, 64 Ga. 524, is on the same line, and there are many others in which this court has made decisions of similar im- port. The doctrine of all these cases, viz. that, as a general rule, there should be no judicial interference with the exercise by municipal bodies of the discretion with which they are by law invested, is sound and well recognized; but this rule is not absolutely without exception. The whole subject was given thorough consideration in the case of City of Atlanta v. Holliday, 96 Ga. 546, 23 S. E. 509, in which, after stating that "under the charter of the city of Atlanta the discre- tion of its municipal authorities, within the sphere of their powers, is very broad, and this discretion is to be exercised according to the judgment of the corporate authorities as to the necessity or expediency of any giv- en measure," it was held that: "Where these authorities are acting within the scope of their duties, and exercising a discretionary power, the courts are not warranted in inter- fering, unless fraud or corruption is shown, or the power or discretion is being manifestly abused to the oppression of the citizen. In a case where it clearly appears that a threat- ened act on the part of the municipal au- thorities will result in such oppression, a court of equity may interfere to prevent the wrong." The vice of the ordinance now un- der consideration is that it cuts off the power to fully and freely exercise that very discre- tion which the public good requires the may- or and general council to exercise in making

in behalf of the city which it is idle to say would not be presented were this ordinance out of the way. We cannot, therefore, escape the conclusion that in adopting this ordinance the mayor and general council exceeded their authority. In 1 Spell. Extr. Relief, § 718, it is said: "Where no conditions or restrictions are imposed upon municipal officers in the matter of letting contracts, they are not obliged to let the work to the lowest bidder, and cannot be enjoined for a refusal to do so, unless guilty of fraud. They may exercise an unlimited discretion so long as they are not guilty of gross abuse of discretion, and do not pervert their powers to such an extent as to amount to a fraudulent misappropriation of the public funds." It is interesting, in this connection, to notice the case of Avery v. Job, 25 Or. 512, 36 Pac. 293, in which it was ruled that: "Although the purchase or erection of certain public improvements may have been by the municipal charter confided to the judgment and discretion of the city council, yet equity will, at the suit of taxpayers, restrain the council from proceeding in the matter when it is not exercising its discretion, but is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers." Here, then, we have most respectable authority for the proposition that a municipal act which amounts to a refusal to exercise discretion, and which must result in an arbitrary waste of the public funds, "is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers." Is not such waste sure to occur when, out of nineteen printing concerns in Atlanta, only four are allowed to compete for the city's work, and would not a combination of these four (which could most probably be effected without much difficulty) certainly create a monopoly? If the four should combine, there would be no competition whatever. It was urged in the argument that, if such a thing should occur, the ordinance could and would be speedily repealed. To this we reply that the combination might be made without the knowledge of the municipal authorities; but, aside from this, they ought at all times to be in a position to meet such an emergency without being compelled to resort to further legislation; and, further, whether such a combination is to be anticipated or not, they have no more right to restrict competition than to defeat it altogether.

The case of Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, is in many respects similar to the one in hand. It was there held that "a board of education has no power to agree with the representatives of labor organizations to insert in all its contracts for work upon school buildings a provision that none but union men should be employed in such work, or placed upon its pay rolls." included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition, and to increase the cost of work. It is unquestionable that, if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should, by a statute, undertake to require this board, as the agency of the state in the management of school affairs in the city of Chicago, to adopt such a rule, or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the constitution of the state. If such a restriction were sought to be enforced by any law of the state, it would constitute an infringement upon the constitutional rights of citizens, so that the state in its sovereign capacity, through its legislature, could not enact such a provision." Pages 199, 200, 177 Ill., page 316, 52 N. E., and page 720, 42 L. R. A. "There is another ground upon which complainant has an undoubted right to maintain the bill, and that is that the contract tends to create a monopoly, and to restrict competition in bidding for work. The board of education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to lessen competition by preventing contractors from employing any except certain persons, and by excluding therefrom all others engaged in the same work; and such a provision is illegal and void. A taxpayer may resist an attempted appropriation of his money in execution of such a contract." Pages 201, 202, 177 Ill., page 316, 52 N. E., and page 721, 42 L. R. A. In Holden v. City of Alton, 179 Ill. 318, 53 N. E. 556, which was a case of identically the same kind as ours, except that there the city charter required the contracts to be let to the lowest bidders, it was decided that an ordinance like the one now under review was "illegal, as tending to create a monopoly, and impose an additional burden on taxpayers." While, of course, the provision as to letting contracts to the lowest bidders was a matter of consequence, an examination of the opinion, which was delivered by the same justice from whom we quoted above, will leave little room for doubting that the decision would and ought to have been the same, even in the absence of such a provision.

There are, besides the foregoing, numerous other authorities which support our conclusion in the present case. We cite, as more or less in point, the following: Beach, Monop. § 125; 2 Beach, Inj. § 1299; City of Chicago v. Rumpff, 45 Ill. 90; Littler v. Jayne, 124 Ill. 123, 16 N. E. 374; Association v. Topeka, 20

Oakley v. City of Atlantic City (N. J. Sup.) 44 Atl. 651; Winkler v. Summers (Sup.) 5 N. Y. Supp. 723. Most of the authorities cited in this opinion are also pertinent upon the proposition that in a case like the present the taxpayer has the right to invoke an injunction. Our case of Peeples v. Byrd, 98 Ga. 688, 25 S. E. 677, relied on by counsel for the plaintiffs in error, is in entire accord with what we now decide. There the supreme court reporter was in fact exercising a discretion. Here the corporate authorities sought to put themselves in a place where they could not do so at all, or else within very narrow limits. Judgment affirmed. All the justices concurring.

CITY OF BAINBRIDGE v. REYNOLDS.

(Supreme Court of Georgia. Aug. 9, 1900.)

INJUNCTION—VIOLATION OF CITY ORDINANCE.

A court of equity will not, by injunction, prevent the institution of a prosecution for the violation of a penal municipal ordinance; nor will it, upon petition for an injunction of this nature, inquire into the validity of such an ordinance, upon constitutional or other grounds.

(Syllabus by the Court.)

Error from superior court, Decatur county; W. N. Spence, Judge.

Action by J. E. Reynolds against the city of Bainbridge. Judgment for plaintiff, and defendant brings error. Reversed.

Hawes & Hawes, for plaintiff in error. Albert H. Russell and M. E. O'Neal, for defendant in error.

FISH, J. The plaintiff, alleging that he was a resident of the city of Bainbridge, and the agent in that city of a nonresident steam laundry, applied for an injunction to prevent the municipal corporation, its officers and agents, from enforcing or attempting to enforce a city ordinance which required the "agent or agents or representatives of each nonresident steam laundry" to pay a special license of $100. He alleged that the ordinance was "unconstitutional, null, and void"; that it was violative of both the constitution of this state and the constitution of the United States; that the city had no authority, under its charter, to enact the same; that it was unreasonable, etc. The case was heard in the court below simply upon the pleadings, and the court granted a permanent injunction, as prayed for, whereupon the defendant excepted.

It appears from the record that the ordinance in question imposes upon the agent or agents or representatives of each nonresident steam laundry a special license of $100, and then, in respect to its enforcement, simply provides "that any violation of this ordinance shall be punished as prescribed in section 260 of the City Code." While it pose for which it was enacted, that the municipal corporation does intend to attempt to enforce this ordinance against the plaintiff, how it will attempt to enforce it, or in what way it can enforce it, does not appear, either from the petition of the plaintiff, the answer of the defendant, or from anything else in the record, except as may be inferred from the ordinance itself. As the ordinance, in respect to the means provided for its enforcement, appears to be purely penal in character, we must presume, from the record, that the plaintiff was seeking, by injunction, to prevent the institution against himself of a prosecution under its penal provisions. The case, therefore, as it is presented to us, is controlled by the decision in Paulk v. City of Sycamore, 104 Ga. 24, 30 S. E. 417, 41 L. R. A. 772, and the previous decisions of this court therein cited. In that case it was held that: "Courts of equity will not, by injunction, prevent the institution of prosecutions for criminal offenses, whether the same be violations of state statutes or municipal ordinances; nor will they, upon petition for an injunction of this nature, inquire into the constitutionality of a legislative act, or the validity or reasonableness of an ordinance making penal the act or acts for the doing of which prosecutions are threatened." Accordingly, as the ordinance involved in the present case is, with reference to the means provided for its enforcement, purely penal in its nature, the court below had no power, upon an application for an injunction against its enforcement, to inquire into its validity, either upon constitutional or other grounds, and to enjoin the city from attempting to enforce it. If the ordinance is invalid, by reason of its unconstitutionality, or for other cause, such invalidity would be a complete defense to any prosecution that might be instituted for its violation. Judgment reversed. All the justices concurring.

BENTLEY et al. v. SHINGLER.

(Supreme Court of Georgia. Aug. 9, 1900.)

TAX EXECUTIONS—WILD LANDS—ADVERTISEMENT—EXECUTION SALE.

1. It was not essential to the validity of tax executions against wild lands issued by the comptroller general under the act of February 28, 1874 (Acts 1874, p. 105), that the same should recite that the lands were wild or unimproved, or that they had not been returned for taxation.

2. A statutory requirement that a given advertisement shall be published in a designated newspaper "once a week for four weeks" (Act Feb. 28, 1874, p. 105, as amended by Act March 2, 1875, p. 119), before a particular thing can lawfully be done, is complied with if the advertisement be inserted in that paper four times, in as many separate consecutive weeks, and the first insertion is made in an issue of the paper published 28 or more days before the thing in question is done.

4 weeks, before the day of sale.

(Syllabus by the Court.)

Error from superior court, Wilcox county; C. C. Smith, Judge.

Action by W. H. Bentley and others against J. H. Shingler. Judgment for defendant, and plaintiffs bring error. Affirmed.

J. W. Haygood, D. A. R. Conn, and Greer & Felton, for plaintiffs in error. J. H. Martin, for defendant in error.

LUMPKIN, P. J. The plaintiffs in error, W. H. Bentley and others, brought against J. H. Shingler an action for the recovery of lots of land 277 and 278 in the Twelfth district of Wilcox county. They proved that they were the heirs at law of M. A. Bentley, deceased, and introduced grants to him from the state of the lots in question. The defendant introduced two executions issued by the comptroller general against these lots, respectively, for taxes alleged to be due thereon and unpaid, and also two deeds from the sheriff of Wilcox county to one Jonathan Walker, in one of which that officer undertook to convey to Walker lot 277, and in the other lot 278. Each of these deeds contained a recital that the lot therein described had been sold under a tax execution issued by the comptroller general, and the execution referred to in each deed corresponded, as to description, with one of those in evidence. The defendant also introduced a quitclaim deed to himself from Walker, covering both lots. There was no dispute that when the executions were issued, and the sheriff's sales had thereunder, the lots in controversy were wild lands. The plaintiffs then tendered in evidence what purported to be the original files of the Constitution, a newspaper published in Atlanta, embracing issues of divers dates. The court rejected the same, and upon this action the plaintiffs assign error. After the close of the testimony on both sides the court directed a verdict in favor of the defendant, and to this the plaintiffs also excepted. The case turns upon the three questions discussed below:

1. The executions issued by the comptroller general did not contain a recital that the lots were wild or unimproved lands, or that they had not been returned for taxation. These executions were issued under the act of February 28, 1874 (Acts 1874, p. 105). It was insisted by counsel for the plaintiffs in error that the executions were, for want of such a recital, void, and that the sales thereunder were likewise void. It is only necessary to refer to the decisions of this court in Greer v. Fergerson, 104 Ga. 552, 30 S. E. 943, and Hilton v. Singletary, 107 Ga. 821, 826, 33 S. E. 715, to show that there is no merit in this contention.

2. The executions in question were issued on the 1st day of October, 1877. If the files of the Constitution which the court rejected ment requiring the owners of the lots in dispute to come forward and return the same for taxation, and to pay the taxes thereon, and notifying them that in default of so doing the lands would be sold. This advertisement was published four times; the dates of the papers in which it was inserted being, respectively, August 31, September 7, September 11, and September 18, 1877. There was no publication of the advertisement before August 31st or after September 18th. The above-mentioned act of February 28, 1874, as amended by that of March 2, 1875 (Acts 1875, p. 119), required the comptroller general to publish such advertisements "once a week for four weeks" before issuing executions. Counsel for the plaintiffs in error contended that, inasmuch as the rejected newspaper files would have shown that the full period of 28 days did not elapse between the first and the last insertion of the advertisement under consideration, it would thus have been established that the law was not complied with, and that consequently the executions were invalid. To this we cannot agree. More than 28 days elapsed between August 31st and the date of the executions, which, as has been seen, was October 1st, and this was sufficient; there being no dispute that each insertion appeared in a separate and distinct calendar week from any of the others. See, in this connection, Boyd v. McFarlin, 58 Ga. 208; Montford v. Allen (Ga.) 36 S. E. 305.

3. It was further urged in behalf of the plaintiffs in error that the sheriffs' sales under which the defendant asserted title were void because the same were not advertised for 90 days, and that Walker, the defendant's grantor, must necessarily have so known, for the reason that the executions were levied on May 1st, and the sales took place on July 2d. The reply is that the law did not require the sheriff to advertise these sales for a period of 90 days. With reference to this matter the act of 1874 provided: "On the expiration of the time of advertisement, the comptroller general shall issue execution against all unimproved or wild lands not returned for state and county tax, as per assessment in the county where the land lies, assessing the value at the average value of such land in the county where it lies, which execution shall be directed to the sheriff of the county where the land lies, and the sheriff shall forthwith proceed to advertise and sell the same under the same rules and regulations as govern other sheriff sales." Under the rules and regulations governing sheriffs' sales at that time, a levying officer was required to advertise sales of land "weekly, for four weeks." Code 1873, § 3647. The requirement that property sold by a sheriff under an execution issued by a tax collector should be advertised for 90 days (Id. § 897) had no application to sales made under executions issued by the comptroller general. Doubtless the reason for pro-

lectors was that the persons affected by those of the former class would, by the advertisement which the act of 1874 required the comptroller general to publish, be given timely and sufficient warning of the necessity of coming forward and returning their wild lands, and paying the state the taxes due upon the same, while no preliminary warning was provided in the case of executions issued by tax collectors. Judgment affirmed. All the justices concurring.

REID et al. v. SEWELL et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

WITNESS — COMPETENCY — TRIAL — RIGHT TO OPEN AND CLOSE—APPEAL.

1. Though one may, as a party or otherwise, be pecuniarily interested in the result of a case brought by an executor, he is not incompetent to testify to admissions made in his presence by the testator to another, when it appears that the conversation in which such admissions were made was not addressed to the witness. Ray v. Camp (Ga.) 36 S. E. 242.

2. In order to entitle a defendant to the opening and conclusion of the argument, he must, in his pleadings, and before the plaintiff begins to introduce testimony, admit enough to make out a prima facie case for the latter. Massengale v. Pounds, 28 S. E. 510, 100 Ga. 770; Dorough v. Johnson, 34 S. E. 168, 108 Ga. 812; Railway Co. v. Morgan (Ga.) 35 S. E. 345; Whitaker v. Arnold (Ga.) 36 S. E. 231. (a) This is not done when the action is one by an executor upon a promissory note, and the defendant merely admits the execution of the paper, and its delivery to the plaintiff's testator. The answer should go further, and embrace an admission that the plaintiff, in his representative capacity, was, at the time of the bringing of the action, the holder of the note in question. (b) As the plaintiffs in the present case were, by reason of the court's refusal to allow them to open and conclude, deprived of a substantial right, and as the evidence by no means demanded the verdict, a new trial should be had. Massengale v. Pounds, supra.

(Syllabus by the Court.)

Error from superior court, Campbell county; John S. Candler, Judge.

Action between C. S. Reid and others and J. W. Sewell and others. From the judgment, Reid and others bring error. Reversed.

L. S. Roan, for plaintiffs in error. J. F. Golightly, for defendants in error.

PER CURIAM. Judgment reversed.

BROOKE et al. v. MORRIS et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

FRAUDULENT CONVEYANCE—ASSIGNMENT OF LIFE POLICY—RIGHTS OF CREDITORS.

1. That one obtained credit by representing in general terms that he had policies of life insurance payable to his estate, which he expected to keep up, and the proceeds of which would after his death inure to the benefit of his creditors, did not in equity entitle the person who extended credit merely on the faith time of the assignment of the policy to the wife it had no cash surrender or market value. And the more especially is this true when the premiums accruing upon the policy after the assignment to her were paid, not by the husband, but with her own funds, or funds advanced by others for her benefit.

2. In view of the evidence disclosed by the record, and of the rule above announced, there was no error in refusing the injunction.

(Syllabus by the Court.)

Error from superior court, Fulton county; J. H. Lumpkin, Judge.

Action by George W. Brooke and others against Victoria A. Morris and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Smith, Hammond & Smith, for plaintiffs in error. J. A. Anderson, Dorsey, Brewster & Howell, and Arthur Heyman, for defendants in error.

PER CURIAM. Judgment affirmed.

RALEIGH & G. R. CO. et al. v. ELLETT.

(Supreme Court of Georgia. Aug. 9, 1900.)

DEATH BY WRONGFUL ACT.

This case, upon its facts, falls within and is controlled by the rule of law this day announced in the case of Railroad Co. v. Spinks, 36 S. E. 855.

(Syllabus by the Court.)

Error from city court of Atlanta; H. M. Reid, Judge.

Action by L. H. Ellett against the Raleigh & Gaston Railroad Company and others. Judgment for plaintiff. Defendants bring error. Reversed.

Erwin & Brown and Vasser Woolley, for plaintiffs in error. W. P. Andrews and Westmoreland Bros., for defendant in error.

PER CURIAM. Judgment reversed.

LEWIS, J., dubitante.

WIGHT et al. v. SCHMIDT.

(Supreme Court of Georgia. Aug. 7, 1900.)

APPEAL—REFUSAL OF NEW TRIAL—ASSIGNMENTS OF ERROR.

1. No cause for reversing a judgment denying a new trial is presented: (1) By a general assignment of error that the verdict is contrary to the charge of the court, or to a specified portion thereof. See Manufacturing Co. v. Rucker, 4 S. E. 885, 80 Ga. 291, 295; Roberts v. Keller (decided at the present term), 36 S. E. 617. (2) Nor by a complaint merely alleging that the court erred in refusing, upon the request of movant, to rule out the testimony of a certain witness which related to a specified subject, such testimony not being otherwise indicated, and the ground upon which it was sought to be excluded not being stated. (3) Nor by an assignment of error in general terms upon a specified portion of the judge's charge, when

the portion so excepted to states a sound proposition of law in the abstract, or when it embraces two or more distinct propositions, at least one of which is abstractly correct. Anderson v. Railway Co., 33 S. E. 644, 107 Ga. 500. (4) Nor by a general complaint that the court erred in refusing to admit in evidence a certain letter, there being no allegation that it was offered by the movant. See Ponder v. Walker, 33 S. E. 690, 107 Ga. 753.

2. The evidence, though conflicting, was amply sufficient to warrant the verdict.

(Syllabus by the Court.)

Error from superior court, McIntosh county; Paul E. Seabrook, Judge.

Action between Wight & Wesloshy and A. Schmidt. From a judgment, and from an order denying a new trial, Wight & Wesloshy bring error. Affirmed.

D. H. Pope and Glgnilliat & Stubbs, for plaintiffs in error. Garrard & Meldrim, for defendant in error.

PER CURIAM. Judgment affirmed.

BINION v. GEORGIA SOUTHERN & F. RY. CO.

(Supreme Court of Georgia. Aug. 9, 1900.)

INJURY TO EMPLOYÉ—EVIDENCE—DIRECTING VERDICT.

1. In a suit against a railway company by an employé, a rule of the company relative to the duty of such employé is admissible in evidence in behalf of the company, without first proving that the employé had knowledge of the rule. Such knowledge may be shown either before or after the admission of the rule in evidence. Parker v. Railway Co., 10 S. E. 233, 83 Ga. 539.

2. It was error to direct a verdict for the defendant in this case, the evidence being conflicting on the main issues,—the same being (1) whether the employé's failure to get a coupling stick was due to fault on his part or on the part of the company; (2) whether the nonobservance of the rule to make all couplings with sticks was so general as to raise a presumption that such nonobservance was known to the company, and to lead the employé, although he was shown by the evidence to have had full notice of the rule, to believe that it was abrogated; and (3) whether there was any negligence on the part of the company in running the train back to make the coupling.

(Syllabus by the Court.)

Error from superior court, Dooly county; Z. A. Littlejohn, Judge.

Action by Frank Binion against the Georgia Southern & Florida Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

Guerry & Hall and J. T. Hill, for plaintiff in error. Hall & Wimberly, Thomson & Whipple, and R. C. Jordan, for defendant in error.

PER CURIAM. Judgment reversed.

McPHAUL v. FLETCHER et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

JOINT TRESPASSERS—VENUE—RECEIVER.

When, to a petition filed in the superior court of the county of the residence of F., in which it was alleged that the plaintiff was owner of a certain lot of land in said county that F. and A., who resided in another county, have colluded to defraud and damage plaintiff, and have by their tenants and employés entered on such land, and are cutting and removing therefrom the timber growing thereon, and committing other acts of trespass and waste, to the damage of plaintiff; that defendants are insolvent,—and which prays for a receiver to take charge of the timber already cut, and for an injunction to restrain defendants from further cutting and removing timber, a plea is filed to the jurisdiction of the court by A. because of his residence in a county other than that in which the petition was filed, it was error to refuse the injunction and to appoint a receiver merely because of the alleged residence of A. Suits against joint trespassers residing in different counties may be tried in either county. Civ. Code, § 5872.

(Syllabus by the Court.)

Error from superior court, Worth county; W. N. Spence, Judge.

Action by J. G. McPhaul against J. A. Fletcher and others. Judgment for defendants. Plaintiff brings error. Reversed.

F. Park, Perry & Tipton, and Bower & Bower, for plaintiff in error. Sam S. Jones, for defendants in error.

PER CURIAM. Judgment reversed.

STATEN, Tax Collector, et al., v. SAVANNAH, F. & W. RY. CO.

(Supreme Court of Georgia. Aug. 9, 1900.)

COUNTIES—TAXATION OF RAILROAD—PROPERTY—BACK TAXES.

1. Under the decisions of this court in the cases of Railway Co. v. Morton, 71 Ga. 318; City of Albany v. Savannah, F. & W. Ry. Co., Id. 158; Houston Co. v. Central R. Co., 72 Ga. 211; City of Atlanta v. Georgia Pac. Ry. Co., 74 Ga. 16; and City of Augusta v. Central R. Co., 78 Ga. 119,—neither counties nor municipal corporations had, prior to the act of October 16, 1889, providing a system for the taxation of railroad property by counties, any statutory authority to tax such property within their territorial limits, nor was there any machinery provided by the legislature for them to assess and collect taxes on such property. There is not, in the act just mentioned, nor any legislation subsequent thereto, any attempt to confer such authority or supply such machinery, with reference to "back taxes" on railroad property; and it necessarily follows that it was not within the power of the authorities of a particular county, or of its tax collector, in 1899, to levy and collect taxes on railroad property necessary for the support and maintenance of the railroad for the years prior to 1889, inclusive, and to assess double taxes for those years against the railroad company.

2. Can a county, in any event, collect taxes after the lapse of more than seven years from the time when they became due and payable? Quære.

3. If so, should not an equitable bar to the collection of such taxes be applied when, on account of the lapse of time, and for other sufficient reasons, it would be inequitable or unjust to enforce collection? Quære.

(Syllabus by the Court.)

Error from superior court, Lowndes county; A. H. Hansell, Judge.

Action by W. T. Staten, tax collector, and others, against the Savannah, F. &

Western Railway Company. Judgment for efendant. Plaintiffs bring error. Affirmed.

S. T. Kingsberry & Son and R. F. Ousley, or plaintiffs in error. D. H. Pope, J. G. rawford, and Chisholm & Clay, for defendnt in error.

PER CURIAM. Judgment affirmed.

DEVEREAUX v. ATLANTA RAILWAY & POWER CO.

(Supreme Court of Georgia. Aug. 7, 1900.)

VENUE—ACTION AGAINST RAILROAD—SERVICE OF PROCESS.

1. Section 2334 of the Civil Code requires all uits against railroad companies for damages person or property to be brought in the coun- wherein the cause of action originates, with ie sole exception that, if the cause of action rises in a county where the company has no gent, the suit may be brought elsewhere. The le jurisdictional fact being the place of the igin of the cause of action, and the statute ot superadding the further fact of the resi- ence of an agent as one requisite to jurisdic- on, it must be held that the scheme of the w is to make the jurisdiction exclusive in the unty where the cause of action originates hen there is such residence, but elective when iere is not. (a) It follows that the present tion was well brought.

2. While no question as to the manner of ef- cting service is presented by the bill of ex- ptions, a court with jurisdiction of the person nd subject-matter of an action necessarily has ie power to take proper steps to have service ully made.

(Syllabus by the Court.)

We think the scheme of the statute (Civ. ode, § 2334) is to fix the jurisdiction in the unty wherein the cause of action originates hen the company has an agent there, and to onstrain the bringing of it "in the county of ie residence of such company" when it has no ich agent. The word "may," in the last sen- nce of the section, has the force of "shall," else that sentence adds nothing to the mean- g of the law.

Per Little and Lewis, JJ., dissenting.

Error from superior court, Dekalb county; ohn S. Candler, Judge.

Action by F. L. Devereaux against the At- nta Railway & Power Company. Judg- ent for defendant, and plaintiff brings er- or. Reversed.

Arnold & Arnold, for plaintiff in error. oodwin & Hallman and C. P. Goree, for de- ndant in error.

PER CURIAM. Judgment reversed.

ATLAS TACK CO. et al. v. EXCHANGE BANK OF MACON et al.

(Supreme Court of Georgia. Aug. 7, 1900.)

AGENCY—RATIFICATION—CORPORATIONS—MORTGAGE—PREFERENCE OF DIRECTORS—VALIDITY.

1. A creditor, by accepting a mortgage in his vor, which had been executed without a re- uest from him, and of which he had no knowl- ge until it was actually tendered to him, ac- uiesced in and ratified all that had been done in his behalf by the person who procured the execution of the instrument, and occupied the position of giving to all the terms and stipulations therein embraced an assent relating back to the time of its execution.

2. When, in such a case, a mortgage was, at the instance of the directors of an insolvent trading corporation, executed in favor of a creditor thereof, and purported to secure the payment of a promissory note due to that creditor, upon which the directors were individually liable as indorsers, the mortgage also reciting that it was made "for the purpose of saving harmless the said accommodation indorsers," then such mortgage, when its validity was questioned by other creditors of the corporation, should, unless falling within an exception to the general rule, have been classed as an instrument which was rendered void by the legal principle forbidding such directors from giving themselves a preference over outside creditors, and not as a security which was good as having been given in the exercise of a statutory right to prefer a particular creditor.

3. Such an exception might arise if the mortgagee in question, at the time of giving credit, or the directors, at the time of becoming liable on the paper, made with the corporation a valid and binding contract for additional security by mortgage, to be given on demand, or when such a contingency should occur; but a contract of this kind, to be effectual, would have to be sufficiently clear and explicit in its terms to be capable of enforcement, and would have to constitute a part of the consideration upon which the credit was extended, or the liability as indorsers assumed by the directors. (a) There was no such contract in the present case, the undertaking or agreement set up as such being entirely too loose and indefinite in its terms to meet the requirements of the law in this respect.

4. As this case was tried upon lines entirely at variance with what is above laid down, there must be another hearing, which should be had in the light of the principles now announced, and the result of which should be in accord therewith.

(Syllabus by the Court.)

Error from superior court, Bibb county; L. D. Moore, Judge pro hac.

Action between the Atlas Tack Company and others and the Exchange Bank of Macon and others. From the judgment the tack company and others bring error. Reversed.

I. L. Harris, G. L. Jones, A. W. Lane, Anderson, Anderson & Grace, Hill, Harris & Birch, John I. Hall, O. J. Wimberly, C. P. Stud, and J. L. Hardeman, for plaintiffs in error. Ryals & Stone, Hardeman, Davis & Turner, Dessau, Bartlett & Ellis, and Bacon, Miller & Brunson, for defendants in error.

LEWIS, J. 1, 2. This case was here at the March term, 1897, and is reported in 101 Ga. 391, 29 S. E. 27, wherein its general nature is sufficiently indicated. This court simply held, as to the vital question in the case, that the judge erred in directing a verdict in favor of the mortgagees. It did not undertake to decide the controlling questions now dealt with in the headnotes; nor is there any intimation in the opinion of Justice FISH touching the questions which now engage this court's attention. On the contrary, on page 394 (of his opinion), 101

them, with one exception, knew that the mortgages had been executed until after they were filed with the clerk for record. It further appears that one of the purposes for which the mortgages were given, as expressed therein, was to secure harmless the accommodation indorsers or guarantors. While the motion for a new trial in the present case presents a number of questions, the same, upon such of its facts as are undisputed, really turns upon, and should be controlled by, the law announced in the preceding headnotes. The record discloses the fact that the Macon Hardware Company was a corporation composed of three persons,—L. E. Culver, H. C. Tindall, and J. C. Van Syckel,—who owned its entire stock, and who were also its directors. On December 23, 1893, there was a meeting of its stockholders, at which meeting it was unanimously resolved that the corporation had become utterly insolvent and incapable of continuing its business with safety to its creditors, and that it was impossible to attain the real objects for which the corporation was formed, namely, the carrying on of a wholesale hardware business in the city of Macon, Ga., and that the failure of the company is and had become inevitable, which statements are confirmed as the truth in the petition of said parties in this case for the appointment of a receiver, and in which they express a desire to surrender their charter. In that petition is an express declaration to the effect that the franchises of the corporation are "here surrendered." It is alleged in the petition that, prior to its filing, petitioners had executed mortgages to certain of its creditors to the amount of nearly $75,000. The entry of filing by the clerk indicated that the petition was filed a day before these mortgages were given. An attempt was made on the trial of the case to show that this was a mistake in the date, and that it was really filed on December 23d, but we deem it unnecessary to go into that question. For the purpose of determining what we conceive to be the controlling issues, it is sufficient to say that the record clearly shows very little space of time between the resolution adopted by the stockholders and the mortgages given under a resolution of the stockholders by the directors; the defendants in error contending that they were given the same date. However this may be, it is patent that, when these mortgages were given, the stockholders and directors not only knew of the corporation's insolvency, but had resolved on a discontinuance of its business, and by its action on that date had thereby practically ceased to be a "going corporation," and had abandoned the idea of continuing its business, on account of its being absolutely and hopelessly insolvent. Prior to the act of 1894, we recognize the fact that even an insolvent corporation could prefer a bona fide creditor, and that such creditor could be benefited thereby, in consequence of being indorser on the notes secured by the mortgages, does not necessarily render them invalid. Such was the decision in Welhl, Probasco & Co. v. Atlanta Furniture Mfg. Co., 89 Ga. 297, 15 S. E. 282, which was afterwards affirmed in Milledgeville Banking Co. v. McIntyre Alliance Store, 98 Ga. 503, 25 S. E. 567. We do not think that there is anything in the facts of those two cases which conflicts with the ruling herein made. Those were going concerns at the time of the execution of the mortgages. On page 506 (of the latter case), 98 Ga., and page 568, 25 S. E., Justice Lumpkin, now presiding justice, distinguishing it from the decision in Lowry Banking Co. v. Empire Lumber Co., 91 Ga. 624, 17 S. E. 968, says: "Had they in good faith been endeavoring to secure creditors who were asking to be preferred, it would, as in the present case, and in the case cited from 89 Ga. and 15 S. E., have been a different matter; for where directors, in behalf of the corporation, have simply undertaken to prefer certain of its bona fide creditors at their instance and upon their demand, the case presented is one in which a court of equity has no power to interpose or interfere." But the case at bar is quite different. It appears that these mortgagees had not only not asked to be preferred, and that these mortgages were not given at their instance or demand, but that, on the contrary, they had no knowledge of them until they were delivered after their record. Besides this, they were executed at a time when the corporation, through its officers having entire charge of its business, and in fact owning all its stock, had resolved to suspend business, and had reached the conclusion that it was utterly impossible for it to carry out the purposes for which it was chartered.

It is a well-established principle of law that, when a corporation has reached this condition, its assets should be really held by its officers in trust for its creditors; and it is, to say the least of it, questionable whether, under such circumstances, it can make a preference for any creditor. There is really a conflict of authority as to whether or not an insolvent corporation may prefer its creditors upon the same principle that such a privilege is allowed to individuals. In the absence of a statutory prohibition on the subject, some courts have decided that a corporation has the same power of disposing of its property as an individual has. In 5 Thomp. Corp. § 6496, it is declared: "But in adopting this hasty conclusion they have overlooked the fact that the analogy between an insolvent individual and an insolvent corporation wholly fails, in this: That, although an insolvent individual may turn over his property to certain of his creditors whom he desires to prefer, and may by so doing hin-

may, and often does, get on his feet again, and acquire property and discharge his previous obligations. But when a corporation becomes insolvent, and ceases to have the means of carrying out the objects of its creation, and dispossesses itself of all its property, it destroys itself, and becomes ipso facto dissolved, and in fact is regarded as a dissolved corporation for many purposes, having reference to the rights of creditors." The author, in section 6504, further says: "After the corporation has actually become dissolved and has gone into liquidation, then there is no room for controversy upon the question; for then its assets, which were previously a trust fund for its stockholders, become a trust fund for its creditors and stockholders, and its directors, if they remain in custody of those assets, hold them as trustees for its creditors first, and its stockholders next. The principle here spoken of is not necessarily confined to that formal dissolution which takes place under the judgment or decree of a court of competent jurisdiction, but it equally extends to that de facto dissolution which takes place when the corporation suspends business by reason of insolvency, and goes into liquidation. The governing principle is that the directors and managers of insolvent corporations are trustees of the funds, as well for the creditors as for the corporation, and are bound to apply them pro rata, and cannot use them to exonerate themselves to the injury of other creditors." When a corporation is insolvent, in the sense that it has not sufficient assets to discharge its debts, we can conceive how it could with propriety borrow money, and secure the same by mortgage upon its property, for the purpose of endeavoring to work out of debt and discharge its obligations. Under such conditions, it may also secure an antecedent debt while it proposes to continue actively in business; and, if it does so purely and solely for the purpose of securing a creditor, the incidental benefit that one of its officers may derive from such security, by being indorser on such a debt, will not necessarily render that security invalid. This, as we understand it, is as far as this court has gone in its adjudications on this subject, even prior to the act of 1894. But we know of no decision of this court validating a mortgage given after the corporation had not only become insolvent, but had resolved, through its controlling officers, that it would liquidate its claims, surrender its charter, and attempt to follow its business no further. We do not decide that such a mortgage would necessarily be void, under the liberal view once allowed by our statute touching the right of a debtor to prefer a creditor, which has been applied to corporations as well as individuals. It is not necessary to decide that question in this case, though we must confess we do not see how the force of the argument can be avoided, as seems to have been done in the present instance, before, or at least when, these mortgages were given, they would not be violating this trust by any special preference for a particular creditor to the injury of its creditors generally. In this connection, see Bump, Fraud. Conv. (4th Ed.) p. 192, where it is declared, "It seems that there are circumstances in which an insolvent corporation cannot prefer any creditor." The author then quotes the following from Woolen-Mills Co. v. Kampe, 38 Mo. App. 229: "When a corporation is hopelessly insolvent, and there is no reasonable or well-founded hope for a continuance of its business, and these facts are known to its officers and directors, then all the assets of the corporation become a trust fund in the hands of the directors, to be administered by them as trustees or agents for the equal benefit of all the creditors of the concern; and any attempted preferences, either in favor of the directors themselves or of a stranger, will not be upheld." He further adds: "In equity the assets of a corporation hopelessly insolvent become a trust fund for the benefit of its creditors, to be managed by the directors; and after such confessed insolvency the directors cannot, in equity, secure any advantage to themselves or to a creditor." Manufacturing Co. v. Hutchinson, 11 C. C. A. 320, 63 Fed. 496; Wisconsin Marine & Fire Ins. Co.'s Bank v. Lehigh & F. Coal Co. (C. C.) 64 Fed. 497; Phipps v. Harding, 17 C. C. A. 203, 70 Fed. 479. We need not, however, go to that extent in this case. It appears from the record that these mortgages were executed under resolution of the stockholders made at the time of a practical dissolution of the corporation; for in them is a recital to this effect: "Now, for the better securing the payment of the aforesaid promissory notes to the said Exchange Bank of Macon, and for the purpose of saving harmless the said accommodation indorsers or guarantors, who were the shareholders of this corporation, the said Macon Hardware Company hereby grants," etc. Then follows the mortgage upon the property to secure the debt. It also appears from the record that these directors gave to themselves a mortgage as indorsers, which covered an alleged indebtedness of $13,000, and that this mortgage was made to them as indorsers on the notes of the Macon Hardware Company, which notes were then outstanding, and the holders of which were then unknown. Unquestionably, that was a direct effort to secure themselves and nobody else. In reply to the recital in these mortgages, the directors were permitted by the court below to testify that their real intention was not to secure or indemnify themselves against loss, but solely to prefer creditors who had befriended them. There is no pretense that the recital in the mortgage to the effect that

sealed instrument as to one exact purpose of its execution; and we think, under every principle of law bearing upon this subject, that the makers of such an instrument, in the absence of any fraud, imposition, or mistake, would be estopped from contradicting the terms of such a recital, and its absolute truth. In Terrell v. Huff, 108 Ga. 655, 34 S. E. 345, it was held that, where a deed was unambiguous, parol evidence of declarations by the grantor, explanatory of its intent and meaning, was inadmissible. In Hill v. Manufacturing Co., 79 Ga. 106, 3 S. E. 447 (Opinion, point 3), it was held: "A party to a contract cannot, by proving what he said or wrote to a third person after the contract was entered into, show either what it means, or what he understood it to mean. Such evidence is not admissible."

It follows that these creditors, when they accepted the mortgages which had been executed without any request, and without authority until they were actually tendered, necessarily acquiesced in and ratified all that had been done in their behalf by the party who procured the execution of the instrument, and occupied the position of giving to the terms and stipulations embraced therein an assent relating back to the time of their execution. We think it very clear, therefore, that when the validity of these mortgages, to secure debts upon which the directors were indorsers, was questioned by other creditors of the corporation, they should have been classed as instruments rendered void by the legal principle which prevents directors of an insolvent corporation from giving themselves a preference over outside creditors.

3. To this general rule the record discloses no exception in favor of the mortgagees. Such an exception might arise if the mortgagees, at the time of giving the credit, or the directors, at the time of becoming liable on the paper, had made with the corporation a valid and binding contract for additional security by mortgage, to be given on demand. No such contract was made in the present case. There was, as to the mortgage given one of the creditors, some evidence tending to show that one or more of the directors told a party representing this creditor, in effect, that they would see him protected, or would protect him. Such testimony was loose and indefinite in its terms. There was nothing to indicate that the protection meant that a mortgage upon the assets of the corporation would be given in the event of its insolvency. It was just as susceptible of the meaning, as the directors had indorsed the debt, that the creditor would be protected through their individual obligation as guarantors.

4. In one of the grounds of the motion for a new trial, complaint is made that the court erred in refusing to give in charge to the promissory notes which the directors had indorsed, and to save harmless the directors who were indorsers on the notes of the Macon Hardware Company. This statement in the mortgages estops both the Macon Hardware Company and the holders of the mortgages from denying that such was its purpose in making the mortgages." And further in refusing to give in charge the following written request: "Evidence has been submitted to you as to the intent of the maker in executing the mortgages, but I charge you that such evidence will not release the maker of such mortgages or the creditors from the force of such estoppel. If the directors had the purpose of saving themselves harmless as to their indorsements, then, although the directors may have also had in view the securing of debts due to persons with whom they dealt and were under obligations, this would not render the mortgages valid; and, if you so believe, you should find against the validity of mortgages given to secure debts which were indorsed by the directors of the Macon Hardware Company." We think these requests to charge are entirely in accord with the law applicable to this main issue in the case. In fact, the record discloses that the case was tried upon lines entirely at variance with what is above laid down; and it follows, therefore, that there should be another hearing, which should be had in the light of the principles now announced, and the result of which should be in accord therewith. Judgment reversed. All the justices concurring.

GARBUTT LUMBER CO. v. GEORGIA & A. RY.

(Supreme Court of Georgia. Aug. 8, 1900.)

EMINENT DOMAIN—PUBLIC USE—COMPENSATION—PROCEDURE.

1. A partnership, which is the owner of a sawmill, and which, in connection with the business carried on, has constructed a railroad, to be used solely for the purpose of facilitating the operations of the sawmill business, is not engaged in any business in which the public is interested. A railroad owned by such a partnership, and operated in such a way, is in no sense property used for public purposes.

2. Section 4657 et seq. of the Civil Code provides a method to be followed when private property is taken or damaged for public purposes, and the procedure therein prescribed cannot be adopted when the property is sought to be taken for a purely private purpose.

3. Even if the act of November 22, 1899 (Acts 1899, p. 31), which authorizes a person or company owning or operating a private railroad in this state to cross any other railroad, be construed to authorize the taking of private property for that purpose, and, when so construed, is a valid and constitutional law, there is no law of force in this state which provides a method for fixing the compensation to be paid the owner of the railroad sought to be crossed, when the right to cross is refused.

4. The proceedings to condemn in the present case do not purport to be instituted under the

sections.

(Syllabus by the Court.)

Error from superior court, Wilcox county; O. C. Smith, Judge.

Proceedings by the Georgia & Alabama Railway against the Garbutt Lumber Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Hal Lawson and Eldridge Cutts, for plaintiff in error. Mackall & Anderson, for defendant in error.

COBB, J. The Georgia & Alabama Railway, a corporation, brought its petition against the Garbutt Lumber Company, a partnership, in which it alleged that the defendant was seeking to condemn a right of way for a tramroad across the track of the plaintiff at a designated point. It was alleged that the defendant was seeking to condemn, not for any public, but for a purely private, purpose, and that there was no law of Georgia by which the defendant could exercise the right to take or damage the property of the plaintiff for that purpose. Attached to the petition, as an exhibit, was a notice to the plaintiff, signed by the defendant, that, in pursuance of the provisions of law contained in section 4657 et seq. of the Civil Code, it desired to condemn a right of way for its tramroad across the track of the plaintiff at a described point,—such right of way to be 10 feet each way from the center of the tramroad of the defendant,—and requesting the plaintiff to appoint an assessor to act with one selected by the defendant, and named in the notice. The prayer of the petition was that the defendant be enjoined from undertaking to condemn any right of way at all across the tracks of the plaintiff. To this petition the defendant filed an answer in which it set up that it owned and operated a private railroad, and was engaged in the business of cutting and sawing for market pine lumber, and that it owned timber on both sides of the railway of the plaintiff, and that in order to carry its timber to its sawmill it was necessary to cross the plaintiff's track. The defendant further alleged that it desired to connect its sawmill, by means of a tramroad, with the Ocmulgee river, for the purpose of transporting lumber and timber by means of the same, which is a water way much used for the purpose of transporting lumber, naval stores, and timber to market and sawmills. In order to reach the Ocmulgee river, it is necessary for the tramroad to cross the plaintiff's right of way; the sawmill of the defendant being on one side of the railway, and the river on the other. On the hearing the judge granted the injunction prayed for, and this ruling is assigned as error.

1. One who owns a sawmill, and is engaged in preparing lumber for market, is engaged in a business in which the public is in no way interested, and a business which from its very

ris, 42 Ga. 500.

The fact that a railway is necessary in order to make the enterprise successful does not change the business from one of a private nature to one in which the public is interested. The defendant admits in its answer that its railroad is a private one. It is not pretended that it was constructed for the use of the public, nor that it is used or to be used in hauling for the public. It came into existence simply as an incident to the private business of the owner, and has been, and is to be, operated as such. The answer of the defendant, when construed in its most favorable light for it, cannot be held to establish that its sawmill was erected, or its railroad constructed or maintained and operated, for any other purpose than that of private gain. Not one thing appears in the record which would authorize an inference that the defendant's sawmill or railroad business should be classified as one in which the public is interested.

2. The method of condemnation of property, and assessment of damages, to be followed in all cases where corporations or persons are authorized to take or damage private property for public purposes, except where such property is taken for the purpose of laying out public roads or private ways, is prescribed in section 4657 et seq. of the Civil Code. The provisions of law just referred to do not contain any grant of power to any corporation or person to exercise the right of eminent domain, but simply provide how property may be condemned and the damages assessed, when the right to do so is derived from any lawful statute. The method thus provided is limited in terms to cases where authority is given to take or damage private property for public purposes. As the defendant in the present case is not a person or corporation authorized to take or damage private property for public purposes, the method provided in these sections is not at all applicable, and cannot be used in any way whatever, as the business in which the defendant is engaged is not devoted to a public purpose. This was a sufficient reason to enjoin the condemnation proceedings sought to be instituted by the defendant.

3. Section 2219 of the Civil Code, as amended by the act of November 22, 1899, reads as follows: "Any railroad company heretofore or hereafter chartered by the legislature of this state, and also, any person or persons or company owning or operating a public or private railroad in this state, when necessary to reach minerals, timber, or other materials, shall have the right to cross any other railroads heretofore or hereafter built or to be built in this state, upon the following terms: They shall be allowed to cross at grade points, or at any other point where the same shall not obstruct the other road, and may be allowed

claims that it has authority to exercise the right of eminent domain under the provisions of the act just quoted, which declares that a private railroad in this state, when necessary to reach minerals, timber, or other materials, shall have the right to cross other railroads. Even if the general assembly has power to grant to a private railroad the right to take or damage the private property of another for such purpose, and even if the section of the Code as amended, properly construed, should be held to confer such power, in order to make the grant effective there must be some method provided by law for assessing the damages to be paid to the owner of property thus taken; for the general assembly certainly has no power to authorize the taking of private property, for either a private or a public purpose, without adequate compensation being first paid therefor. This method may be found either in the act of conferring the authority to exercise the right of eminent domain, or in general laws which by their terms will be applicable to such cases. Neither the act of 1899, nor the section of the Code of which it was amendatory, provides any method whatever for assessing damages to the owner. The only general law on the subject of fixing the compensation of the owner of property which is lawfully taken is found in section 4657 et seq., above referred to, and sections 557 et seq. and 661 et seq. of the Political Code, which provide the method of fixing the compensation of the owner of property taken for a public road or a private way. As has been shown, the method prescribed in Civ. Code, § 4657 et seq., is not available to the defendant. Of course, the provisions of law with reference to the establishment of public roads have no application; and while the constitution provides that, in cases of necessity, private ways may be granted, upon just compensation being first paid by the applicant (Civ. Code, § 5729), the defendant does not claim the right to condemn for a private way, and the general assembly has expressly limited the purposes for which private ways may be granted to such ways as may be necessary for individuals to go from and return to their farms or places of residence. Pol. Code, § 661; Board of Com'rs v. Harris, 71 Ga. 250. Treating the act of 1899 as legislative authority to the defendant to condemn for the purpose desired, and conceding, for the purposes of the present case, that the general assembly can constitutionally grant such authority, the act is inoperative until the general assembly shall provide the method to be followed when the owner of the property sought to be condemned refuses to permit his property to be taken.

4. The defendant contended that it had a right to condemn a right of way across the son or corporation desiring to build a railroad to connect with a water way, for the purpose of transporting lumber, naval stores, and timber by means of the same, may make application in writing to the county authorities of the county in which the tramroad is to be located, and after such application is filed the proceedings thereafter shall be the same as provided in the Code for condemning property, except that the strip of land to be used for such purpose shall not exceed 15 feet in width. There is nothing in the notice served upon the plaintiff in the present case to indicate that the defendant intended to proceed under the law just referred to. On the contrary, it is apparent from the notice that the defendant had no such intention, for the simple reason that the law just referred to limited the strip of land authorized to be taken to 15 feet, and the notice in the present case distinctly provided for condemnation of a strip 20 feet. Judgment affirmed. All the justices concurring.

MUTUAL LIFE INS. CO. OF KENTUCKY v. CLANCY.

(Supreme Court of Georgia. Aug. 8, 1900.)

INSURANCE—DEFAULT IN PREMIUMS.

1. Where a policy of life insurance expressly stipulated that the premium should be paid annually, on or before a specified day, at the home office of the company, or to an agent producing a receipt of the company, signed by its president or secretary, and that if not so paid the policy should then become void, and that none of the terms of the policy could be changed or waived, except by written agreement signed by the president or secretary of the company, a failure to pay the premium as stipulated released the company from all liability upon the policy. See Reese v. Association (decided at the present term) 36 S. E. 637.

2. Where the local agent of the company represented to the holder of such policy that the company would change it so that the premium would be payable quarterly instead of annually, and the assured thereafter made a written request of the company that it make such change, the mere failure of the company to reply to this request was no excuse for not paying the premium in accordance with the terms of the policy.

3. The evidence submitted upon the trial demanded a finding in favor of the company, and the court erred in rendering judgment for the plaintiff.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by J. E. Clancy against the Mutual Life Insurance Company of Kentucky. Judgment for plaintiff. Defendant brings error. Reversed.

Dessau & Harris, for plaintiff in error. M. G. Bayne and T. J. Cochran, for defendant in error.

PER CURIAM. Judgment reversed.

RAILROADS—INJURY TO LIVE STOCK.

The railway company introduced positive testimony which fully overcame the legal presumption upon which alone the plaintiff's case rested. Its witnesses were entitled to be believed, for they were not directly contradicted; and the circumstantial evidence by which it was sought to discredit them, while consistent with the theory that they did not swear truly, was also consistent with the theory that they did. In such case the positive testimony must control.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by J. B. Thompson against the Georgia Southern & Florida Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Geo. S. Jones and R. C. Jordan, for plaintiff in error. E. P. Johnston, for defendant in error.

LUMPKIN, P. J. There was a head-end collision between a moving locomotive and a stationary bull, the latter showing fight, and manifesting total ignorance of the doctrine of impenetrability. The company's servants in charge of the locomotive were better versed in the principles of natural philosophy, and, according to their testimony, did their best to save the animal from the consequences of his rashness; but, in spite of their well-directed efforts, the crash came, with its inevitable result. They were the only eyewitnesses. At the trial the plaintiff proved certain circumstances which were consistent with his contention that the defendant's witnesses did not state accurately the details of the catastrophe, but these circumstances were also perfectly consistent with the company's contention that its witnesses gave an entirely correct version of what occurred. Under the well-settled rules of evidence applicable to such a case, it must be held that the defendant's witnesses were in no legal or fair sense discredited, and that the verdict in the plaintiff's favor cannot lawfully stand. Judgment reversed. All the justices concurring.

JENKINS v. NATIONAL MUT. BUILDING & LOAN ASS'N OF NEW YORK.

(Supreme Court of Georgia. Aug. 8, 1900.)

COMPROMISE AND SETTLEMENT—ACCEPTANCE—EVIDENCE.

1. When a debtor pays to a collecting agent a given sum of money upon the express condition that the same is to be accepted by the principal of the latter in full settlement of all demands against the debtor, it is the duty of the creditor, within a reasonable time after being informed of the condition on which the payment was made, to notify the debtor whether or not his offer of settlement is accepted, and, if not, to return to him the money received. What, in a given case, would be a reasonable

announced, and did not submit to the jury the real issue upon which a proper determination of the case depended.

3. The court also erred in permitting witnesses to testify to the correctness of accounts taken from books which they did not keep, and upon which alone their testimony respecting the accounts was based.

(Syllabus by the Court.)

Error from superior court, Bibb county; W. H. Felton, Jr., Judge.

Action by D. E. Jenkins against the National Mutual Building & Loan Association of New York. Judgment for defendant. Plaintiff brings error. Reversed.

Anderson & Grace, for plaintiff in error. Marion W. Harris, for defendant in error.

COBB, J. Jenkins brought his petition against the National Mutual Building & Loan Association of New York, alleging that he had borrowed a sum of money from the defendant, which he had agreed to pay back in the manner prescribed by its rules and by-laws, and, to secure the repayment of the loan, had executed a deed to certain realty; that after he had made sundry payments on the debt he made a calculation as to the amount necessary to pay the balance then due according to his understanding of the rules of the association, and that he remitted to it the amount thus ascertained by him, accompanied with the statement that this amount was to be received in full discharge of his liability to the association; that the association has retained the amount so remitted; and that a reasonable time has elapsed since the remittance for the association to determine whether it would accept the proposition or decline the same. The plaintiff charges that the failure of the association to return the money amounts to an election to receive the same in full satisfaction of his liability, and that notwithstanding this the defendant is attempting to sell the property held by it as security. The prayer of the petition is that the defendant be enjoined from selling the property, and that the deed and evidence of indebtedness held by it be delivered up to be canceled. The defendant in its answer admits having received the money, but denies having accepted it in full satisfaction of the plaintiff's liability to it, and, by way of cross bill, prays for a judgment against the plaintiff for the amount claimed by it to be due on the debt. The trial resulted in a verdict against the plaintiff in favor of the defendant on its answer in the nature of a cross bill.

At the trial it appeared that the plaintiff had paid the amount claimed by him to be the balance due on the debt to a collecting agent of the defendant at Macon, with the distinct understanding that the amount should be received in full settlement of the debt due by the plaintiff; that this agent remitted the amount, less his commission,

forwarded by the agent to the association in a letter in which the agent said the amount paid by Jenkins completed "his payments, according to his understanding of contract with your association. He asks that you cancel and return to me or to him the evidence of indebtedness of your company against him." This letter was dated February 2, 1897, and the defendant acknowledged receipt of the same on February 8th, in a letter to its agent, in which it was said the amount remitted did not complete the payments of Jenkins due the association. Then followed a correspondence between the association and its agent, and the association and Jenkins and his attorneys, continuing until August 21, 1897. The money was never returned to Jenkins, and nothing that would amount to an offer to return the same was made until May 7, 1897. An examination of the correspondence shows that Jenkins and his attorneys steadfastly adhered to his original contention, that he had remitted the amount in final settlement, and that the failure of the defendant to return the same within a reasonable time after it was received amounted to an acceptance on its part of the proposition thus made by Jenkins. The letters from the association to Jenkins and his attorneys contain strenuous efforts to obtain from Jenkins an acknowledgment that there was a misunderstanding about the matter, that his calculation was incorrect, and that he did not understand the way to calculate the balance due on the debt according to the rules of the association, and also a claim by them that they took the amount of the remittance, and credited it upon the debt as they understood it to be. It is not at all clear that the letter of May 7th would amount to an offer to refund the money, but this is the first communication from the association that at all resembles an offer to refund. In Hamilton v. Stewart, 105 Ga. 300, 31 S. E. 184, it was held that where a debtor remitted to a creditor less than the amount of the debt as claimed by the creditor, upon the distinct understanding that the same was to be received in full discharge of the debt, if the creditor did not, within a reasonable time after the money was received, repudiate the offer and return the money remitted to him, all liability on the debt would be discharged. When the case was before the court a second time (108 Ga. 472, 34 S. E. 123) the necessity for the return of the money within a reasonable time was emphasized, and it was intimated that a bare refusal to accede to the proposition to accept the amount in full discharge would be unavailing to the creditor in the absence of a return of the money. In the present case, even if an offer to refund, without an actual tender of the money, would be available as a defense to the action, it was a question for the jury whether, in

complained of in the present case were not exactly adjusted to the facts of the case, and did not with sufficient fullness submit to the jury the real issues in the case, nor were some of them in harmony with the rules above laid down.

During the progress of the trial a witness was allowed to testify that he made up a statement of the account due by the plaintiff to the association, and that the same was correct. It appeared upon cross-examination that his knowledge of the transaction was derived solely from the books of the association. This testimony of the witness should have been excluded. Association v. Butler (Ga.) 35 S. E. 679. Judgment reversed. All the justices concurring.

CENTRAL OF GEORGIA RY. CO. v. ROGERS.

(Supreme Court of Georgia. Aug. 8, 1900.)

CARRIERS—LIVE STOCK SHIPMENT.

The evidence showed that the damage to the live stock of the plaintiff resulted from his negligent failure to comply with that part of the special contract of affreightment in which he undertook to accompany and to water, feed, and attend such stock. The verdict against the defendant company was, therefore, error, and should have been set aside on motion for a new trial. Railroad Co. v. Bryant, 73 Ga. 722; Boaz v. Railroad Co., 13 S. E. 711, 87 Ga. 463; Railroad Co. v. Reid, 17 S. E. 934, 91 Ga. 877.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by W. B. Rogers against the Central of Georgia Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Hall & Wimberly and R. C. Jordan, for plaintiff in error. Wm. F. Blue and Guerry & Hall, for defendant in error.

PER CURIAM. Judgment reversed.

AYERS v. HARRELL.

(Supreme Court of Georgia. Aug. 8, 1900.)

FRAUDULENT CONVEYANCE—SOLVENCY OF GRANTOR—SURETYSHIP.

1. As a general rule, in testing the solvency of one who has made a voluntary conveyance of property, his indorsements or suretyship on the obligations of others, not matured at the time of the conveyance, should not be counted as his debts, where it does not appear that his contingent liability was at that time likely to become absolute, or that it afterwards in fact became so. King v. Thompson, 9 Pet. 203, 220, 9 L. Ed. 102; McLaughlin v. Bank, 7 How. 229, 12 L. Ed. 675; Bump, Fraud. Conv. (4th Ed.) § 255. Where, therefore, one made such a conveyance to his wife, and was at the time surety for another, and the obligation

that the husband was insolvent when he made it. (a) This case is distinguishable from that of Primrose v. Browning, 56 Ga. 369; Id., 59 Ga. 69. In that case the indorsement was on a 30-day note. The voluntary deed was made to the wife 5 days before the maturity of the note. The maker became a bankrupt, judgment was obtained against the indorser, and the execution was levied on land purchased by the wife with the proceeds of the land voluntarily conveyed to her. In that case the contingent liability of the surety became absolute, while in the present case the payment by the principal discharged the surety from all liability on the note.

2. Where one made a voluntary deed and some time thereafter died, the value of his other property at the time the deed was made is the true test of his solvency at that time, and not the value of his property at the time of his death, as estimated by appraisers appointed to set aside a year's support for his widow and minor children. King v. Thompson, supra; Whitesel v. Hiney, 62 Ind. 168; Goodman v. Wineland, 61 Md. 449; McCole v. Loehr, 79 Ind. 432; Posten v. Posten, 4 Whart. 27, 44; Bump, Fraud. Conv. (4th Ed.) § 255; Wait, Fraud. Conv. (3d Ed.) p. 482, § 278.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action between L. G. Ayers and J. D. Harrell. From the judgment, Ayers brings error. Reversed.

Washington Dessan, Roland Ellis, and Dessan, Harris & Birch, for plaintiff in error. W. E. Martin, Jr., and F. Chambers, for defendant in error.

PER CURIAM. Judgment reversed.

FUTRELL v. MUTUAL BENEFIT FIRE ASS'N.

(Supreme Court of Georgia. Aug. 8, 1900.)

ACTION ON INSURANCE POLICY—APPEAL.

The evidence was amply sufficient to show that the parties by mutual consent had agreed before the loss occurred to rescind the contract of insurance upon which the plaintiff's action was predicated. It follows that the verdict against him was right, and it is immaterial whether the charges complained of were erroneous or not.

(Syllabus by the Court.)

Error from superior court, Effingham county; Paul E. Seabrook, Judge.

Action by A. J. Futrell against the Mutual Benefit Fire Association. Judgment for defendant. Plaintiff brings error. Affirmed.

H. B. Strange, for plaintiff in error. Gignilliat & Stubbs, for defendant in error.

PER CURIAM. Judgment affirmed.

ODUM v. CREIGHTON MIN. & MILL. CO.

(Supreme Court of Georgia. Aug. 8, 1900.)

APPEAL—REVIEW—INSTRUCTIONS.

The requests for particular instructions were, so far as legal and pertinent, covered in dict.

(Syllabus by the Court.)

Error from superior court, Cherokee county; George F. Gober, Judge.

Action between J. M. Odum and the Creighton Mining & Milling Company. From the judgment, Odum brings error. Affirmed.

J. P. Brooke and Mozley & Griffin, for plaintiff in error. Teasley & Hutcherson and A. S. Clay, for defendant in error.

PER CURIAM. Judgment affirmed.

BUCHANAN v. PARKS.

(Supreme Court of Georgia. Aug. 8, 1900.)

EASEMENT—PRIVATE WAY—OBSTRUCTION—PRESCRIPTION—NUISANCE.

1. In order to sustain an application for the removal of obstructions from an alleged private way, the right to which the applicant bases upon prescription, he must show, not only that he has been in the uninterrupted use thereof for seven years or more, but also that it does not exceed fifteen feet in width, that it has been kept open and in repair, and that "it is the same fifteen feet originally appropriated." Collier v. Farr, 7 S. E. 860, 81 Ga. 749, and cases cited; Follendore v. Thomas, 20 S. E. 329, 93 Ga. 300; Peters v. Little, 22 S. E. 44, 95 Ga. 151.

2. In the present case the plaintiff failed to show compliance with these requirements, and therefore had no right to the way, or consequent right to abate, as a nuisance, an obstruction therein.

(Syllabus by the Court.)

Error from superior court, Catoosa county; A. W. Fite, Judge.

Action by J. M. Parks against F. A. Buchanan. Judgment for plaintiff. Defendant brings error. Reversed.

Wm. E. Mann, for plaintiff in error.

PER CURIAM. Judgment reversed.

CONYERS v. FORD.

(Supreme Court of Georgia. Aug. 8, 1900.)

JUDGE—DISQUALIFICATION—PRINCIPAL AND AGENT—EVIDENCE—CERTIORARI.

1. An attorney at law employed to file an equitable petition for the appointment of a receiver, and who, since the appointment was made, retired from the case, and had no further connection therewith, was not disqualified as a judge from presiding in a case subsequently brought by the receiver against a third person.

2. When it is sought to establish a course of dealings between two persons, with a view to showing that one of them was in the habit of sending his servant to the other for the purpose of purchasing goods, for which payment was uniformly made, evidence tending to show a similar course of dealings between the alleged principal and other persons is not admissible.

3. An overcharge or an unauthorized charge by a magistrate of costs alleged to have accrued in a trial before a jury in his court cannot be made the subject-matter of review by a petition for certiorari complaining of er-

tioned by the judge.

(Syllabus by the Court.)

Error from superior court, Bartow county; J. W. Harris, Judge.

Action by F. M. Ford against James B. Conyers. Judgment for plaintiff. Defendant brings error. Reversed.

B. J. Conyers, for plaintiff in error. Joe M. Moon, for defendant in error.

COBB, J. Ford, as receiver of the estate of Satterfield, brought suit against Conyers in the justice's court upon an account for goods sold and delivered by the receiver after he had taken charge of the mercantile business which was carried on by the deceased in his lifetime. The trial resulted in a verdict in favor of the plaintiff, and the defendant carried the case to the superior court by certiorari, complaining that certain errors were committed at the trial. The judge overruled the certiorari, and this is the error assigned.

1. When the case was called in the superior court the judge of that court announced that he was disqualified from presiding, and called upon the judge of the city court of Cartersville to hear and determine the questions made in the certiorari. Objection was made that the judge of the city court was disqualified by reason of the fact that he, as attorney at law, had been employed to file the petition in the case in which the plaintiff had been appointed receiver. It appeared, however, that after the appointment of the receiver the judge had retired from the case, and had no further connection therewith, and was not interested in any way in the litigation. Upon this state of facts, he held that he was not disqualified to preside, and we do not think there was any error in this ruling.

2. It was admitted at the trial that the goods were not sold and delivered to the defendant in person, but that the same were delivered to a servant in his employ. The defendant denied the authority of this servant to purchase the goods on his credit, and it was sought to charge him with her purchases for the reason that goods bought by her from the receiver in the past had been paid for by him. The case was stubbornly contested on this point. The defendant, as has been said, not only denied that the servant had any authority to buy the goods in his behalf, but also denied that any goods bought by her in the past had ever been paid for by him. The court admitted evidence that the defendant had paid for goods bought by this servant in his behalf from Satterfield, as well as for goods bought from another merchant. We think this was error. What the defendant may have authorized his servant to do with reference to purchasing goods from Satterfield and from per-was calculated to prejudice the defense set up. The defendant would have a perfect right to authorize his servant to purchase goods from Satterfield and from another merchant in the city, and the fact that the servant was so authorized could not throw any light on the question as to whether she had authority to purchase from a person other than these two.

3. Complaint was made in the petition for certiorari that the magistrate before whom the case was tried had compelled the plaintiff in certiorari to pay more than should have been demanded as legal costs in the case. Such a complaint as this has no place in a petition for certiorari. It is not necessary to attach to the petition a certificate of the magistrate that the costs have been paid. Fuller v. Arnold, 64 Ga. 599. A certificate showing that the costs have been paid must be filed with the clerk within the time required by law before writ of certiorari could be issued. Any complaint in regard to an overcharge or an unauthorized charge of costs by the magistrate when the application is made for a certificate that the costs have been paid cannot be made the basis of an assignment of error in the petition for certiorari.

The petition for certiorari contained other assignments of error than those above mentioned, but the foregoing discussion embraces all the assignments of error which relate to matters which will probably arise at another trial, or which are of sufficient importance to require particular notice. Judgment reversed. All the justices concurring.

KEYS v. FLEMISTER et al.

(Supreme Court of Georgia. Aug. 8, 1900.)

DEPOSITIONS—INDORSEMENT—TRIAL.

1. Where a package containing interrogatories and answers thereto, which had been transported by mail, was by the postmaster, in the presence of the parties to a case pending in a justice's court, delivered in open court to the magistrate, and thereafter, pending the trial, upon objection that the package had not been indorsed by the magistrate as required by Civ. Code, § 5310, he then made the proper indorsement upon the package, this was a substantial compliance with the law as to such indorsement.

2. That a jury in returning a verdict in an action upon a promissory note accepted a calculation of the amount due thereon by the plaintiff's attorney is no cause for setting aside the verdict, unless it affirmatively appears that because of such action a verdict for too large an amount was rendered. (a) It does not in the present case appear that the calculation made by the attorney was in any respect incorrect.

3. The evidence, though conflicting, being sufficient to warrant the verdict rendered in the magistrate's court, this court will not reverse a judgment of the superior court overruling a ground of a petition for certiorari alleging that the verdict was contrary to evidence.

(Syllabus by the Court.)

Bros. From the judgment, Keys brings error. Affirmed.

Wm. E. Mann and Mr. Terry, for plaintiff in error. Geo. N. Head, for defendants in error.

PER CURIAM. Judgment affirmed.

CASEY et ux. v. WAGNON.

(Supreme Court of Georgia. Aug. 8, 1900.)

CERTIORARI—PROCEDURE—TROVER.

This case upon its facts is, in principle, identical with that of Sing Wah v. Singer, 34 S. E. 1027, 110 Ga. —, and is therefore controlled by the rule therein laid down. See, also, Blocker v. Boswell, 34 S. E. 289, 109 Ga. 230; McHenry v. Mays, 34 S. E. 1010, 110 Ga. —; Hamer v. White, 34 S. E. 1001, 110 Ga. —; Elson v. Saul, 34 S. E. 1011, 110 Ga. —; Berger v. Same, 34 S. E. 1036, 109 Ga. 240; Watson v. Pearre, 35 S. E. 316, 110 Ga. —; Jordan v. Glover (Ga.) 35 S. E. 667; McLendon v. Griswold, Id.

(Syllabus by the Court.)

Error from superior court, Murray county; A. W. Fite, Judge.

Action by S. D. Wagnon against J. G. Casey and wife. Judgment for plaintiff. Petition by defendants for certiorari overruled, and they bring error. Reversed.

T. S. Gourdin and F. A. Cantrell, for plaintiffs in error. C. N. King, for defendant in error.

PER CURIAM. Judgment reversed.

BATES et al. v. FIRST NAT. BANK OF DALTON.

(Supreme Court of Georgia. Aug. 8, 1900.)

PLEADING—CONSTRUCTION—USURY.

1. A trial judge, in passing upon the sufficiency of an answer, must base his judgment upon what the same actually contains, and not upon an erroneous representation as to its contents made in open court by counsel for the plaintiff; and this is so although counsel for the defendant may have heard the representation made, and have failed to call the attention of the court to the fact that the same was incorrect.

2. An answer in a suit brought by a national bank which set up that a promissory note on which the plaintiff's action was founded was usurious, because the payee had reserved as interest an amount exceeding the maximum legal rate,—the figures showing the precise amount of the alleged usury being distinctly alleged,—set forth a good defense, so far as the interest claimed on the note was concerned.

(Syllabus by the Court.)

Error from superior court, Murray county; A. W. Fite, Judge.

Action by the First National Bank of Dalton against R. L. Bates and others. From a judgment striking pleas of certain defendants from the files, they bring error. Reversed.

COBB, J. The First National Bank of Dalton brought suit upon a promissory note against R. L. Bates, R. F. Chastain, and J. W. Green. Green filed no defense. Bates and Chastain each filed pleas to the action, which will be hereafter referred to. Upon motion the court struck these pleas, and this ruling is assigned as error.

1. The bill of exceptions states that the ruling of the judge was made upon an oral statement by counsel for the plaintiff as to the contents of the pleas, such statement not being denied or corrected by defendant's counsel. It appears that the statement of plaintiff's counsel was incorrect, and that the pleas were of an entirely different character from that referred to in the statement. The record shows that the court struck the pleas which were filed, and therefore the ruling upon which we must pass is the one appearing in the record; that is, the decision that the pleas as filed set up no defense to the action. The court must rule upon the case as made by the pleadings, and not upon the case as stated by counsel. See Bostick v. Palmer, 79 Ga. 680, 4 S. E. 319.

2. The plea of Bates set up that the note sued on was for $150, and that he was liable thereon only for the sum of $148, without interest, for the reason that at the time the note was made he received only $144, $6 having been taken out and reserved by the plaintiff as interest in advance, and that the amount so reserved was $2 in excess of the lawful interest for the time between the date of the execution and the maturity of the note. The facts alleged set up a complete defense to the action, so far as the interest on the note was concerned. While the rate of interest which a national bank is authorized to charge is governed by the law of the state in which the bank is located, the penalty to be imposed upon such a bank for exacting usury is that prescribed by the act of congress providing for the creation of national banks. In Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196, Mr. Justice Swayne says: "There was reason why the rate of interest should be governed by the law of the state where the bank is situated; but there is none why usury should be visited with the forfeiture of the entire debt in one state, and with no penal consequences whatever in another. This, we think, would be unreason, and contrary to the manifest intent of congress." The act of congress provides that knowingly taking or reserving a rate of interest greater than that authorized by law shall work a forfeiture of the entire interest which the note, bill, or other evidence of indebtedness carries with it, or which has agreed to be paid thereon. See Barnet v. Bank, 98 U. S. 555, 25 L. Ed. 212. It was error, therefore, for the court to strike the plea of the defendant Bates.

any usury had been charged or reserved, and set up that she was discharged by reason of "said usurious charge of interest by" the plaintiff, and prayed that the court should so decree. The principal being discharged to the extent of the interest on the debt by reason of the exaction of usury, of course the security is discharged to the same extent. It was argued in the brief of counsel for the plaintiffs in error that as the note contained a waiver of homestead, and as the exaction of usury in the transaction avoided such waiver, the security was discharged from all liability on the note. So far as the point thus raised is concerned, it is sufficient to say that no such claim was set up in the plea, and therefore the question as to whether the provisions of the national bank act will preclude the defendant from setting up this defense will not now be decided. Judgment reversed. All the justices concurring.

ATLANTA MACHINE WORKS v. POPE et al.

(Supreme Court of Georgia. Aug. 8, 1900.)

APPEAL—REVIEW—NEW TRIAL—INSTRUCTIONS.

1. Grounds of a motion for a new trial which are not approved by the trial judge cannot be considered by this court.
2. It is not erroneous for the trial judge to refuse to give a request to charge, when such request is not in writing.
3. There was no material error in the charges excepted to, the evidence was sufficient to authorize the verdict, and there was no error in overruling the motion for a new trial.

(Syllabus by the Court.)

Error from superior court, Cherokee county; George F. Gober, Judge.

Action between the Atlanta Machine Works and Pope & Dye and others. From the judgment, the machine works brings error. Affirmed.

Mozley & Griffin, for plaintiff in error. Teasley & Hutcherson, for defendant in error.

PER CURIAM. Judgment affirmed.

AMICALOLA MARBLE & POWER CO. v. COKER.

(Supreme Court of Georgia. Aug. 8, 1900.)

EVIDENCE—ADMISSIONS OF AGENT.

1. Admissions of the alleged agent of a corporation are not admissible to bind the corporation unless the agency be shown.
2. Agency cannot be proved by the declarations of the alleged agent (Jones v. Harrell [Ga.] 35 S. E. 690), nor, without other and further proof of agency, are orders for money signed by such alleged agent, or agreed settlements by him of claims against the corporation, admissible in evidence to bind the corporation.

(Syllabus by the Court.)

Power Company and C. T. Coker. From the judgment the power company brings error. Reversed.

J. W. Hendley and Z. D. Harrison, for plaintiff in error. Morris & Green, for defendant in error.

PER CURIAM. Judgment reversed.

AMICALOLA MARBLE & POWER CO. v. THOMASON.

(Supreme Court of Georgia. Aug. 8, 1900.)

CONTINUANCE—DIRECTING VERDICT.

1. The trial judge did not err in refusing to continue the case, nor in refusing to submit the same to an auditor.
2. There being no conflict in the evidence, and the same being such as to require a verdict for the plaintiff, the judge committed no error in directing a finding in his favor.

(Syllabus by the Court.)

Error from superior court, Pickens county; J. S. Candler, Judge.

Action by Y. J. Thomason against the Amicalola Marble & Power Company. Judgment for plaintiff. Defendant brings error. Affirmed.

J. W. Hendley and Z. D. Harrison, for plaintiff in error. Morris & Green, for defendant in error.

PER CURIAM. Judgment affirmed.

SPEARS et al. v. SCOTT.

(Supreme Court of Georgia. Aug. 8, 1900.)

PLEADING—AMENDMENT—NONSUIT.

1. One at whose instance another is made a party to a pending case involving equities pro and con between the two cannot, after the latter has filed an answer in the nature of a cross bill, setting up his alleged rights in the premises, and praying for affirmative relief by an enforcement of the same, so amend his pleadings as to prevent a hearing of the case upon its real merits, and thus deprive his adversary of the opportunity to establish his allegations and obtain the relief to which he is entitled thereon.
2. Where such a case, upon the trial thereof, was finally resolved into an action by the newly-made party against the person who brought him into the litigation, it was erroneous to grant a nonsuit against such newly-made party, when there was sufficient evidence to sustain his allegations and entitle him to the judgment for which he prayed.

(Syllabus by the Court.)

Error from superior court, Cherokee county; George F. Gober, Judge.

Action by J. P. Spears against A. K. Scott. R. L. Strickland was thereafter made a party, and filed a cross complaint. Judgment for defendant. Plaintiff brings error. Reversed.

The following is the official report:

J. P. Spears, as administrator of George W. Jefferson, deceased, brought suit in the su-

substance, the following facts: That on said date Jefferson made a contract with Scott to sell him land lot No. 193, and the east half of lot No. 169, in the Twenty-Third district and Seventh section of Cherokee county, Ga., on the following terms: Jefferson owed Scott $1,000, with interest; James R. Brown, $1,000, with interest, and Mrs. M. E. Strickland, as guardian of R. L. Strickland, $787.91. And Scott agreed to pay the Brown and Strickland debts, and cancel his own, in consideration of obtaining deeds to said land. Jefferson made deeds to the land to Scott, who paid the Brown debt, but refused to pay the Strickland debt, wherefore the administrator brought suit to recover the amount of the Strickland debt. Scott answered the petition, admitting the purchase of land lot 193, and his agreement to pay the Brown debt and to cancel his own debt, as part of the consideration for the deeds, but denied having purchased the east half of land lot No. 169, and claimed that he and Jefferson and R. L. Strickland, who had become of age, had made a contract by which he (Scott) agreed that, if Strickland would accept $500 for his debt, he would pay the same, in consideration of a deed to be made by Jefferson to Scott to the east half of land lot No. 169; that Jefferson executed the deed, but that Strickland, who had the matter under consideration, declined to carry out the agreement and accept the $500, and the agreement fell through; that subsequently Strickland foreclosed his mortgage, sold the east half of land lot No. 169 thereunder, and bought it in at the sheriff's sale; that although he (Scott) had kept the deed, he had never been in possession of the land, and that, on account of Strickland's failure to comply with the agreement, he (Scott) was not liable for the Strickland debt; that, if there was any agreement on his part to pay it, the consideration for his promise had failed. He charged that the suit was really proceeding for Strickland's benefit, and that Strickland was a party to the original agreement, and had repudiated it; and he prayed that Strickland be made a party to this cause, and should show cause why he should not surrender the east half of land lot 169 and receive the $500, which defendant was willing to pay. By consent of all parties, Strickland was made a party in his name. Strickland thereupon filed a petition adopting all of the allegations of the original petition filed by Spears, administrator, and alleging that all the debts stated by Spears to have been due by Jefferson were owed, and that they were all secured by mortgages given by Jefferson on land lot 193 and the east half of 169, Brown's being the first mortgage, Strickland's the second, and Scott's the third; that by mistake land lot 193 had been written "No. 192" in the Strickland mortgage, and that it was a mutual mistake; that Jefferson had made the contract to sell and Jefferson had executed the deeds to Scott, who received them, but afterwards refused to pay the Strickland debt; that Jefferson, outside of the mortgaged property, was insolvent; that Scott received the deeds in pursuance of the agreement to pay these debts, knowing that all the lands were covered by the mortgages; that Scott refused to pay the Strickland debt, and petitioner (Strickland) afterwards foreclosed his mortgage, and bought in the east half of land lot No. 169 at sheriff's sale under this procedure; that there was due to him the sum of $787.91, with interest from March 8, 1895. He prayed judgment against Scott for this amount, and offered to release to Scott all claims he had to the said east half of land lot No. 169, on payment of said amount. Scott answered this petition, practically reasserting his former contentions, but withdrawing the proposition to pay Strickland $500 if Strickland would convey the east half of lot 169 to him.

Upon the trial of the case three witnesses were examined, viz.: D. W. Ferguson, who negotiated the transaction as the agent of Jefferson, R. L. Strickland, and P. P. Du Pre. Ferguson swore that Scott knew of these mortgages, and understood that they covered land lot No. 193 and the east half of land lot 169; that Jefferson had never owned land lot No. 192, nor was he ever in possession of it; that Scott afterwards found out that there was a mistake in the Strickland mortgage, and that the land lot was written therein "192," instead of "193"; that Scott purchased the land on the express undertaking to cancel his own debt and pay the Brown and Strickland debts, and that the deeds were made by Jefferson and delivered to Scott, and received by him, and never brought back; that it was not true that Scott was to pay Strickland $500 for his claim, but he was to pay both debts. Strickland testified that he had a conversation with Scott, and Scott admitted to him that he was to pay off the Strickland mortgage,—that his trade was to pay off the Brown and Strickland mortgages, and cancel his own, and take the land; that he had found out afterwards that there was a mistake in the Strickland mortgage, and that it described the land as land lot No. 192, instead of 193, and came to see witness (Strickland) to ascertain if the mistake was in the mortgage, or in the record, and, when he found it was in the mortgage, tried to scare him; that, when Scott refused to pay his (Strickland's) claim, he then foreclosed his mortgage, and had the east half of land lot No. 169 sold, because Scott filed a claim to land lot No. 193; that he bid off the east half of lot 169 at the sheriff's sale for $350, and took the sheriff's deed to the same, and is seeking to recover the balance due him upon his debt. Du Pre testified that Scott agreed to pay both debts and cancel his own,

the Brown and Strickland debts, he could not get the property. Plaintiff put in evidence seven promissory notes, for the aggregate sum of $682.50, with interest from date at the rate of 8 per cent. per annum, made by Jefferson, and payable to Strickland or bearer, dated April 4, 1888, with a credit of all interest up to April 4, 1893, and also a credit on one note of $29.40, dated February 21, 1890. Plaintiff also put in evidence the mortgage from Jefferson to Strickland on lot 192 and the east half of lot 169, dated April 4, 1888, to secure the bid notes; also, a deed from Jefferson to Scott, dated March 8, 1895, to lot 193, and a deed of the same date from Jefferson to Scott to the east half of lot 169. The judge, at the conclusion of the plaintiff's evidence, granted a nonsuit, to which ruling plaintiff excepted.

W. D. Mills, Lee Mullins, P. P. Du Pre, and King & Spalding, for plaintiff in error. Teasley & Hutcherson and J. P. Brooke, for defendant in error.

FISH, J. 1. The facts of this case will be found in the reporter's statement. Whether Strickland, the mortgagee, could have brought, either at law or in equity, an action against Scott on his alleged promise to Jefferson, his grantor, to pay the mortgage debt, is a question upon which the decisions of the courts of the several states are in great conflict. See Clark, Cont. 513 et seq.; 7 Am. & Eng. Enc. Law (2d Ed.) 104 et seq. In Insurance Co. v. Collins, 54 Ga. 376, and Austell v. Humphries, 99 Ga. 408, 27 S. E. 736, this court held, in effect, that one for whose benefit a contract was made between others, to the consideration of which he was a stranger, could not sue thereon in an action at law. In Bell v. McGrady, 32 Ga. 257, and Dallas v. Heard, Id. 604, wherein the contracts sued upon were construed to constitute the promissor trustee for the benefit of the third person, it was held that the latter might sue thereon in equity. Though it be conceded that Strickland could not have maintained an action, either at law or in equity, against Scott on his promise to Jefferson to pay Strickland the debt which Jefferson owed him, there can be no doubt but that Jefferson's administrator, Spears, had the right to bring the suit against Scott upon such promise, and to recover of him whatever balance remained unpaid of Strickland's debt. Williams v. Moody, 95 Ga. 8, 22 S. E. 30. And when Strickland, at Scott's instance, and in view of the allegations in the equitable cross petition filed by the latter, was made a party plaintiff in such action, it could proceed in his name, and he had the right to recover therein from Scott whatever balance might be proven to be due him on his mortgage debt. Nor could Scott, after Strickland had been made a party and had filed his answer to Scott's cross petition, so amend his

was entitled thereon.

2. The evidence submitted upon the trial was amply sufficient to warrant a verdict in favor of Strickland for the balance due him on his mortgage debt, and the court erred in granting the nonsuit. Judgment reversed. All the justices concurring.

JOLLEY et al. v. HARDEMAN et al.

(Supreme Court of Georgia. Aug. 8, 1900.)

EXECUTION—PERISHABLE PROPERTY—PARTNERSHIP ASSETS—CLAIM CASE—LIS PENDENS—ABATEMENT.

1. The words "liable to deteriorate from keeping," employed in section 5463 of the Civil Code for the purpose of designating a class of personal property which may, under its provisions, be brought to speedy sale, do not apply to articles which, because of their enduring nature, are unlikely, merely by reason of the lapse of a brief space of time, to undergo changes in form or otherwise, causing depreciation in value, but to articles which are for such a reason subject to such changes. (a) An ordinary cotton press does not fall within the class described by the words above quoted.

2. It is not lawful to levy an execution against an individual upon property belonging to a partnership of which he is a member.

3. The mere tendering to a levying officer of the affidavits requisite to the interposition of a claim in forma pauperis does not, if he refuses to accept the same and return them to the proper court, make a claim case between the plaintiff in fi. fa. and the affiant.

4. Since neither the levying officer, nor the purchaser at a sale conducted by the former, are parties to a claim case, the pendency of such a case does not, relatively to an action by the claimant against them for the recovery of the property sold, constitute lis pendens.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Action by J. J. & T. J. Jolley against James W. Hardeman and C. N. Barrett. Judgment for defendants. Plaintiffs bring error. Reversed.

J. O. Gartrell and H. B. Moss, for plaintiffs in error. J. Z. Foster, for defendants in error.

LUMPKIN, P. J. This was an action by J. J. & T. J. Jolley against James W. Hardeman and C. N. Barrett. The material portions of the plaintiffs' petition were as follows: They were, and had for many years been, partners, and as such were the owners of a described cotton press. Hardeman, the plaintiff in an execution which had been issued upon a judgment in his favor against J. J. Jolley, caused the same to be levied upon this cotton press by Barrett, a constable of the 898th district, G. M., of Cobb county. After so doing, Hardeman presented to the justice of the peace of that district a petition stating that such levy had been made, that the property was likely to deteriorate in value, and that the defendant

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a prayer for an order directing the property to be sold before the court-house door of said district after the same had been advertised for 10 days. Thereupon the magistrate granted an order of sale as prayed for, it being in the order recited that the defendant in execution could not be served with notice. Subsequently the constable did sell the cotton press, and Hardeman became the purchaser at the price of $5, although the real value of the property was $150. The latter then took possession of the cotton press, and refused to deliver it to petitioners upon their making a demand for the same. Before the sale took place, they tendered to the constable a claim affidavit in which it was distinctly alleged that the property levied on as that of J. J. Jolley was not his individual property, but the partnership property of the firm of J. J. & T. J. Jolley. The claim affidavit was accompanied by a proper affidavit of inability, from poverty, to give bond, etc. The constable disregarded this claim, and failed and refused to return the same to the court from which the execution issued. The petition distinctly alleged that the order of sale "was illegal and void; said press, in contemplation of law, not being such personal property of a perishable nature, or liable to deterioration from keeping, or of expense attending the keeping, as is specified and intended by the statute in such cases made and provided." Petitioners prayed that the sale be set aside, and that they recover possession of the property, with hire. To this petition the defendants demurred on the following grounds: "(1) It sets forth no legal cause of action against the defendants, or either of them. (2) Said petition shows that before and at the time of the filing of the same there was pending in the justice court of the 897th district, G. M., Cobb county, Georgia, a suit by said plaintiffs against said Hardeman for the recovery of said property sued for in this case; the same being a claim case in which said Hardeman was plaintiff in fi. fa., said J. J. Jolley defendant in fi. fa., and said plaintiffs, J. J. Jolley and T. J. Jolley, as a firm and partners and joint owners, claimants, and being the same cause of action and between the same parties as this suit." The demurrer was sustained, and the plaintiffs excepted.

1. The first question presented is whether or not so much of section 5463 of the Civil Code as provides for a speedy sale of property "liable to deteriorate from keeping" is applicable to such an article as an ordinary cotton press. We are of the opinion that it is not, and so hold as matter of law. The section in question deals with three classes of personal property, viz. (1) that which is "of a perishable nature"; (2) such as is "liable to deteriorate from keeping"; and (3) herent qualities, rapidly decompose or decay, and in so doing undergo material changes of form and quality, which render them unsuitable for use and of little or no value. Such things as fruit, fresh fish, and the like, may properly be termed articles "of a perishable nature," within the meaning of the above-cited section. The class of articles evidently intended to be covered by the words "liable to deteriorate from keeping" is of a somewhat different nature. The words just quoted doubtless refer to things which, while not so readily destructible by the mere lapse of time as articles strictly perishable in their nature, are nevertheless liable to become less useful, and consequently less valuable, much sooner than articles of an enduring character, whose composition and characteristics would be but little affected even by the lapse of a considerable period of time. The general assembly must, we think, have had in mind articles which would preserve their existence and form longer than those of a perishable nature, but which would in a short space of time undergo changes affecting their utility and value. Such, for instance, are articles of food manufactured for immediate use, which, though not perishable, to a greater or less extent lose with their freshness the chief features which render them desirable and valuable. Clearly, the class of articles to which we now refer is of a decidedly different nature from those which remain practically the same in form and substance through periods of weeks, months, or even years, and which therefore could not be expected, merely by reason of being kept, to deteriorate, and, consequently, to become depreciated in value, between the time of a levy and a sale had thereunder after advertising in accordance with the general statutory provisions on the subject. It would scarcely be pretended that a wagon or a sewing machine would appreciably deteriorate from keeping during such a space of time. We, of course, use the word "keeping" as synonymous with "properly keeping"; for it cannot have been employed by the legislature in any other sense. We are not now concerned with the question as to what property falls within the third class dealt with in the Code section above referred to, viz. that the keeping of which is attended with expense; for there is no contention in the present case that the property sold belonged to that class. We discussed the meaning of the word "perishable" only for the purpose of distinguishing property of which it is descriptive from that intended to be designated by the words "liable to deteriorate from keeping." We are quite confident that the general assembly never remotely contemplated that a cotton press should be classed as an article which would deteriorate if kept by a levying officer until a sale thereof could be made under a levy

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recting that the original order of dismissal be signed and entered nunc pro tunc, which was done, *held* that, whether the plaintiffs were or were not bound to except to the action taken at the preceding term within due time thereafter, they cannot maintain a bill of exceptions sued out after the adjournment of the last term, when it is impossible to ascertain therefrom whether exception is taken to what was done at the former term, or to the order directing the signing and entering of the original order of dismissal. This is so because such a bill of exceptions does not comply with the law requiring alleged errors to be plainly and distinctly pointed out.

2. Where a bill of exceptions recites that an order was passed on a specified day, and the record shows that it was passed on a different day, the record will control. Applying this well-established rule to the present bill of exceptions, it does not affirmatively appear that it was tendered within the time required by law.

(Syllabus by the Court.)

Error from superior court, Rabun county; J. B. Estes, Judge.

Action by S. C. Sweatman and others against Drew Wall. Judgment for defendant, and plaintiffs bring error. Dismissed.

Crane & McMillan, for plaintiffs in error. W. S. Parks and H. H. Dean, for defendant in error.

PER CURIAM. Writ of error dismissed.

GEORGIA RAILROAD & BANKING CO. v. FITZGERALD.

FITZGERALD v. GEORGIA RAILROAD & BANKING CO.

(Supreme Court of Georgia. Aug. 8, 1900.)

APPEAL—REVIEW.

There being no exception to the rulings of the court during the progress of the trial, or to the charge, and there being sufficient evidence to support the verdict, there was no error in refusing to grant a new trial.

(Syllabus by the Court.)

Error from superior court, Walton county; R. B. Russell, Judge.

Action between the Georgia Railroad & Banking Company and Moselle Fitzgerald. From the judgment the banking company brings error, and Fitzgerald assigns cross errors. Judgment on main bill of exceptions affirmed, and cross bill dismissed.

Jos. B. & Bryan Cumming and H. D. McDaniel, for plaintiff in error. Henry C. Roney and W. S. Upshaw, for defendant in error.

PER CURIAM. Judgment on main bill of exceptions affirmed; cross bill dismissed.

MAYOR, ETC., OF CITY OF ATHENS v. SMITH.

(Supreme Court of Georgia. Aug. 8, 1900.)

ACTION BY MARRIED WOMAN—PERSONAL INJURIES—DISMISSAL—DEMURRER.

1. A married woman living with her husband may bring an action in her own name for

2. A general motion to dismiss a suit "because it is a suit for a tort by a married woman living with her husband, in her own name alone," was properly overruled where the petition set out a cause of action against the defendant, and prayed for certain elements of damage for which the plaintiff could recover, although it may have also contained prayers for other elements of damage for which the plaintiff had no right to sue. A general demurrer should not prevail where any part of the petition is good. Reese v. Reese, 15 S. E. 846, 89 Ga. 645, 652, and cases cited; Munnerlyn v. Bank, 14 S. E. 554, 88 Ga. 339; May v. Jones, 14 S. E. 552, 88 Ga. 308, 312, 15 L. R. A. 637, and cases cited. See, also, Baer v. Christian, 9 S. E. 790, 83 Ga. 822.

3. The evidence warranted the verdict for those elements of damage alleged in the petition for which the plaintiff was entitled to recover, and the trial judge did not abuse his discretion in overruling a motion for a new trial based on the grounds that the verdict was contrary to law and evidence.

(Syllabus by the Court.)

Error from superior court, Clarke county; R. B. Russell, Judge.

Action by M. S. Smith against the mayor and common council of the city of Athens. Judgment for plaintiff, and defendant brings error. Affirmed.

F. C. Shackelford and Strickland & Green, for plaintiff in error. E. S. Price, W. M. Smith, and Lumpkin & Burnett, for defendant in error.

PER CURIAM. Judgment affirmed.

MALPASS v. GRAVES.

(Supreme Court of Georgia. Aug. 8, 1900.)

GUARDIAN—POWERS—SETTLEMENT OF CLAIMS.

1. When a guardian makes with a debtor of his ward a final settlement, and, on receipt of a given sum paid in pursuance thereof, discharges such debtor from further liability, the ward, if the settlement, though not a just one, was free from fraud or collusion, cannot, on arriving at majority, maintain against the debtor an action for a balance which he ought to have paid to the guardian upon a proper settlement. Before such an action would lie, it would be incumbent on the ward to directly attack and set aside the settlement actually made; and to a proceeding for this purpose the guardian would be an essential party.

2. The case is controlled by the ruling above made, and in the light thereof all of the assignments of error, the decision of which is not controlled by the foregoing note, related to rulings which, even if erroneous, were not harmful to the losing party.

(Syllabus by the Court.)

Error from superior court, Hancock county; S. Reese, Judge.

Action by Fairy Malpass against R. A. Graves. Judgment for defendant, and plaintiff brings error. Affirmed.

Roberts & Pottle, Jas. A. Harley, and R. H. Lewis, for plaintiff in error. W. H. Burwell and Bacon, Miller & Brunson, for defendant in error.

ant's intestate was the executor of the will of her grandfather William Fraley, and as such was liable to her, in different stated sums, for alleged acts of mismanagement as the representative of that estate. The defendant answered, denying any liability on the part of his intestate to the plaintiff. The trial resulted in a verdict in favor of the defendant, and, the plaintiff's motion for a new trial having been overruled, she excepted.

1. At the trial it appeared that an execution for $10,000 against one Watkins, in favor of William Fraley, came into the hands of Henry Fraley, as executor, and that by a negligent indulgence granted to Watkins a portion of this debt was lost to the estate. The plaintiff was one of the residuary legatees under the will of William Fraley, and the debt of Watkins passed under the residuary clause of the will. Lou A. Fraley, as guardian of the plaintiff, gave a receipt to Henry Fraley, as executor of William Fraley, for a given sum of money, in which it was recited that the sum was received "in full of amount due my ward from residuary clause in the will of said deceased," except two items, which are not involved in the present controversy. The plaintiff claims that the defendant's intestate was liable to her for her portion of the amount due on the Watkins execution which was lost by his negligence in failing to press the collection of the same with due diligence, and that the receipt given by her guardian should not be so construed as to preclude her from calling the executor to account for his negligence. The terms of the receipt of the guardian are broad enough to indicate that there was a final settlement between her and the executor as to this matter; and as, at the time she receipted the executor, the claim for the amount for which the plaintiff now sues was certainly of doubtful character, so far as the prospect of collecting the same was concerned, the guardian was authorized to compromise the same, under the provisions of section 3428 of the Civil Code, which declares that guardians are authorized to compromise all contested or doubtful claims for or against the estates or wards that they represent, to submit such matters to arbitration, or release a debtor, if to the interest of the estate or ward. There being no evidence whatever to show that the receipt given by the guardian did not speak the truth, or that the settlement was the result of either fraud or collusion, it was binding between the parties to the same; and the ward could not, on arriving at majority, maintain a suit against the executor on the claim which was thus settled by her guardian. If the settlement was not a proper one to be made by the guardian, the ward has her remedy against her guardian; but in order to reach the estate, and in such a proceeding the guardian would be a necessary party. Under this view of the case, the evidence demanded the verdict rendered. This case is to be distinguished from the case of Fraley v. Thomas, 98 Ga. 875, 25 S. E. 446, in that in the latter case Mrs. Thomas, the residuary legatee, did not receive the amount paid by the executor in full discharge of the amount due her under the will.

2. There were assignments of error in the motion for a new trial raising other questions than the one above dealt with, but, under the view we have taken of the case, all of them complain of rulings which, even if erroneous, were not harmful in the present case. Even if the receipt of the guardian did not preclude the plaintiff from recovering for the rents alleged to have been collected and not accounted for by the executor, there was no sufficient evidence to authorize a recovery on this branch of the case; and the failure of the judge to charge the jury with reference to the same was, therefore, not productive of any harm to the plaintiff. Judgment affirmed. All the justices concurring.

BORN v. SIMMONS.

(Supreme Court of Georgia. Aug. 8, 1900.)

POWER OF ATTORNEY—CONSTRUCTION.

By a power of attorney which authorizes the agents "to transact all such business as I may not be able to attend to in person; to take charge of and attend to the collection of all my outstanding debts; * * * to look after the collection of rents, make divisions of crops with tenants, make such compromises and settlements as in their judgment is for my interest, make sale of such property as I may desire to dispose of from time to time, and generally to do and perform all acts that I might do were I in good health; and for this purpose * * * to sign my name to bonds, receipts, and such other papers as may be necessary in the transaction of the business heretofore set forth,"—the agents are not given power to purchase mules and wagons and give promissory notes therefor. The general words in the power must be construed with reference to the specified objects to be accomplished, and limited by the recitals made in regard thereto. Mechem, Ag. §§ 306–308; Claflin v. Jersey Works, 11 S. E. 721, 85 Ga. 27, and cases cited.

(Syllabus by the Court.)

Error from city court of Gwinnett county; F. F. Juhan, Judge pro hac.

Action between W. H. Born and W. E. Simmons. From the judgment, Born brings error. Reversed.

C. H. Brand and T. M. Peeples, for plaintiff in error. N. L. Hutchins, for defendant in error.

PER CURIAM. Judgment reversed.

(Supreme Court of Georgia. Aug. 8, 1900.)

EVIDENCE—PEDIGREE.

Sayings of a deceased person cannot be rendered competent evidence on a question of pedigree by merely proving that such person said he was a kinsman or relative of the person whose pedigree is the subject-matter of the inquiry. The fact of relationship must be shown by other evidence.

(Syllabus by the Court.)

Error from superior court, Wilkes county; S. Reese, Judge.

Action between T. G. Greene and R. A. Almand. From the judgment, Greene brings error. Affirmed.

T. G. Lawson and Wm. Wynne, for plaintiff in error. Colley & Sims, for defendant in error.

COBB, J. "Pedigree, including descent, relationship, birth, marriage, and death, may be proved * * * by the declarations of deceased persons related by blood or marriage." Civ. Code, § 5177; Foster v. Brooks, 6 Ga. 293. "Before such declarations, however, can be admitted, the relationship of the declarant to the family must be proved by other evidence than his declarations; for it would be a petitio principii to say that his declarations are receivable because he is a member of the family, and he is a member of the family because his declarations are receivable." 1 Whart. Ev. § 218. "The relationship of the declarant with the family must be established by some proof other than the declaration itself." 2 Tayl. Ev. § 640. See, also, American notes to same volume (page 427); 1 Greenl. Ev. (16th Ed.) 198; 18 Am. & Eng. Enc. Law (1st Ed.) 260; Abb. Tr. Ev. (2d Ed.) p. 117, § 86; Blackburn v. Crawfords, 70 U. S. 175, 18 L. Ed. 186. The only assignment of error in the bill of exceptions which was argued here complained of the rejection of evidence which was, under the principles above referred to, clearly inadmissible, and therefore the judgment is affirmed. All the justices concurring.

SMITH v. FARMERS' MUT. INS. ASS'N OF GEORGIA.

(Supreme Court of Georgia. Aug. 8, 1900.)

INSURANCE POLICY—AUTHORITY OF AGENT.

It is not essential to the validity of a policy of insurance, which was actually signed by the president and secretary of the company by which it purported to have been issued, that the person who, in behalf of the company, after the policy had been so signed and placed in his hands, filled blanks therein so as to make it a complete contract, and who then delivered the same to the insured, should have been clothed with written authority either to fill such blanks or make the delivery.

(Syllabus by the Court.)

Error from superior court, Elbert county; S. Reese, Judge.

brings error. Reversed.

John P. Shannon and Asbury G. McCurry, for plaintiff in error. W. D. Tutt, for defendant in error.

COBB, J. Smith sued the Farmers' Mutual Insurance Association of Georgia upon a policy of fire insurance in the city court of Elbert county. At the trial, in addition to evidence of the value of the property claimed to have been insured, its total destruction by fire, and notice of loss to the company, followed by a refusal on its part to pay, there was evidence that the plaintiff received from one Brown the paper sued on, signed by the president and secretary of the association. Brown testified that he was the agent of the association, and as such filled up the blanks in the policy which had been delivered to him by one Manglebury, and after the property had been valued by Thomas, who was a director of the association, delivered the policy to the plaintiff, who signed the same as required by the rules of the association. It appeared from the minutes of the association that one Fickett was elected local agent for the county in which the plaintiff's property was located, and that Manglebury was appointed to assist him. The by-laws of the association, which were in evidence, clearly authorized the local agent to appoint assistants; one of such by-laws imposing upon the "agent, or any one appointed by him," certain penalties for insuring buildings of a certain character, and another by-law providing that, should the agent "appoint assistants, such assistants shall be responsible to their appointees, and not to the association, which shall hold each responsible for everything done in his name." At the conclusion of the plaintiff's evidence a motion was made to rule out the evidence as to what had been done by Brown, upon the ground that it appeared therefrom that his authority to fill the blanks in the policy and deliver the same was not in writing. The court sustained this motion, and then, upon motion of the defendant, granted a nonsuit. The rulings just referred to were assigned as error in a petition for certiorari which was filed by the plaintiff; and the case is here upon a bill of exceptions, in which a judgment overruling the certiorari is assigned as error.

As the effect of the ruling upon the testimony of Brown was to leave the plaintiff's case in a condition where, although the policy of insurance was in evidence, it did not constitute a binding contract with the association, we will deal only with the assignment of error on that ruling, for the reason that, if Brown had authority to fill the blanks in the policy and deliver the same, the evidence in behalf of the plaintiff was

also to deliver them. There is no controversy as to this. It is said, however, that Manglebury is not a local agent. The minutes of the association show that he was appointed to assist the local agent. This would prima facie clothe him with the same authority as the agent had,—at least, so far as soliciting insurance and delivering the form of contract prescribed by the association. If Manglebury be treated as the agent of the association, duly appointed, he has, under the by-laws, undoubted authority to appoint another, being responsible for the acts of his appointee. Can such an appointment be made otherwise than in writing? is the question to be determined in the present case. It is said that because the law requires contracts of fire insurance to be in writing (Civ. Code, §§ 2022, 2089), and also that an agency must be created with the same formality as is required for the execution of the act for which the agency is created (Id. § 3002), Manglebury's parol appointment of Brown would not authorize him to fill, in behalf of the company, the blanks in the policy delivered to him. The contract of insurance was contained in a printed policy signed by the officers of the association, delivered first to Manglebury, and by him to Brown. All that was necessary to complete the contract was to find some one who was willing to accept the paper upon the terms therein contained, have the property valued in the manner prescribed in the by-laws of the association, and fill in certain blanks in the policy. Such a person was found in the present case. All that Brown was to do was to fill in his name, the description of the property, and the date, after the property had been valued by the director in the manner provided in the rules of the association. Brown did not execute the contract for the association. It was already executed when it was placed in his hands. Blanks in a written instrument may be filled in by parol authority. 1 Greenl. Ev. (16th Ed.) § 568a, note 8; Abb. Tr. Ev. (2d Ed.) p. 504, § 34, and cases cited. Does the rule just referred to apply in a case where the contract evidenced by the writing is valid only when it is in writing? In Ingram v. Little, 14 Ga. 173, it was held that "a deed, duly signed, sealed, and attested, but without any grantee named, and without the amount of the purchase money stated,—these being left blank,—is inoperative as a muniment of title, and cannot be completed by a third person in the absence of the grantor, without authority under seal." In the opinion, Judge Nisbet says that "we put our decision upon authority, conceding that the books in England and in this country are in 'distressing' conflict, and with some misgiving whether reason and common sense do not condemn it." In Drumright v. Philpot, 16 Ga. 428, Judge Lumpkin therein announced had been repudiated by Lord Mansfield, and that Chief Justice Marshall had expressed himself dissatisfied with the extent to which it had been carried. In Brown v. Colquitt, 73 Ga. 59, it was held that where several criminal recognizances were to be given, and the same surety agreed to sign all of them, and did so,—some of them being filled out at the time, and some of them having the name of the obligee and the amount blank, which were filled in by the sheriff under parol authority so to do from the surety,—the bond was not invalid, but was binding on the surety. It is to be noted in this case that the contract of the surety (being one to answer for the default of another) belonged to that class which the law requires to be in writing in order to be binding. The case of Ingram v. Little is expressly referred to in the opinion, and the doctrine therein announced virtually repudiated. In Weaver v. Carter, 101 Ga. 213, 28 S. E. 869, Mr. Chief Justice Simmons says, in effect, that the decision in Ingram v. Little was practically overruled in Brown v. Colquitt. The ruling now made is in perfect accord with the latter case, which seems to be in line with modern decisions. It may be safely said, in view of the foregoing, that the doctrine announced in Ingram v. Little is not at this time to be regarded as the law of this state.

It was erroneous to hold that the policy was invalid because Brown did not have written authority to fill the blanks and deliver the same. Judgment reversed. All the justices concurring.

CARITHERS v. LEVY.

(Supreme Court of Georgia. Aug. 8, 1900.)

ACTION ON NOTE—DEFENSES—CONSIDERATION—FRAUD.

1. An answer to an action upon a promissory note which was given for the purchase of property, containing in substance the following allegations, set forth a good defense: The property for which the note was given was of considerably less value than the price agreed upon and included in the note. The defects were not patent. The defendant was induced to sign the note by false and fraudulent representations on the part of the plaintiff as to the value and character of the property. The defendant was thereby deceived and defrauded, and in due time made an offer to rescind.

2. Applying the above to the answer and the amendment thereto upon which the trial judge passed in the present case, it was, upon the demurrer filed by the plaintiff, error to strike the same.

(Syllabus by the Court.)

Error from superior court, Madison county; S. Reese, Judge.

Action by Mrs. D. Levy against J. S. Carithers. Judgment for plaintiff. Defendant brings error. Reversed.

LEWIS, J. This was a suit brought by Mrs. D. Levy against J. S. Carithers upon a promissory note for $900 principal, besides interest and attorney's fees. The petition also sought the establishment of a special lien upon a tract of land which the maker had given for the purpose of securing the note. In answer to the suit the defendant stated, in substance: That the note was procured by fraud and fraudulent representations of the plaintiff. That $740 of the amount embraced in the note sued upon was given for the lease of a beef market and restaurant in the town of Elberton, Ga., and that, at the time of the contract touching the purchase of said property, plaintiff represented to the defendant that the business had proved paying and profitable, that plaintiff was making money out of the same, and that defendant could not only make money, but could pay off the note in less than 12 months' time from the profits of the business. Defendant, having no experience in such business, and reposing special confidence and trust in the plaintiff, relied upon the representations as to the character and extent of the business. He accordingly gave the note and deed to secure the same, and put an experienced man in charge of the business, but soon thereafter discovered that it was being conducted at a loss to defendant; and he was forced to quit the business, and to dispose of the same at the sum of $200, which was as much as the property was worth. The defendant filed an amendment to his answer, which was allowed by the court, alleging that he had discovered, soon after purchasing the market and restaurant, that plaintiff was running the business before the sale at a considerable loss; that plaintiff did not have the custom and trade as represented to defendant, and the character of the business was of such a nature that it could not have been discovered by defendant before he made the trade. As soon as defendant discovered that he had been deceived by the false representations of plaintiff, he offered to rescind the trade, and to place plaintiff in as good position as she was before the trade was made, and also to pay her $100 extra to rescind the trade, all of which plaintiff refused. To defendant's answer, plaintiff filed a demurrer, upon which the court granted an order that the demurrer to the plea as amended be sustained, and that said plea be stricken, and then directed a verdict in favor of the plaintiff for the amount sued for. Upon this judgment error is assigned in the bill of exceptions. The defendant below also made a motion for a new trial on the general grounds, and likewise excepted to the judgment overruling this motion.

1, 2. We think the answer in this case sets up a valid defense to the suit. The defense relied upon is that of fraud, caused by chased. It appears from the answer that the property for which the note was given was of considerably less value than the price agreed upon and included in the note, that the defects were not patent, and that defendant was induced to sign the note by misrepresentations on the part of the plaintiff in reference to the character and value of the property. Acting upon the misrepresentations in reference to the property, the defects of which were not patent to the purchaser, the defendant was thereby deceived and defrauded; and in due time, as appears from the amendment to his answer which was allowed by the court, he made a fair offer to rescind, which was rejected. The answer made out a clear case of fraud perpetrated by the vendor of the property upon the purchaser, made with design to deceive, or at least which actually did deceive, the purchaser; and therefore, under Civ. Code, §§ 3533, 4026, the conduct of the vendor in this case constituted a legal fraud. The court therefore erred in eliminating this defense by striking the defendant's answer. For a full discussion of the law bearing upon this subject of misrepresentations, see the case of Newman v. H. B. Claflin Co., 107 Ga. 89, 32 S. E. 943, and opinion on page 90 et seq., 107 Ga., and page 943 et seq., 32 S. E. Though the facts alleged in this answer may not have been enough to authorize a rescission of the entire contract, we do not understand that the defendant is seeking that in his plea, but is seeking a reduction of the purchase money, which, under the decision in the case of Thompson v. Boyce, 84 Ga. 497, 498, 11 S. E. 353, he clearly has a right to do.

From the principles of law applicable to this case, the court erred in sustaining the demurrer to the defendant's answer. Judgment reversed. All the justices concurring.

COLLINS v. CARR.

(Supreme Court of Georgia. Aug. 8, 1900.)

APPEAL—ASSIGNMENT OF ERRORS—SUFFICIENCY.

1. The supreme court has no authority to "decide any question unless it is made by a special assignment of error in the bill of exceptions." Civ. Code, § 5584.

2. A bill of exceptions which, after setting forth a judgment rendered by the presiding judge in a case submitted to him for decision without a jury, merely adds, "To which decision of the court the defendant excepted, and now excepts, and assigns the same as error," does not contain a special assignment of error, and consequently does not present any question which this court can lawfully consider. See Deposit Co. v. Anderson, 28 S. E. 382, 102 Ga. 551, and cases cited; Henslee v. Henslee, 27 S. E. 676, 102 Ga. 554; Peavy v. Atkinson, 33 S. E. 956, 108 Ga. 167; Kimball v. Williams, 33 S. E. 994, 108 Ga. 812; Wheeler v. Worley, 35 S. E. 639, 110 Ga. —; Warren v. Oliver (Ga.) 35 S. E. 673.

(Syllabus by the Court.)

Action by J. G. Collins against J. H. Carr. From the judgment, Collins brings error. Dismissed.

Hunt & Merritt and Jas. A. Harley, for plaintiff in error. W. H. Burwell, L. C. Culver, and R. H. Lewis, for defendant in error.

PER CURIAM. Writ of error dismissed.

FIRST STATE BANK v. CARVER.

(Supreme Court of Georgia. Aug. 9, 1900.)

EXECUTION—CLAIM CASE—DISMISSAL OF LEVY—ISSUES—JUDGMENT—EVIDENCE.

1. When two fi. fas. in favor of the same plaintiff were levied upon realty, which was claimed by a third person under a deed from the defendant in execution of older date than the plaintiff's judgments, and before the trial of the claim case the plaintiff filed an equitable amendment in aid of his levies, to which there was no demurrer, and upon which the parties went to trial, and in the course thereof really contested over only two issues, viz. (1) whether the deed under which the claimant asserted title was one of bargain and sale, or had merely been given to secure a debt; and, (2) if the latter, what was the amount of that debt,—the plaintiff in the amendment referred to conceding the priority of this debt over his executions, and praying that the property be sold under his fi. fas., and that out of the proceeds thereof the amount due to the claimant should be first paid,—*held*: (a) that a refusal to dismiss one of the levies, even if based on a good ground, resulted in no injury to the plaintiff; (b) that, in such a case, giving a charge which restricted the verdict to be rendered by the jury to a mere general finding as to whether or not the property was subject was an error requiring a new trial; (c) that a verdict rendered on such a trial which simply found that the property levied upon was subject, without more, did not cover the issues submitted.

2. That a judgment does not follow, or is not authorized by, the verdict upon which it is entered, is not a good ground of a motion for a new trial.

3. On the trial of a claim case, wherein a corporation was the claimant, a memorandum, in the form of a written statement, in reference to a question involved in the case, made and delivered to the plaintiff in execution by a person not shown to have been an officer or an authorized agent of the corporation at the time the memorandum was made and delivered, was not admissible in evidence over the objection of the claimant.

4. When the value of given realty at a specified date was a material inquiry, there was no error in rejecting evidence tending to show what it brought at a public sale had several years thereafter.

(Syllabus by the Court.)

Error from superior court, Terrell county; H. C. Sheffield, Judge.

Action by the First State Bank against A. J. Carver. From the judgment, plaintiff brings error. Reversed.

M. C. Edwards, Jr., Jas. G. Parks, Hoke Smith, and H. C. Peeples, for plaintiff in error. Worrill & Laing, for defendant in error.

PER CURIAM. Judgment reversed.

(Supreme Court of Georgia. Aug. 9, 1900.)

EJECTMENT—EVIDENCE—DIRECTING VERDICT.

The plaintiff showed a perfect paper title to the land in controversy, but the defendant showed a prescriptive title, based on more than seven years' adverse possession under written evidence of title. A verdict for the defendant was, therefore, demanded, and the court did not err in so directing.

(Syllabus by the Court.)

Error from superior court, Miller county; A. G. Powell, Judge pro hac.

Action by A. F. S. Briscoe and others against Jefferson Holder and others. Judgment for defendants and plaintiffs bring error. Affirmed.

W. C. Worrill, C. C. Bush, and R. H. S. Sheffield, for plaintiffs in error. B. B. Bower, for defendants in error.

PER CURIAM. Judgment affirmed.

BROOKS v. STROUD et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

INJUNCTION—REMEDY AT LAW.

1. Under the facts alleged in the petition, the remedy at law was not as complete as in equity, and the court did not err in overruling the demurrer.

2. The evidence was conflicting on the material issues, and the judge did not abuse his discretion in granting the injunction.

(Syllabus by the Court.)

Error from superior court, Monroe county; E. J. Reagan, Judge.

Action by Sam Stroud and others against R. P. Brooks. Judgment for plaintiffs, and defendant brings error. Affirmed.

Cabaniss & Willingham, for plaintiff in error. Stone & Williamson and Persons & Persons, for defendants in error.

PER CURIAM. Judgment affirmed.

HAMILTON et al. v. PHENIX INS. CO.

(Supreme Court of Georgia. Aug. 9, 1900.)

CERTIORARI—RENEWAL OF APPLICATION—DISMISSAL.

1. If an original application for a writ of certiorari be for any reason void, an attempted renewal thereof within six months must be held to be ineffectual. Williamson v. Wardlaw, 46 Ga. 126; McClendon v. Phosphate Co., 28 S. E. 152, 100 Ga. 219.

2. The certiorari originally sued out, of which it is claimed the present is a renewal, has been judicially declared absolutely void. Hamilton v. Insurance Co., 33 S. E. 705, 107 Ga. 728. Being void, it could not be renewed; and, not having been presented for sanction within 30 days of the rendition of the verdict which it seeks to review, the motion to dismiss should have been granted.

(Syllabus by the Court.)

Error from superior court, Carroll county; S. W. Harris, Judge.

Action between G. R. & S. L. Hamilton & Co. and the Phenix Insurance Company.

J. T. Pendleton and S. Holderness, for plaintiffs in error. John C. Reed and Oscar Reese, for defendant in error.

PER CURIAM. Judgment reversed.

MILLER et al. v. FREEMAN.

(Supreme Court of Georgia. Aug. 7, 1900.)

ACTION BETWEEN PARTNERS—ACCOUNTING.

1. Where a partnership has been fully launched and is continuing, one of the partners cannot maintain against the other an action at law for damages resulting to the partnership by reason of the defendant's failure to perform a duty imposed upon him by a stipulation in the partnership agreement. This is true although the plaintiff may seek to recover only his pro rata share of the damage, and although at the time the suit is brought the partnership may owe no debts to third persons, and there may be no other debt due by either party to the other.

2. An accounting may be had in equity by one partner against the other, without a final winding up and dissolution, in a case where the partnership has, by the agreement, several years to run, and where the partnership articles contemplate a settlement at the end of each season.

(Syllabus by the Court.)

Error from city court of Floyd county; John H. Reece, Judge.

Action by F. B. Freeman against G. H. Miller & Son. Judgment for plaintiff. Defendants bring error. Reversed.

Dean & Dean, for plaintiffs in error. Wright & Ewing and C. N. Featherston for defendant in error.

SIMMONS, C. J. Suit was brought in the city court by F. B. Freeman, as administrator with the will annexed of G. S. Freeman, against Miller & Son; the petitioner alleging that a contract had been entered into between his testator and the defendants, which was in substance as follows: Plaintiff's testator had leased to the defendants a certain described tract of land for a term of 15 years from January 1, 1893. Defendants were to furnish during 1893 as many peach trees as would be required to plant the land leased, and also to furnish trees to replant whenever necessary during the first three years of the lease. Plaintiff's testator was to cultivate, prune, pick, and pack the fruit as directed by the defendants; the same to be cultivated during the first three years in a designated way. After the expiration of the three years the orchard was to be cared for according to the terms prescribed in the contract. The defendants were to attend to the procuring of packages necessary to ship the fruit, and were to have full control of the shipping and selling of the fruit. After three years all expenses necessary to a proper carrying on of the business were to be borne equally by each party. The net profits derived from the sale of the fruit were to be

contract were to be binding upon the heirs, executors, and assigns of the parties. The petition further alleged that since the death of the plaintiff's testator the defendants have, in their dealing with the petitioner, treated the contract as binding and obligatory; that in 1898 defendants failed to procure the packages necessary to ship the fruit in sufficient time to properly and seasonably ship and market the same, and thereby petitioner was damaged in amounts which are set forth in detail in the petition, aggregating the sum of $2,396.10, for which sum, with interest, petitioner prays judgment. By an amendment to the petition it was alleged that one inducement which moved the plaintiff's testator to enter into the contract was that the defendants were experienced fruit shippers, and plaintiff, under the contract, relied upon them to procure the necessary packages to ship and market the fruit; that there is nothing due and unaccounted for between the plaintiff and defendants on the contract, except the matter set forth in the petition; that the parties to the contract interpreted the same as providing for a division of the profits at the end of each season, and have so acted; that there are no debts due by the parties to the contract to others in connection with the business with which the contract deals, and there is no debt due by either one of the parties to the other, except the claim set forth in the petition. To this petition the defendants demurred. The court overruled the demurrer, and the defendants excepted.

There were but two questions argued by counsel for plaintiff in error: First, can one partner maintain an action against his co-partner in a court having no equity jurisdiction? And, second, the title to the property alleged to have been damaged being in the partnership, ought not the action to have been brought in the name of the partnership? No question was raised here as to whether the contract between the parties constituted them partners. See, however, in this connection, the case of Gray v. Blasingame (Ga.) 35 S. E. 653.

Treating the contract as one of partnership, we think that the present action was not maintainable at law, and that the judge erred in overruling the demurrer to the petition. The case fell within the recognized rule that one partner cannot, before a final winding up of a partnership, maintain against his co-partner an action at law based upon partnership transactions. This rule has but few exceptions; most of the so-called exceptions being apparent only, and not real. After the partnership is practically at an end, whether it be a single venture or otherwise, the rule cannot apply, for the parties are no longer partners. So an action may be maintained for the breach of an agreement to enter into a partnership, or

of the suit is a matter not connected with the partnership affairs, the rule, of course, cannot apply. The present suit is, however, not like those just mentioned. It falls within the general rule against suits between partners, and cannot be maintained unless it is within the exception to that rule which is thus stated by Judge Story: "Wherever there is an express stipulation in the partnership articles, which is violated by any partner, an action at law (either assumpsit or covenant, as the case may require) will ordinarily lie to recover damages for the breach thereof." Story, Partn. (7th Ed.) § 218. While this statement of the exception is very broad, we think that, in seeking to determine whether this case is within it, it should be construed with reference to other authorities, and to the cases upon which it is based. A careful consideration of the statement, and of the authorities cited to sustain it, will show that the cases falling within this exception are of three classes: (1) those in which the partnership is inchoate and has never been launched; (2) those in which the partnership is at an end; and (3) those in which the stipulation which is violated, and for the breach of which the action is brought, is one between the partners individually, and "the damages from which belong exclusively to the other partner, and can be assessed without an accounting." See 2 Bates, Partn. § 889. The statement of the exception in Pars. Partn. (4th Ed.) p. 258, § 191, that, "whenever there has been any breach of an express stipulation between persons who are partners, an action for damages will be sustainable, unless the breach or the stipulation itself, or both, are such that they involve the whole partnership business and accounts, and the damages can be determined only by first settling those accounts," is more carefully worded; and the instance given as an illustration is where "one partner agrees to pay the other a certain salary or commission, or other compensation for his services, over and above his share of the profits, and independently of them." This is not in any sense inconsistent with the doctrine laid down in the case of Hill v. Palmer, 56 Wis. 130, 14 N. W. 23, in which it was said: "The test seems to be that if the damages resulting from a breach of a covenant or stipulation in the partnership agreement by one partner belong exclusively to the other partner, and can be assessed without taking an account of the partnership business, covenant or assumpsit may be maintained by the injured partner against the other for such damages."

Among the cases cited to sustain the judge in overruling the demurrer in the present case are several in which the stipulation violated was between the partners individually, and not for the benefit of the partnership. Such cases are not in conflict with what is with most of them the only fault is that, in ruling properly the particular cases, broad statements, made in reference, not to the cases decided, but to partnership cases generally, are not always guarded and restricted with sufficient care. So far as we can find, every case worthy of note in which this point is expressly decided seems to be an authority against the ruling of the court below in the present case. In section 196, Colly. Partn. (6th Ed.), it is said that the right of one partner to maintain an action at law against his co-partner for the breach of a stipulation in the partnership agreement, during the existence of the partnership, does not extend to cases "where the damages to be recovered are of necessity payable out of, or when recovered payable into, the partnership fund." Mr. Wood, in his notes to the section of Collyer just cited, states the test as follows: "An action for damages for the breach of an express agreement entered into by one partner with another will lie if the damages, when recovered, will belong to the plaintiff alone." In Gow, Partn. (3d Ed.) p. 70 et seq., the first statement of the right to sue for the breach of a partnership agreement is as broad as that of Judge Story, which it is cited to sustain. Every single instance given to illustrate it is, however, in perfect accord with those authorities which limit the right to sue at law during the continuance of the partnership to those cases in which the stipulation is between the partners personally, and not for the benefit of the partnership, or between it and one or more of its members. After mentioning cases where the breach is of an agreement to advance money to launch the partnership, and of an agreement not for the benefit of the partnership, but between the partners personally, and of an agreement to account, it is said: "Where a penalty is reserved in case of breach of a partnership agreement, one partner can recover on the covenant against his co-partner; and if it is stipulated in the articles of partnership that one of several partners shall sue for the penalty agreed on, and divide the amount between his co-partners who have not committed a breach of the articles, such agreement will be binding, although the partner appointed to sue, if he incurred the penalty, could not sue himself. The same rule applies to every other species of lawful covenant by which partners reciprocally and severally bind themselves inter se to the performance of any particular act or thing." In 2 Lindl. Partn. (Rapalje's Ed.) p. 456, it is pointedly stated that, before the English judicature acts of 1873 and 1875, "no action at law could be brought by one partner against another for the recovery of money or property payable to the firm, as distinguished from the partner suing. * * * An agreement by each partner with his co-partners might, indeed, be framed so as to enable one to be sued by the others, if care was taken

and to exclude the partner suing from all obligation to contribute to his own payment; but an agreement so as to accomplish both these objects was not generally convenient." Again, in the same work (page 562), it is said: "An action for damages for the breach of an express agreement entered into by one partner with another would lie if the damages, when recovered, would have belonged to the plaintiff alone." With this the other authorities are in accord. "An action at law will lie for a premature dissolution in violation of the partnership agreement; but, to sustain such an action, the claim must be, not for the recovery of any share of profits or agreed compensation due him from the firm, but for the wrong done him personally, as distinguished from a breach of duty owing to the firm. This rule applies to the violation of all other stipulations in the articles, the damages from which belong exclusively to the other partner, and can be assessed without an accounting." 17 Am. & Eng. Enc. Law (1st Ed.) p. 1264. "Partners can, by agreement, separate any part of the business from the general rule of partnership, and make a separate and individual obligation of it, as between each other; and in such case the liability can be enforced at law, independent of the state of the partnership accounts. But the real test is not solely whether the action can be tried without going into the partnership accounts, but whether the defendant has bound himself personally to the plaintiff." 2 Bates, Partn. § 878. See, also, Ryder v. Wilcox, 103 Mass. 24, 29; Wills v. Simmonds, 8 Hun, 189; Stone v. Wendover, 2 Mo. App. 247; 15 Enc. Pl. & Prac. p. 1046.

Where, therefore, the stipulation is an agreement by one partner individually to do something for the benefit of the other individually, and imposes an obligation binding the one personally to the other, its breach gives a right of action at law, if the damages can be assessed without an investigation of the partnership accounts. But where the stipulation is for the benefit of the partnership, and consequently of both partners, neither partner alone has a right, the partnership relation existing, to sue in his own name, and at law, for the damages arising from its breach. There was in the present case no covenant to furnish crates, but merely an agreed distribution of partnership duties, by which the duty of securing crates was put upon the defendants, while the cost of the crates was to be defrayed by the partnership. The defendants did not agree to contribute the crates, but merely to see that crates were procured. The crates were to be used, not by the plaintiff, but by the partnership; and the right to the profits was in the partnership, and not solely in the plaintiff. The damage arising from the breach was to the partnership, and the plaintiff was not damaged at all, except by the reduction of the amount he should receive of the partnership profits. The damages were to the partnership, and not to the plaintiff alone, and the plaintiff was not entitled to recover them. The defendants were not liable to the plaintiff for the losses. While the damage arising from the breach of the defendant's agreement was to the partnership, one cannot sue himself, or be in the same action party plaintiff and defendant, and therefore the partnership could not maintain a suit against the defendants. Further, the compensation owed to the partnership by the defendants for their breach of duty was a partnership asset, and one partner could not collect and keep it. 2 Bates, Partn. § 849. These rules—that a partnership cannot sue one of its members, and that one partner cannot recover from his co-partner an amount due the partnership—are universally recognized, and the plaintiff sought to evade them by suing for only his pro rata share of the amount due the partnership. This cannot be done. See Id. § 1018. "One partner cannot recover his share of a debt due to the partnership in an action at law prosecuted in his own name alone against the debtor." Vinal v. Land Co., 110 U. S. 215, 4 Sup. Ct. 4, 28 L. Ed. 124. And a suit against one of the partners does not in this particular differ from a suit against a stranger. While the partnership continues, whatever sum is due from the defendants on account of their breach of the partnership agreement is due to the partnership, and not to the plaintiff alone, and must be considered as partnership assets. "So long as the community relation subsists, neither party has a remedy at law in respect to the joint assets." Hunt v. Morris, 44 Miss. 314. And the plaintiff, therefore, ought not to be permitted to maintain the present action. Until after a dissolution or termination of the partnership agreement, he cannot maintain such an action at law; and the judge should have sustained the demurrer to the plaintiff's petition, as it showed that the partnership relation still continued. While it appeared that, further than the claim made in the present suit, neither partner owed anything to the other, and that the partnership owed no debts to third persons, it did not appear that debts were not due to the partnership, or that there were no funds on hand, or that the profits already collected had been equally divided. And, even had all these things appeared, there may have been partnership transactions the next day, as a result of which the partnership may have become indebted to third parties, and other such transactions may occur at any time. One partner should not be compelled to make payment to the other, to settle a partnership matter, when the partnership assets may be used for that purpose. The liability of one partner to the other is for such sum only as will settle all cross claims, and this is usually best ascertained by an accounting. See Abb. Tr. Ev. (2d Ed.) p. 281. Even though the defendants in the present case are liable to account for their failure to properly provide crates, and for the resulting damages, their share of the undi-

be compelled to submit to a judgment, when they can then recover of the partnership more than enough to pay the judgment. And certainly if the business is continuing, and the partnership likely to become indebted to third persons, it would not be proper to allow such a suit as the present one. The reason given in Story, Eq. Jur. § 664, why a somewhat different action between partners cannot be maintained, will, with little change, apply to the present case: It is impossible, during the continuance of the partnership, without taking a general account, to say that any one partner is, on the whole, a debtor of the firm to such an amount. And, if he is, how, in point of technical propriety, can a remedy be instituted against him by the other partner alone, as contradistinguished from the partnership? See 2 Bates, Partn. § 849, where it is said: "Even if there are no debts, yet collections must be received unequally by the partners. The mutual balances are therefore constantly fluctuating quantities, and a judgment on any one item would settle nothing, and, if allowed, would produce a multiplicity of suits."

We think, for these reasons, that the present case is one in which an action at law cannot be maintained by the plaintiff during the continuance of the partnership relation. The amount of the assets and profits can be best determined by an equitable accounting, in which all differences may be adjusted. It is urged as an objection to forcing the plaintiff to seek an accounting that it would be a hardship to force a dissolution of a partnership which is designed to continue for several years longer. We think that this objection is untenable, for two reasons: In the first place, while equity jurisdiction is extended to cases where the law does not afford a full or adequate remedy, a court of law cannot take cognizance of cases not otherwise within its jurisdiction solely because equitable relief can be obtained only on conditions which seem unreasonable or oppressive. In the second place, the rule laid down by the older text writers, and in a few of the older cases, that an accounting cannot be had in a court of equity unless there be a prayer for a dissolution, is now by no means recognized as applying to all cases. There are now many well-recognized exceptions. "It was formerly considered that no account between partners could be taken in equity, save with a view to dissolution; and a bill praying an account, but not a dissolution, has been held bad on demurrer. But this rule has been gradually relaxed; for it has been felt that more injustice frequently arose from the refusal of the court to do less than complete justice, than could have arisen from interfering to no greater extent than was desired by the suitor aggrieved." 2 Lindl. Partn. (Rapalje's Ed.) p. 494. "Whether one partner is entitled to the business, is, so far as text-books are to be believed, very doubtful; but a careful examination of the voluminous authorities extant upon the subject would seem to leave no doubt whatever that the action is a proper one, and can be maintained, not only during the existence of a partnership, but for the very purpose of settling questions in order to avoid a dissolution. * * * And not only is any such rule [that an accounting cannot be had without a prayer for a dissolution] manifestly oppressive in principle, since a partner is surely entitled to the benefit of the articles during the existence of the partnership, and not upon dissolution alone, but it is manifestly absurd, since it implies that the court will dismiss a bill because it lacks a prayer which the court has no power whatever to enforce by its decree, should the parties see fit to disregard it after judgment. * * * There is little doubt, or none, that the rule should be taken from our text-books, or at least be applied to such cases only as are brought for a receiver and for interim management." Tracy Gould, in an article in the Albany Law Journal for February 28, 1880 (volume 21, p. 168). Among the "more common cases where a partial accounting, or an accounting without dissolution, may be had," are those in which there is an agreement for settlements periodically. 2 Bates, Partn. § 911. See, also, Story, Eq. Jur. §§ 668, 671. The partnership now under consideration was such that there should be an annual loss or an annual profit, and that there should be annually a considerable period of time when but little partnership business could be done. The contract did not in terms provide for an annual accounting and settlement between the parties, but this was evidently their intention; and the allegations of the petition are clear and distinct that the partnership articles were so interpreted by the partners, and that in the past they have acted on this interpretation. The actual construction thus put upon the articles by the partners should be adopted as the proper interpretation of them. Story, Partn. (7th Ed.) § 191. The present seems, therefore, to be just such a case as should be excepted from the rule that an accounting cannot be had without a dissolution. An accounting would determine the state of the partnership accounts at the time when an accounting was contemplated by the agreement, and it would make no difference that accounts might be changing between the time of filing the petition and the time the decree is made. According to their agreement, the partners were entitled to an accounting at a certain time, and transactions occurring subsequently to that time could be accounted for on the next annual settlement. Then, too, the fact that at the end of the season there is but little partnership business to be done renders this a case in which

n accounting without dissolution would be ree from practically all the objections urged i favor of the old rule against it,—a rule hich, "though true in some cases, and to a ertain extent, has been supposed to be more enerally applicable than it is upon author-y, or ought to be upon principle," as was aid by Lord Cottenham in Wallworth v. olt, 4 Mylne & C. 619. Judgment reversed. ll the justices concurring.

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cLEOD v. FLORIDA CENT. & P. R. CO.

(Supreme Court of Georgia. Aug. 7, 1900.)

PPEAL—BRIEF OF EVIDENCE—AFFIRMANCE.

Where the only assignment of error in e bill of exceptions is that the court erred granting a nonsuit, and it appears from the cord that no bona fide effort has been made brief the evidence as the law requires, this urt, without considering the evidence, will sume that the judgment of the court below as correct, and affirm it. Price v. High, 33 E. 956, 108 Ga. 145; Carmichael v. State is day decided) 36 S. E. 872.

(Syllabus by the Court.)

Error from superior court, Effingham coun-; Paul E. Seabrook, Judge.

Action by C. H. McLeod against the Flora Central & Peninsular Railroad Company. dgment for defendant, and plaintiff brings ror. Affirmed.

D. H. Clark, for plaintiff in error. Denark, Adams & Freeman, for defendant in ror.

PER CURIAM. Judgment affirmed.

O'HARA v. SOUTHERN BUILDING & LOAN ASS'N.

Supreme Court of Georgia. Aug. 9, 1900.)

ILDING AND LOAN ASSOCIATIONS—PLEADING—AMENDMENT.

The present bill of exceptions presents no estion relating to the law of building and n associations which has not been by this rt, either directly or in principle, decided ad-sely to the contentions of the plaintiff in or. Restricting the general allegations of petition, in which mere conclusions are ted, to the meaning which should be ascribto them in the light of the facts well pleadno cause of action was set forth; and there s no error in sustaining the defendant's derrer, nor in refusing to allow the amendment the plaintiff's petition, to the rejection of ich exception is taken. Association v. Pace .) 36 S. E. 98, and authorities cited.

Syllabus by the Court.)

Error from city court of Macon; W. D. ttingham, Judge.

ction by M. O'Hara against the Southern ilding & Loan Association. Judgment for endant, and plaintiff brings error. Afned.

Marion W. Harris and Hall & Wimberly, plaintiff in error. Estes & Jones, for dedant in error.

PER CURIAM. Judgment affirmed.

MACON NAV. CO. v. SCHOFIELD et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

APPEAL—PLAINTIFFS IN ERROR—GARNISHMENT—OFFICER OF CORPORATION.

1. A person interested in litigation as a party to a case in a trial court may, on motion, be made a party plaintiff in error in this court, in connection with the person suing out the bill of exceptions, they being on the same side in the lower court; and the writ of error will not be dismissed on motion of the defendant in error because such person has not been served with the bill of exceptions. Telegraph Co. v. Griffith, 36 S. E. 859, 111 Ga. —.

2. The secretary and treasurer of a company, who as such holds funds belonging to it, is not subject to a process of garnishment requiring him to answer what property or effects he has in his hands belonging to the company of which he is an officer. His possession of such property as an officer is possession by the company. If such officer has been garnished as an individual, and he holds anything in his hands as an individual belonging to the company, such officer, as an individual, is subject to garnishment, and the property which he holds as an individual may be subjected to a debt against the company.

3. When the person who holds the office of secretary and treasurer of an incorporated company has been garnished, both as an officer of the company and as an individual, to answer what he is indebted to the company, or what effects belonging to it he has in his hands, and answers that as an individual he owes the defendant nothing, and has none of its effects in his hands, but that as an officer of said company he has in his hands a given sum of money belonging to his company, it is error to enter a judgment against the garnishee for the amount admitted to be in his hands as an officer of such company.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by J. B. Schofield's Sons against the Macon Navigation Company. From the judgment, the navigation company brings error. Reversed.

Arthur L. Dasher, for plaintiff in error. Estes & Jones, for defendants in error.

PER CURIAM. Judgment reversed.

BARNES CYCLE CO. v. SCHOFIELD.

(Supreme Court of Georgia. Aug. 9, 1900.)

CONTRACT — WHAT CONSTITUTES — PROPOSAL OF GUARANTY—NOTICE OF ACCEPTANCE.

1. An instrument in the form of a contract between two parties, signed by one of them and by an agent of the other, with a clause reciting that "this contract shall not be considered as binding upon the first party until approved in writing by" the second party, is only a proposal to contract, submitted by the party of the first part to the party of the second part.

2. When, before approval of the proposed contract by the latter, a third person, for a valid consideration paid by the party of the first part, enters in writing upon such proposal a stipulation that he will "guaranty all sums owing or which may hereafter be owing [by the party of the first part] during the term of this contract," etc., such indorsement amounts only to a proposal of guaranty, and does not take effect until the original paper becomes a binding contract between the parties of the first and

antor was entitled to notice of its acceptance by the party of the second part before he was bound by the terms which it set forth. Sanders v. Etcherson, 36 Ga. 409; Claflin v. Briant, 58 Ga. 414; Brandt, Sur. §§ 189–193; Clark, Cont. p. 29.

3. The record not disclosing that any proper notice of acceptance by the party of the second part was given to the guarantor, there was no error in any of the rulings made by the trial judge, nor in the direction of a verdict in favor of the guarantor.

(Syllabus by the Court.)

Error from city court of Macon; W. D. Nottingham, Judge.

Action by the Barnes Cycle Company against J. S. Schofield. Judgment for defendant, and plaintiff brings error. Affirmed.

John R. L. Smith, for plaintiff in error. Estes & Jones, for defendant in error.

PER CURIAM. Judgment affirmed.

HILL v. VAN DUZER.

(Supreme Court of Georgia. Aug. 8, 1900.)

OBJECTIONS TO EVIDENCE—AUTHORITY OF AGENT—WIDOW'S ALLOWANCE.

1. The points sought to be made as to alleged error in admitting testimony were not properly presented.

2. Mere agency to collect a particular claim does not authorize the agent to agree that the proceeds thereof shall be applied to a debt due by his principal.

3. Neither a widow nor her agent, whatever his authority, can lawfully apply the proceeds of a year's support set apart for the benefit of herself and minor children to the payment of a pre-existing debt due by her individually, in the consideration of which the minors had no interest.

4. Applying the principles laid down in the two preceding notes to the facts of the present case, the verdict complained of was without evidence to support it, and ought to have been set aside.

(Syllabus by the Court.)

Error from superior court, Elbert county; S. Reese, Judge.

Action between Flora Hill and I. C. Van Duzer. From the judgment, Hill brings error. Reversed.

Z. B. Rogers, for plaintiff in error. I. C. Van Duzer, in pro. per.

PER CURIAM. Judgment reversed.

SIMS v. WALKER.

(Supreme Court of Georgia. Aug. 8, 1900.)

APPEAL BOND—SUFFICIENCY.

1. The meaning of the phrase, "give bond and security to the ordinary for such further costs as may accrue by reason of such appeal," appearing in Civ. Code, § 4466, is that the bond required shall be deposited by the appellant with the ordinary. It does not mean that the bond shall be made payable to that official, for ground that the appeal bond was made payable. not to the ordinary, but to the appellee. Such bond was a proper and lawful one, and needed no amendment.

(Syllabus by the Court.)

Error from superior court, Lincoln county; S. Reese, Judge.

Action by Amanda Sims against Mary J. Walker. Judgment for defendant before the ordinary, and plaintiff appeals. From a judgment dismissing the appeal, plaintiff brings error. Reversed.

W. D. Tutt & Son and M. P. Reese, for plaintiff in error. Thos. E. Watson and J. E. Strother, for defendant in error.

PER CURIAM. Judgment reversed.

HILSON v. KELLEY.

(Supreme Court of Georgia. Aug. 8, 1900.)

EXECUTION—AFFIDAVIT OF ILLEGALITY.

An affidavit of illegality, which alleges that the judgment upon which was issued the execution sought to be arrested was rendered by a justice of the peace at a place in his district where the justice's court thereof had no lawful authority to sit, is good without alleging at what particular place in the district the court in question ought to have held its sessions.

(Syllabus by the Court.)

Error from superior court, Glascock county; S. Reese, Judge.

Action between Aaron Hilson and T. J. M. Kelley. From the judgment, Hilson brings error. Reversed.

K. J. Hawkins, for plaintiff in error. B. F. Walker, for defendant in error.

PER CURIAM. Judgment reversed.

BALDWIN v. GARRETT et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

UNDISCLOSED PRINCIPAL—AUTHORITY OF AGENT.

1. It is the right of one who deals with an agent who fails to disclose his principal to proceed directly against the principal, when discovered. Civ. Code, § 3024. This right is not dependent on the diligence of the plaintiff in discovering the fact of the concealed agency.

2. An agent to conduct a given business for his principal necessarily has authority to do everything which is essential to the performance of his duties as agent. (a) If the agency be to carry on a mercantile business, and to do this it is necessary to rent a house, the principal will be bound for the rent thereof, whether he expressly authorized the agent to make the contract of rent or not.

3. Two of the charges complained of in the present case being in conflict with the law as above stated, and the same having relation to vital issues in the case, there should be a new trial; the record not disclosing that the verdict complained of was demanded by the evidence.

(Syllabus by the Court.)

Error from superior court, Muscogee county; W. B. Butt, Judge.

Action between A. J. Baldwin and Garrett & Sons. From the judgment, Baldwin brings error. Reversed.

R. R. Marlin and Brannon, Hatcher & Martin, for plaintiff in error. McNeill & Levy, for defendants in error.

PER CURIAM. Judgment reversed.

REYNOLDS v. HOWARD.

(Supreme Court of Georgia. Aug. 9, 1900.)

LANDLORD—DISTRAINT—COUNTER AFFIDAVIT.

1. Under a contract of rent whereby the tenant agreed to pay to the landlord specified fractional portions of the crops made upon the rented premises, the latter, although the former further agreed to cultivate the land "in a good, husbandlike manner," and failed to do so, was entitled to distrain for only the value of such fractional portions of the crops actually made, and not for such portions of crops which might have been made if the tenant had complied with his contract as to the manner of cultivation.

2. The counter affidavit filed in the present case was sufficient in law, and there was no error in overruling the demurrer to the same. It does not appear that any error was committed in submitting to the jury the issues made by the pleadings, and the evidence warranted the verdict.

(Syllabus by the Court.)

Error from city court of Cartersville; J. W. Harris, Judge.

Distress proceedings by P. H. Reynolds against C. M. Howard. Judgment for defendant. Plaintiff brings error. Affirmed.

Jas. B. Conyers, for plaintiff in error. Miller & Anderson, for defendant in error.

PER CURIAM. Judgment affirmed.

WESTERN & A. R. CO. v. CALLAWAY et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

NEW TRIAL—BRIEF OF EVIDENCE—APPEAL—DIRECTING VERDICT.

1. When the time for filing in vacation a brief of evidence to accompany a motion for a new trial is expressly limited by an order of the court, and the brief is not filed within that time, it is not erroneous to dismiss the motion; nor will this court reverse the action of the trial judge in refusing to accept as a sufficient excuse for not duly filing a brief of evidence the failure of the circuit stenographer, from illness or any other cause, to write out the evidence. Boatwright v. State, 16 S. E. 101, 91 Ga. 13; Eason v. City of Americus, 32 S. E. 5, 106 Ga. 179.

2. While a trial judge may, within the restrictions prescribed by section 5331 of the Civil Code, direct a verdict, this court will in no case overrule, as erroneous, a refusal to do so.

3. When a party against whom a verdict has been rendered, without moving for a new trial, sues out a direct bill of exceptions, he must, in order to obtain a reversal of the judgment, show not only that error was committed, but also that the adverse verdict was a necessary result thereof. (a) There was at the trial of the present case no error, if any at all, of the nature above indicated.

(Syllabus by the Court.)

Error from superior court, Whitfield county; J. S. Candler, Judge.

Action between the Western & Atlantic Railroad Company and Callaway, McCarty & Gregory. From the judgment, the railroad company brings error. Affirmed.

Payne & Tye and R. J. & J. McCamy, for plaintiff in error. Jones & Martin, for defendants in error.

PER CURIAM. Judgment affirmed.

CHASTAIN et al. v. PEAK.

(Supreme Court of Georgia. Aug. 9, 1900.)

MARRIED WOMAN—VALIDITY OF CONTRACT—DEBT OF HUSBAND.

1. If a married woman voluntarily and upon her own responsibility borrowed money, and gave therefor a note and mortgage, she was bound by her contract, although her object in obtaining the loan was to raise money for the purpose of paying a debt due by her husband, and although this fact was known to the lender, if the latter was not the creditor to be thus paid, and had nothing to do with any arrangement or scheme between the husband and wife looking to the accomplishment of the result intended. Nelms v. Keller, 30 S. E. 572, 103 Ga. 745, and cases cited.

2. The charges complained of in the present case were in substantial accord with the law as above announced; and the verdict, upon sufficient evidence to sustain it, settled adversely to the plaintiffs in error all disputed issues of fact.

(Syllabus by the Court.)

Error from superior court, Murray county; A. W. Fite, Judge.

Action by R. I. Peak against R. F. Chastain and others. Judgment for plaintiff. Defendants bring error. Affirmed.

J. W. Harris and J. J. Bates, for plaintiffs in error. R. J. & J. McCamy, for defendant in error.

PER CURIAM. Judgment affirmed.

KEYS v. BELL.

(Supreme Court of Georgia. Aug. 9, 1900.)

BRIEF OF EVIDENCE — INADVERTENT APPROVAL—NEW TRIAL.

Where a trial judge inadvertently approved as a brief of evidence a document presented as such, but which was palpably no brief at all, and subsequently passed an order in effect revoking the approval formerly entered, and in terms overruling, for want of a lawful brief of evidence, the motion for a new trial, in connection with which such document had been filed, the judgment will not be disturbed by this court.

(Syllabus by the Court.)

Error from superior court, Whitfield county; J. S. Candler, Judge.

Proceedings by S. E. Bell to probate the will of Elizabeth A. Bell. Mary D. Keys fil-

Mann & Terry, for plaintiff in error. R. J. & J. McCamy, for defendant in error.

LEWIS, J. This was a proceeding by S. E. Bell to probate in solemn form the will of Elizabeth A. Bell. To this application Mrs. Mary D. Keys filed her caveat, and objected to the admission of the will to record, alleging that the instrument was not the will of Elizabeth A. Bell, because she did not execute the same freely and voluntarily, but was moved thereto by the undue influence exerted over her by her husband, S. E. Bell. Another ground of caveat was that the testatrix was misled by the legatees mentioned in the will, and especially by S. E. Bell, who, with Alice and Florence Bell, led the said Elizabeth Bell to believe that caveatrix was responsible for a certain lawsuit brought against Thomas Caldwell, father of testatrix, when in truth and in fact caveatrix had nothing to do with the bringing of such suit, and, further, that testatrix was for many years an invalid and in very feeble health, and was thereby made more susceptible to the undue influence of S. E., Alice, and Florence Bell. After the introduction of the evidence on the issue formed on this caveat, the court directed a verdict for the propounder, which was accordingly rendered, whereupon caveatrix moved for a new trial upon the general grounds that the verdict was contrary to law and evidence, and upon the further ground that the court erred in directing a verdict for the propounder. To the judgment of the court overruling her motion for a new trial, the caveatrix excepts.

The record discloses that the movant made no attempt whatever to prepare a brief of this evidence. On the contrary, it appears that what purported to be a brief of the evidence was nothing but the stenographic report of the testimony taken down by the stenographer on the trial of the case, and consisted of questions and answers in the exact language and order in which they were asked and answered, and covers a space in the record perhaps 10 times larger than was necessary. The judge below approved this evidence when it was presented to him, but when he passed upon the application for a new trial he granted the following order: "The brief of evidence as approved by me on December 2, 1899, was presented to me and approved without any examination. Upon taking up the motion to pass upon it, I find that no effort has been made whatever to comply with the rule of court as to briefing the evidence; and, there being no compliance with the rule, I refuse the motion for new trial, and deny the same, there being no motion to dismiss." We think the judge was clearly right in granting this order. Indeed, the record, in its present shape, even without such an action on the part of the judge below, could not be considered by this court, utter failure to prepare any brief of evidence at all, the grounds of error could not be considered. Judgment affirmed. All the justices concurring.

ATLANTA NAT. BUILDING & LOAN ASS'N v. JONES et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

APPEAL—BILL OF EXCEPTIONS—EXCEPTIONS PENDENTE LITE—DISMISSAL.

1. Where, during the pendency of an equitable petition to marshal the assets of the estate of a decedent, the court passed an order which in effect adjudicated that a particular claim against the estate held by one of the defendants, a corporation, and by it alleged to be for a stated amount and also to be secured by a deed to realty, was for a less amount, and unsecured, but no final judgment in the case was entered, such order was not the proper subject-matter of a direct bill of exceptions to this court, but of exceptions pendente lite.

2. The bill of exceptions now under consideration having been prematurely sued out, the writ of error must be dismissed; but inasmuch as the record discloses that the plaintiff in error did, at the proper time, tender exceptions pendente lite, and that the same, because of the illness of the presiding judge, were not certified in due time, leave is granted to enter as exceptions pendente lite the official copy of the present bill of exceptions, which the clerk of the trial court retained in his office. See Walsh v. Colquitt, 62 Ga. 384, 389; Bank v. Harrison, 68 Ga. 463; Stanford v. Treadwell, Id. 827; Bass v. Bass, 73 Ga. 135; McGowan v. Lufburrow, 7 S. E. 314, 81 Ga. 358; Buford v. Kennedy, 11 S. E. 561, 85 Ga. 212; Bacon v. Bank, 31 S. E. 588, 105 Ga. 700; Gibson v. Wilkins (Ga.) 35 S. E. 316.

(Syllabus by the Court.)

Error from superior court, Bartow county; A. W. Fite, Judge.

Petition of the Atlanta National Building & Loan Association against J. W. Jones, administrator, and others, to marshal assets. From an order of the court, plaintiff brings error. Dismissed.

Thos. W. Milner & Sons, for plaintiff in error. John W. Akin, J. W. Harris, J. M. Neel, J. H. Wikle, A. M. Foute, G. H. Aubrey, J. M. Moon, and J. B. Conyers, for defendants in error.

PER CURIAM. Writ of error dismissed, with direction.

TAYLOR v. CANTRELL.

(Supreme Court of Georgia. Aug. 9, 1900.)

APPEAL—HARMLESS ERROR.

1. Though, in the trial of a claim case which turned upon the question whether or not a deed from a husband to his wife was fraudulent, and therefore void as to creditors, the court may have read to the jury sections of the Civil Code bearing upon the subject of fraud which were not applicable to the issues involved, yet when it affirmatively appears, from the nature of a request for further instructions preferred by the jury after they had for some time deliber-

when the verdict was apparently right, and fully supported by evidence.

2. The above is true of the verdict complained of in the present case, and the error pointed out in the preceding note is the only one committed at the trial.

(Syllabus by the Court.)

Error from superior court, Gordon county; A. W. Fite, Judge.

Action between R. D. Taylor and F. A. Cantrell. From the judgment, Taylor brings error. Affirmed.

W. H. Dabney and J. M. Neel, for plaintiff in error. R. J. & J. McCamy, for defendant in error.

PER CURIAM. Judgment affirmed

BUICE v. BUICE.

(Supreme Court of Georgia. Aug. 9, 1900.)

NEW TRIAL—CONFLICTING EVIDENCE—DISCRETION OF COURT.

The evidence in the case was conflicting, and in no sense demanded the verdict which was rendered. The trial judge did not, therefore, in sustaining the certiorari, abuse the discretion with which he is invested; the result being the grant of a first new trial. Railway Co. v. Fennell, 28 S. E. 437, 100 Ga. 477; Williams v. Railroad Co., 30 S. E. 260, 103 Ga. 575; Mitchell v. Braswell, 30 S. E. 947, 105 Ga. 502; Weinkle v. Railroad Co., 33 S. E. 471, 107 Ga. 367; Crapp v. Morris, 33 S. E. 951, 108 Ga. 793.

(Syllabus by the Court.)

Error from superior court, Forsyth county; George F. Gober, Judge.

Action between R. G. Buice and Joshua Buice. From the judgment, R. G. Buice brings error. Affirmed.

H. P. Bell, for plaintiff in error. H. L. Patterson, for defendant in error.

PER CURIAM. Judgment affirmed.

GLEASON v. TRAYNHAM et al.

(Supreme Court of Georgia. Aug. 9, 1900.)

APPEAL—ASSIGNMENTS OF ERROR—WIDOW'S ALLOWANCE—PRIORITY—MECHANIC'S LIEN.

1. Where a case was submitted to the presiding judge without the intervention of a jury, and a judgment in favor of the plaintiff was rendered, an assignment of error in the bill of exceptions upon this judgment in the following language was sufficiently specific: "To which judgment the defendant excepts, assigns the same as error, and says the court erred in finding any sum for the plaintiffs, and that under the law and facts his judgment should have been in favor of the defendant."

2. If a cause is submitted to the presiding judge to decide both as to the law and the facts, a writ of error will lie to his decision, though no right to except was expressly reserved. Morrison v. Ponder, 45 Ga. 167.

3. The claim of the widow and children for a year's support, with the exception made in section 3472 of the Civil Code, will, as to realty, the property owned by him during the term of his ownership. Civ. Code, §§ 3424, 3465; Cole v. Elfe, 23 Ga. 235; Barron v. Burney, 38 Ga. 264; Rust v. Billingslea, 44 Ga. 306; Murphy v. Vaughan, 55 Ga. 361.

4. It follows from the foregoing that the claim of the widow and children for a year's support is superior to a material man's lien upon the property of the decedent, which attached to the property as the result of a contract made by him in his lifetime.

5. The ruling now made does not in any way conflict with the decision in Boynton v. Westbrook, 74 Ga. 68. It was simply ruled in that case that the lien of a contractor for material and work would take precedence of a claim of the widow on account of a debt due her for trust funds in the hands of her deceased husband. The question of the dignity of a widow's claim for a year's support was not involved in that case.

6. The judgment entered in the present case, not being in accord with the principles above announced, must be reversed.

(Syllabus by the Court.)

Error from superior court, Cobb county; George F. Gober, Judge.

Action by Traynham & Ray against E. A. Gleason. Judgment for plaintiffs. Defendant brings error. Reversed.

Clay & Blair, for plaintiff in error. Lumpkin & Colquitt, for defendants in error.

PER CURIAM. Judgment reversed.

OWEN v. PALMOUR.

(Supreme Court of Georgia. Aug. 9, 1900.)

EVIDENCE ON FORMER TRIAL—ABSENT WITNESS—ESTOPPEL—IMPEACHMENT—WEIGHT OF EVIDENCE.

1. The trial judge did not err in admitting the evidence of an absent witness, taken on a former trial, and incorporated in a brief of the evidence had in such trial, which had been agreed to by counsel and approved by the court; it having been shown that the witness was, and had been for some time, in the territory of Oklahoma, and the fact of his residence in this state not having been satisfactorily established. Railway Co. v. Gravitt, 20 S. E. 550, 93 Ga. 369, 26 L. R. A. 553; Adair v. Adair, 39 Ga. 75.

2. A party to a suit, who testified in her own behalf on the trial, and who on a second trial of the same case is offered as a witness, becomes in such second trial an original witness, and is not estopped from testifying contrary to her evidence as reported on the former trial. The fact that her evidence originally taken was agreed to by counsel for each of the parties, and approved by the court, does not alter the rule. The material part of the brief of the evidence so filed and approved may be introduced by way of impeachment. It is not, however, admissible for this purpose unless the foundation for the evidence is first laid by asking the witness if she had not sworn to certain facts on the former trial. Taylor v. Morgan, 61 Ga. 46. As a general rule, a witness is not bound by recitals contained in a brief of evidence unless it be shown that such brief had been read over and approved by the witness. Reid v. State, 8 S. E. 431, 81 Ga. 760.

3. What part of the evidence of a witness should be given most weight is for the jury to determine, and it is error for the trial judge

Error from city court of H
Prior, Judge.

Action between Mary M
Palmour. From the judgr
error. Reversed.

Hubert Estes, for plain
Dean, for defendant in e

PER CURIAM. Judg

BRANTLEY et al.

(Supreme Court of G

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V. W. Stark, for plaintiffs in error. J. C. vards and A. P. Wofford, for defendants error.

ER CURIAM. Judgment reversed.

ITCHELL v. GEORGIA & A. RY. CO.

upreme Court of Georgia. Aug. 9, 1900.)

LEVIN—POSSESSION BY AGENT—PLEADING —AMENDMENT.

While, at common law and by statute in state, "mere possession of a chattel * will give a right of action for any in- rence therewith," such possession must the plaintiff's own right, and not as agent nother. (a) The above rule is not contra- d by section 3038 of the Civil Code. The "agent," as used therein, is to be con- d as meaning an agent who has a proper- ther general or special, in the personalty in ossession.

A petition brought, in the name of a per- who had not such a possession, to recover nal property taken from him, cannot be nended as to proceed in the name of the tiff for the use of the real owner.

llabus by the Court.)

ceable and lawful possession of a chat- ven if the holder has no title to the same, him a right to sue in trover a wrongdoer has deprived him of that possession. e it follows that where a husband is the ger of his wife's business, and as such is e lawful possession of lumber belonging , which without his authority or consent wrongfully removed by a railroad com- an action of trover in his own name will r the recovery of the property.

Lewis, J., dissenting.

or from superior court, Wilcox county; Smith, Judge.

ion by T. I. Mitchell against the Geor- Alabama Railway Company. Judg- for defendant, and plaintiff brings er- Affirmed.

ridge Cutts and Hal Lawson, for plain- error. Charlton, Mackall & Anderson, Nicholson, and W. A. Hawkins, for de- it in error.

SB, J. T. I. Mitchell, describing him- "agent," brought an action against the a & Alabama Railway Company to re- possession of a certain described lot of alleged to be in the possession of the ant. The petition averred that the ff was the owner of the property sued d that he had demanded the same of fendant, who had refused to deliver it or pay him the profits thereof. At the e plaintiff testified that he was in pos- of the property described in the peti- agent for his wife, and that he had er interest therein; that he had the loaded on one of the cars of the de- t, intending to sell it to one Gibbs if he sh for it as agreed; that Gibbs did not the lumber, and the defendant, before r to it, and without authority of plain- tiff, shipped the lumber to Gibbs; that plaintiff made a demand on the defendant for the lumber, but it refused to deliver the same to him. At the conclusion of the evidence the court granted a nonsuit on the ground that the evidence showed the title to the property sued for was in the plaintiff's wife, and that he had no such possession as entitled him to recover. The plaintiff then offered an amendment inserting in the petition the name of his wife as usee. The court refused to allow the amendment, and the plaintiff sued out a bill of exceptions, complaining of this refusal and of the granting of a nonsuit.

1. The exception to the granting of a nonsuit brings up for determination the question whether a person in possession of a chattel as agent for another, and having no special property or interest therein, can maintain against a person wrongfully converting the goods an action of trover. A proper solution of this question requires a somewhat extended examination into the nature of some of the actions which were at common law employed in cases of injury to or interference with the personal goods of another. Our action of trover is purely statutory. In McBain v. Smith, 13 Ga. 315, Judge Warner said that it was a substitute for the old common-law action of detinue, while in McElhannon v. Commission Co., 95 Ga. 670, 22 S. E. 686, Mr. Justice Atkinson said that it combined some of the characteristics of both of the common-law actions of trover and detinue. We think it perhaps more accurate to say that our action of trover may be employed in any case in which replevin, detinue, or trover could be used at common law. We shall therefore inquire into the nature of these three forms of action, with a view to ascertaining what persons were authorized to maintain them.

Replevin was employed to recover goods unjustly taken and wrongfully detained. It was generally used in cases of distress, when the person whose goods were seized gave security and replevied the property, in which event he was bound to bring replevin against the distrainor. 3 Black, Comm. p. 146 et seq. It seems, however, that it could be brought in any case where the owner had goods wrongfully taken from him by another. 1 Chit. Pl. (16th Am. Ed.) *181; Steph. Pl. (Heard's Ed.) *20. And in many of the states the action of replevin is by statute employed to recover personalty in any case in which possession is wrongfully withheld from the person entitled thereto. In this form of action at common law the goods themselves could be recovered, with damages for their wrongful detention. The action of detinue was used to recover goods wrongfully detained, though lawfully taken. In order to maintain this form of action, it must have appeared (1) that the defendant came lawfully into possession; (2) "that the plaintiff have a property"; (3) that the goods were of some value; and (4) that they were capable of identification. In this action the plaintiff recovered the goods themselves, if

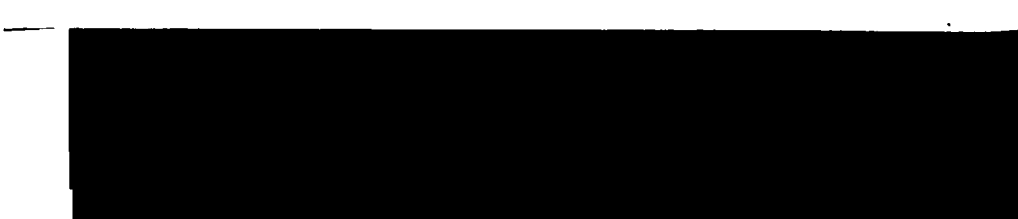
tention. 3 Bl. Comm. p. 151. The common-law action of trover and conversion lay to recover damages equal to the value of the goods wrongfully withheld, but not the goods themselves. The gist of this action was the unlawful conversion. Id. p. 152. Under our action of trover the plaintiff may elect whether he will take a verdict for the property or its value, or for damages alone, or for the property alone and its hire, if any. Civ. Code, § 5335. It is well settled that, to support any one of the three common-law actions, the plaintiff must have had either a general or special property in the goods seized. "To support replevin, the plaintiff must, at the time of the caption, have had either the general property in the goods taken, or a special property therein." 1 Chit. Pl. (16th Am. Ed.) p. 239, *183. "It is a general rule that the plaintiff must have the property of the goods in him at the time of the taking." Co. Litt. 145b. See, also, Manufacturing Co. v. Wiggin, 14 N. H. 441, 40 Am. Dec. 198; Beckwith v. Philleo, 15 Wis. 223; Pattison v. Adams, 7 Hill, 126, 42 Am. Dec. 59; Walpole v. Smith, 4 Blackf. 304. To maintain the action of detinue, it must appear "that the plaintiff have a property." 3 Bl. Comm. p. 152. "It seems to be a general rule that the plaintiff must have a general or special property in the goods at the time the action was commenced, in order to maintain detinue." 1 Chit. Pl. (16th Am. Ed.) *137. See, also, 6 Enc. Pl. & Prac. 645 et seq. In reference to the common-law action of trover, Mr. Chitty says that in order to support the action the plaintiff must at the time of the conversion "have had a complete property, either general or special, in the chattel, and also the actual possession, or the right to the immediate possession, of it." 1 Chit. Pl. (16th Am. Ed.) *167. And on the next page he says, "Without an absolute or special property, this action cannot be maintained." See, also, 26 Am. & Eng. Enc. Law (1st Ed.) 744. In this state the general rule is that in order to maintain trover the plaintiff must show title in himself. Gilmore v. Watson, 23 Ga. 63; Jaques v. Stewart, 81 Ga. 81, 6 S. E. 815; Palmour v. Fertilizer Co., 97 Ga. 244, 22 S. E. 931. While a property in the goods, either general or special, must appear, to authorize any one of the three forms of action, "in an action of replevin against a wrongdoer prior possession is alone sufficient to enable the plaintiff to recover." Shinn, Repl. § 200. See, also, 18 Enc. Pl. & Prac. 505; Cobbey, Repl. § 423. The same is true of trover. In discussing what is meant by having a special property in a chattel, Mr. Chitty says, "It is a general rule that the bare possession of goods, without any strict legal title, confers a right of action against a mere wrongdoer, having no right, and not clothed with any authority from the real owner." 1 Chit. Pl. (16th Am. possessor in the thing may be, is sufficient to enable trover to be maintained, as against all the world except the rightful owner, for a conversion committed in respect to it." 26 Am. & Eng. Enc. Law, 748. See, also, Broom, Comm. (9th Ed., by Arch. & C.) p. 912; 1 Smith, Lead. Cas. p. 632. This principle is well settled, and has been incorporated in our Code in the following language: "Mere possession of a chattel, if without title, or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession." Civ. Code, § 3886. This section, as stated, is but a codification of the common law, and the principle intended to be announced therein is the same as that above quoted from Chitty and the Encyclopædia. As this case turns, to a large extent, on the construction of this section, it is necessary to ascertain the meaning of the words "mere possession," as used therein. As a general rule, as is laid down in the decisions from this court cited above, a plaintiff, in order to recover in trover, must show title in himself. Possession is presumptive evidence of title, and becomes conclusive evidence against a mere wrongdoer; he not being allowed to set up the jus tertii. Dicey, Parties, marg. p. 356, citing Jeffries v. Railway Co., 25 Law J. Q. B. 109, 110, in which the judgment was rendered by Lord Campbell, who, in his opinion, uses this language: "The law is that, if a person is peaceably and quietly in possession of a chattel as his own property, a person who takes it from him, having no good title, is a wrongdoer; and such person cannot defend himself by showing that the chattel is not the property of the plaintiff, but the property of a third person."

Whatever language of Lord Campbell there is in the opinion in that case which seems to support the proposition that an agent who is in possession can maintain an action in his own name must be qualified by the language above quoted, in which the learned chief justice states that the case with which he is dealing is one where the plaintiff was in possession of the chattel "as his own property." An examination of the authorities has satisfied us that the possession referred to is a possession in the possessor's own right, or under a claim of property, either general or special. Even in the case of a thief, who, according to many authorities, can maintain trover, or a finder or a bailee, the possession which the plaintiff claims is for himself and in his own right. It cannot be a possession simply as the agent or servant of another, who has no interest in the property itself. The action of replevin "cannot be maintained by one whose right of possession is for another,—as, for example, an agent or servant. The plaintiff must be entitled to possession in his own right." Shinn, Repl. § 32. "A mere

bailor." 2 Greenl. Ev. (15th Ed.) § 561. "A mere servant who has possession at the will of the owner has not such a right of possession as will sustain the action." Cobbey, Repl. p. 224, § 423. Mr. Chitty states that the rule that a mere servant cannot maintain trover is an exception to the general rule that bare possession will authorize it. 1 Chit. Pl. (16th Am. Ed.) *170. "The possession by a mere servant of his master's goods is ordinarily deemed to be so far the possession of the master as to give the servant no right of action against one who disturbs that possession." Mechem, Ag. § 765. The case of Lockhart v. Railroad Co., 73 Ga. 472, seems to be almost decisive of this question. In that case the plaintiff brought suit against the defendant for "damages to personal property," the subject-matter of the suit being an oil painting of a landscape. On the trial it appeared from the testimony for the plaintiff that the picture belonged to her brother, who had given it to her to keep until he called for it, and, if he never did so, it was to be her property. It was held that as the plaintiff had no property, either general or special, in the picture, but was a mere borrower, she could not maintain the action. The plaintiff was in possession of the picture, but her possession was in the right of another, and no presumption of ownership arises from such a possession. The principle that, when possession is shown, a mere wrongdoer could not set up the jus tertii, as the presumption arising from such possession would be conclusive against him, was recognized in the decision, but it was ruled that that principle has no application to a case in which the plaintiff shows that he is not entitled to possession in his own right. In the case of Philips v. Robinson, 4 Bing. 106, the declaration alleged that the plaintiff delivered to the defendant certain deeds belonging to the plaintiff. The defendant pleaded that the plaintiff was not lawfully possessed of the deeds as of his own property, and that they were not the property of the plaintiff. At the trial it was proved that the deeds in question were the title deeds to an estate belonging to the plaintiff's wife, and that the plaintiff or his agent had delivered them to the defendant. It was held that the plaintiff could not maintain detinue for the deeds or their value. Park, J., said: "In order to support an action of detinue, the plaintiff must have a general or special property in what he seeks to recover." Burrough, J., remarked: "At the time of the action the plaintiff had no interest in these deeds; they were of no value to him; and therefore the nonsuit was right." See, also, Solomons v. Bank, 7 East (New Ed.) 79; De La Chaumette v. Same, 9 Barn. & C. 208. In the case of Williams v. Millington, 1 H. Bl. 81, it was held that an auctioneer could maintain against a buyer an action for goods sold an interest, which was a lien for the charges of the sale, the commission, and the auction duty, which he was bound to pay. In Ludden v. Leavitt, 9 Mass. 104, it was held: "Where a sheriff, having attached personal chattels on an original writ, delivers them to a third person for safe-keeping, such person is the mere servant of the sheriff, and has no legal interest in the chattels. He cannot, therefore, maintain trover for them." In Scott v. Elliott, 61 N. C. 104, it was held: "Possession of a chattel by one who holds for himself, in respect to either a general or a special property, will support replevin or trover. Such possession for another will not support an action." In Harris v. Smith, 3 Serg. & R. 20, it was held: "A mere servant who has the care of goods cannot maintain replevin, but if they are delivered to him by the master, as bailee, he may." In Clark v. Skinner, 20 Johns. 465, it was held that the owner of goods can maintain replevin against a sheriff or other officer who takes them from the custody of a servant or agent of the owner by virtue of an execution against such servant or agent; "the actual possession of the property in such case being considered as remaining in the owner, and not in the defendant in the execution." In Dillenback v. Jerome, 7 Cow. 294, it was held: "One who receipts property levied upon by a constable or sheriff by virtue of an execution, and engages to deliver to the officer, has neither a general nor special property. He is the mere servant or agent of the officer, and cannot maintain trover in his own name, though the property be taken and converted by a stranger." See, also, the following cases: Thorp v. Burling, 11 Johns. 285; Stephenson v. Little, 10 Mich. 433; White v. Dolliver, 113 Mass. 400; Donahoe v. McDonald, 92 Ky. 123, 17 S. W. 195; Linscott v. Trask, 35 Me. 150; Tuthill v. Wheeler, 6 Barb. 362; Waterman v. Robinson, 5 Mass. 303; Brownell v. Manchester, 1 Pick. 232; Rosentreter v. Brady, 63 Mo. App. 398; Baker v. Campbell, 32 Mo. App. 529; Rockwell v. Saunders, 19 Barb. 473; Faulkner v. Brown, 13 Wend. 64. These authorities abundantly settle the proposition that a mere agent or servant, having no special property therein, cannot, on bare possession alone, maintain an action to recover the goods from a person wrongfully in possession thereof; and this for the reason that his possession is that of his principal. The rule that a person wrongfully in possession of goods taken from another cannot set up title in a third person, or dispute the plaintiff's title, is perfectly consistent with the principle above announced. As stated above, a general or a special property in the personalty is essential to maintain trover; but, as against a wrongdoer, possession will be held to be conclusive evidence of such a property. But certainly a defendant, though a wrongdoer, will be per-

in that of another. As the plaintiff's right of recovery rested in the present case upon bare possession, and as the evidence introduced in his behalf shows that such possession was in the right of his wife, and not in his own right, and that he had no interest whatever in the property, the presumption of ownership arising from possession was rebutted; and, under the authorities above referred to, he was not entitled to recover.

It is said, however, that section 3038 of the Civil Code changes the rule recognized by the decisions and authorities above referred to. That section is as follows: "An agent having possession, actual or constructive, of the property of his principal, has a right of action for any interference with that possession by third persons." If this section be construed literally, its language is such as to support the position that the possession of an agent is sufficient to sustain an action in his own name against one who wrongfully interferes with such possession. The rule on this subject as it existed at common law is thus stated in 1 Am. & Eng. Enc. Law (2d Ed.) 1166: "An agent who is in possession of or entitled to the possession of property belonging to his principal by virtue of the agency, and having a special or general property therein, has a right of action against a third person who unlawfully injures or converts such property." The rule is stated in substantially the same language in Mechem, Ag. § 765. The provisions of section 3038 of the Civil Code appear for the first time in the statute law of this state in the Code of 1863. The section as it appears in that Code has been embodied in every Code since adopted, and now appears in the Civil Code in identically the same language. If this section be so construed as to authorize an agent to maintain an action in his own name on a possession which is founded on nothing more than a right of property in his principal, the effect of the section was to make a radical change in the law as it existed at the time of the adoption of the Code of 1863. The authorities above cited demonstrate clearly that there can be no escape from this proposition. Was it the intention of the codifiers in framing this section, and of the legislature in adopting it, to change the law existing at the time the Code was adopted, or was it intended merely as declaratory of the law as it then stood? The codifiers were not authorized to make new law, but "to prepare for the people of Georgia a Code, which should, as near as practicable, embrace in a condensed form the laws of Georgia, whether derived from the common law, the constitutions, the statutes of the state, the decisions of the supreme court, or the statutes of England, of force in this state." See the preface to the Code of 1863. In Shumate v. Williams, 34 Ga. ute, which the codifiers found already established." In Bank v. Heard, 37 Ga. 401, 412. Judge Harris uses this language: "It should be kept in mind that the codifiers were commissioned to embody the principles of the common law in force in Georgia. They had no authority to originate new matter for legislative sanction. It, therefore, is incumbent on those who assert that they went beyond their commission * * * to prove it." In Phillips v. Solomon, 42 Ga. 192, 195. Judge McCay said: "It must be remembered that the object of the codification was not to make laws, but to codify or declare those already in existence. Act Dec. 9, 1858. It is true that in some instances the Code has changed the law, though these changes are less frequent than is supposed. But in the main it cannot be doubted that the Code is to be looked at as what it purports to be,—a codification of our laws as they existed at the time,—and its provisions are not to be considered as changing the law unless the intent to change be clear." In Gardner v. Moore, 51 Ga. 269, the same judge remarked: "The Code is not to be construed as changing the old law unless the change be very apparent, and it would be specially dangerous to take the definitions of the Code as absolutely accurate, and as excluding the common-law definitions, unless it be plainly manifest that the intent was to make an exclusive and inclusive definition." The language of Judge McCay in 42 Ga., supra, was quoted approvingly by Mr. Justice Hall in City of Atlanta v. Gate City Gaslight Co., 71 Ga. 119, 120, who took occasion to add that: "Many similar views may be found scattered through our Reports and the Reports of other states, but these are deemed sufficient. We are well satisfied that in this instance no change of the provision in question was intended, or was in fact made." In that case the court was dealing with a section of the Code which apparently changed the existing law. In Gillis v. Gillis, 96 Ga. 1, 10, 23 S. E. 107, 110, 30 L. R. A. 143, 146, Mr. Justice Lumpkin, in dealing with a section of the Code which it was claimed altered the existing law with reference to witnesses attesting wills by their marks, used this language: "There is no act of our legislature or decision of our supreme court, before the adoption of our Code, that ever changed or attempted to change the old law as to witnesses attesting wills by their marks; and there is at least one case decided by this court, before the Code went into effect, which is in harmony with and upholds that law. See Horton v. Johnson, 18 Ga. 397. How, then, can it be said that the compilers of our Code intended to incorporate into it any other than the prevailing rule of law? It is not to be presumed that they, learned in the law, would, except in rare instances, them-



'es make a rule of law, when they were r empowered to codify existing laws of 'e in this state." In Lamar v. McLaren, Ga. 591, 598, 34 S. E. 116, 119, Mr. Jus- Fish uses this language: "The rule is t, unless the contrary manifestly appears n the words employed, the language of a e section should be understood as intend- to state the existing law, and not to nge it." The court was dealing with a ion of the Code in that case which, if strued literally, clearly changed the ex- ıg law. In Rome Grocery Co. v. Green- h Ins. Co. (Ga.) 36 S. E. 63, Mr. Justice 'is, in dealing with a section which, ac- ling to its literal terms, changed the ex- ıg law, says: "The object of the codifiers 'ompiling the first Code was to embody, only the statute law, but the common of force in this state. As there was no rt to codify any statute upon that sub- by the codifiers, we think it clearly prop- in determining the meaning of this sec- , to ascertain what was the general law orce in this country at the time of the ɔtion of the Code." The ruling in that followed what was the law existing at time of the adoption of the Code, and not t the terms of the section, literally con- ed, would have required. The rule on subject under investigation in the pres- case being well settled when the Code adopted, and there being no sufficient on suggested why such rule should not ɛ been allowed to remain unchanged, and ɔt being "clear" that there was an "in- to change the law on the subject," the on of the Civil Code now under consid- ion should be construed as a mere codi- ion of the existing law; and therefore word "agent," as used therein, should be to mean an agent who has a special erty or interest in the chattel. Without an interest, his possession is the actual ession of his principal, as was held in ver v. Brogden, 67 Ga. 24. The word nt," appearing after the plaintiff's name he petition, is merely "descriptio per- ɛ," and is to be treated as surplusage; hence the action is to be regarded as brought in the name of the plaintiff, as person entitled to recover in his own :. Civ. Code, § 2998; Owsley v. Wool- er, 14 Ga. 124; McDuffie v. Irvine, 91 748, 17 S. E. 1028; Ice Co. v. Bluthen- 101 Ga. 542, 28 S. E. 1003; Lester v. ıtosh, 101 Ga. 676, 29 S. E. 7. So treat- it, the action was not maintainable, and ɛ was no error in awarding a nonsuit. When the plaintiff relies on title to re- r possession of personal property wrong- withheld from him, he must show a le- itle. A mere equitable title will not suf- When, therefore, it appears that the le- ight of action is not in the plaintiff, he has ight of action at all,—either in his own ɛ or in that of another. He cannot sue :he use of the person who has the legal : of action, but the action should be brought in the name of the real plaintiff. See Railroad Co. v. Bedell, 88 Ga. 591 (Syl., point 3) 15 S. E. 676; Cunningham v. Elliott, 92 Ga. 159, 18 S. E. 365. "It is well settled that an action of replevin cannot be brought in the name of one person for the use of another; for the action involves nothing but legal rights, and, if equities are to be settled, another form of action must be resorted to. While the name of the usee might be treated as surplusage, a recovery can only be had where it is shown that the plaintiff is entitled to recover. The usee's title cannot be considered in the action, and if the plaintiff have no title the action must fail." Cobbey Repl. § 425. See, also, 18 Enc. Pl. & Prac. 507; Moore v. Watson (R. I.) 40 Atl. 345; Myer v. Warner (Miss.) 1 South. 837; 20 Am. & Eng. Enc. Law, 1056, 1057. What is said above applies also to the action of trover. 26 Am. & Eng. Enc. Law (1st Ed.) 744. There was no error in rejecting the amendment. Judgment affirmed. All the justices concurring, except Lewis, J., who dissents.

LEWIS, J. (dissenting). It is inferable from the testimony in this case that, prior to the conversion of the property in dispute by the defendant, the transactions the husband had with the railway company were in his individual name. It is true, he stated that the real title to the property was in his wife; that he was manager of his wife's business, and the property was actually in his peaceable and lawful possession. I think it quite evident that the nonsuit was granted in the present case upon the ground that the evidence showed that the title to the property was not in the plaintiff, but his wife. The entire argument of counsel for defendant in error, in endeavoring to uphold the judgment of the court below granting the nonsuit, is based purely upon this idea. While the plaintiff testified that the lumber belonged to his wife, and that it was cut on her land, and sawed with her engine and mill, yet he further testified, positively and without contradiction: "I had an interest in it, by reason of acting as agent for her and having charge of her business." There is no doubt but that at common law an action of trover is maintainable in favor of any one having possession of property against any wrongdoer who deprives him of such possession, and this peaceable possession on the part of the plaintiff, without further proof of title, is amply sufficient to maintain the action. In Dicey, Parties (2d Am. Ed.) p. 376, it is declared: "A person who has the actual possession of goods has a right to possess them against any one who cannot show a better title, or, what is the same thing, who cannot show that in interfering with possession of the goods he is acting under the authority of some one who has a better title than the possessor." In the case of Jeffries v. Railway Co., 25 Law J. Q. B. 109, 110, Lord Campbell, C. J., enters into a discus-

in possession of a chattel as his own property, that a person who takes it from him, having no good title, is a wrongdoer, and that such person cannot defend himself by showing that the chattel is not the property of the plaintiff, but the property of a third person. * * * It is of the greatest importance that a man shall not, having no good title of his own to the property, be allowed to seize it, and thereby probably bring about a breach of the peace, and occasion great mischief and confusion. * * * It is allowed that, if an action of trespass is brought by the party in possession, the defendant cannot set up the jus tertii, he having no right in himself. I think there is no difference whatever, for this purpose, between an action of trespass and an action of trover. In both cases the plaintiff rests on his possession of the property, and the question is whether the person who has no title whatever of his own shall be allowed to show that the plaintiff has not the right of property. The right of property is presumed from the possession; and is that presumption to be rebutted by evidence on the part of the defendant, a mere stranger and wrongdoer, showing that the plaintiff was not the real owner of the chattel?" See, also, Rogers v. Spence, 13 Mees. & W. 579, 580. In discussing this right of a mere possessor of property to maintain trover against a wrongdoer, it was decided in that case: "These rights of action are given in respect of the immediate and present violation of the possession of the bankrupt, independently of his rights of property. They are an extension of that protection which the law throws around the person, and substantial damages may be recovered in respect of such rights, though no loss or diminution in value of property may have occurred." The decision of Lord Campbell in the case of Jeffries v. Railway Co., above cited, is extensively quoted in Dicey, Parties, p. 378. The same case is also reported in 85 E. C. L. 802. See, also, Faulkner v. Brown, 13 Wend. 64; Sutton v. Buck, 2 Taunt. 302.

Our Civil Code (section 3886) clearly adopts that common-law rule, in the following language: "Mere possession of a chattel, if without title, or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession." In the case of Harpes v. Harpes, 62 Ga. 394, it is decided: "One from whose hands property of an estate has been wrongfully taken may bring trover for its recovery against the tortious holder, although there has been no administration." Chief Justice Warner, delivering the opinion in that case, says: "The mere possession of a chattel, if without title or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession." In the case of Harpes v. Harpes, 62 Ga. 394, it is decided: "One from whose hands property of an estate has been wrongfully taken may bring trover for its recovery against the tortious holder, although there has been no administration." Chief Justice Warner, delivering the opinion in that case, says: "The mere possession of a chattel, if without title or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession." In the case of Harpes v. Harpes, 62 Ga. 394, it is decided: "One from whose hands property of an estate has been wrongfully taken may bring trover for its recovery against the tortious holder, although there has been no administration." Chief Justice Warner, delivering the opinion in that case, says: "The mere possession of a chattel, if without title or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession." In the case of Harpes v. Harpes, 62 Ga. 394, it is decided: "One from whose hands property of an estate has been wrongfully taken may bring trover for its recovery against the tortious holder, although there has been no administration." Chief Justice Warner, delivering the opinion in that case, says: "The mere possession of a chattel, if without title or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully de-

estate, and it was clear that the plaintiff in that case had no title whatever in the property. It is said in the opinion: "If the plaintiff had sued for the horse as a part of the estate of her deceased husband, then a grant of administration would have been necessary to have entitled her to recover; but she declared against the defendant as a wrongdoer, upon her own possession of the property sued for. The dismissal of the plaintiff's action was error." This doctrine is recognized in Greenleaf on Evidence (volume 2, § 637), in his chapter on trover. In discussing the right of one having a special interest in property to maintain an action of trover for same, he adds: "But a lower degree of interest will sometimes suffice, against a stranger; for a mere wrongdoer is not permitted to question the title of a person in the actual possession and custody of the goods, whose possession he has wrongfully invaded." See, also, 26 Am. & Eng. Enc. Law (1st Ed.) pp. 744–748. The idea, therefore, of the law embodied in the section of the Code above recited is evidently to give one who has possession of property, even if he has wrongful possession of it, a right of action against any one who interferes therewith, unless he should be the true owner, or the person wrongfully deprived of possession. The bare possession of the plaintiff makes out, in law, title sufficient to recover in such a case; and the wrongdoer is estopped from denying his title by showing a legal title in another. This, however, is a stronger case than a suit by one in wrongful possession of property; for there is no question, under this evidence, but that the plaintiff was in its rightful possession. The defendant was guilty of a conversion of the property when it moved the same from where the plaintiff had placed it without his authority or consent.

But it is contended that, the evidence in this case showing that the plaintiff was not the owner of this property, he was not, in contemplation of law, in possession thereof in his own right, and that his possession was therefore not his own, but really that of his principal. I do not think the word "possession," in Civ. Code, § 3886, will bear any such construction. The term "mere possession" must have some significance, and I think it necessarily means the party having the actual, manual custody of the property at the time his actual possession thereof is interfered with. It seems, from the ingenious argument of Mr. Justice COBB in his opinion in this case, that he has reached the conclusion that in order to maintain an action of trover the possession of the plaintiff, which has been interfered with, must have been coupled with some interest in the property sued for. But that is entirely inconsistent with the language of this section; for it is therein plainly stated that even if the party,

as against the true owner or the person wrongfully deprived of possession. This language, then, is entirely inconsistent with the idea that such a possession, to authorize the action, must be in a person having some interest in the property. If that had been the intention of the codifiers, evidently lawyers of their learning would have made it appear in language unmistakable,—for instance, by simply adding that the possession of a chattel, "coupled with an interest in the same," will give a right of action, etc. They would not have written, "Mere possession of a chattel," etc., will give a right of action; for the expression "without title or wrongfully" implies that the party need not have had any interest whatever in the property in dispute. But, apart from this, from the evidence in the case above referred to it will be seen that this plaintiff, while he did not claim title to the property, did actually claim an interest therein by virtue of the services rendered in the management of his wife's affairs.

It is contended, however, that, being the agent of the owner, he was not, in contemplation of law, in possession of the property; that his possession was the possession of his principal. This proposition is completely answered by the provisions of Civ. Code, § 3038, which declares, "An agent having possession, actual or constructive, of the property of his principal, has a right of action for any interference with that possession by third parties." So, if there was ever any doubt about the right of an agent to bring this action against a wrongdoer, it strikes me that it is forever set at rest by this provision in the Code. In the opinion of Mr. Justice COBB, however, it is contended that this section of the Code was intended as an embodiment of the common law, and that under the common law an agent had no such right of action, even against a wrongdoer, unless the agent's possession was coupled with an interest he had in the property. In the first place, I do not think this is a correct view of the common law. There can be no doubt but that, as a general rule of law, to maintain an action of trover the plaintiff must have had either a general or special property in the goods seized; and abundant authority can be cited from text-books, as well as from decisions of courts, which recognizes this general principle. The truth is, actions of trover in this country are not often based upon a mere possession of the plaintiff, of which he has been deprived by a wrongdoer who has no interest whatever in the property. The majority of trover cases are of such a nature that the plaintiff cannot recover unless he shows title to or interest in the property sued for. Often is it the case that the defendant never derived any possession from the plaintiff at all, and that he claims a right to the property entirely under a different from the plaintiff. In such cases the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's. Such is the case at bar. The defendant claims under a title entirely independent of the plaintiff, and the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant

he takes quite a different view of a right of action against a mere wrongdoer, who is not permitted to question the title of a person in the actual possession and custody of goods, whose possession he has wrongfully invaded. Great reliance is placed by Mr. Justice COBB upon the decision of this court in the case of Lockhart v. Railroad Co., 73 Ga. 472. Upon a careful review of that decision and the facts in that case, I cannot see that it in the least sustains the view of the majority of this court. That was not an action of trover, but an action for damages resulting from an injury done to an oil painting by the defendant. Civ. Code, § 3886, has no application whatever to that case. It clearly appears that the defendant did not wrongfully get possession of the property from the plaintiff. On the contrary, the property that was damaged was received by the defendant for transportation. It appears in the case that the plaintiff was only a borrower, and acquired no title in the picture loaned. She brought suit against the defendant, not because of any unlawful possession of the picture by it, but because of injury it sustained while in its lawful possession. It is there expressly recognized that the carrier cannot dispute the title of the party delivering goods for transportation, either by setting up title in himself or in a third person, which is not being enforced against him; but, says the court, on page 474, "that is not this case. He sets up no adverse claim; does not refuse to deliver the property to the consignee." In such a case, where the plaintiff had no interest in or title to the property which has been damaged, she, of course, had no right of action; for she had not been damaged. I think this is really authority to sustain my view; for it is intimated in the opinion that, if the railroad company had unlawfully deprived the plaintiff of possession of the property, she could have maintained an action against it, although she had no title to same. I fail to find any of the authorities cited by Mr. Justice COBB which sustain his theory of what the common law is,—that possession of an agent of his principal's chattels will not enable him to maintain an action against a wrongdoer who has unlawfully deprived him of such possession, because his possession is in law possession of the principal. As a general rule, an agent cannot maintain an action in trover for the recovery of his principal's property; but that rule does not apply when he is in possession of the principal's property, and has been deprived thereof by the wrongful act of a person who has no interest whatever in that property. To say that Civ. Code, § 3038, refers not only to an agent who has possession, actual or constructive, of the property of his principal, but to one who has an interest in the property, would be giving it a construction which was evidently never contemplated by

occupies some other relation than that of mere agent. If that is the only thing that gives him a right to sue, then his possession is not that of an agent, but of an owner, and he has the right to protect his interest in the property against a wrongdoer independently either of section 3038 or section 3886 of the Civil Code. Chitty, the authority relied upon by Mr. Justice COBB, recognizes but one exception which even appears to exist, and that is where the possession is that of a mere servant. I know of no authority that recognizes the possession of an agent as an exception. But suppose it did, and at common law an agent did not have a right of action of this sort; then, manifestly, under our Civil Code, that principle of the common law has been changed. Suppose the word "servant" had been used instead of the word "agent" in section 3038; no one could contend that the servant could not bring this action. If, therefore, under the common law mere possession by an agent of his principal's property will give him no right of action against a wrongdoer for interference with such possession, then that section of the Code (3038) changes the common law by declaring exactly the contrary.

It is true that the main purpose of the codifiers was to embody in the Code of laws of this state not only the statutes, but the common law in force, and also the decisions of this court, and that in case of a want of absolute clearness as to what a section might mean, or in case of ambiguity, if it relates to a principle of the common law, a determination of what the common law on the subject is is entirely proper, and often of great aid in arriving at the true intent of the codifiers, and of the action of the legislature in adopting their work. But, when we find in the Code a provision as clear and unmistakable in its meaning as is embraced in section 3038, the invariable rule of this court has been to treat it as law, although it may never have been law before the adoption of the Code. Now, that section says "an agent having possession, actual or constructive." Of what? Of the property of his principal. It necessarily implies, so far as the absolute legal title is concerned, that the principal alone is the holder thereof; and yet that section gives the agent in possession a right of action for any interference with that possession by third persons. What possession? Manifestly and unquestionably, the possession he holds for his principal. If the agent has an interest in the property himself, he would have a right of action, not by virtue of his possession as agent of his principal, but by virtue of his possession in an entirely different capacity. The effect, then, of the construction of the majority of the court, as I conceive it, is to change the clear and unmistakable meaning of the language employed in the Code, and to add to its words a thought that simply

ren, and think that the court below erred in granting a nonsuit.

HANDEL v. CHAPLIN, Superintendent of Public Works.

(Supreme Court of Georgia. Aug. 7, 1900.)

CONSTITUTIONAL LAW—SEAMEN—DESERTION.

Congress not having legislated upon the subject of the offense of aiding articled seamen or apprentices to desert or leave a foreign vessel while in the waters of this state, the legislature of the state had the right and power to enact section 655 of the Penal Code, making it a misdemeanor for any person to aid or induce an articled seaman or apprentice to desert from or leave his vessel while in the waters of this state. The act in no way attempts to regulate or interfere with commerce, but is an aid thereto. Where the subject is local, and not national, in its nature, and does not require a uniform system of regulation, then, in the absence of legislation on it by congress, it may be regulated by the state.

(Syllabus by the Court.)

Error from superior court, Chatham county; R. Falligant, Judge.

Application by Edward Handel for a writ of habeas corpus against William F. Chaplin, superintendent of public works. Release refused, and petitioner brings error. Affirmed.

The following is the official report:

Handel filed his petition for the writ of habeas corpus. The grounds of his petition are as follows: "(1) That your petitioner is restrained of his liberty. (2) The person restraining the liberty of your petitioner is William F. Chaplin, and the mode of such restraint is compulsory work and labor, and confinement in the county chain gang of Chatham county, and the place of such detention is at the camps of said county chain gang, in the county of Chatham, as aforesaid. (3) The cause or pretense of such restraint of your petitioner as aforesaid is a sentence passed upon your petitioner on January 26, 1900, by the Honorable T. M. Norwood, judge of the city court of Savannah, a copy of which sentence is hereto annexed, and made a part of this petition. (4) Petitioner says that said restraint of him, your petitioner, by the said William F. Chaplin, superintendent of the public works of said county, is illegal, in that: First. Your petitioner was sentenced as hereinbefore set forth for violation of the provisions of section 655 of the Penal Code of 1895 of this state, as will appear from the accusation in said case, of file with the clerk of said city court, a copy of which is hereto attached, and made a part of this petition, and leave of reference to which is hereby prayed. Second. Said section 655 is void and unconstitutional for the following reasons: (a) The power to legislate upon the subject-matter of said section was and is the exclusive right said section 655, and the questions and interests involved in said law, the power to legislate thereon resides with, and should be exercised exclusively by, congress. (c) Congress had full power to legislate upon the subject-matter involved in said section 655, and to pass laws to prevent the evil consequences of the acts in said section aimed at by the legislature of this state, and in pursuance of such rightful power congress has passed a full and complete body of laws, and said laws are now still in force; and therefore said section 655 is void and unconstitutional, and especially so in that said section 655 is in many and material respects at variance with and in repugnance to the aforementioned laws of the United States. (d) Said section 655 is void by reason of its repugnance to the laws of the United States. (e) Said section 655 is void by reason of section 2, art. 6, of the constitution of the United States, and paragraphs 1, 2, and 3 of section 1, art. 12, of the constitution of the state of Georgia. (f) That, if any part of said section 655 is valid, such valid part cannot be separated from the unconstitutional and void parts of said act, and that therefore said section should be declared to be void and ineffective. Third. The bark referred to in the attached accusation, and called the 'D. H. Morris,' is a Norwegian bark."

Accusation: "State of Georgia, County of Chatham, City of Savannah. And now, on this 26th day of January in the year of our Lord 1900, comes William W. Osborne, solicitor general of the Eastern judicial circuit of Georgia, who prosecutes for the state of Georgia in the city court of Savannah, and by accusation made on oath, and in accordance with the statute in such case made and provided, in the name or behalf of the citizens of Georgia, charge and accuse John Bowen and Edward Handel, of the county of Chatham and state aforesaid, with the offense of misdemeanor, for that the said John Bowen and Edward Handel, in the county of Chatham and state of Georgia aforesaid, on the 20th day of January in the year of our Lord 1900 did aid one John Bendecksen, an articled seaman on bark D. H. Morris, to desert from or leave his vessel while in the waters of this state, contrary to the laws of the said state, the good order, peace, and dignity thereof. W. W. Osborne, Solicitor General, E. J. C. of Georgia."

On return of the petition and answer thereto, and after argument had, the court rendered the following judgment: "Judgment of the Court. In Chatham Superior Court. Edward Handel v. Wm. F. Chaplin, Supt. of Public Works. Habeas Corpus. The petitioner was convicted and sentenced by the city court of Savannah, under section 655 of the Penal Code of 1895, for aiding one John Bendecksen, a seaman, to desert from the bark D. H. Morris. It is admitted that the

of the Criminal Code does not conflict with any statute of the United States, nor interfere directly or indirectly with foreign or interstate commerce. It is claimed, however, that the United States having exclusive jurisdiction, and having legislated with reference to American seamen and ships, the silence of congress upon the subject of foreign ships and seamen amounts to the exclusion of state action; and the section is therefore claimed to be unconstitutional, for the reasons stated in the petition, and the conviction and sentence void and of no effect. Regarding this state statute as a purely local law, under the police power, affecting persons within this jurisdiction, and not in conflict with any law or jurisdiction of the United States, interfering in no respect with foreign or interstate commerce, or with any jurisdiction of the laws of the United States, but, rather, promotive of both, it is held that section 655 is a valid, constitutional law; and, petitioner having been lawfully convicted under said law, his application for release is refused, and he is hereby remanded back into custody, that the sentence of the city court of Savannah may be carried out. R. Falligant, Judge. In open Court, Apl. 7, 1900." To which judgment Handel excepted.

R. J. Travis and J. L. Travis, for plaintiff in error. W. W. Osborne, Sol. Gen., and J. R. Saussy, for defendant in error.

PER CURIAM. Judgment affirmed.

CATT v. OLIVIER et al.

(Supreme Court of Appeals of Virginia. Sept. 27, 1900.)

SUBSCRIPTIONS—PERFORMANCE OF CONDITIONS—EVIDENCE—WAIVER OF CONDITIONS.

1. In an action against the receiver of an institution to which subscription notes were executed on certain conditions, not expressed in the notes, to determine their liability to creditors, the subscribers may show the conditions on which such notes were given, and that they were not performed, as such evidence is not contradictory of the notes, but avoids their effect.

2. In an action against the receiver of an institution to which notes were given on certain conditions, not expressed in the notes, to determine the liability of the makers to creditors, that the notes were of the same date, alike, except as to amount, and were kept together and treated as belonging to the same fund, is sufficient to show that they were given on the conditions outlined when the plans for raising the funds were adopted.

3. In an action against the receiver of an institution to determine the liability of the makers on certain subscription notes to creditors, which were given on certain conditions, the fact that payments were made by such makers before the conditions on which they were given were complied with is not a waiver of such conditions, since such makers had the right to assume that the money paid by them would be used for the purpose for which they had agreed to pay it.

Reeves Catt, trustee of the Wesleyan Female Institute, to determine their liability on certain notes. From a decree for plaintiffs, defendant appeals. Affirmed.

A. C. Braxton, for appellant. Ranson & Ranson, for appellees.

BUCHANAN, J. The controversy in this appeal is whether W. L. Olivier and 25 other parties who filed their petition in this cause are liable to the creditors of the Wesleyan Female Institute, an insolvent corporation, on certain notes made by them, and now in the hands of Reeves Catt, the receiver of the court in this case. This question was referred to one of the commissioners of the court for investigation. He reported the facts and circumstances under which the notes were made, and reached the conclusion that the makers of the notes were not liable thereon. The court confirmed his report, and from that decree this appeal was allowed.

It appears from the commissioner's report, which, in all material matters, is, we think, sustained by the evidence, that in the year 1893 the friends of the institute, finding that it was financially embarrassed, set about to devise means to meet its indebtedness and to continue the school as a going concern; that the head of the movement was one W. W. Smith, an active worker in the Methodist Episcopal Church South; that he and parties interested held a public meeting at the Young Men's Christian Association Building in Staunton for the purpose of adopting some means to accomplish that end; that the plan proposed and adopted was that subscriptions to the amount of $25,000 should be secured, of which sum $10,000 was to be raised in and about Staunton by the friends of the institute, while the remaining sum of $15,000 was to be secured by the friends of the school at large; that this fund was to be kept as a separate one, and, when secured, was to be used to pay off the bonded indebtedness of the school, after which any surplus that might remain was to be used for its general benefit; that it was further understood that none of the subscription secured was to be binding unless the entire sum of $25,000 was secured, and that this sum, when secured, was to be turned over to the institute for the purpose named, and none other; that when this was done it was to give such subscribers a deed of trust on its real estate, by which it was to bind itself to return to them, without interest, the amount of their several subscriptions in the event it should cease to be conducted as a conference school in Staunton; that the next step taken was at a meeting of some of the subscribers to the fund held at the Virginia Hotel, in Staunton, at which it was agreed that J. A. Fauver should act as trustee to hold the fund for the purpose named, and that he and one

)rge S. Lightner should reduce to writing conditions above stated, upon which subptions had been or were to be received; t this writing was never prepared; that :e was no subscription paper, and that promises to pay were embodied in the :s given by the subscribers, which were executed after the last-named meeting; : the subscription notes were obtained by :rent solicitors (just who those solicitors e is not shown, but many of them were :n by W. W. Robertson, president of the)ol, but not a member of the board of tees of the corporation); that some time r the notes were made "J. A. Fauver, surer," to whom they were all payable, e the following indorsement upon each of n, "J. A. Fauver, Treasurer of the Board rustees of the Wesleyan Female Institute, inton, Va.," and left them with Mr. Rob)n, at whose instance the indorsements : made, and in whose possession the notes ı to have been from the time they were uted until the corporation made an asment of all its property to Reeves Catt, :ee.

further appears that Robertson, presi- of the institution, Fauver, the payee in notes, Catt, trustee, now receiver, and : if not all of the members of the board :ustees of the institute, knew the pur- ; for and the conditions upon which the ı were made.

further appears that none of the condi- upon which the notes were given were n be performed by the institute.

e of the grounds upon which the cred- of the institute insist that the makers ıe notes are liable thereon is that the formed a large and material part of the s of the corporation, and were used by it, the full knowledge and consent of the rs of the notes, as a basis of credit, and as they (the creditors) relied largely upe notes as a valid asset of the corpora- in extending such credit, it would be itable and illegal not to hold the mak- f the notes liable.

ıatever merit there might be in this ntion if true, it is unnecessary to consid- ; the evidence does not show that the ors (the appellants here) relied upon notes in extending credit to the cor- ion, or even knew of their existence un- :er their debts were created, and the as- .ent made to Catt, trustee.

s insisted that the notes, being plain, ditional, and unambiguous promises to ıoney, cannot be varied, altered, or con- ted by any verbal evidence of a prior or nporaneous agreement between the ·s of the notes and the corporation.

rule of law is better settled or of great- portance than that a written contract : be contradicted or varied by evidence oral agreement between the parties before or at the time of such contract.)ject of the evidence introduced in this as not, however, for the purpose of contradicting or varying the writings in question, but to show that the conditions upon which they were to become operative never occurred. That this may be done, within certain limitations, by oral evidence, is also well settled.

"In such cases," as was said by this court in Nash v. Fugate, 32 Grat. 595, 609, "the oral evidence tends to prove independent facts, which, if established, avoid the effect of the written agreement by facts dehors the instrument, but do not tend to contradict or vary it. * * *

"And in Woodward v. Foster, 18 Grat. 200, 207, Judge Joynes, in discussing the same subject, says: 'So it has been held that, between the immediate parties, evidence may be given of a contemporaneous agreement consistent with the written contract,—as, for example, that the bill was indorsed and handed over for a particular purpose, as for collection, without giving the trustee the usual rights of an indorsee (Manley v. Boycot, 75 Eng. Com. Law, 45), or that the bill was transferred as an escrow, or upon an express condition which has not been complied with.'"

In Ward v. Churn, 18 Grat. 801, 813, it was said that: "When the instrument is delivered directly to the obligee, the delivery cannot be regarded as conditional, in respect to the party who makes it, unless the condition is made known to the obligee. * * * If the delivery is upon a condition made known to the obligee, his assent to it will be presumed from the acceptance of the instrument, and he will not be allowed to repudiate the condition thus asserted, and treat the delivery as absolute and unconditional." See, also, Solenberger v. Gilbert's Adm'r, 86 Va. 778, 11 S. E. 789; Humphreys v. Railroad Co., 88 Va. 431, 13 S. E. 985.

The supreme court of the United States held in the case of Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698, that, in an action by the payee of a negotiable note against the maker, evidence was admissible to show by parol an agreement between the parties, made at the time of making the note, that it should not become operative as a note until the maker could examine the property for which it was to be given, and determine whether he would purchase it.

The controversy in this case is really between the same parties, for the receiver and the creditors in the case took no other or greater interest in the notes than the institute had. The evidence was not only admissible to show, but it does show, we think, that the notes were made upon conditions which were never complied with, some of which, at least, if not all, were known to and recognized by the corporation.

It is also contended that the record does not show, except as to a very small number of the makers of the subscription notes, that they knew of or made their subscriptions upon the conditions named. While only three of the subscribers to the fund for which the

ditions which have never been, and cannot be, complied with. The notes given, except in two instances, are of the same date, most of them payable at the same time, alike in all other respects, except as to amounts and makers, and they were kept together and treated by all parties as belonging to the same fund. The record, we think, satisfactorily shows that the notes were given for the purposes and upon the conditions outlined when the plan for raising the money was proposed and adopted.

Neither were those conditions waived, as is contended, by the subsequent conduct of the makers in making payment on their notes before the conditions were complied with. They had the right to expect that the conditions would be complied with, and that the money paid by them would not be used for any other purpose than that for which they agreed to pay it. That this was their expectation is shown by the fact that when Robertson, the president of the institute, used the money collected by him on the notes to pay the running expenses of the school, the attention of the executive committee of the board of trustees was called to it, when they, recognizing that the money could not be used for any such purpose, directed that the note of the corporation for the amount so used be executed payable to Fauver, the same person to whom the notes were payable upon which collections had been made and misappropriated by Robertson. There is not sufficient evidence in the case to justify the court in holding that the makers of the notes had waived the conditions upon which their notes were made, after full knowledge that the conditions upon which they were made had not been and could not be complied with.

Without discussing further the objections urged to the decree complained of, we are of opinion that, upon the whole case, the makers of the notes, who are parties to this suit, are not liable thereon, and that the hustings court did not err in so decreeing and directing their notes to be canceled and surrendered to them.

HARRISON et al. v. WISSLER.

(Supreme Court of Appeals of Virginia. Sept. 27, 1900.)

VENUE—ACTION BY CIRCUIT JUDGE—STATUTORY PROVISIONS—CONSTRUCTION.

Under Code, § 3214, subd. 7, providing that, where a circuit court judge is interested in a case, which, but for such interest, would be proper for the jurisdiction of his court, the action may be brought in any county in an adjoining circuit, a circuit court judge can bring an action in the circuit court of any county in his circuit in which the defendants reside.

Appeal from circuit court, Clarke county.

M. McCormick and Conrad Kownslar, for appellants. R. T. Barton, for appellee.

BUCHANAN, J. This action was instituted against the defendant in error in the circuit court of Shenandoah county, where he resided, by the plaintiffs in error, one of whom was then, and still is, the judge of that court. A plea to the jurisdiction of the court was filed, and the cause removed by an order in vacation to the circuit court of Clarke county, where two other pleas to the jurisdiction of that court were filed. Upon the hearing the pleas were sustained, and the action dismissed.

The question involved in this writ of error to that judgment is whether a judge of a circuit court can bring an action or suit in the circuit court of any county or corporation in his circuit in which the defendant resides, or can only bring such action or suit in some county or corporation in an adjoining circuit.

The provisions of law, so far as they affect this question, are found in sections 3214 and 3215 of the Code. The former section was amended and re-enacted by acts approved February 14 and March 3, 1900 (Acts 1899–1900, cc. 329, 736), but the amendments made do not affect the question involved in this case.

Section 3214, so far as applicable to this case, provides that: "Any action at law or suit in equity, except where it is otherwise specially provided, may be brought in any county or corporation: First, wherein any of the defendants reside; * * * seventh. If a judge of a circuit court be interested in a case, which but for such interest, would be proper for the jurisdiction of his court, the action or suit may be brought in any county or corporation in an adjoining circuit."

By section 3215 of the Code "an action may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein," subject to the limitations prescribed by section 3220 of the Code.

Under the provisions of these sections the judge of a circuit court may sue the defendant in the county or corporation in which the latter resides, or in which the cause of action, or any part thereof, arose, or in any county or corporation in an adjoining circuit, unless the word "may," in the seventh clause of section 3214, be construed as imperative, and not permissive, as if it were written "shall" or "may only," as is contended by the counsel of the defendant in error, and as was held by the trial court.

The object of all interpretation and construction is to ascertain the legislative intent, and in order to do this the general rule is that words must receive their ordinary meaning, unless it can be seen that the legislature intended that they should have

Ron's Lessee, 22 How. 422, 434, 16 L. Ed. 391, Mr. Justice Greer, in discussing the question when the word "may" should be construed "must," said: "It is only where it is necessary to give effect to the clear policy and intention of the legislature that such a liberty can be taken with the plain words of a statute." And in Minor v. Bank, 1 Pet. 46, 64, 7 L. Ed. 55, Mr. Justice Story, in considering the same subject, said: "Without question, such a construction is proper in all cases where the legislature meant to impose a positive and absolute duty and not merely give a discretionary power. But no general rule can be laid down upon the subject, further than that that exposition ought to be adopted in this, as in other, cases which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language must be presumed to be intended unless it would manifestly defeat the object of the provision." Suth. St. Const. §§ 460–462; Sedg. St. & Const. Law, pp. 375–377.

In determining what is the proper construction of the clause under consideration, we may, I think, be aided by a reference to previous legislation on that subject.

We have not access here to the statute law of the state prior to the Code of 1819. Under the provisions of that Code an action or suit might be instituted in the court where the defendant resided, or where the cause of action arose (chapter 128, § 41), and, if either of the judges of the general court was interested in any suit which, in the case of any other person would have been proper for the jurisdiction of such judge, it was provided that "it shall be lawful to institute such suit in any court within an adjacent circuit" (chapter 69, § 53; 1 Rob. Prac. [Old] 19, 20). When the revision of our laws was made in 1849, the several statutes providing where actions or suits should be commenced were gathered together, and placed in chapter 169 of the Code of 1849.

In the fifth clause of section 1 of that chapter, which is identical with the seventh clause of section 3214 of the Code of 1887, the revisers, instead of using the words "it shall be lawful," as in section 53 of chapter 69 of the Code of 1819, substituted the word "may." It would hardly be contended that the words "it shall be lawful" in that section were imperative, and meant "must," or "shall," or "may only." Those words, in a statute like that, of themselves merely make that legal and possible which there would otherwise be no authority or right to do. The presumption is that in substituting the word "may" for the term "it shall be lawful" it was only intended to shorten the statute by using a word which, in its ordinary signification, had the same meaning as the term for which it was substituted.

The rule of construction when there has been a revision is that the old law was not [illegible] lative mind," as was said by Judge Moncure in Parramore v. Taylor, 11 Grat. 220, 242, in speaking of the revision of 1849, "was fixed on the then existing law as the text, to be altered only as occasion might seem to require. Great alteration was made in words and phraseology, while comparatively little was made in substance." And in the case of The Wenonah v. Bragdon, 21 Grat. 685, 695, the same learned judge in considering the meaning of a section found in the Codes of 1803, 1814, 1819, 1849, and 1860, said: "The established rule of construction of the latter Codes, or rather of the Code of 1849, is that an intention not to change the law will be presumed unless a contrary intention plainly appear."

There is nothing in the provisions of the Code of 1849 or of the Code of 1887 on the subject which shows any intention to alter the law, nor did any reason exist, so far as we can see, when these revisions were made, why a judge of a circuit court should not be allowed to sue or be sued in any county or corporation in his circuit which did not equally exist when the provisions of the Code of 1819 were enacted. In addition, the report of the revisers, who were among the most learned lawyers of the commonwealth, shows that in substituting the word "may" for the term "it shall be lawful" they did not intend to make any change in the law. The third section of chapter 169 as reported by them provided that "any action or suit mentioned in the two preceding sections [which were the same, so far as they affect this case, as sections 3214 and 3215 of the Code of 1887] may be in a circuit, county, or corporation court of any county or corporation wherein it is allowed thereby to be brought, except that an action or suit against a judge of a circuit court shall not be in a county or corporation court unless it be brought under some other clause of the first section than the fifth."

If it was intended that a circuit judge could not sue or be sued (in such a case as is contemplated by the fifth clause of section 1 of chapter 169 of the Code of 1849) under the first clause of that section, or under the second section of that chapter, but only under the fifth clause of section 1, why make any such provision as is contained in the latter part of section 3?

There is nothing, as it seems to us, in the clause under consideration, or in its context, or in the revisions which our laws have undergone, to show that it was the intention of the lawmaking power to use the word "may" in the clause in question in the sense of "may only."

If the construction insisted upon had no other effect than to prevent a judge from suing and being sued in his own court, and thereby did away with the necessity of removing the cause to some court of which he was not the judge or of having some other

sult that would follow. Such a construction would take away the jurisdiction of courts other than his own, which, but for such construction, would have jurisdiction of the case. It would prevent a circuit judge in such a case from suing or being sued in any corporation or other court in any county or corporation in his circuit which might otherwise have jurisdiction of the case. If, in the case under consideration, the debt or demand asserted had been against two persons, one of whom resided in Shenandoah county and the other in the city of Richmond, upon a cause of action which arose in the city of Lynchburg, or if the judge, with another who resided in Richmond, was liable upon a cause of action which arose in Lynchburg, no action or suit could be brought in any court in the judge's circuit, nor in the city of Richmond, nor in the city of Lynchburg, but could only be brought in some court in a circuit adjoining the Twelfth circuit.

What reason is there in the cases supposed why the actions or suits should not be brought in some court in Richmond or Lynchburg? Yet if the word "may" must be construed as "may only," actions or suits could only be brought in an adjoining circuit.

We are of opinion that the circuit court of Shenandoah county had jurisdiction of the case, and that the demurrer to the plea ought to have been sustained. We are further of opinion that the demurrers to the pleas to the jurisdiction of the circuit court for Clarke county, to which the case had been removed, should also have been sustained. Section 3216, Code.

The judgment complained of must be reversed, and the cause remanded for further proceedings.

TATE v. JONES et al.

(Supreme Court of Appeals of Virginia. Sept. 13, 1900.)

EXECUTORS AND ADMINISTRATORS—SETTLEMENT OF ACCOUNTS—LEGACIES—PAYMENT—PRESUMPTION—EQUITY—LACHES.

1. An administrator had a settlement with the residuary legatees, and received receipts from them in full of their interests in the estate. He afterwards collected money on judgments in his favor as administrator. After the execution of such receipts, and until the administrator's death, a period of some 17 years, all parties in interest treated the accounts as settled; and after the administrator's death no claim was made against his estate, except by complainant, an assignee of one of such legatees, who sued the administrator's estate for a settlement of his accounts. *Held*, that it must be presumed that the money collected on the judgment was embraced in the receipts.

2. In a suit by an assignee of a residuary legatee against the administrator's estate for a settlement of his accounts, it appeared that in 1874 complainant became assignee of the claim; that he never notified the administrator of its assignment, nor made a demand for its payment; that in 1875 the administrator paid the legatee a small sum, and received his receipt in full; that suit was not brought until 1895. Complainant gave no explanation for his long delay in asserting his claim. *Held*, that complainant's right of action was barred by laches.

Appeal from circuit court, Smyth county.

Bill by one Jones and others against one Tate, administrator, for a settlement of accounts. From a decree in favor of complainants, defendant appeals. Reversed.

James H. Gilmore and White & Buchanan, for appellant. A. L. Robinson and C. B. Thomas, for appellees.

BUCHANAN, J. John McCready died in the year 1862 testate. His son William J. McCready, one of the executors named in the will, qualified as such in November of that year. In the year 1871 he refused to give additional security, and his powers as executor were revoked. M. B. Tate was appointed administrator of the unadministered estate, with the will annexed. Neither the executor nor the administrator de bonis non returned an inventory of the assets which came to their possession or knowledge; nor did either of them lay before the commissioner of accounts a statement of his receipts for any year, or cause a settlement of his accounts to be made, as required by chapter 121 of the Code. The executor died in the year 1877, and the administrator de bonis non in the year 1892. This suit was instituted in the year 1895 by the assignee of one of the residuary legatees, for a settlement of the accounts of the administrator. The defense relied on is the long and unexplained delay of the complainant in asserting his claim, which was acquired by assignment from Thomas F. McCready, one of the residuary legatees, in the year 1874.

Neither in the complainant's bill nor in his proof is there any explanation furnished of his great delay in bringing suit. While it is true that the administrator returned no inventory and made no settlement of his accounts before the commissioner of accounts, it seems that he had some kind of a settlement or accounting with the residuary legatees in the year 1874 or 1875. In August, 1873, William J. McCready, the late executor, assigned all his interest in the personal estate of the testator, which had or would come to the hands of the administrator de bonis non for administration, to M. McCormick; and on the 4th of September, 1874, McCormick executed a receipt to the administrator in full settlement of that interest in the testator's estate.

On the 29th day of August, 1874, W. R. McCready, one of the residuary legatees, gave the administrator a receipt in full of the interest which he took under the will; and on the 2d day of September following he executed as assignee of his brother John L. McCready, another residuary legatee, a receipt to the administrator in full settlement of that interest.

claims, executed a receipt to the administrator in full of his interest in the estate. The genuineness of this receipt is disputed by the complainant.

Subsequent to the date of those receipts the administrator collected more than $300 on judgments rendered in his favor as administrator before the receipts were given. The receipts being in full of all the interests which the parties giving them had in the testator's estate, the presumption is that the amounts due on those judgments were embraced in the settlement or calculation made when the receipts were given. That presumption, however, is only prima facie, and in a case like this would be more easily rebutted than where the party taking the receipt did not occupy a fiduciary relation.

There is nothing, however, in this case tending to rebut that presumption. After the execution of those receipts, and until the administrator's death,—a period of 17 or 18 years,—all the parties in interest seem to have treated the accounts of the administrator as settled, so far as their interests were concerned. After the administrator's death, and until the institution of this suit, no claim was made against his estate on that account by any of the parties except the complainant; and during the progress of the cause none of the parties in whose favor the decree was rendered appeared, so far as the record shows, and claimed that anything was due them, or that the receipts in full did not include all their interests in the testator's personal estate.

In December, 1892, within a few months after the administrator's death, the complainant asserted his claim, and in the year 1895, as before stated, instituted this suit.

Although the complainant became the assignee of the claim now asserted in the year 1874, it does not appear that he ever notified the administrator of its assignment to him, or made any demand upon him, or sought a settlement of his accounts as administrator. In August, 1875, nearly a year after the complainant became the assignee of Thomas F. McCready's legacy, the administrator paid McCready a small sum, and took his receipt in full for his interest in the estate.

In the year 1891 the administrator and the complainant had a settlement, in which a judgment in favor of Tate, as administrator of the testator's estate, against the complainant, and the private dealings between them, were settled, yet it clearly appears that at that time no mention was made of the claim now asserted.

As before stated, the complainant neither in his pleadings nor his proof gives any explanation for his long delay in asserting his claim.

In the case of Covington v. Griffin's Adm'r, 98 Va. —, 34 S. E. 974, 975, this court, in discussing the question of laches, held, upon

It cannot be said that there has been reasonable diligence in this case. The complainant delayed asserting his claim (notwithstanding the receipts in full had been given to the administrator 20 years before, of which he must have had notice) until the original transactions out of which it arose had become obscure by time, parties had died, and evidence had probably been lost, so that it would be impossible now, with any degree of certainty, to do justice between the parties.

The decree appealed from must therefore be reversed, and the complainant's bill dismissed.

RIELY, J., absent.

GARDNER v. GARDNER.

GARDNER et al. v. SAME.

(Supreme Court of Appeals of Virginia. Sept. 13, 1900.)

DOWER—DEED—CANCELLATION.

1. A widow is entitled to dower in lands of which her husband was seised during the marriage, unless the lands were bought and paid for by another, and conveyed to him by inadvertence.

2. Evidence raising only a strong suspicion that a deed from a son to his father was obtained by the grantee's fraud and undue influence is insufficient to entitle the grantor's heirs to a decree setting it aside.

Appeals from circuit court, Washington county.

Actions by Jennie M. Gardner against John W. Gardner, and by Bessie Gardner and another against same defendant. From a decree dismissing both causes, plaintiffs appeal. Reversed as to the first case, and affirmed as to the second.

J. J. Stuart, L. P. Summers, and White & Penn, for appellants. D. Trigg and D. F. Bailey, for appellee.

CARDWELL, J. This is an appeal from two decrees of the circuit court of Washington county entered in the above-styled causes, heard together; the one on July 12, 1897, refusing to assign dower to the appellant in the first-named cause in the lands in controversy, and the other on October 2, 1897, denying the prayer of appellants in the second-named cause that a certain deed made by their father, John Gardner, conveying the lands to the appellee, John W. Gardner, be declared null and void,—and dismissing both causes.

The facts out of which the suits arise are as follows: By four several deeds of conveyance made in the years 1882, 1884, and 1885, John Gardner, son of appellee, John W. Gardner, acquired title of record to certain undivided interests in the lands in controversy, lying in Washington county, and known as the "Fullen Lands." In 1889 John Gard-

the following deed:

"This deed, made this March 24th, 1891, between John Gardner, of the first part, and John W. Gardner, of the second part, all of the county of Washington and state of Virginia:

"Witnesseth, that for and in consideration of one hundred dollars in hand paid, the receipt of which is hereby acknowledged, John Gardner, party of the first part, has this day bargained, sold, and does hereby convey to the said John W. Gardner, of the second part, all of my interest in the Hiram Fullen and Minnick land, or Peggy Fullen and Hiram Fullen land, lying on both sides of Poor Valley road, adjoining the lands of Hamilton and others; John W. Gardner having bought and paid for the above-named lands, and the deeds was made to John Gardner, when they should have been made to John W. Gardner, and as the said John Gardner cannot pay him, the said John W. Gardner, for the land, has taken the above one hundred dollars, and conveys his interest in said lands; and John Gardner, party of the first part, warrants generally the title of the lands hereby conveyed.

"Witnesseth the following signatures and seals.

"John W. Gardner. [Seal.]"

Shortly after making this deed, John Gardner instituted his suit in equity against John W. Gardner in the circuit court of Washington county to have the deed set aside and annulled on the ground that it was obtained from him by fraud, and when he was in such a state of intoxication that he was without knowledge of what he was doing; but there were no further proceedings in the cause,—John Gardner having on the 1st day of September, 1891, died intestate, leaving surviving him his said wife and their two infant children, the said Bessie and Sister Gardner.

In April, 1894, appellant Jennie M. Gardner instituted her suit in the circuit court of Washington county against appellee, John W. Gardner, seeking to have dower assigned to her in the lands conveyed to him by the deed above set out; and at the same time, and in the same court, Bessie and Sister Gardner, by their mother, Jennie M. Gardner, as their next friend, instituted their suit against appellee, John W. Gardner, to have the said deed set aside on the ground that it was obtained from their father by fraud and undue influence.

The appellee, John W. Gardner, set up as a defense to these suits that the lands in question were bought and paid for by him and conveyed to him, but by inadvertence or otherwise the middle letter of his name, "W.," was omitted, and that John Gardner, his son, recognizing this fact, in order to correct the mistake, conveyed the lands to him by the deed of March 24, 1891.

Upon oral testimony taken before a commissioner the circuit court made the decrees appealed from.

It is unnecessary for us to determine whether this oral testimony was admissible to alter the documentary evidence showing that John Gardner had such seisin in the lands in controversy after his marriage with appellant Jennie M. Gardner as to entitle her to dower therein; for, if it were conceded that it was admissible, it is by no means sufficient to sustain appellee's contention that the lands in question were in fact conveyed to him, and the confusion as to title thereto caused by the middle letter of his name being inadvertently or otherwise omitted from each of the four deeds above mentioned. One or more of the deeds to John Gardner describe the land conveyed as adjoining the lands of John W. Gardner; the latter having acquired other interests in the Fullen lands, and owning other lands adjoining. It is true that "title bonds" for two of the interests in the land were taken by John W. Gardner to himself, and it may be that he paid a part of the purchase money, but he knew that his son, John Gardner, claimed and exercised ownership over the lands. He said on several occasions during the period in which John Gardner acquired the deeds to the lands that he was helping the latter (his son) to buy the lands. He united with John Gardner in employing counsel to file a bill in the circuit court of Washington county against other parties owning the remaining interests in the Fullen lands to have partition of the lands, and in which bill it was averred that John Gardner's interest in the lands was acquired by the four deeds above referred to, and his (John W. Gardner's) interest therein acquired by deed from certain other grantors than those to the deeds to John Gardner. On the 25th day of July, 1887, appellee united with John Gardner in a deed of trust conveying their interests in the Fullen lands and other lands of appellee, upon which he resided, to indemnify and save harmless an indorser of a note made by John Gardner to appellee's order, and by him indorsed. Under these circumstances, it is inconceivable that in each of the four deeds conveying an interest in the Fullen lands to John Gardner the mistake was made that appellee contends for; and it is incredible that such a mistake could have been made, and appellee not have discovered it and demanded a correction till March, 1891, when he procured the deed from John Gardner of March 24, 1891. Appellant Jennie M. Gardner not having united with her husband in that deed, she is clearly entitled to dower in the lands thereby conveyed. Therefore the decree of July 12, 1897, is erroneous. Sections 2267 and 2502 of the Code.

While the evidence in the cause is sufficient to raise a strong suspicion that the

these causes, it is, in our opinion, insufficient to sustain the allegation, and therefore the decree of October 2, 1897, in so far as it dismissed that bill, must be affirmed, but reversed and annulled in so far as it dismissed the bill in the first-named cause; and the decree of July 12, 1897, entered in the first-named cause, will also be reversed and annulled, with costs to appellant Jennie M. Gardner, and that cause remanded to be further proceeded with in accordance with this opinion.

RIELY, J., absent.

ROLLER'S ADM'R v. PITMAN'S ADM'R.

(Supreme Court of Appeals of Virginia. Sept. 27, 1900.)

TRUST DEED—SALE—COMMISSIONS—ESTOPPEL—RES ADJUDICATA.

1. The trustees under a deed of trust were appointed special commissioners to sell the incumbered property, and included a charge for commissions in their report. The report was confirmed by the court without objection, and was afterwards confirmed in the supreme court. The beneficiary afterwards deducted such commissions from the property in computing a dower interest in the property which was due another. *Held* to estop the beneficiary from insisting that the allowance was too large.

2. The trustees under a deed of trust were appointed by the court as special commissioners to sell the incumbered property, and they included a charge for commissions in their report. The report was confirmed by the court without objection by the beneficiary. *Held* an adjudication on the amount of the commission allowed which would preclude the beneficiary from subsequently objecting thereto.

Appeal from circuit court, Rockingham county.

Suit by Roller's administrator against Pitman's administrator. From an order requiring commissioners to account for certain moneys charged by them as commissions for the sale of land, the commissioners appeal. Reversed.

J., J. L. & R. Bumgardner, for appellants. Sipe & Harris, for appellee.

HARRISON, J. The suit out of which this controversy grows was brought to subject the land of Charles A. R. Moore to the satisfaction of the liens thereon. A number of liens were audited, but it is only necessary to mention that the first in order of priority was a deed of trust debt in favor of Samuel Shacklett, which provided for 5 per cent. commissions to the trustee in the event of a sale; the second, an annuity charge in favor of Mrs. E. G. Moore; and the third, a deed of trust debt in favor of John L. Pitman.

On April 14, 1887, the trustees named in the deeds of trust, constituting the first and third liens, were appointed special commissioners of the court to sell the real estate in trustees, from which it appears that the land was sold to John L. Pitman at the price of $18,323.21. This sum was credited by the trustees in their report with an itemized statement of the costs of suit and sale, including therein a commission on the gross sale of 5 per cent., showing a balance in hand of $17,282.66, which was not sufficient to pay in full the third lien in favor of John L. Pitman. On April 19, 1889, this sale was, without objection, duly confirmed, and W. W. Roller, trustee in the Shacklett deed of trust, appointed special receiver to collect the proceeds of sale and disburse the same in accordance with the report of liens confirmed April 14, 1887.

From this decree of April 19, 1889, which, in addition to confirming the sale, finally disposed of a controversy as to the priority of the Pitman deed of trust, an appeal was taken to this court by one of the subsequent lienors of Moore, attacking the priority given the Pitman deed of trust upon the ground that it was not properly acknowledged for recordation. The result of this appeal was an affirmance of the decree of April 19, 1889. See Corey v. Moore, 86 Va. 721, 11 S. E. 114. After the case went back from this court an order was made directing W. W. Roller, as trustee and special receiver, to settle his accounts. This settlement was promptly made by a master commissioner, whose report shows that the entire proceeds of sale had been properly applied, and the special receiver's disbursements supported by proper vouchers. Among the credits allowed in stating this account is the following: "Commissions stated in the report of sale, $916.16." The allowance of this item was excepted to by John L. Pitman upon the ground that the commissions were excessive; the contention being that W. W. Roller and L. Triplett, Jr., were not acting in their capacity as trustees in making the sale in question, but as special receivers of the court, and were therefore only entitled to the commissions allowed by statute. The circuit court subsequently sustained this view, and by decree of January 11, 1897, ordered that W. W. Roller, special receiver in the cause, pay to the administrators of John L. Pitman $765.54, with interest on $577.77 from April 1, 1896, and the costs attending the controversy; that being the amount of commissions reserved by the trustees in excess of the statutory allowance. W. W. Roller having died, his administrator was made a party defendant, and in October, 1897, asked leave to file a bill to review the decree of January 11, 1897, which motion was overruled by decree of November 1, 1897.

From both these decrees (namely, that of January 11, 1897, and that of November 1, 1897) this appeal was allowed.

In the view we take of this case, it is unnecessary to consider whether or not the trustees or special commissioners were, as

sale made by them. They acted upon the view that they were entitled to such commissions. When the sale was made they collected as the cash payment $1,040.55,—a sum exactly sufficient to pay the costs of suit and sale, including the commission of 5 per cent.; and in making their report of sale to the court, which they do as trustees, they return therewith an itemized statement of their disbursement of the cash payment, one item of which is, "Coms. on $18,323.21, 5 per cent., $916.16." John L. Pitman, who alone was affected by the sum retained for commissions, was a party to this suit; he was the purchaser of the land sold; he made the cash payment by check to cover the costs of suit and sale, which included the 5 per cent. commissions; he allowed the sale to be confirmed to himself upon the basis of the report of sale as made, without one word of objection to the commissions allowed by the report; and in this court, as appellee in the case of Corey v. Moore, supra, he had the decree confirming the report of sale affirmed, without a suggestion that there was any error in respect to the rate of commissions reserved by the trustees.

After the case went back to the circuit court, Mrs. E. G. Moore filed her petition therein, claiming a right to contingent dower in the land sold, and asking that the same be commuted and paid to her in money. To this petition John L. Pitman filed an answer denying the contingent dower right, but saying that inasmuch as he had been greatly harassed in securing his debt, and was very desirous of finally and forever putting an end to the protracted litigation, he would make no objection to the decree in favor of the petitioner. He then proceeds to show what proportion of the proceeds of sale is subject to the contingent dower right, by deducting the items paramount thereto; and among other deductions he includes this item, "The cost of sale and suit, $1,040.55," thus again recognizing and acquiescing in the 5 per cent. commissions retained by the trustees. Apart, however, from the acquiescence of John L. Pitman in the charge of 5 per cent. commissions made by the trustees at the time of the sale, which abundantly appears from the record, we are of opinion that the question is res adjudicata, and cannot be reopened. Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation, in respect of matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

The plea of res adjudicata applies, except parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Henderson v. Henderson, 3 Hare, 115; Diamond State Iron Co. v. Alex. K. Rarig Co., 93 Va. 595, 25 S. E. 894. The question presented in the case at bar could have been raised by an exception to the report of sale in which the commissions were credited to the trustees, and, in justice to all parties, this should have been done. Having permitted the report of sale to be confirmed, and the decree confirming the same to be affirmed by this court, without raising any question as to the propriety of the commissions charged, the rights of the trustees in respect to such commissions must be regarded as finally settled and beyond the reach of judicial inquiry.

For these reasons the decree complained of must be reversed and set aside, and this court will enter such decree as the circuit court ought to have rendered.

CARDWELL, J., absent.

DEATON GROCERY CO. v. PEPPER.

(Supreme Court of Appeals of Virginia. Sept. 27, 1900.)

JUDGMENTS—PAYMENT—NOVATION—SUFFICIENCY OF EVIDENCE.

1. Where a deed of trust is given to a creditor as collateral for a debt, and the property is afterwards purchased by the creditor at a sale under the trust deed, but is subsequently taken from him under a vendor's lien existing against the property when the trust deed was made, the debtor is not entitled to credit on the judgment for the price which the creditor agreed to pay for such property.

2. Evidence that, when a trust deed was given by the son of a judgment debtor to the creditor, the parties knew that there had been a vendor's lien on the property, but that the debtor insisted that it had been extinguished, is admissible, but not conclusive, to determine whether the transfer was for security or was a novation.

3. A son executed a trust deed to certain property to the judgment creditor of the father. In the transaction, in which all were present, the creditor and his attorney testified that it was expressly agreed that the deed was given as security, and not in settlement of the judgment. The attorney testified that the debtor afterwards admitted his liability on the judgment, and an employé of the creditor testified that the debtor stated that the only defense he had against the judgment was that he was not served with notice. These facts were denied by the debtor, but his statements were inconsistent. The son testified that he did not hear all the conversation at the time of the execution of the deed, but that it was given to release his father, but on cross-examination he admitted that the creditor was to have the first lien on the property. One witness testified that he heard the creditor say that the deed released the debtor. *Held* not sufficient to establish a novation.

against J. E. Pepper. Petition by plaintiff to enforce its judgment against defendant. From the decree, plaintiff appeals. Modified.

Henry & Graham and J. Hampton Hoge, for appellant. Phlegar & Johnson, for appellee.

CARDWELL, J. The Deaton Grocery Company, assignee of Jones & Deaton, held a judgment against A. J. Deyerle & Sons and J. E. Pepper for $810.61, with interest and costs, obtained in the hustings court of the city of Roanoke at its March term, 1893. A. J. Deyerle & Sons were at the time, or soon thereafter became, insolvent, leaving J. E. Pepper as the only solvent judgment debtor from whom the judgment could be made. The Deaton Grocery Company, not desiring to press Pepper, in their negotiations relative to the judgment took a deed of trust from F. P. Pepper, a son of J. E. Pepper, to B. Lacy Hoge, trustee, dated October 20, 1893, and conveying, with covenants of general warranty, a house and lot in the town of Elliston, to secure a note of F. P. Pepper of even date with the deed, drawn to the order of the Deaton Grocery Company, payable one year from its date, for the sum of $1,028.79, the aggregate of the said judgment, including interest, costs, and attorney's commissions for its collection. Default having been made in the payment of the note secured, the trustee sold the house and lot at public auction on the 1st day of December, 1894, and the property was purchased by the Deaton Grocery Company at the price of $750, and on or about that date the trustee conveyed the property to the purchaser.

A short time after this sale Mrs. A. D. Campbell brought her suit in equity in Montgomery county circuit court to enforce a vendor's lien held by her on lands in the town of Elliston that she had previously sold to the Elliston Development Company,—the lot in question being a part of the land to which this vendor's lien attached, and the Elliston Development Company having sold it to R. M. Deyerle, a member of the firm of A. J. Deyerle & Sons; but at Deyerle's request, he being financially embarrassed, it was conveyed to F. P. Pepper.

The Deaton Grocery Company, relying upon the representations made to its representative and to its attorney by R. M. Deyerle and J. E. Pepper when the deed of October 20, 1893, was executed, to the effect that Mrs. Campbell had agreed with R. M. Deyerle that, if he would build a drug store upon the lot in question, she would release her vendor's lien thereon, and that the agreement had been complied with on the part of R. M. Deyerle, thereby entitling him and F. P. Pepper to the release of the house and lot from the vendor's lien, appeared in that suit Campbell, and the house and lot entirely lost to the Deaton Grocery Company.

At the November term, 1897, of the circuit court of Montgomery county, appellant filed its petition in the suit of the New York Enamel & Paint Company against A. J. Deyerle & Sons et al., pending in said court, seeking to enforce its original judgment against A. J. Deyerle & Sons and J. E. Pepper; the latter being solvent, and owning lands upon which the judgment became a lien at its rendition. J. E. Pepper resisted the enforcement of the judgment upon two grounds: One, that he had not been summoned in the action at law in which the judgment was obtained; the other, that there had been a substitution of securities. In other words, that by the giving of the deed of trust of October 20, 1894, by his son F. P. Pepper, there was a novation of the judgment, and he (J. E. Pepper) had been released from it.

It was conceded finally that there was no merit in the first contention; and as to the second the circuit court, upon the evidence pro and con, held that the execution of the deed of trust by F. P. Pepper was not a novation of the judgment, but was intended as additional or collateral security for its payment, but further held by its decree then made that the judgment should be credited with the net amount of the proceeds of the sale of the property conveyed in the deed of trust made by the trustee, and bid in by the Deaton Grocery Company.

From so much of this decree as requires that the judgment of the Deaton Company shall be credited with the net proceeds of the sale of the house and lot by Hoge, trustee, it obtained an appeal to this court; and appellee, J. E. Pepper, assigns as cross error that part of the decree which decides that the deed of trust was not a novation of the judgment.

The grounds upon which the circuit court bases that part of its decree complained of by appellant are: First, that at the time of the execution of the deed of trust it was known to all parties, including appellant and its counsel, that there was a vendor's lien on the property conveyed in the deed of trust in favor of Mrs. A. D. Campbell, and that the trustee did sell the property, subject to the vendor's lien, and it was purchased by appellant at the price of $750; and, second, that it appeared from the record in the suit of Mrs. A. D. Campbell against the Elliston Development Company et al. that after obtaining its deed the appellant appeared in that suit and tried to show that there was no subsisting vendor's lien on the property in favor of Mrs. Campbell.

If the deed of trust was not a novation of the judgment, but was intended only as additional or collateral security for the payment of the judgment, and this security was entirely lost to appellant, it would seem clear

That it was known to all the parties, including the appellant and its counsel, that there was a vendor's lien on the property conveyed, in favor of Mrs. Campbell, and that appellant tried to show that it was not then a subsisting lien in favor of Mrs. Campbell, are circumstances to be considered in determining whether or not there was a novation of the judgment or a substitution of securities, but they are by no means conclusive of the question.

This is the only question in the case that requires our consideration. A decision of it turns upon the evidence as to the intention of the parties, and what was their understanding when the time for the payment of the judgment was extended and the deed of trust executed.

B. Lacy Hoge, the trustee in the deed of trust, was a member of the law firm of Hoge & Hoge, which firm was in charge of the collection of the judgment. He testifies that a day or two prior to the execution of the deed he examined the title to the property to be conveyed, and found of record a small judgment which was a lien thereon, and also the vendor's lien of Mrs. Campbell; that afterwards he and W. E. Deaton (of the Deaton Grocery Company) saw R. M. Deyerle and J. E. Pepper, and told them of these liens; that Pepper and Deyerle both stated that an execution had been levied on the stock of goods in the drug store, which would be sufficient to satisfy the judgment, and that, as to the vendor's lien, an agreement had been made with Mrs. Campbell that if R. M. Deyerle would build a house upon the lot she would release the vendor's lien on it; that Deyerle had built the house (a drug store) on the lot, and Mrs. Campbell would release the lien; that J. E. Pepper then and there agreed that, if the deed of trust was taken, he would see that the judgment was satisfied, and that the vendor's lien was marked "Satisfied." He further states that J. E. Pepper agreed that if Mr. Deaton would extend the time 12 months, and take a deed of trust upon the property as collateral security for the judgment, he (J. E. Pepper) would see that the judgment was satisfied, and that the vendor's lien would be marked "Satisfied" as to this property, and upon his agreeing to do this Mr. Deaton remarked "that he had no disposition to press Mr. Pepper, and was perfectly willing to give him the time, if he was made perfectly safe, and that he would take the deed of trust"; that thereupon he (witness) drew up the deed of trust, and F. P. Pepper was sent for, who, upon arriving, wanted to know if what was being done involved him in any way, saying that the debt was not his and the property was not his, and when assured that he would only be affected to the extent of the property deeded, and would and J. E. Pepper, and was taken as collateral security for the judgment; that it was expressly stated by him to J. E. Pepper, at the time the deed of trust was taken, that he would not be released from the payment of the judgment, and that Mr. Pepper said he readily understood that, but he expected that, if he got the time, R. M. Deyerle would pay the judgment, and he would be saved harmless; that as they started away Mr. Deaton remarked to Mr. Pepper, "Now, you see that that judgment and vendor's lien are marked 'Satisfied,'" and Mr. Pepper said, "I will attend to that at once." Witness further states that before the property was advertised for sale he saw J. E. Pepper, and told him that the note secured by the deed of trust would be credited with any amount the Deaton Grocery Company would purchase the property for, whenever he (Pepper) would have the vendor's lien marked "Satisfied," and he agreed to do so; that after the purchase of the property by appellant he went to see J. E. Pepper, and Pepper agreed to have the lien marked, "Satisfied."

As to the representations made by R. M. Deyerle and J. E. Pepper, and as to what transpired at the time of the execution of the trust deed and before, witness Hoge is corroborated by W. E. Deaton. He positively states that it was understood that the deed of trust was not a novation of the judgment or a substitution of securities, and that J. E. Pepper came to witness in the spring or summer of 1897 to get him to refrain from the enforcement of the judgment, saying that it was a just debt, and that he would sell the last thing in the world to pay his just obligations; that if he (witness) would be patient, and not press him, he would make an arrangement to pay the debt, —referring to the fact that witness had been kind to him, in not sooner enforcing the judgment. Witness explains that the object appellant had in extending the time for the payment of the judgment and taking the trust deed, and in defending the suit of Mrs. Campbell to enforce her vendor's lien on the drug-store lot, was to befriend J. E. Pepper, who was only security for the debt, and towards whom witness felt very kindly. Witness further says that J. E. Pepper in no way claimed, or even intimated a claim, that he was released from the judgment by the deed of trust, and that Pepper never applied to witness or to the Deaton Company to have the judgment in question marked "Satisfied."

Witness Straus, who is also connected with the Deaton Grocery Company, appellant, says that in August, 1897, J. E. Pepper came into his office, looking for Mr. Deaton, saying that he wanted to see Mr. Deaton about a debt he had against him; that he had seen Mr Deaton, and had some talk

:h him about it, a few weeks before. In
: conversation with this witness, J. E.
pper said that he did not know what to
about it, as his attorney had advised him
it he did not think he ought to pay the
)t, because he had not been notified that
udgment would be taken, whereupon wit-
ss asked Pepper if that was the only thing
the way, and he said it was.

R. M. Deyerle having died before the depo-
ions in the case were taken, his version
to what was said or what was understood
ien the deed of trust was given by F. P.
pper is not known.

J. E. Pepper, in his deposition, claims to
ve known nothing of the judgment until
it before he had the interview with W. E.
aton in the summer of 1897, but after-
ards abandons his claim that no notice was
:ved on him in the suit in which the judg-
:nt was obtained. He denies the material
itements made by witnesses Hoge and
aton, and gives a different version of
iat was said or understood when the deed
trust was given, but testifies in an eva-
e manner and makes inconsistent state-
:nts. He admits that he wrote on Au-
st 16, 1897, to Hoge & Hoge, attorneys, in
)ly to a letter from them asking a settle-
:nt of the judgment, saying: "F. P. Pep-
r will be at home in a few days. Then I
n answer you more fully. It is not worth
ile bringing suit in the circuit court. If
: have to pay it, we can arrange to pay it
thout further costs." He again wrote to
:se attorneys on August 28, 1897, in reply
a letter from them, in which he says:
. P. Pepper says that he agreed with R.
Deyerle to join him in the deed of trust
the drug store to release me on the Dea-
n Grocery debt. R. M. Deyerle so under-
)od it in that way." He therein claims
at no notice was served on him when the
igment was gotten, but makes no claim or
:ntion, even, in that letter or the one of
igust 16th, of any other defense to the
igment, or that he had any understanding
th appellant or its attorney that he was
eased from the judgment by the deed of
ist.

F. P. Pepper claims in his deposition that
: deed of trust was given in order to re-
ise his father (J. E. Pepper) from the judg-
:nt, but he admits that he did not hear all
the conversation between J. E. Pepper
d R. M. Deyerle, W. E. Deaton, and B.
icy Hoge, when it was agreed that the
ie for the payment of the judgment would
extended 12 months, and the deed of trust
is executed by him; and he finally admit-
l on cross-examination (whereby the
:ight of his testimony is greatly impair-
) that it was agreed by all at the time the
ed of trust was given that appellant was
have a first lien upon the drug-store prop-
ty. It is manifest that this witness was
stifying from impressions made upon him
to his father being released, by conversa-
ins he had with R. M. Deyerle about giv-
ing the deed of trust on the drug store, and not from anything that was said to him or in his presence by W. E. Deaton or appellant's attorney. His statements are inconsistent, and at variance with the rational version of the transaction as given by witnesses Deaton and Hoge, and with their statements of the reasons for taking the deed of trust, and at variance with the statement of J. E. Pepper.

The testimony given by the remaining witnesses examined by appellee is unimportant, except the statements made by G. W. Foster that he heard F. P. Pepper ask Mr. Deaton or Mr. Hoge if the trust deed released his father, and they told him it did. This is contradicted by both Deaton and Hoge. Even if it were true, it does not impair the weight of the testimony of Deaton and Hoge as to what was understood at the time, viz. that J. E. Pepper was not to be released from the judgment; for it is shown that all then thought the drug store worth enough to pay the judgment, if the prior liens thereon were removed, as F. P. Pepper admits they agreed to cause to be done. It further appears that the property could have been sold, after the deed of trust was given, for $1,000, had the prior liens been removed, whereby J. E. Pepper would have been relieved.

Much stress is laid, in support of the cross error assigned, upon the interpretation given by the court below of Hoge's statement of how the property was sold under the trust deed, viz.: "Sold it subject to the vendor's lien." He could only have meant, under the circumstances, that the lien had not been formally marked "Satisfied"; for Pepper had promised before, and promised after, to have it so marked.

It is not a reasonable supposition that appellant, by bidding in the property at $750, agreed to take it at that price, subject to the vendor's lien thereon or regardless of it; i. e. assume practically its payment. Appellant was bound to have known, as the evidence clearly shows, that unless this lien was removed the property would be of little or no value to it. If J. E. Pepper was to be released from the judgment by the substitution of the deed of trust as the security for its payment, it was an easy matter for him to have had the judgment so indorsed on the record; and it is not at all probable that the successful business man he is shown to be would have failed to require that the judgment be released as to him, or failed to claim promptly, when demand was made upon him for its payment, after the drug-store lot had been sold under the deed of trust, that he was entitled to the release by reason of an understanding he had with appellant when the deed was executed. Instead of this, he sought to obtain further time within which to pay the judgment, recognizing his liability therefor; and not until he was advised by his son, F. P. Pepper, of some understanding that the latter claimed to have had

We are of opinion that the decree appealed from, in so far as it requires the judgment of appellant asserted in this cause to be credited with the net proceeds of the sale of the drug store and lot made by Hoge, trustee, is erroneous. Therefore in this respect the decree will be reversed and annulled, but in all other respects affirmed, with costs to appellant; and the cause will be remanded, to be further proceeded with in accordance with this opinion.

BURDINE v. BURDINE'S EX'R et al.

(Supreme Court of Appeals of Virginia. Sept. 13, 1900.)

WILLS—CONTRACT TO DEVISE—VALIDITY—ENFORCEMENT—CONSTRUCTION—EVIDENCE—DOWER.

1. Emancipated slaves (mother and daughter) remained in the service of their former master until a short time before he gave them a bond conditioned that he would devise certain real and personal property, definitely described, "provided they would return and live and remain with" him and his wife during their natural lives. *Held*, in an action brought after his death to compel his personal representatives to convey and deliver the property, that the contract was sufficiently definite, both as to the property to be devised and the services to be performed.

2. Parties who have complied with the terms and conditions of a contract to devise property to them are entitled to specific performance thereof, though they did not sign it.

3. A master contracted to devise property to his former slaves (mother and daughter), who had been emancipated, provided they would live and remain with him and his wife during their natural lives. *Held*, that the daughter's right to the property to be devised to her depended upon the performance of the agreement on her part, and not on the duration of the life of her mother, who died before the master.

4. Where a master contracted to devise property to a former slave, who had been emancipated, provided she would remain in his service during his life, and then retained her in his service until he died, notwithstanding her misconduct, for which she might have been discharged, he thereby condoned her acts, and she was entitled to the property.

5. Evidence that illicit relations had existed between the parties to a contract to devise property, before it was made, was insufficient to show that the contract was founded on an immoral consideration, where the contract purported to be for future services which were lawful, and which were rendered.

6. A widow is not entitled to dower in land which her husband had agreed to devise to another before his marriage.

Appeal from circuit court, Russell county.

Bill in equity by Nancy Burdine against N. E. Burdine's executor and others. From a decree dismissing complainant's bill, she appeals. Reversed.

White & Penn, Chapman & Gillespie, and Bailey, Price & Byars, for appellant. E. S. Finney and J. C. Gent, for appellees.

BUCHANAN, J. The record shows that in the year 1883 N. E. Burdine, of Russell county, and two of his former slaves, Roena and is in the following words:

"Know all men by these presents, that I, N. E. Burdine, of the county of Russell and state of Virginia, am held and firmly bound in the sum of ten thousand dollars to Roena and Nancy Burdine, colored, of the same county and state.

"The conditions of the above bond are as follows: That I, N. E. Burdine, will make or cause to be made a good will to the land that I purchased of Christopher Frick, and reference can be had to said deed; the said land to be divided between the two parties last named as follows: Roena to have the land running from John Alderson's east, commencing at a water gap; thence up the bluff through a sugar orchard, and with the top of Cedar Ridge, in the direction of Clinch Mountain, as far as said land extends, and with the lines of same to the lands of Barnett Reynolds, dec'd, and J. W. Darton's land to the public road, and with the same to the beginning, except four acres, including the Lastly house. And Nancy Burdine, colored, daughter of Roena, is to have four acres last named, and all of said tract east of Cedar Ridge, and all north of the public road. I also give to Roena Burdine, colored, one-fourth part of the stock and of the grain and meat, &c., and growing crops, that may be on the farm at my death; all the household and kitchen furniture at said farm. I also give to her my bank stock, amounting to one thousand dollars, in the Bank of Abingdon.

"And I give to Nancy Burdine five hundred dollars cash, all this property and cash to pass to the other parties by will at my death, provided they live and remain with myself and wife during our natural lives; and, in the event that Roena Burdine should die first, she is to have the bank stock mentioned above; and provided, further, that she return to my home at once, and remain, as above stated. I furthermore bind myself to treat both parties with kindness and respectability, they treating me and my wife in like manner.

"In witness whereof, I have hereunto set my hand and seal this 6th day of April, 1883.

"N. E. Burdine. [Seal.]"

From the close of the Civil War, which resulted in the emancipation of Roena and her daughter Nancy, they had remained with or in the service of their former master until a short time before the said agreement was entered into, when they determined to quit his service and remove to Washington county. The mother did leave, taking with her her own and a part of her daughter's personal effects; but the latter, on account of the severe illness of her old mistress, had remained, and was still in his service when the contract sued on was made. The mother had been a trusted and faithful servant, who for many years had been, on account of the feeble health of Mrs. Burdine, charged with the oversight and management of much of

in the home of Mr. Burdine and wife, who were childless, and treated more like a child than a servant. Among her duties was that of caring for Mrs. Burdine, who had been for many years subject to some chronic disease.

In a few days after the mother quit Mr. Burdine's service, he set about, directly and through others, to secure her return to his home, and to get her and her daughter to continue to live with them, and succeeded in getting them to agree to do so upon the terms stipulated in the writing sued on.

The daughter, after setting out in her bill the agreement with herself and mother, her construction of it, and the circumstances under which it was made, alleged that, pursuant to the agreement, her mother did at once return to Mr. Burdine's, and they together lived with and served him and his wife until the death of her mother, which was in the year 1885, and that after the death of the latter she continued to live with and serve them until his wife's death, and afterwards until his death; that she did not live all the time at the home of Mr. Burdine, for the reason that after the death of her old mistress Mr. Burdine married again, and, the second wife not desiring her to live at the house with them, he moved her to one of his farm houses, where she remained in his employment and rendered him valuable services until his death; that, she and her mother having done and performed all they were required to do under the agreement, it became the duty of Mr. Burdine to keep and perform it on his part; that, having failed to make a will and give them the property mentioned, as he had agreed to do, it became the duty of his representative and heirs to deliver and convey the property mentioned in the agreement to the complainant and her mother's heirs and representatives, according to their respective rights, and this she prayed the court would compel them to do.

Strictly speaking, an agreement to dispose of property by will cannot be specifically enforced,—not in the lifetime of the party, because all testamentary papers are, from their nature, revocable; not after his death, because it is no longer possible for him to make a will. Yet courts of equity can do what is equivalent to a specific performance of such an agreement, by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representative, or purchaser with notice of the agreement, as the case may be. 3 Pars. Cont. (6th Ed.) § 406; Hale v. Hale, 90 Va. 728, 730, 19 S. E. 739.

Several grounds of defense are relied on. The first is that the agreement cannot be specifically enforced, because it is uncertain

its language is not as clear as it might be, we do not think there is any serious difficulty in determining either the duties or the rights of the parties under it, when considered in the light of the circumstances under which it was made.

The mother and the daughter had for many years, as the record shows, lived with, and performed certain duties for, Mr. Burdine and his wife, which were well known to both parties. The agreement of the servants, on their part, was that the mother should return to the home of Mr. Burdine, and that she and her daughter "live and remain with" Mr. Burdine and his wife during their natural lives, for the purpose of rendering such services as they had been accustomed to render them. This was manifestly the intention of the parties, and the meaning of the agreement. In consideration of such services, they were each entitled to receive from Mr. Burdine, by devise and bequest, certain real and personal property, definitely described; but, in the event the mother died before Mr. and Mrs. Burdine, she, or rather her estate, was only entitled to receive his stock in the Bank of Abingdon.

The next objection made to the specific enforcement of the agreement is that it is lacking in mutuality, being signed only by Mr. Burdine, and, as he could not have it specifically enforced against the other parties, they cannot enforce it against him.

The question of the specific execution of unilateral contracts for the sale of real estate was considered and passed upon by this court in the recent case of Land Co. v. Johnston, reported in 95 Va. 223, 28 S. E. 175, which seems to have been overlooked by counsel. It was held in that case that specific performance of a unilateral contract will be enforced against the party who signed it, the other requisites for specific performance existing, although the other party did not sign, and there was no mutuality of remedies between them at the time the agreement was made; the filing of the bill by the other party for specific performance making the remedy and the obligation mutual.

In the case of Cox v. Cox, 26 Grat. 310, which was a suit brought by the widow and heirs of a son for the specific execution of a verbal agreement made with his father that, if the son would support him and his wife during their lives, the father would give the son the tract of land on which they lived, the mutuality required in such cases was discussed. Judge Staples, who delivered the opinion of the court, after stating that courts of equity, as a general rule, will not decree in favor of a plaintiff who is himself not bound by the agreement, said: "It is very true that, if Joseph Cox had complied with all the terms and conditions upon which the land was to be devised to him, he

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or his representatives would be entitled to a decree for specific performance. The vendor, having received the full consideration, would, of course, be bound to convey." And the same is true in this case, although the complainant and her mother did not sign the agreement sued on, if they complied with the terms and conditions upon which Mr. Burdine agreed to make the devise and bequest to them.

Another objection is that the mother and daughter were botn to serve Mr. Burdine and wife during their lives, as a condition precedent to the gift of the property, and, being a condition precedent, there could be no recovery by either, since the mother died before the condition was complied with.

While the agreement is between the mother and daughter on one side, it does not make the rights of one depend upon the service or the life of the other. The mother, in consideration of her returning to and living with Mr. Burdine and wife, was to receive, if she outlived them, certain definitely described property; but, in the event she died before they did, she was only entitled to receive a part of that property, viz. the bank stock. The daughter, for continuing to live with them as long as they lived, would become entitled to certain other property, equally well defined. Her right to that property depended, not upon the duration of her mother's life, but upon the performance of the conditions of the agreement on her part.

This brings us to the next objection, viz. that the daughter did not keep and perform the contract.

The answer avers that the daughter not only failed and refused to render the services she owed to Mr. Burdine and wife, and especially to the wife, but became unruly, vicious, aggravating, disobedient, and lewd; that she became the mother of five illegitimate children, thereby disqualifying herself from carrying out the contract on her part if she had desired to do so; and that her conduct became so notoriously bad that Mr. Burdine had to move her away from his mansion house to another part of his premises, two or three miles distant.

Such misconduct as is set out in the answer furnished ample grounds for her discharge, and, if she had been dismissed therefor, it is clear that she could not maintain this suit.

The evidence fully sustains the answer as to some of the acts of misconduct averred, but it does not show that the daughter was discharged for them. On the contrary, it appears that she lived at the home of Mr. Burdine until his wife's death, and afterwards until his second marriage. The second wife and the daughter not getting on pleasantly together, the latter was removed to a small house, not far from his dwelling house, near his store, where she lived until he desired to use or lease that house in connection with his storehouse, when he removed her to another house on his farm. After removing her two or three times from one place to another on his during which time she was rendering more or less service, he finally removed a house in the yard at his farm house she lived until his death, in the ye While living there, where Mr. Burdine bed and furniture, and spent from to one-half of his time, the daughter his cows, kept the keys of his gra crib, and looked generally after things the house. During the last two yea life, being old and feeble and unwell other person living in the farm slept much of his time in the da house, and was waited on and cared her.

It is not shown that there was any between them during all this peri than that which the daughter is se have enforced, or that either she or M dine treated that agreement as at Having retained her in his service expiration of the term, notwithstan acts of misconduct for which she mig been discharged, but was not, they considered as having been waived o doned by him. Wood, Mast. & S. § 1

It is also urged in argument th agreement cannot be enforced becau founded upon an immoral consider namely, for the future illicit associa cohabitation between Mr. Burdine a ena, the mother.

There is evidence showing that i relations had existed between Mr. B and the mother, and that he had ad that he was the father of the da though not of her other children. T also evidence tending to show that re son why the mother left his house w went to Washington county was th might lead a different life. It does pear, however, either from the agree otherwise, that the consideration agreement was the future illicit cohab of the parties. It purports to be for on her part which were lawful, and were rendered.

In order, says Mr. Wood in his Master and Servant (section 204. to render a contract void for illeg must necessarily involve the breach statute or of the common law, or bonos mores; and when it may or may so, according to the circumstances be presumed that it only involves th of a lawful and proper act, and will tained, as illegality is never presum must be proved, or must clearly appe the face of the contract. Trovinger Burney, 5 Cow. 253; Smith v. Du Bo 3 S. E. 309, 6 Am. St. Rep. 260. Th does not show that the contract m sideration was made for immoral p

We are of opinion that the da entitled to the property which Mr. B agreed to devise and bequeath her. the personal representative of the

10 was made a party defendant to this suit an amended bill, is entitled to the bank ock mentioned in the agreement of April 1883.

We are further of opinion that the widow N. E. Burdine is not entitled to dower in e land which he agreed to devise to the mplainant. The agreement which bound n to make the devise was of record when e second marriage occurred. The rights ich his widow acquired by that marriage re subordinate to those of the complain-t. The title of a widow to dower in her sband's land, being derived through the sband, is liable to be defeated by every osisting claim or incumbrance existing be-e the inception of her right, and which uld have defeated the husband's seisin. Scrib. Dower, 591, 594; 4 Kent, Comm. 2 Minor, Inst. (4th Ed.) 146, 147; 1 ashb. Real Prop. 163.

t is well settled that if a man, before rriage, enters into a contract for the sale land, upon certain terms and conditions, l the terms and conditions are performed, widow is not entitled to dower in the d, although the husband dies without king a conveyance. This is upon the nciple that the husband is regarded in lity as a trustee for the purchaser. apman v. Chapman's Trustee, 92 Va. 537, S. E. 225; 1 Lomax, Dig. c. 2, §§ 13, 14 le page 101).

and the same rule ought to apply when husband has bound himself to make a ise to another for a valuable consider-on, paid or furnished, and he has failed to so, at least in a case where the wife had wledge of the agreement before marriage. s no final decree can be entered by this rt, because of the consent decree for rent-out the lands during the pendency of the , the decree of the circuit court dismiss-the complainant's bill will be reversed, the cause remanded, to be proceeded h in conformity to the views expressed in opinion.

IELY, J., absent.

McKEEVER v. COMMONWEALTH.

preme Court of Appeals of Virginia. Sept. 20, 1900.)

OXICATING LIQUORS—OFFENSE—PROSECU-TION—VARIANCE.

A licensed distiller, having no license to liquor in quantities of less than a gallon, ates the law by selling a gallon or more, to eft in his custody, and taken away by the haser in quantities of less than a gallon. Where an indictment charged the unlawful of liquors to two persons jointly, and the f showed a separate sale to each of them, e was no such variance as would justify a rsal of the judgment.

rror to circuit court, Rockbridge county.

'illiam McKeever was convicted of selling or without a license, and brings error. rmed.

David E. Moore, for plaintiff in error. The Attorney General, for the Commonwealth.

KEITH, P. Plaintiff in error was indicted in the county court of Rockbridge county for selling liquor without a license, and was sentenced to pay a fine of $50; and, that judgment having been affirmed by the circuit court of Rockbridge county, the case is now before us for review upon a writ of error.

There were two counts in the indictment, the first of which charges the defendant with unlawfully selling by retail to P. I. Huffman and H. T. Robinson wine, ardent spirits, malt liquors, or some mixture thereof, without having obtained license therefor as required by law; and the second count charges him with selling to the same persons in quantities of less than a gallon, without first obtaining a license as required by law.

There was no demurrer to the indictment, and no ground upon which one could have been interposed (Peer's Case, 5 Grat. 674); and when the case was tried in the county court the plaintiff in error, without entering any plea, submitted the case to the court without a jury.

The facts proved are: That the plaintiff in error is a licensed distiller, and as such sold whisky to P. I. Huffman and H. T. Robinson. That the sale was not made to them jointly, but separately; each buying for himself a gallon or more, which was measured out and placed in jugs left in the custody of the plaintiff in error subject to the order of the purchasers. The sales were made during the months of September, October, and November preceding the trial, and the price was paid at the time of the purchase, or charged on a running account. Huffman's whisky was put in a jug tagged "P. I.," and was taken away by him in quantities of less than one gallon, or delivered in quantities of less than one gallon, on his order, to Robinson, who conveyed and delivered the same to Huffman. That Robinson had his gallon put in a jug, which was left in the custody of McKeever under substantially the same circumstances as that which was sold to Huffman.

The errors assigned to this judgment are, first, because plaintiff in error is a licensed distiller, and under the law had a right to sell liquor manufactured by him, in quantities not less than a gallon, and there is no proof that he did sell in quantities less than a gallon.

This assignment of error is disposed of by Richardson's Case, reported in 76 Va. 1007. The jury was there instructed that, to constitute a sale by the gallon, there must be a sale and delivery to the buyer of an entire gallon; that a contract for a gallon, and the delivery of the same in parcels at different times, is a violation of the law. This instruction was held to be correct; the court saying in the course of its opinion "that the purpose of the law would be defeated by the interpretation that the distiller might

say, of a pint or half pint at a time,—as he might call for it. Such sales of spirituous liquor would be mere shifts to violate the statute."

The second error assigned is because the indictment charges the sale of liquor to two persons jointly, and the proof was of separate and distinct sales to each of them.

We are of opinion that there is no such variance between the averment and the proof as would warrant us in reversing the judgment. The indictment, it is true, charges a sale to Huffman and Robinson, and the facts proved show a separate sale of liquor to each of them. The offense charged against plaintiff in error is the sale of ardent spirits without first having obtained a license as required by law, in the first count; and in having sold it in a quantity of less than a gallon, in the second count. There was no plea interposed, no objection made to the introduction of the evidence, and the case is before us as upon a demurrer to the evidence; and, so treated, we cannot say that the facts proved are insufficient to support the judgment, which is affirmed.

SOUTHERN RY. CO. v. DAWSON.

(Supreme Court of Appeals of Virginia. Sept. 20, 1900.)

CARRIERS—PASSENGERS—PERSONAL INJURIES—PRESUMPTION—BURDEN OF PROOF—APPEAL—DAMAGES.

1. Where a freight train, with a caboose attached, in which passengers are seated, separates, and the separated cars collide with such force that a passenger is thrown from his seat and injured, the presumption is that the accident resulted from the company's negligence, and the burden of proof is on the company to establish want of negligence.

2. The appellate court will not set aside a verdict unless the evidence is plainly insufficient to support it.

3. A verdict in an action for personal injuries will not be disturbed on the ground that the damages awarded are excessive, when there is nothing to indicate that the jury acted under the impulse of an improper motive, gross error, or misconception.

Error to circuit court, Nelson county.

Action by one Dawson against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Chas. M. Blackford, for plaintiff in error. S. B. Whitehead and Diggs & Perkins, for defendant in error.

HARRISON, J. The defendant in error bought a ticket which entitled him to transportation on a freight train of the plaintiff in error, which was provided with a car for the use of passengers, from Covesville, in Albemarle county, to Fabers Mills, in Nelson county. While on the way the train, consisting of about 30 cars, separated, from some collided with such force that the defendant in error was thrown from his seat with great violence and seriously injured.

This suit for damages followed, and resulted in a verdict in favor of the defendant in error for $2,000.

The sole ground of error assigned is that the circuit court refused to set aside the verdict upon the ground that it was excessive and contrary to the law and the evidence.

The plaintiff in error contends that the accident was inevitable, and that no skill or care on its part could have avoided it, and that the risk of such an accident was assumed by the defendant in error when he bought his ticket.

It is well settled that a railroad company is held to as strict an accountability for the negligence of its employés in the management of a freight train with a caboose attached, in which passengers are seated, as the law imposes in the transportation of passengers on trains specially provided for that purpose.

When a person becomes a passenger on a freight train, he assumes the risks and inconvenience necessarily and reasonably incident to that mode of travel; but life and limb are as valuable in the caboose as in the palace car, and the degree of care required to avoid damage to the passenger is as high in the one case as the other. Thomp. Carr. p. 234, § 20; Railroad Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898.

Where an injury happens as the result of an accident such as the record discloses, the presumption is that it occurred by the negligence of the railroad company; and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage was caused by inevitable casualty, or by some cause which human care and foresight could not prevent. Railroad Co. v. Noell's Adm'r, 32 Grat. 394.

In the case at bar the plaintiff in error has failed to sustain the burden thus imposed upon it. The evidence, which has been certified, was sufficient to justify the jury in the conclusion reached,—that the accident was the result of negligence on the part of the plaintiff in error. Certainly it cannot be said that the evidence is plainly insufficient to support the verdict,—a conclusion necessary to justify this court in setting the verdict aside because contrary to the evidence. Kimball v. Friend's Adm'r, 95 Va. 125, 27 S. E. 901.

Nor can the verdict be disturbed upon the ground that it is excessive; there being nothing to indicate that the jury, in ascertaining the damage, acted under the impulse of an improper motive, gross error, or misconception of the subject. Railroad Co. v. Shott, 92 Va. 84, 22 S. E. 811.

For these reasons, the judgment must be affirmed.

ANKIN v. SIEVERN & K. R. CO. et al.

upreme Court of South Carolina. Sept. 13, 1900.)

ESPASS—COMPLAINT—DEMURRER — PLEADNG—CONCLUSION OF LAW—RAILROAD—RIGHT F WAY—CONSENT OF LANDOWNER—PREUMPTION OF—ASSAULT AND BATTERY—OMPLAINT.

1. In determining a demurrer to a complaint trespass on real property on the ground at the complaint does not state facts suffint to constitute a cause of action, all alleged cumstances of aggravation must be elimted.

2. Where a complaint for trespass on real perty alleges that defendant, a railroad corration, entered on plaintiff's land, and did tain acts, "without having acquired a right way through the lands of this plaintiff," the rds, "without having acquired a right of y," etc., present a mere conclusion of law, d hence must be eliminated in determining a murrer on the ground that the complaint es not state facts sufficient to constitute a ise of action.

3. Where a complaint for trespass alleges it defendant, a railroad corporation, by its ployés, entered on plaintiff's land to grade d lay the tracks; that such employés were in act of cutting down two oak trees, when intiff requested them not to do so, whereup- the foreman threatened to strike her, and erwise abused her; that her son came up to uire the cause of the trouble, whereupon the eman and the employés, with loud cursing, lowed him towards plaintiff's house, threating him, and thereupon proceeded to lop off eral of the branches of such trees, but did t cut them down, and that defendants "thus oke plaintiff's close,"—the words "thus broke intiff's close," etc., being a mere characterion of facts previously alleged, which in mselves must show a breaking of plaintiff's se, must be eliminated in determining a deurrer on the ground that the complaint does t state facts sufficient to constitute a cause action.

4. A complaint against a railroad company trespass on plaintiff's land, which fails to ege that defendant entered on the land for purpose of constructing its road, without intiff's consent, is fatally defective, since a lroad company chartered under the laws of s state, and authorized to construct a road, not a trespasser for entering on lands for the pose of such construction, unless such entry made without the owner's consent.

5. Where a landowner has knowledge of the t entry on his land by a railroad company the construction of its tracks, and makes objection thereto in the manner prescribed statute, his consent will be presumed; and cannot maintain an action against the comy for trespass, his only remedy being for npensation under the condemnation statutes.

6. Plaintiff alleged that defendant, a railroad mpany, by its employés, entered on plaintiff's d to grade and lay the road; that such emyés were in the act of cutting down two trees, when plaintiff requested them not do so, whereupon the foreman cursed her, ered her to get away from there, or he uld put her in the penitentiary, threatened strike her, and greatly frightened and intimied her, and otherwise maltreated and abused . *Held*, that the complaint does not state a d cause of action for trespass on the per, as no assault on plaintiff is alleged, and mere words, under the circumstances, are civilly actionable.

Appeal from common pleas circuit court of rington county; James Aldrich, Judge.

Action by L. C. Rankin against the Sievern Knoxville Railroad Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

The following is the opinion of the court below:

"This case comes before the court upon a motion, in the nature of a demurrer to dismiss the complaint herein upon the grounds that said complaint does not state facts sufficient to constitute a cause of action in said complaint, and the notice of the motion to dismiss the same must be read at this point as a part of this decree. A demurrer admits all the facts properly pleaded in the complaint. Therefore all of the facts stated in the complaint in this action must be regarded as true for the purposes of this motion. This rule does not refer to or include statements of conclusions of law. What are the facts stated in the complaint? Paragraphs 2 and 3 specifically state that both of the defendants are railroad corporations 'duly organized and existing' under the laws of this state. As such they are common carriers, and authorized to enter upon and acquire rights of way. Paragraph 1 alleges that the plaintiff was at the time stated in the complaint, and still is, the owner in fee of a certain tract of land 'through which the line of the Sievern & Knoxville Railroad has since been constructed, and that she was at that time, and still is, residing on said tract of land.' Paragraph 4 states that on or about the 3d day of May, 1898, 'the defendants had in their employ' a certain gang of hands 'then engaged in finishing and grading and laying the track and putting up telegraph poles along the line of the said Sievern & Knoxville Railroad Company,' the said gang being 'jointly employed by the Carolina Midland Railroad Company and the Sievern & Knoxville Railroad Company under some arrangement or agreement the terms of which are unknown to the plaintiff.' Paragraph 5: 'That the said gang of hands under one Rutledge, as foreman, was employed by both of the said defendants, and in the course of their engagement as such were proceeding along the line of the proposed track of the Sievern & Knoxville Railroad Company, and without having acquired a right of way through the lands of this plaintiff, and were in the act of cutting down two large oak trees of great beauty and value, which stood near the residence of this plaintiff, when she approached them, and requested them not to do so, whereupon the said Rutledge, foreman of said gang of hands, cursed this plaintiff, and ordered her to get away from there, or he would put her in the penitentiary, and threatened to strike her, and greatly frightened and intimidated her, she being an old woman; and otherwise maltreated and abused her to her great damage.' It is also alleged that said Rutledge and hands, 'with great violence and loud cursing,' followed Hiram Rankin, the son of plaintiff, who came up at the time, towards plaintiff's house. Hiram Rankin is not a party to this action. The complaint, after stating these facts, adds 'and thereupon' the

oak trees, but did not cut them down." It is possible to read this complaint in various ways. The cause of action may be either: (1) The lopping off of 'several of the most beautiful branches' of 'two large oak trees of great beauty and value, which stood near the residence' of plaintiff; (2) trespass upon the realty; or (3) trespass upon the person of plaintiff. As the question is, does the complaint state facts sufficient to constitute any cause of action? and not, does it state facts sufficient to constitute a certain cause of action? we must answer the first query: As the lopping off of the branches of the oak trees was an injury to the realty, and may be included in the second cause of action above stated, we will divide the alleged trespasses into two classes: First, what is alleged as a trespass upon the realty; and, second, what is alleged as a trespass upon the person of plaintiff. The complaint does not state facts sufficient to constitute an action of trespass upon the realty. The complaint states that defendants, railroad corporations, had entered and taken possession of the land, the strip on which the hands were 'then engaged in finishing and grading and laying the track and putting up telegraph poles along the line of the said Sievern & Knoxville Railroad Company.' This allegation and the complaint, read as a whole, clearly state that the defendants had not only entered upon the strip of land, but were also actually and actively engaged in the construction of their railroad thereon. It was argued that the allegations in paragraph 1 that the plaintiff was and is the owner of the land 'through which the line of the railroad has since been constructed' negatives the idea that the defendants were in possession of the land, and constructing a railroad thereon, the argument being that, 'if the railroad has been constructed "since" the date of the alleged trespass, it was not constructed at said date.' Section 1752, Rev. St. 1893, reads: 'Nothing herein contained shall be construed to prevent entry upon any lands for purposes of survey and location; and if in any case the owner of any lands shall permit the person or corporation requiring the right of way over the same to enter upon the construction of the highway without previous compensation, the said owner shall have the right, after the highway shall have been constructed, to demand compensation, and to petition for an assessment of the same in the manner hereinbefore directed: provided, such petition shall be filed within twelve months after the highway shall have been completed through his or her lands.' Under this act, if a railroad corporation is permitted, by the owner of any land, 'to enter upon' or begin 'the construction of the highway,' then the entry, possession, and subsequent construction, as we shall see hereafter, is lawful, and in no wise a trespass. If the owner of the lands permit the corporation 'to enter upon the construction of the highway,' as termed in the statute—was then located, the defendants were in possession, and had entered upon the construction of said highway under the law, and under this state of facts the defendants were lawfully in possession of the land, and with the permission of plaintiff. Counsel for plaintiff argue that the allegations in the fourth paragraph of the complaint that the hands were 'then engaged in finishing, grading, and laying the track, and putting up telegraph poles along the line of the road,' is consistent with the idea that said hands were at work on the part of the line which did not traverse the land in question; therefore that paragraph does not amount to an allegation that defendants were in possession of the land in question. This construction of the language of the complaint cannot be sustained. It is the duty of plaintiff to state her case

"On May 3, 1898, at the very time of the trespass, the allegation is that 'the gang of hands' were 'then' engaged in 'grading,' etc., the 'line'; that 'in the course of their engagement' they were 'proceeding along the line,' and were 'in the act' of cutting the oak trees, 'near the residence' of plaintiff, when she 'approached them,' etc. No one would, 'under these allegations,' suppose that the 'foreman' and 'gang of hands' were upon the premises of the plaintiff merely 'for the purposes of survey and location' (Rev. St. § 1752); but the natural inference is that they had entered upon, begun 'the construction of the highway.' The allegation in paragraph 5 that defendants had not 'acquired a right of way through the lands of this plaintiff' was insufficient. Tompkins v. Railroad Co., 33 S. C. 218, 11 S. E. 692. Plaintiff contends that the complaint alleges that the defendants had not acquired, in any way, a right of way across plaintiff's lands; therefore they had no right of entry except for the purpose of survey and location, which does not allow defendants to cut down valuable trees, or to make any alteration of the premises; that the foreman and hands were committing 'a trespass in the name of the defendants,' and that 'the line of authorities in South Carolina, which hold that the land once taken possession of by a railroad company under the exercise of the right of eminent domain cannot be recovered in an action is entirely inapplicable to the case,' and in support of this position cites Tompkins v. Railroad Co., 37 S. C. 387, 16 S. E. 149, as conclusive upon the point: 'I have at some length analyzed the complaint, and held that it does allege that the defendant companies had entered upon the land in question, and were engaged in the construction of their road or highway; and a comparison of the complaint in this action with that in Tompkins

no allegation in the complaint herein that the entry of the defendant companies upon the land was without the consent of plaintiff, which, under the Tompkins Case, is essential. There are no allegations in the complaint that defendants entered upon the land after notice from the owner refusing consent, or of like matters; but all that is said is, in substance, that the defendants, by their servants, were proceeding along the 'line' which was 'then' being graded, etc., 'without having acquired a right of way through the lands of this plaintiff,' which allegation amounts to nothing; for the statute expressly provides the mode of enforcing the right to obtain compensation after a railroad company has entered upon the construction of its road, and the sole question here is whether or not defendants had entered upon the construction of their road under the right of eminent domain, which frees defendants from the charge of being trespassers. As the Tompkins Case is relied upon by plaintiff, I will refer to it again. At page 383, 37 S. C., and page 149, 16 S. E., the allegations in the complaint are substantially stated. Then plaintiff distinctly and affirmatively alleges that when the railroad compeny went upon the premises said company did not notify plaintiff that the right of way would be required; and, also, that the plaintiffs, as soon as they ascertained that the railroad would probably extend or run through the premises, gave notice to the railroad company that they objected to the same, and required that the company should proceed according to law. It was alleged that this notice was 'formally' given, and because the allegation did not state that the notice was 'in writing' the complaint was demurrable. In the complaint under consideration there is not the slightest allegation that any notice was ever given by the plaintiff, nor that she did not consent to the use of the land by the railroad; and there is a statement that the 'line' was 'then' being 'constructed.' Under the law, as we shall see, it must be presumed that she permitted defendants to 'enter' upon her land. 'It is true that there is an allegation in the complaint that the defendants never notified the plaintiffs that the right of way over their lands was required for the purpose of constructing the railroad, but, as held in Verdier v. Railroad Co., 15 S. C. 476, such notice was necessary when, as is alleged in this complaint, the plaintiffs had knowledge of the intended entry, and failed to signify in writing their refusal of consent, from which failure the statute expressly says it shall be presumed that consent was given.' Tompkins v. Railroad Co., 37 S. C. 386, 16 S. E. 150. There is no allegation in the complaint in this action that any objection was made to the entry of defendants, or that any notice was given to the railroad company. It follows, therefore, under the statute, that plaintiff permitted—consented to—the laying of the track, etc. Under the statute law of the defendants herein, railroad corporations, for trespass upon her lands; and all special damages connected with the entry upon the land and the construction of the railroad thereon, such as the cutting down of shade trees, must be recovered in the special and exclusive mode laid down and provided in the statute, viz. by the method of condemnation. Without discussing, I will cite as authority for this ruling a few of the authorities: Tutt v. Railway Co., 28 S. C. 397, 5 S. E. 831; McLauchlin v. Railroad Co., 5 Rich. Law, 598; Fuller v. Edings, 11 Rich. Law, 247; Sams v. Railway Co., 15 S. C. 487; Verdier v. Railroad Co., Id. 481; Garraux v. City Council, 53 S. C. 575, 31 S. E. 597; Bowen v. Railroad Co., 17 S. C. 574; Leitzsey v. Water-Power Co., 47 S. C. 484, 25 S. E. 744, 34 L. R. A. 215; and authorities then cited Under these authorities and our statutes (Rev. St. §§ 1743–1755) no cause of action lies at common law, as stated, for the trespass upon the realty in question.

"I will next consider the other branch of the case the alleged trespass upon the person of the plaintiff. While the allegations of the complaint that Rutledge, the 'foreman' of the hands, 'cursed' the plaintiff, 'an old woman,' ordered her 'to get away from there, or he would put her in the penitentiary,' 'threatened' to strike her, frightened and intimidated her, and 'otherwise maltreated and abused her,' place said Rutledge in an unenviable and contemptible position, does said complaint, in any way, allege an actionable act or assault against plaintiff, or injury of any kind to her person or her character which is actionable? Suppose the complaint charged that Rutledge had assaulted plaintiff,—which it does not,—would that give to the plaintiff a cause of action against these defendants, or either of them? I think not, for the reason that the language and conduct complained of were outside of the scope and employment of Rutledge, and the defendants are not responsible for any voluntary assault or trespass which Rutledge may have committed. Williams v. Car Co. (La.) 4 South. 85, 8 Am. St. Rep. 538, Rounds v. Railroad Co., 21 Am. Rep. 602, and Rucker v. Smoke, 37 S. C. 381, 16 S. E. 40. If defendants were persons, and not corporations, and had spoken and acted as the complaint charges against Rutledge, as their agent, plaintiff could not maintain an action against them, similar to the present action, for the reason that curses and threats, while immoral, are not actionable in law. If a principal would not be liable for personally committing a certain act, he would not be liable for that act if it was committed by an agent. In Rucker v. Smoke, 37 S. C. 381, 16 S. E. 41, the supreme court quotes with approval the rule as stated in 1 Am. & Eng. Enc. Law, at page 410, which is as follows: 'A principal is liable to third parties for whatever the agent does or says; whatever contracts, representations, or admissions he makes; whatever negligence he is guilty of,

his apparent authority: and provided, a liability would attach to the principal if he was in the place of the agent.' The last clause cited is full and clear, and sustains the proposition stated. The doctrine is then stated in Wood, Mast. & Serv. § 322: 'The master can never be held chargeable for an act of the servant unless he would have been liable if he had done the act himself. Therefore, unless an injury results from a negligent or unlawful act, no liability attaches.' If Rutledge had been the agent of a common carrier of passengers, and plaintiff had been a passenger under the contractual relations of carrier and passenger to safely carry her, etc., and, while being transported as a passenger, Rutledge, as the agent of defendants, had addressed her as stated in the complaint herein, his curses, threats, etc., would have created a cause of action against the railroad company. The complaint does not allege the existence of any contractual relations between plaintiff and defendants. Defendants' agents were where they had a right to be, engaged in lawful duties, when the plaintiff 'approached' them, and 'requested' them not to do that which they had a legal right to do. She was an outsider. Rutledge, for the language, curses, etc., addressed to plaintiff, might be held criminally, by binding him over to keep the peace, or perhaps for a breach of the peace; but no liability would result therefrom to the defendants. 'To constitute a tort two things must concur,—actual or legal damage to the plaintiff, and wrongful act committed by the defendant.' 1 Add. Torts, c. 1, § 1. 'There may, on the other hand, be a wrong done to another, but, if it has not caused what the law terms "actual" legal damage to the plaintiff, there is no tort in respect of which an action is maintainable.' Id. § 8. 'An act or omission may be wrong in morals, or it may be wrong in law. It is scarcely necessary to say that the two things are not interchangeable. No government has undertaken to give redress whenever an act was found to be wrong, judged by the standard of strict morality; nor is it likely that any government ever will.' Cooley, Torts, p. 3. 'A threat to commit an injury is also sometimes made a criminal offense, but it is not actionable private wrong. Many reasons may be assigned for distinguishing between this case and that of an assault; one of them being that the threat only promises a future injury, and usually gives ample opportunity to provide against it, while an assault must be resisted on the instant. But the principal reason, perhaps, is found in the reluctance of the law to give a cause of action for mere words. "Words never constitute an assault" is a time-honored maxim. Words may be thoughtlessly spoken; they may be misunderstood; they may have indicated to the person threatened nothing but momentary spleen or anger, though when afterwards reported by witnesses they seem to express deliberate careful to require something more than expressions of anger, reproach, or contempt before it will interfere; justly considering that it is safer to allow too much liberty than to interpose too much restraint. And, comparing assaults and threats, another important difference is to be noted. In the case of threats, as has been stated, preventive remedies are available; but against an assault there are usually none beyond what the party assaulted has in his own power of physical resistance.' Id. p. 29.

"To recapitulate, I hold that any claim that plaintiff may have against the defendants for the entry upon her land by the defendant companies, either by way of compensation or special damages, must be sought and obtained by the special proceeding provided in the statute; that said special proceeding or remedy is not cumulative, but it is exclusive, and precludes and bars plaintiff of the remedy she here seeks, which is a suit for a trespass vi et armis. Further, the other elements of damage alleged by plaintiff in her complaint in the nature of threats and abuse on the part of Rutledge as the agent of defendants are not actionable for the reason that they were not within the scope of his employment, even had they been assaults and batteries, and other personal enormities; but they were threats and abuse, which, while immoral, are not actionable in law. Wherefore it is ordered, adjudged, and decreed that the complaint herein does not state facts sufficient to constitute a cause of action, and that the said complaint be, and hereby is, dismissed, and that the plaintiff do pay the costs of this action."

Edwin Folk Strother, for appellant. Hendersons, for respondents.

JONES, J. The circuit court sustained a demurrer to (or motion to dismiss) the complaint for insufficiency in stating a cause of action. The complaint, which we copy in full, is as follows: "(1) That the plaintiff is, and was at the times hereinafter stated, the owner in fee of a certain tract or parcel of land situate in the state and county of Lexington, above named, through which the line of the Sievern & Knoxville Railroad has since been constructed, and that she was at the time, and still is, residing on said tract of land. (2) That the defendant Sievern & Knoxville Railroad Company is a corporation duly organized and existing under the laws of the state of South Carolina. (3) That the defendant Carolina Midland Railway Company is a corporation duly organized and existing under the laws of the state of South Carolina. (4) That on or about the 3d day of May, 1898, the defendants had in their employment a certain gang of hands then engaged in finishing and grading and laying the track and putting up telegraph poles along the line of the said Sievern & Knoxville Railroad Company; the said gang being, as plaintiff is informed and

arrangement or agreement the terms of which are unknown to this plaintiff. (5) That said gang of hands, under one Rutledge as foreman, was employed by both of said defendants, and in the course of their engagement as such were proceeding along the line of the proposed track of the Sievern & Knoxville Railroad Company, and without having acquired a right of way through the lands of this plaintiff, and were in the act of cutting down two large oak trees of great beauty and value, which stood near the residence of this plaintiff, when she approached them, and requested them not to do so, whereupon the said Rutledge, foreman of said gang of hands, cursed this plaintiff, and ordered her to get away from there, or he would put her in the penitentiary, and threatened to strike her, and greatly frightened and intimidated her,—she being an old woman,—and otherwise maltreated and abused her, to her great damage; whereupon her son, Hiram Rankin, came up, and inquired the cause of her trouble, whereupon the said Rutledge called the hands employed on the material train in the employment of both the defendants, and with great violence and loud cursing followed the said Hiram Rankin towards the plaintiff's house, threatening and abusing him in a violent manner, and thereupon proceeded to lop off several of the most beautiful branches of the said oak trees, but did not cut them down. (6) That the said defendants, by the said Rutledge and their hands, whose names are unknown to this plaintiff, thus broke plaintiff's close, trod down the grass, and in a most violent and outrageous manner insulted, intimidated, and threatened this plaintiff, to her damage ten thousand ($10,000) dollars, together with the costs of court." We think the demurrer was properly sustained, and that the conclusions reached were amply vindicated in the elaborate and learned opinion of the circuit court, which is officially reported herewith. We will only make a brief observation or two. First, treating the complaint as one for trespass upon real property, with circumstances of aggravation alleged with a view to exemplary damages, the alleged circumstances of aggravation must be eliminated in determining the demurrer, since, to avoid demurrer on this ground, the complaint must show facts sufficient to constitute a trespass upon land. We must also eliminate from the complaint the words, "without having acquired a right of way through the lands of this plaintiff," in the fifth paragraph of the complaint, since they present a mere conclusion of law, which is not admitted by the demurrer. We must also eliminate the statement in the sixth paragraph of the complaint that defendants "thus broke plaintiff's close," etc., since such statement is a mere characterization of facts previously alleged, which in themselves must show a breaking of plaintiff's close. A railroad corporation chartered construction, unless such entry is made without the consent of the owner; and it is necessary to the cause of action to allege the absence of such consent. Tompkins v. Railroad Co., 37 S. C. 382, 16 S. E. 149. The complaint, then, is fatally defective for failure to make such allegation. So far as the complaint shows, the only objection ever made by plaintiff was as to cutting down the two oaks, and it appears that they were not cut down. As the route of the railroad was very near plaintiff's dwelling, she must have had knowledge of the first entry for construction, and, having made no objection thereto in the manner required by statute, her consent would be presumed, and her only remedy would be for compensation under the condemnation statutes. Verdier v. Railroad Co., 15 S. C. 476; Tompkins v. Railroad Co., supra; Leitzsey v. Water-Power Co., 47 S. C. 477, 25 S. E. 744, 34 L. R. A. 215. If the complaint may be treated as one for trespass upon the person, no assault upon the plaintiff is alleged, and mere words, under the circumstances stated, would not be civilly actionable. We are quite satisfied with the conclusion of the circuit court herein. The judgment of the circuit court is affirmed.

HALL v. BOATWRIGHT et al.

(Supreme Court of South Carolina. Sept. 13, 1900.)

TRIAL—RECOVERY FOR IMPROVEMENTS—NONSUIT—IMPROVEMENTS—TENANT IN COMMON—PARTITION.

1. Since, under the betterments act (Rev. St. c. 64, art. 4), it is incumbent on plaintiff, who has been ousted of possession of land, to show not merely the value of his improvements, but to present evidence from which the jury can find a special verdict, stating the value of the land without the improvements and its value with the improvements, evidence, in an action thereunder after partition, tending to show that improvements of some considerable value had been made, will not warrant sending the case to the jury.

2. Since the betterments act (Rev. St. § 1952), providing "that after final judgment for plaintiff in an action to recover lands, if defendant purchased the lands recovered in such action supposing at the time such title to be good in fee, defendant shall be entitled to recover of plaintiff in such action the full value of all improvements," etc., was intended to give a remedy where none existed before, such act does not apply to a tenant in common who, believing himself sole owner, has made improvements on the common property, as he has ample relief by being allotted on partition the portion improved by him, or, in case of a sale, by being allotted the increased purchase price by reason of such improvements.

3. Where the purchaser at a tax sale of a homestead which was assigned to a widow and her children goes into possession, and the children bring an action for partition against him, alleging that he acquired by such purchase the widow's one-third interest in the land, and the answer does not deny any of the facts alleged in the complaint, but denies that the children have any title to the land, and a judgment is

recover lands," if defendant purchased the lands recovered in such action, supposing at the time such title to be good in fee, defendant shall be entitled to recover of plaintiff the full value of his improvements, etc., since the action against him was strictly for partition, and not "an action to recover lands."

Appeal from common pleas circuit court of Aiken county; D. A. Townsend, Judge.

Action by W. W. Hall against Daniel Boatwright and others to recover the value of improvements made by plaintiff on certain lands. From a judgment for defendants, plaintiff appeals. Affirmed.

Sawyer & Owens and G. W. Croft & Son, for appellant. Hendersons, for respondents.

JONES, J. This is an action under the betterments act, and the appeal is from an order of nonsuit. The documentary evidence introduced showed that Erwin J. Boatwright died intestate, seised of a tract of land in Aiken county, leaving as his only heirs at law his widow, Olivia Boatwright, and the defendants, his children; that after the death of Boatwright this land was assigned to said widow and children as a homestead; that said land assessed in the name of Olivia Boatwright was sold for taxes, and the plaintiff became purchaser, took sheriff's title, dated October 7, 1895, and immediately entered into possession of the land, enjoying the rents and profits. In May, 1889, the defendants brought action for partition of said land against said Hall, alleging substantially the foregoing facts, and also that said Hall had acquired by purchase at a tax sale the one-third interest of Olivia Boatwright in said land. Hall, in his answer to said suit, did not deny any of the facts alleged in the complaint. He contented himself with denying "that the plaintiffs have title to the land described, or any part thereof, or that they are entitled to the relief demanded," alleging also that he has legal title to the premises, and as a third defense alleging that he had purchased said land at a tax sale more than two years before the commencement of the action. As if this raised an issue of title paramount, the matter was submitted to a jury, which rendered a verdict in favor of plaintiff "for a two-thirds undivided interest in the land in dispute." Thereupon a decree was rendered for a sale of the land for partition, allotting to said Hall one-third of the proceeds. Within 48 hours after such judgment, plaintiff brought this action for betterments. In addition to the foregoing, it appears in the original "case" that plaintiff introduced oral testimony "tending to show that improvements of some considerable value had been put by him on the land described in the complaint." At the hearing the "case" was amended by consent so as to state that the plaintiff also introduced testimony that at

ed thus: That the betterments act contemplated a recovery of land in toto, and not a mere interest therein; that the object of the act was to supply a remedy for one who was ejected in a suit at law; and that a cotenant who makes improvements has a complete remedy in equity. We tuink there was no error in granting the nonsuit.

By his first exception, appellant imputes error in holding that he could not recover the value of his improvements placed upon the land, in a separate action. Under the betterments act, it is incumbent on the plaintiff not merely to show the value of his improvements, but he must present evidence from which the jury can find a special verdict stating the value of the land without the improvements and the value of the land with the improvements; the value of the improvements being the sum which the land should be found at the rendition of the judgment to be worth more in consequence of the improvements than it would have been worth had no improvements been made. Evidence merely tending to show that improvements of some considerable value had been put on the land would not warrant sending the case to the jury. On this ground the nonsuit is sustainable, although it was not placed upon such ground.

But, further, the betterments act was not intended to furnish a remedy for a tenant in common who makes improvements on the common property. By the common law the owner of the fee is the owner of all the structures and improvements on the land. Therefore one making improvements upon land of another would lose his improvements on recovery of the land from him by the true owner, and he would be without remedy. The betterments act was intended to relieve this condition and give a remedy. As stated by Mr. Justice Gary in Tumbleston v. Rumph, 43 S. C. 279, 21 S. E. 86, "The statutes in regard to betterments were * * * for the purpose of softening the asperities of the law, and affording relief where none otherwise existed." And Judge Cooley, in Const. Lim. (5th Ed.) 480, says, "Betterments laws recognize the existence of an equitable right, and give a remedy for its enforcement where none existed before." At the time of the enactment of this statute, in 1870, there was, and there is now, ample remedy for a cotenant who, believing himself sole owner, has made improvements on the common property, and there was no necessity to pass such a statute in his behalf. The cases of William v. Holmes, 4 Rich. Eq. 476; Scaife v. Thomson, 15 S. C. 337; Buck v. Martin, 21 S. C. 591; Johnson v. Pelot, 24 S. C. 264,—and other cases that might be cited, show that a court of equity can and will give relief to a co-tenant who, under the belief that he has exclusive title in fee, makes improve-

allotting to him the increased purchase price by reason of such improvements. If the betterments act was to give a remedy where none existed, it could not have been intended to give a cumulative remedy to a co-tenant. He does not improve another's land. He improves his own land; that is to say, land in every inch of which he has an undivided interest. Even if the improved portion is not allotted to him, and if no provision for compensation is made in case of a sale, still he secured in the division of the purchase price a portion of the value imparted by his improvements. The case of McGee v. Hall, 28 S. C. 562, 6 S. E. 566, appears to be in point. In that case it was held that where a co-tenant, supposing himself to be the exclusive owner, has added to the value of the common property by improvements, and is liable for rents and profits thereof, his account for rents should be credited with the increased value imparted by the improvements, and that the remedy under the betterments act was not applicable.

There is another reason why the said act does not apply in this case. The statute provides, "After final judgment in favor of the plaintiff in an action to recover lands and tenements, if the defendant purchased the lands and tenements recovered in such action, supposing at the time of such purchase such title to be good in fee, the defendant shall be entitled to recover of the plaintiff in such action," etc. Rev. St. § 1952. Whether lands were recovered of the plaintiff herein in an action of ejectment must be determined by the complaint in the case. In the case of Elmore v. Davis, 49 S. C. 2, 26 S. E. 898, this court, construing subdivision 2, § 98, Code, providing that, "the plaintiff in all actions for the recovery of real property," etc., "is hereby limited to two actions," etc., held that an action for partition, in which the issue of title was raised in the answer, was not an action to recover real estate, in the sense of that statute; and in determining the question the court was controlled by the allegations in the complaint. So, in the proceedings in question, if we are to be controlled by the allegations of the complaint, the case of the Boatwrights against Hall was not an action to recover real estate, but was a case for partition, strictly. If we could be justified in resorting to the answer to determine whether an action strictly and solely for partition was converted into an action in ejectment, also, there is nothing in the answer to show title paramount in defeat of the right to partition, since all the facts upon which the right to partition rested stood admitted by the pleadings. Appellant, in support of his contention that said partition proceeding was an action to recover land, and so within the betterments act, quoted the following from Reams v. Spann, 20 S. C. 1: "The action for partition is purely legal, for the recovery of the land from the Reams, and the other equitable, for partition after the land was recovered. The legal title should have, therefore, been first tried by a jury; and, if that resulted in favor of the plaintiff, then, and not till then, could the court decree partition, as in Adickes v. Lowry, 12 S. C. 97. In the trial of the legal issue, the action being for the recovery of specific real property, the question of title should have been submitted to a jury upon the issues made by the pleadings." "So far as the McReas are concerned, this is simply an action for the recovery of a tract of land." But it must be noted that the McReas were not made defendants as co-tenants, but as strangers in possession, claiming adversely. The allegations of the complaint were such that the court was induced to say: "This was an action to recover real estate, and incidentally to partition the same." Under such circumstances the court might be justified in saying that the action was to recover real estate, so far as those parties were concerned who were not co-tenants with the plaintiffs, but were in possession, claiming by an independent and paramount title. The language above quoted from Reams v. Spann was quoted with approval in subsequent cases,—as in Carrigan v. Evans, 31 S. C. 266, 9 S. E. 852, and in Sumner v. Harrison, 54 S. C. 359, 32 S. E. 572; but in these cases, as in Reams v. Spann, the complaint tendered an issue of title as to those defendants who were not concerned with the plaintiffs as co-tenants, but were strangers in possession, and alleged in the complaint to claim some interest therein. In the action in question the complaint showed that the defendant therein was a tenant in common with the plaintiffs in the premises sought to be partitioned, and did not allege any ouster. Elmore v. Davis, 49 S. C. 2, 26 S. E. 898. The decisions also show that when it is sought to carry this supposed theory, that an issue of title raised in the answer in a strict action for partition makes two independent causes of action, —one in law, for the recovery of real estate, and the other in equity, for partition,—to its logical consequences, the theory is repudiated. For example, a nonsuit of the legal issue of title raised in an equitable action will not be permitted (Woolfolk v. Manufacturing Co., 22 S. C. 332; McClenaghan v. McEachern, 47 S. C. 451, 25 S. E. 296); and the prevailing party on the issue of title does not, as a matter of right, become entitled to the costs, as in a legal action in ejectment (McCarter v. Caldwell, 58 S. C. 65, 36 S. E. 507).

Our conclusion is that no recovery of land in an action of ejectment has been had against the plaintiff, and therefore he is not within the betterments act. The judgment of the circuit court is affirmed.

1900.)

WILLS—REMAINDERS—ACCOUNTING.

1. A will gave a life estate to testator's wife, with remainder for life to certain other persons who should be alive at the death of his wife; remainder in favor of such persons' heirs. It was further provided that, if such third persons should die before testator's wife, their children should take the interest of the deceased parent. *Held*, that the children of the persons given the life estate in remainder, who were living at the time of the death of the testator and his wife, took vested remainders in the property, subject to open and let in children subsequently born.

2. A decree that a trustee appointed to succeed another trustee, and in possession of certain property, should account for the rents and profits of the property, is to be construed as only requiring him to account for the rents and profits received by him.

Appeal from common pleas circuit court of Sumter county; W. C. Benet, Judge.

Action for partition by Susan S. Tindal, individually and as administratrix of the estate of Mary E. Tindal, against John L. Neal and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

The following is the decree of the circuit judge:

"The above-styled cause was brought to partition a tract of three hundred and fifty acres of land, more or less, situate in said county and state, and bounded on the north by lands of Mrs. Susan S. Tindal (the plaintiff), on the east by lands of the estate of Jared Norton, on the south by lands of Mrs. Susan S. Tindal, and on the west by lands now or formerly of the estate of H. H. Wells. It was alleged in the complaint that this tract of land descended to the parties to this cause as the heirs at law of Mary E. Tindal, who died intestate, seised and possessed of the same, and that the plaintiff, her daughter, is entitled to one-third, and her grandsons John L. and C. M. Neal are each entitled to one-sixth, and that her grandchildren Charles L. Cuttino, Thomas P. Cuttino, S. James Cuttino, David W. Cuttino, and S. Lula McKnight were each entitled to one-fifteenth. The complaint further alleged that the plaintiff and the defendants were seised and possessed of said tract of land as tenants in common, and owned no other lands in common. The complaint further alleged that the defendant John L. Neal was in possession of more than his proportionate share of said premises, and had rented out parcels of said land and collected the rent, and prayed that he be required to account for the same. The defendants answered, denying the allegations of the plaintiff that the parties to said action owned no other lands in common; and they alleged that they, with the plaintiff, were seised and possessed, as tenants in common, of an additional tract of land situate in the county and state aforesaid, containing one hundred acres, more or less, adjoining lands of estate of Richard F. Wells, Elihu tracts of land and estates of said parties in that tract of land were in same proportion as those set forth in the complaint in regard to the tract of land therein described. The defendant John L. Neal admitted that he was occupying a part of the land described in the complaint, but denied the remaining allegations of paragraph 3 of the complaint. Subsequent to the commencement of this action the defendant David W. Cuttino departed this life intestate and unmarried, leaving as his only heirs at law and distributees the defendants S. Lula McKnight, Charles L. Cuttino, Thomas P. Cuttino, and S. James Cuttino; and by an order made in said cause the action was continued against the said parties as his heirs at law, and they are now entitled to one-twelfth each in the estate. There is no controversy as to the tract of land described in the complaint, and the interests of said parties therein, and the contention arises as to the tract of one hundred acres of land referred to and described in the answers of the defendants.

"The cause was referred to the master for said county, to take and report the testimony, and the master duly filed his report thereof. It appears from the testimony and record evidence taken and proved before the master that one Samuel Perdriau made his will, dated July 15, 1842, which was duly admitted to probate in said county on October 2, 1843. By the second clause of said will the testator devised his estate to his wife, Esther Perdriau, for life, with right to dispose of one half by will, etc. The other half of said estate he directed his executors to sell, and divide the proceeds; the words of the devise being as follows: 'The proceeds of said sale of said half of the estate, given as aforesaid to my wife for life, to be divided between Ann M. China, wife of John China, Jr., the children of my deceased brother Peter Perdriau, and also the children of my sister Esther Wells, alive at the death of my wife, share and share alike, for and during the term of their natural lives, and after their deaths to their respective children, forever. It is my will that if the said Ann M. China, either of the children of my brother Peter or sister Esther, should die in my lifetime or the lifetime of my said wife, that the child or children of such one or more of them as may so die take the part of their deceased parent.' At the time of the death of the testator, his brother Peter Perdriau and his sister Esther Wells were dead; and at the time of the death of Esther Wells she left surviving her, among other children, her daughter Mary E. Wells, who married one Charles Lynam some time previous to the year 1832, and the children of the said Mary E. Lynam, Charles Lynam, and Mary A. Lynam, who subsequently married one Neal. And at the death of Mary E. Lynam, who had married one John B. Tindal, her daughter Susan S.

ynam, then the wife of John M. Tindal, one survived her; the said Mary A. Neal ıving predeceased her mother, leaving as ır only heirs at law the defendants John and C. M. Neal, and the said Charles Ly-ım having also predeceased his mother, ary E. Lynam (then Tindal), leaving one ıild, Portia, who intermarried with one T. Cuttino. Portia died in 1884, her husband ing then dead, leaving the Cuttinos and rs. McKnight as her only heirs at law. he said Charles Lynam and his sister Mary Neal, the children of Mary E. Lynam, e Wells, and grandchildren of Esther Wells, ere alive at the date of the will, death of e testator, and at the death of the testator's ife, Esther, the first life tenant. Susan Tindal, née Lynam, a daughter of said ary E. Lynam, was born some time after 37,—about 1840; her sister, Mary A. Neal, ıving been born about 1837. About the year 52 the said Mary E. Lynam, who was the ughter of Esther Wells, and the second e tenant under the will of the testator, ermarried with one John B. Tindal, and on e 6th day of January, 1852, joined in a mar-ge setlement, by deed executed on that day, d recorded in the office of the clerk of the urt for Sumter county, in Book O, at page 7, and thereby conveyed to Richard F. ells, as trustee, among other property, l and singular the undivided interest and tate whatever, real or personal or both, remainder or in expectancy or in præsenti, the party of the second part [Mary E. Ly-ım], under the provisions of the will of muel Perdriau, deceased, to the sole and parate use during her life of the party the second part; and at the death of the rty of the second part, she leaving issue ve at her death, all the said last-mention-negroes, and her interest as aforesaid un-r the will aforesaid, shall go to and be sted absolutely in the issue of the said par-of the second part in such manner and oportion as the said issue would be enti-d under the statutes of distribution were e to die a widow and intestate.'

"In 1851 Esther Perdriau, the widow of e testator, filed a bill in the court of equity said county and state to obtain the assent the court to her relinquishing one-half of e estate passing to her under the will of r deceased husband, Samuel Perdriau, and aying for a sale of that half, and a esent distribution of the proceeds among e parties to whom they were bequeathed at e expiration of her life estate. A decree that effect was obtained, to which no ap-al was taken, except upon a single point, .: The decree divided the proceeds of le into three equal parts,—one to Ann M. ina, one to the children of Peter, and one the children of Esther; and the contention ıs that Ann M. China did not take one-third the proceeds, but should take an equal rt with each of the children of Peter Per-lau and of Esther Wells. The court of ap-al held that they took equally and per capita, upon the clear reason that the contingency of surviving testator's wife bore the same relation to Ann M. China as it did to the children of Esther Wells and Peter Perdriau. See the case of Perdriau v. Wells, 5 Rich. Eq. 20. Under the decree in said cause the interests going to the children of Esther Wells and Peter Perdriau were assigned to them; the shares going to the married women being delivered to trustees. The share of Mary E. Lynam was delivered to R. F. Wells, trustee, to be held in accordance with the terms of the will of Samuel Perdriau; the said Richard F. Wells being the trustee named in the marriage settlement between Mary E. Lynam and John B. Tindal. The proceeding above referred to was solely to divide the estate among the life tenants; and none of the children of Mary E. and Charles Lynam, the remainder-men under said will, were made parties to said cause, although they were in esse at the time. See Equity Roll, Bill 166.

"In 1880 a petition was filed in this court by Mary E. Tindal (formerly Lyman) and her daughter Susan S. Tindal, wherein it was alleged that Richard F. Wells, the trustee aforesaid, had died, and praying that John M. Tindal, the husband of Susan S. Tindal, the petitioner, be appointed trustee in his stead, and further alleging that an action had been previously commenced against the said Richard F. Wells for an account of the trust fund turned over to him as aforesaid; that he had departed this life pending said proceeding, but that a compromise had been effected with his heirs at law, whereby 100 acres of land of his estate should be turned over and delivered to a trustee in full settlement of the trust funds theretofore held by him. The said proceedings referred to in said petition are enrolled as judgment roll 5719 in said county; and the said case was compromised, and the land duly turned over and delivered by the heirs at law of said Richard F. Wells to John M. Tindal as trustee, he having been appointed as such by order made under said petition, as appears from judgment roll 2629; and the said John M. Tindal admits in his testimony in this cause that he is in possession of said tract of land as trustee, and has collected the rents, income, and profits from the same for a number of years last passed.

"I find as a matter of fact from the testimony and from the record evidence proven before the master, and heretofore referred to that the 100 acres of land described in the answers of the defendants herein, and sought to be partitioned in this cause, represent the interest and estate passing under the will of Samuel Perdriau to Mary E. Lynam (afterwards Tindal) for life, and that under the terms of said will said land is now owned by the parties to this cause as tenants in common, in the proportions set forth in the complaint in regard to the tract of 350 acres therein described. It appears from the testimony that the one hundred acre tract of land

proprietors, and the correct description at this time is as follows: That tract of 100 acres of land in said county and state known as the 'Swamp Place,' adjoining lands of estate of John Betts, lands formerly of Hattie E. Lawrence, now of Marion Moise, lands of S. S. Tindal, and Pocotaligo swamp. The question as to the interest of the defendants in said tract of land turns upon the construction of the will of Samuel Perdriau, and I hold, as matter of law, that the children of Mary E. Lynam (afterwards Tindal) who were alive at the death of the testator and at the death of his wife took vested remainders, subject to open, if necessary, and let in other children of Mary E. Lynam who should come into existence. The testator evidently so intended, as he provided in his will against a lapse, as follows: 'It is my will that if the said Ann M. China, either of the children of my brother Peter or sister Esther, should die in my lifetime, or the lifetime of my said wife, that the child or children of such one or more of them as may so die take the part of their deceased parent.' Thus it follows that, if Mary E. Lynam had died during the lifetime of the testator or his wife (the first life tenant), the children of Mary E. (the second life tenant) would have taken a vested interest under the express terms of the will. If the grandchildren of his sister Esther, mother of Mary E. Lynam, were special objects of his bounty and affection, should their parents die in the lifetime of himself or wife, why not equally so should the children of Esther outlive himself and wife and die thereafter? The testator used neither word nor expression to indicate that the estate given under his will should not vest in the grandchildren of his sister Esther as of the date of the will. He did not use the words 'surviving children,' or an equivalent expression, to indicate that only those grandchildren who might survive their parents (the second tenants for life) should take the whole. It would be doing violence not only to the expressed intention of the testator, but to all the springs of human affection, to exclude the grandchildren of his sister Esther, who were evidently in the testator's mind at the time he drew his will.

"By reference to the case of Barnes v. Provoost, 4 Johns. 61, as annotated in 2 Shars. & B. Lead. Cas. Real Prop. p. 260, it appears that the perplexing questions arising in cases of remainders are those which depend in some way upon a specified contingency or condition, or upon different contingencies or conditions. Where there is no condition or qualification named in the will or deed, the remainder is regarded as vested in the persons to take it; and they become so far the owners of the estate as soon as the time of vesting arrives,—usually the death of the testator, although the time when he was to be entitled to the possession did not arrive or fail to happen as precedent incidents, that the discriminating conclusions of courts are necessary to determine the rights of parties. The vested remainder is that part of the estate bestowed upon one person, to take effect in possession at the close of the interest of another person, with no contingent provision, condition, or event intermediate which can possibly defeat the rights of the remaindermen. A remainder is contingent when the person named to take it may possibly be defeated in his right of property by some event designated and provided to have that effect, or when the persons to take depend upon some contingent event, which is not contingent merely because the time of possession or enjoyment is made to depend upon contingent events. In the first class named there is no contingency as to the person who is to take, but only as to the time when the persons designated are to enjoy or to possess; in the other, the contingency relates to the persons who are to take, etc. It is not necessary that the party named to take in remainder shall be certain ever to enjoy the possession, —as, for example, an estate may be conveyed to one for life, with remainder to another in fee. The foregoing principles apply equally and as exacting when a vested estate is limited in remainder to a family of children who may be thereafter born. If one is alive when the testator dies, all succeeding children are let in and vested as of that period. If none are alive, then the remainder vests in the first one born, and all succeeding children become vested as of the time of the birth of the first. And this is the rule in all cases where a remainder is limited to a class of persons. The foregoing principles are gathered from the annotations to the case referred to, the exact language being used in many instances. It is the policy of the law to give to deeds and wills such construction, where permissible, as will effect the early vesting of estates. Boykin v. Boykin, 21 S. C. 529; Wilson v. McJunkin, 11 Rich. Eq. 530; Durant, v. Nash, 30 S. C. 192, 9 S. E. 19. When the remainder is to persons in esse at the time the limitation is made, and upon an event certain, —as at the death of a life tenant,—it is a vested transmissible remainder in such person. Haynsworth v. Haynsworth, 12 Rich. Eq. 114. If a devise is to a class, as children, at the death of the life tenant, the remainder is vested in those living at the death of the testator. Rainsford v. Rainsford, Spear. Eq. 397; Evans v. Durant, 1 Strob. Eq. 82; Bentley v. Long, Id. 43; Shuler v. Bull, 15 S. C. 432; Bannister v. Bull, 16 S. C. 220; McCreary v. Burns, 17 S. C. 45. Also, see 2 Jarm. Wills (2d Am. Ed.) pp. 54-56.

"In the case at bar there is no intervening circumstance which was to happen before the grandchildren of Esther Wells could take. They could take immediately upon the death of their parent,—an event certain

occur; their enjoyment and possession be- g alone postponed. There was no inter- ning circumstance, such as the death of a ird party, before the grandchildren could ke, but they were entitled to take imme- ately upon the falling in of the life es- tes. In 2 Washb. Real Prop. (2d Am. Ed.) 599, the rule is stated as follows: 'There however, a class of cases where a re- inder is regarded as vested, although all e persons who may take are not ascer- ined or in esse, and cannot be until the ppening of some future event. And that where there is a devise of a remainder to class of which each member is equally the ject of the testator's bounty, as to "the ildren" of a person, some of whom are ing at the testator's death. As for in- nce, upon a devise to A. for life, remain- r to the children of J. S., if J. S. has chil- en at the testator's death, they would te a vested remainder; and if he were to ve other children during the life of A., d before the remainder was to take effect possession, it would open and let in the ldren born during A.'s life, who would te shares as vested remainders.' The ne author concludes his discussion of the bject as follows: 'If the limitation be by rise to a class of persons, any of whom alive and capable of taking at the death the testator, the enjoyment of which is stponed until after the expiration of a rticular estate, the estate will vest in such are capable of taking at the death of the tator, and will open and let in such of the ne class as may come in esse during the ntinuance of the particular estate.' Un- the subject of devises and bequests to ldren in 2 Jarm. Wills (2d Am. Ed.) pp. 56, the rule is stated as follows: 'But question which has been chiefly agi- ed in devises and bequests to children is to the point of time at which the class to be ascertained, or, in other words, as the period within which the objects must born and existent; supposing the testa- himself not to have expressly fixed the iod of ascertaining the objects, which, of rse, takes the case out of the general e. For example, a gift to children now ng applies to such as are in existence at date of the will, and those only; and a to children living at the decease of A. extend to children existing at the pre- bed period, whether the event happens the testator's lifetime (supposing that y survive him), or after his decease. The owing are the rules of construction reg- ing the class of objects entitled, in re- ct of period of birth, under general gifts hildren: First. That an immediate gift hildren (i. e. a gift to take effect in pos- ion immediately on the testator's de- se), whether it be to the children of a ng or a deceased person, and whether to children, simply, or to all the children, whether there be a gift over in the case he decease of any of the children under age or not, comprehends the children living at the testator's death, if any, and those only, notwithstanding some of the early cases, which make the date of the will the period of ascertaining the objects. It is scarcely necessary to observe that this and the succeeding rules apply to issue of every degree, as grandchildren, great grandchil- dren, etc., though cases to the contrary are to be found, especially at an early period. Secondly. That where a particular estate or interest is carved out, with a gift over to the children of the person taking that in- terest, or the children of any other person, such gift will embrace not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. Thus, in the case of a devise or bequest to A. for life, and after his decease to his children, or (which is a better illustration of the limits of the rule, since, in the case suggested, the parents being the legatee for life, all the children who can ever be born necessarily come in esse during the preceding interest) to A. for life, and after his decease to the children of B., the children (if any) of B. living at the death of the testator, together with those who happen to be born during the life of A., the tenant for life, are en- titled, but not those who may come into existence after the death of A. The rule is the same where the life interest is not of the testator's own creation, but is anterior to his title. In cases falling within this rule, the children, if any, living at the death of the testator, take an immediately vested interest in their shares, subject to the dimin- ution of those shares (i. e. to their being de- vested pro tanto) as the number of objects is augmented by future births during the life of the tenant for life; and consequent- ly, on the death of any of the children dur- ing the life of the tenant for life, their shares, if their interests therein are trans- missible, devolve to their respective repre- sentatives, though the rule is sometimes in- accurately stated as if existence at the pe- riod of distribution was essential.' The au- thor cites Matthews v. Paul, 3 Swanst. 339, and Hoghton v. Whitgreave, 1 Jac. & W. 150, as cases where the rule was inaccurate- ly stated. In support of the foregoing prop- ositions, see, also, 20 Am. & Eng. Enc. Law, 854; 29 Am. & Eng. Enc. Law, 411; 2 Washb. Real Prop. (2d Am. Ed.) 603.

"In Gourdin v. Deas, 27 S. C. 484, 4 S. E. 66, the rule is stated by the chief justice as follows: 'The authorities in this state ap- pear to be somewhat conflicting, but it seems to us that the more recent cases sup- port the view that the remainder is vested in such of the issue as were in esse at the date of the deed, at that time, opening to let in other issue as they come into exist- ence.' The same principle was announced in Shuler v. Bull, 15 S. C. 421; McCreary v. Burns, 17 S. C. 45; Bankhead v. Carlisle, 1 Hill, Eq. 357. In Brown v. McCall, 44 S.

had been given to comfort Terry for life, remainder to the sons of Spencer and Daniel Brummet, I take it to be equally clear that there would have been a vested remainder in the sons of Spencer and Daniel Brummet who were living at the time of the gift.' If, therefore, the 'sons of Daniel and Spencer Brummet who were living at the time of the gift' took vested remainders, the children of Mary E. Lynam who were alive at the time of the devise in the case at bar also took vested remainders. The word 'children' designates a class no less perfectly than the word 'sons.' 20 Am. & Eng. Enc. Law, supra. In Crossby v. Smith, 3 Rich. Eq. 254, the point of the decision is clear that the chancellor treated the devise to the children of the testator as a class, and held that those who were in esse at the time of the testator's death took vested remainders, which, upon their dying in the lifetime of the tenant for life, were transmitted to their representatives, and not to the surviving children. See, also, Crim v. Knotts, 4 Rich. Eq. 340; Williman v. Holmes, Id. 475; Wilson v. McJunkin, 11 Rich. Eq. 527; Bentley v. Long, 1 Strob. Eq. 43; McGregor v. Toomer, 2 Strob. Eq. 51; Key v. Weathersbee, 43 S. C. 423, 21 S. E. 324; Gourdin v. Deas, 27 S. C. 484, 4 S. E. 66; 4 Kent, Comm. 197. In all these authorities the same principle is affirmed, viz. that the children in esse when the instrument took effect (i. e. the death of the testator in the case at bar) took vested, transmissible remainders, opening to let in all other children who come into existence before the falling in of the life estate.

"The following cases in South Carolina may appear to be in conflict with rules hereinbefore announced, but a careful analysis of them will show that such is not the case:

"Myers v. Myers (1827) 2 McCord, Ch. 256: In that case the effort was to include in the division children who were born subsequent to the death of the life tenant, or born subsequent to the period fixed for distribution, and it was held that they were not entitled. Throughout the entire case the doctrine of vested remainders in those children in esse at at testator's death, and in those born afterwards and before the period for distribution, seems to have been conceded.

"Swinton v. Legare, 2 McCord, Ch. 440: In that case the representatives of the children who died in the lifetime of the life tenant were excluded because by the express terms of the devise the remainder was limited over to the 'surviving children,' and hence the remainder was contingent.

"Cole v. Creyon (1833) 1 Hill, Eq. 311: This case was reviewed in Gourdin v. Deas, supra, and Brown v. McCall, supra, and was held to have decided only two points, viz. (1) that the application for partition was premature; (2) that the children who were in esse at the time of the death of the testator took vested remainders. In Brown v. McCall, Chief Justice McIver cites with approval the remarks of Chancellor Harper in Cole v. Creyon: 'There would be reason for making a different construction, and probably a different one ought to be made, when the child dying before the time fixed for distribution has left children, and this, also, to effectuate the intention; for it cannot be supposed that testator intended the object of his bounty not to be capable of transmitting to his children so as to provide for them.' Cole v. Creyon thus becomes an authority sustaining the contention of the defendants in the case at bar. The discussion there did not relate to a case like the one at bar, but simply as to what portions of an estate would vest in an individual, on the one hand, and a class, on the other.

"Conner v. Johnson (1834) 2 Hill, Eq. 41: The real question decided in this case was that the division should be per stirpes, and not per capita. Subsidiary to that question was the further one as to what should become of the shares of the remainder-men who died in the lifetime of the life tenant, leaving no issue; and it was, in substance, held that the remainders were devested by the express terms of the will, which provided that in case any of the children should die in the lifetime of the life tenant, leaving 'no issue,' then their shares should go over. It was upon a similar principle that the case of Brown v. McCall, supra, was decided, in which case Conner v. Johnson was also reviewed. Should the case of Conner v. Johnson be found in conflict with the contention of defendants herein, yet it will be remembered that it is one of the cases referred to in Gourdin v. Deas, supra, by name, where it was held that these old cases were controlled by the more recent cases sustaining a different doctrine, viz. that a devise to a class, as children, constitutes a vested remainder in all of the class in esse at testator's death, opening to let in other children born before the period fixed for distribution, and for the enjoyment of the estate in remainder.

"Lemacks v. Glover, 1 Rich. Eq. 145: The question involved in that case is not involved in the case at bar, although the chancellor, quoting from Matthews v. Paul, 3 Swanst. 339, does say: 'In all cases of legacies payable to a class of persons at a future period, the constant rule has been that all persons coming in esse and answering the description at the period of distribution shall take; and the same rule must be applied to persons excluded.' It will be observed that the case of Matthews v. Paul is one of the two cases in which Jarman says, supra, 'that the rule is sometimes inaccurately stated as if existence at the period of distribution was essential.' It is remarkable how an erroneous statement of the rule, as in Matthews v. Paul, becomes perpetuated by reference thereto with-

"Deveaux v. Deveaux, 1 Strob. Eq. 283: The point decided there was that children coming in esse after the period fixed for distribution could not be included with those in esse at testator's death, or who were born before the period fixed for distribution, following Myers v. Myers, supra.

"Dickson v. Dickson, 23 S. C. 216: In that case it was held that 'the interests of the three sons were not vested, but contingent, by reason of the fact that they were dependent upon the uncertain event of Amelia's dying without issue.' That is the only point decided in the case, although it is true that the circuit judge and Chief Justice Simpson did casually discuss the doctrine of a devise to a class; the chief justice stating, without quoting any authority for the statement except Jarman, which has been shown not to apply here: 'There is a class of cases in which, when property is given by will to be distributed among a class of persons at some future time, or on some future contingency, all are let in who come into existence before the time of the happening of the event, provided they be in existence at the happening of said event, and no one but such as may be in existence at that time can take.' The statement of the chief justice was obiter dictum, being in no way necessary to a decision of the case, and Jarman does not sustain the position there taken by the chief justice. On the contrary, he lays down the rule that a devise to a class is 'a gift to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time.' They are uncertain in number because subsequent births before the period of distribution let in after-born children. Hence the number is uncertain until the death of the life tenant. The quantity each child is to take is uncertain, but the quality of the estate is fixed, and not uncertain. It is a vested remainder in those in esse at testator's death, opening to let in after-born children, who eo instanti take vested interests in remainder. This is distinctly laid down by Jarman (2 Jarm. Wills [2d Am. Ed.] p. 54). It is thus seen that Dickson v. Dickson is not in conflict with the contention of the defendants. The idea which seems to have been in the mind of Chief Justice Simpson (that only those children alive at the death of the life tenant should take) was probably derived from the case of Wessenger v. Hunt, 9 Rich. Eq. 459, which, in Hayne v. Irvine, 25 S. C. 289, is said 'to have established the doctrine that a bequest to be distributed at a future time to the death of the testator, to wit, at the death of an intermediate life tenant, all who answer to the description at the time of the distribution are the parties alone entitled.' But Chief Justice McIver, in Gourdin v. Deas, supra, points out that Wardlaw, Ch., does not use the word 'alone' in the case cited; but, on the contrary, he held that 'the representa-

those children in existence at the death of the life tenant can take, to the exclusion of those who, although in esse at testator's death, yet die in the lifetime of the life tenant, is erroneous. On the contrary, the error in Dickson v. Dickson and Hayne v. Irvine is the same error that was pointed out by Chief Justice McIver as supposed to have been derived from Wessenger v. Hunt, and is also the same error derived from Matthews v. Paul, supra.

"Clark v. Clark, 19 S. C. 345: The devise was to William Clark for life, at his death to his children (there being two of them), and then to their children living at his death. One of the two children (Mrs. Sherwood) died after the making of the will, but before the testator, and hence took nothing; and it was held that by the express terms of the will the share she would have taken passed to her children, as purchasers by substitution. In the course of the opinion Mr. Justice McGowan does say that 'if a testator gives a legacy, to be divided among the children of A. at a particular time, those who constitute the class at the time will take,' and cites Cole v. Creyon and Swinton v. Legare, supra; but those cases do not support the doctrine claimed, and, besides, the statement was obiter dictum. Mrs. Sherwood had died before the testator, and before the will took effect. Moreover, the statement of Justice McGowan was not inconsistent with the rule here, because the contention is that the children of Mary E. Lynam (Tindal) were of the class at the testator's death, which was the time that the will took effect, and hence took vested remainders; the enjoyment being merely postponed until the death of the life tenant.

"Shanks v. Mills, 25 S. C. 362: The point decided in this case was in the following language of Mr. Justice McGowan: 'The devise over in this case, by its express terms, was to take effect at the time of the death of Christina, and was limited to her children who may be then living.' This was a clear case of a contingent remainder, excluding, of course, the representatives of a predeceased child.

"Brown v. McCall, 44 S. C. 503, 22 S. E. 823: The only point decided in that case was that by the express terms of the deed of settlement the Berry children took a fee defeasible upon dying leaving issue, and that therefore where one of them died in the lifetime of the life tenant, leaving issue, such issue, by the express terms of the deed, took by way of substitution, as purchasers.

"I therefore conclude, as matter of law, that Mary E. Lynam (afterwards Mary E. Tindal) took a vested remainder in fee simple in the interest passing to her under the will of Samuel Perdriau, and that by virtue of the terms of the marriage settlement aforesaid, and of the law of the land applicable to this case, her issue now own and possess such

ferred to in the answers as tenants in common, their interest therein being as follows: Susan S. Tindal, the plaintiff, one undivided third part of the whole; John L. Neal and Charles M. Neal, one-sixth part each of the whole, and S. Lula McKnight, Charles L. Cuttino, Thomas P. Cuttino, and S. James Cuttino, one-twelfth part each of the whole of said lands. The plaintiff, being in possession of the tract of 100 acres of land, should account to the defendants for the income, rents, and profits thereof; and any of the defendants in possession of any part of the tract of 350 acres should account for the income, rents, and profits of the same. It is therefore ordered that it be referred to the master for Sumter county, to take testimony and report as to the rents, income, and profits accruing from said premises, and also to take testimony and report whether partition in kind among the parties be practicable or expedient; and, upon the filing of the master's report, either of the parties hereto has leave to apply for such further orders as may be necessary to effectuate the purport of this decree."

Haynsworth & Haynsworth, for appellant. Lee & Morse and Purdy & Reynolds, for respondents.

McIVER, C. J. There are but two questions presented by this appeal: (1) Whether the circuit judge erred in holding that the children of Mary E. Lynam (afterwards Tindal) who were alive at the time of the death of the testator, Samuel Perdriau, and at the death of his wife, took vested remainders in the property which is the subject of controversy in this case, subject to open and let in other children of Mary E. Lynam (now Tindal) who should come into existence; (2) whether the circuit judge erred in holding that "the plaintiff, being in possession of the 100 acres tract of land, should account to the defendant for the income, rents, and profits of the same," and in directing the master to take testimony and report as to such income, rents, and profits.

The first question has been so fully and satisfactorily discussed by the circuit judge in his decree (which will be incorporated by the reporter in his report of the case) as to supersede the necessity for any further discussion of that question. We therefore adopt his reasoning, enforced by the authorities which he cites, as amply sufficient to vindicate the conclusion which he reaches.

As to the second question, while it is true that the circuit judge does say in his decree that John M. Tindal, the husband of the plaintiff, who had been substituted as a trustee, under the marriage settlement between Mary E. Lynam and John B. Tindal, in the place of the original trustee, Richard F. Wells, who had died, was in possession, as such trustee, of 100 acres of land, should account to the defendants for the income, rents, and profits thereof," yet this is mere error of statement, which certainly would not warrant a reversal of the judgment of the circuit court, as it can very easily be rectified, by construing the circuit decree to mean what we have no doubt the circuit judge did really mean, to wit, that any of the parties who were in the receipt of income, rents, and profits of any portion of the lands sought to be partitioned, either by the complaint or answer, should account for the rents and profits thereof. This is manifest from the language immediately following that just quoted, viz.: "And any of the defendants in possession of any part of the tract of 350 acres [as to which the right of partition was not questioned] should account for the income, rents, and profits of the same." Under this construction of the true intent of the circuit decree, the plaintiff, on the reference ordered, can only be required to account for so much of the income, rents, and profits of the 100-acre tract of land as she may have received from the trustee, John M. Tindal; and if any further accounting for such income, rents, and profits be desired, it will be necessary to make the said trustee a party to these proceedings. The judgment of this court is that the judgment of the circuit court, as herein construed, be affirmed.

HENDRIX et al. v. HOLDEN et al.

(Supreme Court of South Carolina. Aug. 24, 1900.)

ADMINISTRATOR — TIME TO SUE — PARTIES — JUDGMENT—SALE OF LAND—VALIDITY—APPOINTMENT—CITATION TO HEIRS—PUBLICATION—PRESUMPTION—FINDING BY MASTER—FAILURE TO EXCEPT—EFFECT.

1. Where no exception was taken to a master's finding, it was binding on the circuit judge on the subsequent hearing of the case.

2. There being no evidence that the citation requiring persons opposing an administrator's appointment to show cause was not published as required by Rev. St. 1893, § 2027, the court will presume that the required publication was made.

3. Where an intestate died on June 30th, a judgment secured against her administrator on October 6th could be enforced by a sale of land belonging to her estate, without proceedings against the heirs, since the crops were assets in the administrator's hands under such conditions, and therefore the administrator must have had possession of the land.

4. Notwithstanding Rev. St. 1893, § 2322, providing that no action against an administrator shall be commenced until 12 months after the grant of administration, a sale of the intestate's land under a judgment secured against the administrator 2 days after the expiration of the 12 months will be upheld, though the suit was commenced before the expiration of that period.

5. Where an administrator was entitled to one-third of intestate's land, as her heir at law, his creditors could sell his share under a judgment secured against him in his individual capacity.

Gary, A. J., dissenting.

against William Holden, individually and as administrator of the estate of Naomi Holden, deceased, and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

The following are the judgment and the exceptions thereto:

"On the 30th day of June, 1891, Naomi Holden departed this life intestate in Oconee county. At the time of her death she was seised in fee simple and in the exclusive possession of the several tracts of land described in the complaint, which are the subject-matter of this action. The said Naomi Holden left surviving her, as next of kin and heirs at law, her husband, the defendant William Holden, and her children, the plaintiffs above named. After the death of the said Naomi Holden her said husband and children continued in the uninterrupted possession, use, and enjoyment of the real estate of the said Naomi Holden up to the time the same was sold by the sheriff under an execution issued on the 15th day of October, 1892, to enforce the payment of a judgment in favor of John D. Verner, as plaintiff, against the said William Holden as administrator of the said Naomi Holden and in his own right. This judgment of John D. Verner was recovered under the following circumstances: On the 12th day of October, 1891, said William Holden was appointed administrator of the personal estate of Naomi Holden by Richard Lewis, Esq., judge of probate for Oconee county. I think it important that the petition and order of appointment should be set out at length. They are as follows:

" 'The State of South Carolina, County of Oconee. To Richard Lewis, Judge of Probate of the County and State Aforesaid: The undersigned most respectfully petitions for letters of administration upon the estate of Naomi Holden, dec'd. [Signed] Wm. Holden.'

" 'On hearing the above petition, it is ordered that William Holden be appointed administrator of the personal estate of Naomi Holden, dec'd, upon his giving good and sufficient bond. Given under my hand and seal this 12th day of Oct., 1891. [Signed] Richard Lewis, Judge of Probate. [Official Seal.]'

"This petition and order are both written on the same sheet of paper, just as appears in the above copy.

"On the same day the said William Holden entered into bond in the sum of eight hundred dollars, with W. F. Parker and R. E. Mason as sureties, conditioned for the faithful administration of the goods, chattels, and credits of the said Naomi Holden. On the 8th day of September, 1892, John D. Verner commenced an action in the court of common pleas for Oconee county against William Holden, as administrator of the estate of Naomi Holden, the one dated 1st November, 1888, for five thousand and four hundred dollars, and the other for one thousand and five hundred dollars, both due one day after date, and indorsed by the said William Holden. On October 6, 1892, judgment was recovered by default in favor of the said John D. Verner and against the said William Holden, both as administrator of the estate of Naomi Holden and in his own right, for the sum of eight thousand nine hundred and nineteen and $^{38}/_{100}$ dollars; William Holden having accepted service of summons in this action both in his representative and individual capacity, and having failed to file any answer. On the 15th day of October, 1892, execution was issued to enforce said judgment, and under and by virtue of the same the sheriff sold the various lots of land herein sought to be partitioned. The title deeds of the various purchasers are in evidence before me, from which it appears that on the 7th May, 1894, he sold to Thos. N. Hall and L. G. Gaston a lot known as the 'Cox Lot,' in Westminster, containing one acre, and also the John W. Mason lot, in said town, containing one and one-half acres. On 5th February, 1894, the said sheriff sold to the defendant Josiah Holden two hundred and fifty acres in Oconee county, fully described in his answer in this cause. On 3d February, 1896, he sold to the defendant William M. Gossett lot No. 44 in the town of Westminster, and on same day he sold to the defendant John D. Verner a tract of land on Choestoe creek containing eight and one-tenth acres; also, the one-sixth interest in eight hundred and thirty (830) acres, known as the 'King Lands'; also, one other lot in said town, fronting Gum street; also, a part of lot No. 5, containing twelve and thirty-six one-hundredths ($12\,^{36}/_{100}$) acres, in said town (Doyle survey); also, lot No. 38; also, a lot in said town known as the 'Fannie Nelson Lot,' containing one-half acre; also, the William Nix place, containing nine hundred and fifty acres, on both sides of Beon's creek; also, two lots in the town of Walhalla, known as 'Lot 58,' and containing one acre. It is admitted by the parties to this action that Naomi Holden is the common source, and that she died intestate, and was the owner in fee simple of all the lands which have been sold by the sheriff of Oconee county, and that she was the owner of two tracts of land in Oconee county which have not been sold,—one tract of seventy-five acres on Keowee river, and also a lot in Danville, known as 'Lot No. 2,'—and that she was also the owner in fee simple of three small tracts of land in the county of Pickens, one containing one hundred acres, one sixty acres, and the other containing six hundred and twenty-five acres.

"As already intimated, this suit is brought

were sold off under the judgment and execution in favor of John D. Verner against the said William Holden in his own right and as the administrator of Naomi Holden, deceased, and to partition the same amongst the said heirs at law of the said Naomi Holden, and for the purpose, also, of partitioning the several tracts of land that have not heretofore been sold. The present action was commenced on the 15th day of January, 1898. On July 13 and 14, 1898, Judge Benet granted an order that as to the defendants John D. Verner, William M. Gossett, Josiah Holden, Thomas N. Hall, and L. G. Gaston the said cause be transferred to the court of common pleas for Oconee county for trial of the issues between the plaintiffs herein and said defendants, and for any other proceedings that might arise in the cause. On the 10th day of September, 1894, an order of reference was granted by the court, referring the said issues to the master of Oconee county to determine all the issues of law and fact involved in said cause. At the reference before said master it was adjudged that the administrator of Naomi Holden was a necessary party to the action, and William Holden, as such, was made a party defendant, and filed his answer in the cause. The reference then proceeded. The master has taken a large amount of testimony, and filed the same, together with his report on the issues of law and fact, in said cause. On this report and the exceptions thereto the cause was heard by me at Walhalla on the 10th day of November, 1899. At the conclusion of the arguments I reserved my decision until I could have an opportunity to formulate it in a decree. I should have stated that the master decided that the title to the several tracts of land described in the separate answers of John D. Verner, Wm. M. Gossett, L. G. Gaston, Thomas N. Hall, and Josiah Holden was good, and recommended that the complaint of the plaintiffs as to those defendants should be dismissed, with costs. The exceptions to the master's report raise the question, in various forms, whether there was error in the said report in concluding that the title of the various purchasers of the several tracts of land sold under the Verner judgment and execution was good and valid.

"The sixth allegation of the plaintiffs' complaint is as follows: 'That the defendant John D. Verner claims to have some interest in the lands situate in the county of Oconee, by reason of the sheriff's sale thereof under a certain judgment obtained against the defendant William Holden individually and as administrator of the estate of Naomi Holden, but these plaintiffs allege that as to them this judgment and sales thereunder are null and void, and the claims thereunder are worthless and cannot affect their interest in any of the said lands.' The defendants having admitted that Naomi Holden at the time ties to this case are claiming title, and it appearing that the plaintiffs are the children of Naomi Holden and heirs at law, the burden is then cast upon the defendants to show that the judgment of Verner, and execution thereon, were sufficient to devest said plaintiffs of their title to said land. And that question brings up the real issue in the case: Is the Verner judgment and sale thereunder sufficient to devest these plaintiffs? Bonham v. Bishop, 23 S. C. 96. In determining whether these purchasers have a good and valid title, I think it is well settled that, as a general rule, purchasers at sheriffs' sales are not required to look into the regularity of the process under which the sale is made, but that principle does not apply when the process under which the sale was made was absolutely void. Small v. Small, 16 S. C. 72. It is also well settled that the judgment, execution, levy, and sale are all links in the chain of title to property purchased at sheriff's sale. All are necessary to support the purchaser's title, and if any one is void the title of the purchaser fails. Sheriff v. Welborn, 14 S. C. 480; Bonham v. Bishop, 23 S. C. 102. The defendants seem to have recognized this rule in the management and conduct of their defense. The fourth allegation of the answer of John D. Verner is as follows: 'That on the 12th day of October, 1891, the defendant William Holden was duly appointed and qualified as administrator of the personal estate of the said Naomi Holden, deceased, by the judge of probate in and for Oconee county, in said state, and he is still such administrator.' We find from the testimony reported by the master the following extracts: 'Package No. 767 from the probate court, containing the record of the administration of the estate of Naomi Holden, introduced in evidence.' Again, we find: 'Judgment roll No. 1,932, in case of J. D. Verner, plaintiff, against William Holden, as administrator and in his own right, introduced in evidence.' It seems to me that the validity of the defendant Verner's judgment depends upon the appointment of William Holden as administrator of the estate of Naomi Holden, deceased, that being a link in the chain of title of the defendants. Roll No. 767, referred to by the master as containing the record of administration of the estate of Naomi Holden, is before me, and it consists of the petition and order set out at length in the statement of facts in the cause, and the bond of the said William Holden. If that is the evidence of the appointment of the administrator, I must conclude that it is defective, and that the defect is jurisdictional. The mode of granting administration is statutory. Section 2027 of the statute (Rev. St. 1893) is: 'The judge of probate shall grant administration in the following manner: After requiring the person or persons applying therefor to file a petition in writing,

to show cause, if any they have, why administration shall not be granted to the person or persons applying therefor, and he shall cause the same to be published on the court house door of the county in which his office is for two successive weeks, and also by having it printed once a week for two successive weeks, after it has been issued, in some public gazette, if any be published, in the county.' Section 2028 of the statute is: 'Every administrator shall, in open court, when letters of administration are granted him, take the following oath or affirmation, as the case may be, to wit: "I do solemnly swear, or affirm, that A B, deceased, died without any will, as far as I know or believe, and that I will well and truly administer all and singular the goods and chattels, rights and credits of the said deceased, and pay all his just debts, as far as the same will extend, and the law require me, and that I will make a true and perfect inventory of all the said goods and chattels, rights and credits, and return a just account thereof when thereunto required. So help me God."' From the record offered in evidence, it does not appear that any of these requirements have been complied with, save the giving of the bond by the administrator, and the petition in writing, if such it may be termed. On the contrary, the order of the probate judge recites the fact that administration was granted 'on hearing the petition.' This does not come up to the requirements of the statute. In McRae v. David, 5 Rich. Eq. 484, it was decided that the duty of the ordinary to take a bond as prescribed by statute was ministerial, and not judicial. It is true, the bond is signed by two individuals as surety, but has the bond been approved by the court as the statute requires? In Hankinson v. Railroad Co. (S. C.) 19 S. E. 213, the court held that 'any competent evidence showing that the court undertaking to grant such letters of administration had no jurisdiction to do so would be alike admissible; for, if the court have no jurisdiction, then the alleged letters of administration would be mere nullities, and surely the certified copy would be no better.'

"It is contended, however, that the judgment of the court of probate, evidenced by the certified copy of the letters of administration, cannot be attacked in this collateral proceeding. That depends upon whether the judgment in question is absolutely void or is merely voidable. If the former, then it is a mere nullity, and may be so treated whenever it is encountered; but, if the latter, then it cannot be attacked in any collateral proceeding, but must be avoided by some direct proceeding instituted for that purpose. As we understand it, the test whether a judgment is void or merely voidable, for want of jurisdiction, is whether the lack of jurisdiction appears upon the face of the record, or whether the infirmity must be shown by evidence outside of the record. In the former case it the face of the record, while in the latter case such inquiry is necessary to ascertain the fact showing the lack of jurisdiction. See Turner v. Malone, 24 S. C. 398. In the very recent case of Hartley v. Glover, 56 S. C. 69, 33 S. E. 796, it seems that Mr. Justice Gary wrote the opinion for the supreme court, in which Mr. Chief Justice McIver did not concur, but wrote a dissenting opinion, in which Messrs. Justices Pope and Jones concurred. So that the dissenting opinion of Mr. Chief Justice McIver became the law of the case, two of the justices having agreed with him. It is true the court had under consideration a case where administration was granted on a derelict estate, but that would not change the reasoning, as the authority to grant such administration is under a different section of the statute; the point at issue being that the power or authority to appoint an administrator is derived from the statute, and the provisions of the statute must be observed. The departure from the statute in the Hartley v. Glover case consisted in the fact that the record, on its face, disclosed the fact that the 40-days notice required by the statute had not been complied with. The majority of the court held that this defect was jurisdictional and fatal, and that the record might be treated as a nullity 'whenever and wherever it is encountered.' The conclusion of the court was that the power conferred by a special statute can only be exercised in the manner and under the terms prescribed by such statute, citing Whitesides v. Barber, 24 S. C. 373. The record in the present case does not disclose that the requirements of the statute have been complied with, but, on the contrary, it discloses the fact that administration was granted on the petition of the administrator. The order appointing the administrator is conditional upon his giving good and sufficient bond. The act of giving the bond is ministerial. Approving the same is quasi judicial. At any rate, the record shows that the provisions of the statute have not been complied with, and this is jurisdictional, and fatal to the validity of the judgment set up by the defendants. Consequently the sheriff's deed did not convey the interest of the plaintiffs in the land sold by him under said judgment.

"It seems to me, however, that there is another and better reason why said sales should not be sustained. As already stated, it is admitted that Naomi Holden was the owner in fee and in the exclusive possession of said land at the time of her death. After her death these plaintiffs and their father, William Holden, succeeded her in that possession, and continued in the use and occupation of the same till ousted by the purchasers at the sheriff's sale. William Holden testified as to the possession in the following language: 'Q. From the time of her death up to the time the sheriff sold her land in this county, who was in possession of

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I used it—me and my children—for taxes, and to live off of. * * * Me and my children was in possession of all the land that was sold under this judgment from her death up to the sales.' The law in this state governing sale of land under a judgment obtained against an administrator in an action to which the heir at law was not a party is clearly stated in Huggins v. Oliver, 21 S. C. 147, and also in the later case of Wheeler v. Floyd, 24 S. C. 413. In the former case the authorities are reviewed, and conclusion is announced that lands of an intestate may be sold under a judgment recovered against his administrator upon a debt of the intestate, but, if the lands have passed into the actual and exclusive possession of the heirs at law before the judgment was recovered, they cannot be sold under such judgment, and can only be reached by the usual proceedings to subject real estate in the possession of the heir to the payment of the debts of the ancestor, to which proceeding the heir would, of course, be a party. In Wheeler v. Floyd, 24 S. C. 419, the same rule is announced, the language of the court being: 'While it is true that the heir is generally liable for the debts of the ancestor, sealed or unsealed, to the extent of lands descended or devised, yet the land so descended or devised cannot be sold under a judgment obtained against the administrator or executor, obtained in an action to which the heir is not a party, if at the time of such judgment the heir is in the exclusive possession of the land, asserting the right of possession and *enjoying its rents and profits.* [My italics.] In such case the heir can only be made liable by direct action against him or them, in which, if judgment is obtained, the land can be levied upon, provided it has not been transferred before action brought,'—citing Bird v. Houze, Speer, Eq. 252, and Jones v. Wightman, 2 Hill, Law, 579. Now, the only question here is one of fact: Were the heirs in exclusive possession at the time this judgment was recovered? What is exclusive possession? I take it that it is such a holding as, if continued for the statutory period, would ripen into a title by adverse possession, and it does seem to me that these plaintiffs have come within that rule. Their father has rented the same out to tenants, collected the same, and expended them for the use of himself and children,—the highest proof of exclusive possession. It nowhere appears that he transferred or changed his possession of an heir at law to that of an administrator. He made no returns as such. Having reached this conclusion, I am constrained to overrule the master in his finding of fact on this subject. I therefore hold that the titles under said judgment of John D. Verner are invalid as against the heirs at law of Naomi Holden, and that they are entitled to have the same necessary to pass on them. It is therefore ordered that the exceptions of the plaintiffs and such of the defendants as have filed exceptions to the master's report be, and the same are hereby, confirmed in so far as they are consistent with the views announced in this decree, and that the report of the master is hereby reversed in so far as the findings of fact and conclusions of law are inconsistent with the conclusions announced in this decree. It is further ordered that the master in equity for Oconee county do sell, on sales day in February next, or on some convenient sales day thereafter, all of the lands in dispute in this cause, belonging to the estate of Naomi Holden, situate in the county of Oconee, after due and legal notice of said sale for twenty-one days, according to the rules of this court, upon the following terms: One-half cash, and the balance on a credit of twelve months; the credit portion to be secured by the bond of the purchaser or purchasers, and a mortgage of the premises sold; the credit portion to draw interest from day of sale. The purchaser at such sale is hereby permitted to anticipate payment by the payment of all cash. If the purchaser should fail, for any reason, to comply with terms of sale, the master in that event is directed to resell same on same or some subsequent day, as he may be advised. Leave is hereby granted for any of the parties to this suit to apply at the foot of this decree for any further order that may be necessary to carry out the views herein announced.

"Ernest Gary, Presiding Judge.

"Columbia, S. C., December 6, 1899."

The defendant John D. Verner excepts to the decree on the following grounds, to wit:

"(1) Because on the reference before the master on September 28, 1899, the plaintiffs recognized that William Holden was the duly-authorized administrator of the estate of Naomi Holden, and that he was a proper party to the action in his representative capacity, whereupon the following admission and agreement was entered on the record, to wit: 'It is admitted by all parties that the administrator of Naomi Holden is a proper party to this suit in his representative capacity, and it is agreed that the summons and complaint be so amended as to make him a party; that his answer be filed as of this date.' That the summons and complaint should be considered thus amended, and there should be read into the complaint as amended an allegation, in the usual form, alleging the lawful appointment and qualification of William Holden as administrator of the estate of Naomi Holden. That the answer of William Holden as such administrator was filed, alleging that he is the administrator of the estate of said Naomi Holden. That after the complaint was

puting the legality of the appointment and qualification of the administrator, and the circuit judge erred in not so holding. (2) Because the validity of the appointment of William Holden as administrator of the estate of his wife, Naomi Holden, deceased, was not questioned on the trial before the master or the circuit judge, the plaintiffs making no contention or exception that there was any irregularity or defect in such appointment; and the circuit judge erred in presuming such irregularity or defect in the grant of letters of administration as to render the same null and void. (3) Because the master found as facts, to which no exception was taken, as follows, to wit: 'That Naomi Holden died intestate at Westminster, Oconee county, where she then resided, on June 30, 1891, leaving as her heirs at law her husband, the defendant William Holden, and seven children, the plaintiffs in this action. * * * On October 12, 1891, William Holden was duly appointed administrator of the personal estate of Naomi Holden, deceased, by Richard Lewis, judge of probate of Oconee county, and letters of administration were duly issued to him. He thereupon entered upon the discharge of his duties as such administrator, and is still acting as such.' That after this finding by the master, and no exceptions being filed thereto, the circuit judge erred in holding that William Holden was not the duly appointed and qualified administrator of the estate of Naomi Holden, deceased. (4) Because this case should have been heard and determined by his honor upon the report of the master and the exceptions thereto, or recommitted for further testimony, before making the assumption that citation was not duly published for letters of administration to William Holden on the estate of Naomi Holden. (5) Because, on the hearing of this case before the circuit judge on the report of the master and the exceptions filed, there was no question raised as to any irregularity or defect in the grant of letters of administration by the probate court, it having been conceded all along that William Holden was the duly appointed and authorized administrator of the estate of Naomi Holden; and the court erred in not so holding. (6) Because William Holden, the husband of Naomi Holden, deceased, is given preference by statute in the administration of his deceased wife's estate, and the court of probate had exclusive jurisdiction of the granting of letters of administration, and, having jurisdiction of the subject-matter upon which it acted in this instance, the maxim, 'Omnia præsumuntur rite esse acta,' is applicable; and the circuit judge erred in not so holding. (7) That, in the absence of affirmative evidence that there was no publication of citation, the circuit judge erred in making the assumption that there was no of the intestate. (8) Because it does not appear affirmatively from an inspection of the record in the grant of letters of administration to William Holden on the estate of his deceased wife, Naomi Holden, that the probate court of Oconee county acquired no jurisdiction to do so,—the legal presumption being that citation was duly published for two weeks; that the administrator took the statutory oath in open court; that the bond of the administrator was given and approved as the statute required,—and his honor erred in not so holding. (9) Because his honor erred in holding that at the time the judgment of John D. Verner against William Holden as administrator of the estate of Naomi Holden, deceased, was obtained, and the sales of the real estate made thereunder, the plaintiffs and the defendant William Holden were in such actual and exclusive possession of said land as would prevent a sale of the several tracts or lots of land under said judgment and execution issued thereon. (10) That a distinction should be drawn between the mere pedis possessio of the heirs on and after the descent cast, and that actual and exclusive possession which is manifested by partition, or some act of similar import, whereby the heirs are found to be not only in actual, but exclusive, possession against the claims of creditors; and his honor erred in not so holding. (11) Because his honor erred in holding that the burden of proof is on the defendants to show that as a matter of fact the plaintiffs and the defendant William Holden were not in exclusive possession of said land at the time of the recovery of said judgment and sale thereunder, whereas it is respectfully submitted that since plaintiffs are now seeking to recover possession of said land from defendants, who went into quiet and peaceable possession at the time of the purchase thereof, the burden of proof is now on the plaintiffs and the defendant William Holden to show that they were in such exclusive possession as would prevent a sale under the execution issued on said judgment. (12) Because his honor erred in holding the titles under said judgment of John D. Verner against William Holden as administrator of Naomi Holden to be invalid against her heirs at law; that the heirs of Naomi Holden can recover the same of the several purchasers at sheriff's sale thereof under said judgment, and are entitled to have partition among themselves. (13) Because, in any event, this defendant and other purchasers at said sale own the undivided one-third interest of William Holden in said lands,—said judgment being also against William Holden in his own right, and the one-third interest of William Holden in the unsold land belonging to said estate being worth more than one thousand dollars; and his honor erred in not so holding. (14) Because the judgment in the case of John D.

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the circuit judge erred in not so holding. (15) Because the judgment of the probate court in re the appointment of William Holden as administrator of the estate of Naomi Holden is not subject to collateral attack in this action; and the circuit judge erred in not so holding. (16) Because, as to plaintiffs and defendant William Holden, the appointment of William Holden as administrator of the estate of Naomi Holden, deceased, has become res adjudicata, and they are estopped from raising such question by the record in the case of John D. Verner against William Holden as administrator of Naomi Holden's estate, and in his own right."

The defendants William M. Gossett, Josiah Holden, Thomas N. Hall, and L. G. Gaston except to the decree on the following grounds:

"(1) It was error on the part of the circuit judge to find and hold that: 'The record shows that the provisions of the statute [relating to the appointment of William Holden as administrator of the estate of Naomi Holden, deceased] have not been complied with, and that this is jurisdictional, and fatal to the validity of the judgment set up by defendants. Consequently the sheriff's deed did not convey the interest of the plaintiffs in the land sold by him under said judgment.' And the circuit judge should have found and held that it did not affirmatively appear upon inspection of the record that the probate court failed to comply with the statutory requirements before granting the letters of administration, and in the absence of such showing it must be assumed that the probate court conformed to the requirements of law, and that the appointment of William Holden as the administrator of the estate of Naomi Holden, deceased, was properly made as required by law, and that the title of these defendants to the tracts of land purchased by them under the judgment of John D. Verner v. William Holden as administrator of the estate of Naomi Holden, deceased, and in his own right, are valid. (2) For that the circuit judge erred in finding 'that roll No. 767, referred to by the master as containing the records of administration of the estate of Naomi Holden, is before me; and it consists of the petition and order set out at length in the statement of facts in the cause, and the bond of the said William Holden. If that is the evidence of the appointment of the administrator, I must conclude that it is defective, and that the defect is jurisdictional.' But the circuit judge should have considered all the evidence in the cause tending to show that William Holden was the duly appointed and qualified administrator of the estate of Naomi Holden, deceased, including the letters of administration granted to William Holden as administrator of the estate of Naomi Holden, deceased, which letters of administration were also contained in, and were and held that William Holden was the duly appointed and qualified administrator of the estate of Naomi Holden, deceased; and, in the absence of evidence either for or against anything necessary to have been done, he should have assumed that the formal requisites to its validity had been complied with. (3) It was error on the part of the circuit judge to consider the question of the appointment of the administrator, when the validity of such appointment was not questioned before the master, and after it had been alleged and admitted by the pleadings, and in the trial before the master, that William Holden was such administrator, and after the master had found that: 'On October 12, 1891, William Holden was duly appointed administrator of the personal estate of Naomi Holden, deceased, by Richard Lewis, judge of probate of Oconee county, and letters of administration were duly issued to him. He thereupon entered upon the discharge of his duties as such administrator, and is still acting as such.' And such finding of the master was not questioned by any exception thereto, nor was the validity of the appointment of the administrator. (4) For that the circuit judge should have found and held that the appointment of William Holden as administrator of the estate of Naomi Holden, deceased, was regular, and was duly made by the probate court for Oconee county. (5) The plaintiffs having admitted the representative character of William Holden as administrator of the estate of Naomi Holden, deceased, in the trial of the cause before the master, plaintiffs are estopped from raising such question afterwards. (6) For that it was error on the part of the circuit judge to consider the appointment of William Holden as administrator of the estate of Naomi Holden, deceased, and that the circuit judge should have held that the defendant William Holden and plaintiffs are estopped now from raising such question by the record in the case of John D. Verner v. William Holden as administrator of the estate of Naomi Holden, and in his own right, and that such question is now res adjudicata as to the defendant William Holden and the plaintiffs. (7) It was error on the part of the circuit judge to overrule the finding of the master that the heirs at law of Naomi Holden, deceased, were not in the actual and exclusive possession of the lands sold under the execution in the cause of John D. Verner v. William Holden as administrator of the estate of Naomi Holden, deceased, and in his own right, and to find and hold that the heirs at law of said Naomi Holden were in actual and exclusive possession of the said lands, and that the titles under said judgment of John D. Verner are invalid as against the heirs at law of Naomi Holden, and that they are entitled to have the same partitioned. (8) The defendants being in possession of the

right to recover the said tracts of land from defendants by a preponderance of all the evidence; and the circuit judge erred in not so holding. (9) The defendants being in possession of the several tracts of land under written titles, as bona fide purchasers, the burden is upon the plaintiffs to show by a preponderance of the evidence that the heirs at law of Naomi Holden were in actual and exclusive possession of the tracts of land purchased by these defendants at the time of the sale of said lands under the judgment in the case of John D. Verner v. William Holden as administrator, etc.; and it was error in the circuit judge to hold otherwise. (10) It was error on the part of the circuit judge to find and hold that the titles of these defendants under said judgment of John D. Verner v. William Holden as administrator, etc., were invalid as against the heirs at law of Naomi Holden; and the circuit judge should have affirmed the finding of the master that these defendants were bona fide purchasers, for valuable consideration and without notice, at the sheriff's sales of the tracts of land purchased by them, and that the titles these defendants obtained under their purchases at such sales are valid. (11) It was error on the part of the circuit judge to find and hold that the titles under said judgment of John D. Verner are invalid as against the heirs at law of Naomi Holden, and that they are entitled to have the same partitioned, and in not holding that these defendants are entitled to the interest of the defendant William Holden in the several tracts of land purchased by them. (12) For that the circuit judge should have found that the defendant William Holden procured the defendant Josiah Holden to purchase the tract of land purchased by the defendant Josiah Holden, representing to him that the land was being sold to pay the debts of Naomi Holden, deceased, and the circuit judge should have held that such conduct on the part of the defendant William Holden estops the defendant William Holden and the plaintiffs from now claiming any part or interest in the tract of land purchased by the defendant Josiah Holden under the said John D. Verner judgment. (13) It is respectfully submitted that neither the judgment of the probate court of Oconee county in re the appointment of William Holden as the administrator of the estate of Naomi Holden, deceased, nor the judgment of the court of common pleas in re John D. Verner v. William Holden as administrator, etc., can be attacked collaterally in this proceeding; and it was error on the part of the circuit judge so to hold."

Carey & McCollough, for appellant J. P. Carey. Stribling & Herndon, for appellants Josiah Holden, Thos. N. Hall, L. G. Gaston, and Wm. M. Gossett. Jaynes & Shelor, for appellant J. D. Verner. J. R. Earle, for respondent Wm. Holden.

Holden, and her children, the plaintiffs, who were all minors at that time. On the 12th day of October, A. D. 1891, the defendant William Holden procured letters of administration upon her estate to be granted to him by the probate court of Oconee county, S. C.; and her personal estate was very inconsiderable, but her real estate was considerable, lying partly in Oconee county and partly in Pickens county, although at her death she was residing with her said husband and with her said children in the little town of Westminster, in Oconee county, until the year 1888, when the plaintiff N. A. Holden intermarried with —— Hendrix, and never afterwards lived as one of the family. Mrs. Naomi Holden had given her note to the firm of Peden & Anderson, and also executed a mortgage of some of her lands to secure said note. Mrs. Holden had also in the year 1888 executed her two sealed notes to her husband, William Holden,—one for the sum of $5,500, due at one day after date, and dated the 1st day of November, 1888, with interest at 7 per cent. per annum, and another of the same date, and also due at one day after date, at 7 per cent. interest, for the sum of $1,500, thus aggregating the sum of $7,000. On the 17th day of October, 1891, upon the application of William Holden, he was appointed the administrator of the personal estate of his wife, Mrs. Naomi Holden, deceased. Upon bond as such administrator, with sureties thereto, letters of administration were duly issued to him by Mr. Lewis, the probate judge for Oconee county. William Holden transferred the two sealed notes given to him by his wife, Mrs. Naomi Holden, for value, unto John D. Verner. On the 8th day of September, 1892, John D. Verner brought his action in the court of common pleas for Oconee county, S. C., against the said William Holden as the administrator of the estate of Naomi Holden, deceased, and also in his own right, summons in which was accepted in writing by William Holden as said administrator and as an individual. William Holden, as administrator and in his own right, neither answered, demurred, nor appeared in said action. On the 6th day of October, 1892, in regular term time, judgment was rendered in said action against William Holden as administrator, etc., of Naomi Holden, deceased, for the sum of $8,919.38, and for a like amount against William Holden as an individual. Executions were issued under said judgments. Levies were made upon certain pieces of real estate belonging to the estate of Mrs. Naomi Holden, deceased, in October, 1892, and some in 1894, and some in 1896. Sales were made of certain lands of the intestate, and some of intestate's lands were purchased by John D. Verner, some were purchased by Josiah Holden, some were purchased by William M. Gossett, and some were purchased by Thomas N. Hall and L. G. Gaston. These pur-

ties are still in possession of said land so purchased. All the real estate in Pickens and Oconee counties not sold by the sheriff still remains in the possession of William Holden and his children. So on the 15th day of January, 1898, all the children of Mrs. Naomi Holden, deceased, as plaintiffs, began their action against William Holden, John D. Verner, J. P. Carey, W. M. Hagood, the Seneca Bank, W. P. Andrews, William M. Gossett, Josiah Holden, Thomas N. Hall, and L. G. Gaston, as defendants, alleging the foregoing facts, but claiming that the sales made by the sheriff of Oconee county under the judgment and execution thereon of J. D. Verner against William Holden as administrator, etc., of Naomi Holden, deceased, was null and void, and that such lands as were attempted to be sold, together with all the other lands of the intestate's estate, were seised by them and William Holden in fee simple as the heirs at law of Mrs. Holden, deceased, and they demanded partition. It should have been stated that the defendants J. P. Carey, W. M. Hagood, and the Bank of Seneca are made parties because they hold claims by lien against the defendant William Holden. The defendants John D. Verner, W. P. Anderson, William M. Gossett, Josiah Holden, Thomas N. Hall, and L. G. Gaston deny that the lands purchased by them at the sheriff's sale under the judgment of John D. Verner as plaintiff against William Holden as administrator of the personal estate of Naomi Holden, deceased, and against him as an individual, are now the property of the plaintiffs and the defendant William Holden as heirs at law of Naomi Holden, deceased, and that such lands remain for partition among such alleged heirs at law; but, on the contrary, the defendants allege that such lands are now owned and held by them as their own, respectively, freed from any and all rights or claims thereto by such heirs at law, or any one or more of them. The action of the children of Mrs. Naomi Holden was begun in Pickens county, as some of them resided in that county (Pickens), and some of the lands were there located; but upon the complaint of the defendant John D. Verner, and the others in like plight with him, an order by consent was passed transferring the record to the county of Oconee, where their lands were located, for trial in the latter county. Soon after the action was transferred to Oconee an order was passed by consent that, "trial by jury being waived," all the issues of law and fact were referred to J. W. Holleman, Esq., as master, with leave to report any special matter.

It was admitted by all the counsel engaged that Naomi Holden at the time of her death was the owner in fee of the lands in dispute in this case, and that she is the common source of title, from whom all the parties to it is agreed that the summons and complaint be so amended as to make him a party; that his answer be filed as of this date." Such answer of William Holden as administrator of the personal estate of Naomi Holden, deceased, was accordingly made, wherein he admitted that he was such administrator. Testimony was taken before the master in regard to the judgment, execution, and sales in the action of John D. Verner as plaintiff against William Holden as administrator of the estate of Naomi Holden, deceased. "It was admitted and agreed by counsel for appellants and respondents that the levies on the several tracts and lots of land by the sheriff under said execution, the advertisement of the same for sale, and the deeds to defendants John D. Verner, Josiah Holden, Thomas N. Hall, L. G. Gaston, and W. M. Gossett, were regular in all respects; and no question is raised as to the regularity of any of said official acts of the sheriff in making levy, advertisement, sale, or conveyance of the several lots and tracts of land to said defendants, respectively." After hearing all the testimony, the admissions, and the pleadings, the master, J. W. Holleman, Esq., found, among other things, as follows: "That Naomi Holden died at the time, and survived by her husband and her children, as stated in the complaint, and that she was seised of the real estate as set out in the complaint. That William Holden on October 12, 1891, was duly appointed the administrator of the personal estate which belonged to her estate at her death, and letters of administration were duly issued to him. He thereupon entered upon the discharge of his duties as such administrator, and is still such administrator." That John D. Verner began his action against William Holden as such administrator, and against such William Holden as an individual, to obtain judgment against such William Holden, as said administrator and as an individual, for the $8,500 due by Naomi Holden in her lifetime to her husband, William Holden, which were duly transferred to the said John D. Verner by written assignment, which culminated in a judgment against said William Holden, as administrator as aforesaid and as an individual, for $8,919.38 and costs, on the 14th day of October, 1892. That the real estate as described in the answers of John D. Verner, W. M. Gossett, Thomas N. Hall, L. G. Gaston, and Josiah Holden was sold by the sheriff under the execution issued under said judgment, which execution "commanded said sheriff to satisfy said judgment out of the personal property belonging to the estate of Naomi Holden, deceased, and, if sufficient personal property cannot be found belonging to said estate, then out of the real property belonging to the estate of Naomi Holden." That the defendants above named purchased the same, took deeds therefor, went into im-

iate possession and remained in posses- until now. Said sales of land took place he years 1894 and 1896. At the time of death of Naomi Holden, all her children plaintiffs) were minors. That no parti- was ever had of said lands among the heirs at law, nor any fact tantamount eto. That William Holden's possession aid lands was as administrator, and he l debts of his intestate with rents. He s, also, that the judgment of Peden & erson, now owned by Anderson, is in ›er condition. As conclusions of law, he s: That the judgment of John D. Verner ffective from all collateral attack. That administrator had a right to waive his llege of 12 months from suit. Of course, ase of fraud, it would be different. That plaintiffs are bound by the judgment tak- by J. D. Verner against their mother's ıinistrator. He finds no irregularities in judgment, nor in the levy and sales there- er. He holds the titles of the defendants purchasers valid, and recommends that complaint as to such defendants be dis- sed. The plaintiffs and defendant Wil- ı Holden excepted to the master's report, it is deemed important that we have text of these exceptions before our eyes a future purpose, and therefore we first oduce the plaintiffs' exceptions, and then defendant William Holden's, to wit:

1) The master erred in holding that in case the burden of proof herein rests up- he plaintiffs to show that they, as heirs aw of Naomi Holden, deceased, were in ıal and exclusive possession of the lands ispute at the time the alleged judgment nst the administrator of Naomi Holden, ased, was obtained and sale of the lands eunder had; it being respectfully sub- ed that the said burden rests upon the ndants who claim title thereunder. (2) ıot holding, as a matter of fact, that the ence in this case shows that at the time judgment was alleged to have been ob- ed, and sale thereunder had, the plain- herein and the defendant William Hol- were in the actual and exclusive posses- of said lands, and in not holding, as a ter of law, that the plaintiff in execution therefore no right to sell any of said ls thereunder, and that said sales were efore void, and passed no title to the haser or purchasers. (3) In not holding the judgments under which the pur- sers at said sale purchased never acquir- ıny liens on said lands, for the reasons esaid, and that the heirs at law of Naomi den, deceased, were not parties to the suit, and therefore not bound by said gments. (4) In not holding that the gment and execution in this case, and er which defendants claim title, did not against the administrator de bonis tes- ris, and was therefore no authority to sell ls of Naomi Holden, deceased. (5) In not ling the judgment under which certain de- lants claim title to the lands in dispute void, in that the record shows upon its face that the suit was brought within the period inhibited by the statute from bringing suits by creditors against administrators. See section 2322, Rev. St. 1893. (6) In not holding, as a matter of fact, that there was collusion between the defendant John D. Verner and the administrator of Naomi Holden in obtaining said judgment, and in not holding, therefore, as a matter of law, that the defendant John D. Verner could acquire no title thereunder. (7) In not holding that the defendants, nor any of them, cannot hold the lands in dispute, for the reasons that the evidence shows that the lands were worth not exceeding $1,000 at the time of the alleged sales, and were exempt from sale under homestead laws of this state. (8) In not holding that as to heirs at law of Naomi Holden, deceased, the notes which the defendant John D. Verner claims to have obtained his judgment upon—being the judgment under which the lands were sold—were barred by the statute of limitations, and were void because they were not such contracts as Naomi Holden, being at the time a married woman, could lawfully make, and in not holding that said heirs at law could make such a defense in this action, and especially as against the defendant John D. Verner, who had notice thereof. (9) In not holding that the judgment of defendant W. P. Anderson proven in this case against Naomi Holden is void as to the plaintiffs in this case, for the reason that it shows upon its face that the plaintiffs were not properly served in the suit against them under which said judgment was obtained. (10) In not holding that the lands described in the complaint were subject to partition among the heirs of Naomi Holden as alleged therein, and in not recommending that the lands be sold and the proceeds divided among them as prescribed by law, subject to such liens as were proven against the interest of William Holden, to wit, the mortgages of J. P. Carey, Seneca Bank, and Wm. Hagood. (11) In not holding that plaintiffs had established all the material allegations of their complaint, and were entitled to the relief prayed for. (12) Because the master erred in holding that the testimony failed to show that William Holden was in possession for himself, as heir at law, and the other heirs at law, but does show that he was in possession as administrator (qualified possession), and used the rents for the estate. (13) Because the master erred in holding that the commencement of the action against the administrator before twelve months had elapsed after the grant of letters of administration did not render the judgment void on its face, but only voidable, and that the administrator could waive his right to resist the suit on that ground. (14) Because the master erred in denying the right of homestead to the plaintiffs and the defendant William Holden. (15) Because he erred in finding the judgment of W. P. Anderson regular and valid. (16) Because he erred

ton, Thomas N. Hall, and Josiah Holden to be good. (17) In finding balance due on judgment of John D. Verner to be $1,639.18, and its priority."

The defendant William Holden, as administrator, filed the following exceptions: "(1) Because the master erred in holding that the possession of this defendant of the lands in dispute was as administrator of the estate of Naomi Holden, whereas he should have held that he, together with the other heirs at law of the said Naomi Holden, were in the actual and exclusive possession of the lands in dispute, claiming the same as heirs at law of Naomi Holden, from her death till the sale of same by the sheriff of Oconee county, and that a sale of said lands by the said sheriff was null and void and carries no title. (2) Because the master erred in not holding that this defendant was entitled to a homestead, as to his interest in the lands of his deceased wife, as to the judgment against him individually, and that sales were void as to him; his homestead right preventing the judgment under which said sales were made from being a lien on his interest in said lands. (3) Because the master erred in holding that this defendant was not entitled to a homestead. (4) Because the master erred in finding any amount due on J. D. Verner's judgment or W. P. Anderson's judgment, or any priority for them."

The cause then came on to be heard before his honor, Judge Ernest Gary, at the November term of the court of common pleas for Oconee county, on the exceptions to the master's report. When Judge Gary filed his decree, on 6th December, 1899, he held: First, that William Holden was not the administrator of the personal estate of Naomi Holden, deceased; and, second, that the lands having been in the exclusive possession of William Holden and his children from the moment Mrs. Naomi Holden departed this life until devested of such exclusive possession by the purchasers under the sheriff's sales of said lands, hence the sales made by the sheriff conferred no title upon the purchasers of said lands. He therefore adjudged as follows: "I therefore hold that the titles under said judgment [J. D. Verner v. William Holden as administrator of Naomi Holden, deceased, and as an individual] of John D. Verner are invalid as against the heirs at law of Naomi Holden, and that they are entitled to have the same [lands] partitioned. The judgment is assailed on several other grounds, but, having arrived at a satisfactory conclusion, I think it unnecessary to pass on them. It is therefore ordered that the exceptions of the plaintiffs and such of the defendants as have filed exceptions to the master's report be, and the same are hereby, confirmed in so far as they are consistent with the views announced in this decree, and that the report of the master is hereby further ordered that the master in equity for Oconee county do sell, on sales day in February next, or on some convenient sales day thereafter, all of the lands in dispute in this cause, belonging to the estate of Naomi Holden, situate in the county of Oconee, after due and legal notice of said sale for twenty-one days, according to the rules of this court, upon the following terms: One-half cash, and the balance on a credit of twelve months; the credit portion to be secured by the bond of the purchaser or purchasers, and a mortgage of the premises sold, the credit portion to draw interest from day of sale. The purchaser at such sale is hereby permitted to anticipate payment by the payment of all cash. If the purchaser should fail for any reason to comply with terms of sale, the master, in that event, is directed to resell same on some subsequent day, as he may be advised. Leave is hereby granted for any of the parties to this suit to apply at the foot of this decree for any further order that may be necessary to carry out the views herein announced. Ernest Gary, Presiding Judge. Columbia, S. C., December 6, 1899." From this judgment the defendants John D. Verner, William M. Gossett, Josiah Holden, Thomas N. Hall, and L. G. Gaston have appealed. But, before referring to the grounds of appeal, it might be well to insert the agreement of all the counsel as to the scope and effect of Judge Ernest Gary's judgment: "Addenda to Agreement. State of South Carolina, County of Oconee. Court of Common Pleas. N. A. Hendrix et al., Plaintiffs, v. Wm. Holden et al., Defendants. It is hereby agreed by and between all of the attorneys in the above-stated case that the decree rendered by Judge Gary in said case has only passed upon the rights of the plaintiffs and of the defendants who claim to have bought lands at the sheriff's sale under the judgment of John D. Verner v. William Holden, individually and as administrator of the estate of Naomi Holden, and has not considered or determined the rights of any of the other defendants in the said case, and that the rights of all the other defendants are to be determined by such future proceedings in this case as may be necessary in the event that the decree of the circuit judge is confirmed; and the time for any of the said defendants to appeal from this decree, if they should be advised that the decree of Judge Gary affects the rights and defenses set up by the defendants in this case, except those who have already appealed from said decree, be extended until the final determination of this case. March 16, 1900. Carey & McCollough, Plaintiffs' Attorneys, and Attorneys for Defendant J. P. Carey. Stribling & Herndon, Attorneys for Defendants Josiah Holden, Thos. N. Hall, L. G. Gaston, and Wm. M. Gossett. Jaynes & Shelor, Attorneys for John D. Verner, Defendant. J. R. Earle, At-

ney for Wm. Holden,"—whereby it is man-
it that the parties contesting have deter-
ied to restrict the operation of Judge
ry's judgment within those limits, to wit,
rights of the plaintiffs and of the de-
dants who claim to have bought lands at
sheriff's sales under the judgment of
n D. Verner against William Holden in-
idually and as administrator of the estate
Naomi Holden. We will not reproduce the
eptions in terms. They are intended to
ail the judgment of Judge Gary on the
findings and conclusions which we have
eady set forth herein. In the abundance
caution, however, we will direct that the
gment of Judge Gary, and the exceptions
reto, be reproduced in the report of this
e.

he exceptions complain that the learned
uit judge overlooked the fact that the
ster, in his report, distinctly found that
liam Holden was duly made the admin-
ator by the probate judge of the county
rein the intestate resided; that he qual-
l as such on the 12th October, 1891, and
so remained until to-day. The very ob-
of exceptions is to point out the exact
rs of law and fact made in the report of
aster or a decree of a circuit judge. All
issues of law and fact were committed to
decision of J. W. Holleman, Esq., as
ter. When his report was made, it was
ling on all the parties, unless excepted to,
such exceptions are required to set out in
t particulars there was error committed
he master. Unless exceptions are taken,
circuit judge must make the findings of
and the conclusions of law of the mas-
the basis of his judgment or decree. It is
in the power of the circuit judge to dis-
rd the machinery provided by law for
conduct of business in our courts. When
ies litigant confide the trial of all is-
of law and fact to the master, they are
tled to have the report of such master on
uch issues confirmed by the judgment of
circuit court, unless excepted to; and,
he event of exceptions, the circuit judge
mited to those exceptions, and he can-
of his own motion, go outside of these
ptions. This is not to be viewed as a
ship to the circuit judge, no more than
requirements of our constitution that the
eme court of the state shall not pass up-
acts in a law case. Inasmuch as the mas-
passed directly upon the validity of the
inistratorship of William Holden, and
that he was such administrator, and
e were no exceptions to such findings of
and conclusion of law by the master, it
ot an open question, so far as the parties
his action are concerned, whether such
ng of the master is conclusive. And it
st as imperative upon the circuit judge.
it, apart from this point, which we hold
e conclusive, it is not so certain that the
on of the probate judge in the matter of
appointment of William Holden as admin-
tor is not conclusive. Reliance is sought to be placed upon the case of Hartley v. Glover, 56 S. C. 69, 33 S. E. 796, as authority for the circuit judge in declaring the administration of Holden void. But a reference to that case will show wherein the difference exists, for in the case cited it was when Mr. Assman, as clerk of circuit court, had applied for letters of administration upon a derelict estate, under the statute of 1873 (section 2034, 1 Rev. St.). In such statute it was made imperative upon the probate judge to publish a notice for 40 days in some newspaper, and after such notice to grant such letters, but it appeared upon the face of the record itself that only about 30 days had expired; and this court held that it was necessary, in order for the probate court to have jurisdiction in the case of administration to be granted in a derelict estate, that such 40 days' previous notice be given. In the case at bar, under section 2023 of volume 1 of the Revised Statutes of this state, it is made the duty of the probate judge to grant administration to the husband of his deceased wife, if he applies therefor, and in section 2027 it is provided: "The judge of probate shall grant administration in the following manner: After requiring the person or persons applying therefor to file a petition in writing, he shall issue a citation to the kindred or creditors of the intestate or person deceased to show cause, if any they have, why administration shall not be granted to the person or persons applying therefor, and he shall cause the same to be published on the court house door of the county in which his office is for two successive weeks, and also by having it printed once a week for two successive weeks, after it has been issued in some public gazette, if any be published, in the county." It is suggested that in the record produced by the probate court it does not appear affirmatively that the probate judge published notice of the application by Holden for letters of administration. It must occur to any one that there is quite a difference between a record which shows upon its face that only 30 days' notice of application was had, when 40 days' notice was required, and one in which there is no paper produced showing that notice for 14 days had been given. One shows a positive or affirmative violation of the statute, and in the other there is no showing as to publication at all. One is positive and affirmative, and the other is negative. In the latter it may be shown that such notice was given. In the former the record could not be contradicted. In the former it is physically impossible to make 30 days become 40 days. In the case at bar, the bond is there, the appointment is there, the letters of administration are produced. Why may we not assume that this probate court is a court of record, invested by the constitution of 1868 with jurisdiction in all matters testamentary and of administration (see section 20, art. 4, Const. 1868), and also a court of which it has been said: "The court of probate, in its jurisdic-

general jurisdiction. Herm. Estop. p. 148, § 140." Thomas v. Poole, 19 S. C. 336. See, also, Turner v. Malone, 24 S. C. 398, where it is declared that "the court of probate, though of limited jurisdiction, is a court of record, with very large powers, and, as to proceedings clearly within its jurisdiction, is not to be regarded as an inferior court, in respect to the dignity of its records." We would have no hesitation in agreeing with the circuit judge in his view of the invalidity of the records of the probate court in showing the appointment by that court of William Holden as administrator of Naomi Holden, deceased, if there was anything in the records of that court showing affirmatively that notice of 14 days was not given by publication. In such an event the case of Turner v. Malone, supra, when it did show affirmatively that service had not been made, or the case of Finley v. Robertson, 17 S. C. 438, when it was shown by the record affirmatively that service of summons was accepted for the infant defendants, or the case of Hartley v. Glover, 56 S. C. 69, 33 S. E. 796, where it appeared affirmatively upon the record that notice had not been published for 40 days, but only 30 days, would apply. Here there is no testimony that such notice was not published, —only an absence of such statement from the record. If in the case at bar the plaintiffs had pleaded that the appointment of their father as the administrator was procured from the probate court without any publication of the 14-days notice to heirs or creditors, and the proofs had been that the office or court of probate had been searched, and no such notice had there appeared, or that no such notice had been published in the newspaper at the time required by the statute, then the circuit judge would have been right; but no such allegation appeared in plaintiffs' complaint, nor were there any such proofs as we have just described offered. Turner v. Malone, supra, treats of what is void and what is voidable in judicial records. So that, even from this second consideration (which is not necessary to our holding the circuit judge in error), we think there was error in the court below.

2. As to the "exclusive holding" of the heirs at law of Mrs. Naomi Holden, deceased, from her death until the purchasers at the sale of her lands under the judgment in the action of John D. Verner v. William Holden, as administrator and as an individual, rendering the claims of the heirs at law valid: Consider these dates: Mrs. Naomi Holden died June 30, 1891; William Holden was appointed administrator of her estate October 12, 1891. Mrs. Holden, the intestate, thus appears to have died between the dates fixed by law when all her crops were assets in the hands of her administrator. Then her lands could not be in the hands of her heirs at law the judgment against William Holden as administrator of Mrs. Naomi Holden, deceased, and also against the said William Holden as an individual; and, under the law, executions are liens on lands as soon as judgment is entered up, if such executions are then issued. So, therefore, these judgments were liens upon all the real estate of Mrs. Naomi Holden on the 14th October, 1892. As Mrs. Naomi Holden died intestate, the law threw title to William Holden, her husband, for one-third of said lands; and this execution issued under the judgment, and the judgment itself against him individually, were liens upon his third part of said lands on the 14th October, 1892. When did William Holden ever render up his possession of his wife's lands which he took by virtue of his administration on October 12, 1891, but which the law refers back to the death of his wife, June 30, 1891? This court is well aware that under certain circumstances it is permitted to heirs at law to assert their rights to exclusive ownership of the lands which belonged to their ancestor, whose title was devolved upon them by operation of law. Jones v. Wightman, 2 Hill, Law, 579; Bird v. Houze, Speer, Eq. 250. But it is well aware that these decisions recognized D'Urphey v. Nelson, 1 Brev. 289, and Martin v. Latta, 4 McCord, 128. We greatly fear that there is gradually creeping into the legal mind of this state an idea that very slight causes will operate to defeat the right of creditors of an intestate to have the lands of such intestate sold under a judgment against an administrator which is recovered soon after the 12 months have expired during which, under our statute, an administrator is protected from suit. In the case at bar the creditor sued a little more than a month before the 12 months had expired, reckoning from the date of administration, 12th October, 1891, during which the administrator was protected from suit. On the 14th October, 1892, just 2 days after 12 months had expired, judgment was entered up, and on the 17th October, 1891, an execution was levied upon lands of the intestate. Now, it is patent that most of the cases which seem to sustain an heir at law when he occupies intestate's lands (such as Bird v. Houze, supra; Jones v. Wightman, supra; Vernon v. Ehrich, 2 Hill, Eq. 257; Huggins v. Oliver, 21 S. C. 147) all seem to point to something akin to laches on the part of the creditor, whereby personal assets have been done away with by administrator or executor. There is in none of these cases a denial of the fact that for nearly 100 years it has been the law in this state that, under a judgment obtained by a creditor against an administrator, lands of an intestate in the hands of intestate's heirs may be sold to satisfy such judgment. Huggins v. Oliver, supra, where Chief Justice McIver

where the possession of an administrator, who is also heir at law, and seven infant heirs at law, for about three years from the death of an intestate, one of which years was when suit could not be brought, was held to repair into a right to oust purchasers of such lands at sheriff's sales under a creditor's judgment against the administrator of an intestate whose lands were sold. We must overrule this proposition of the circuit judge.

But, apart from all these things, the judgment of the circuit court cannot stand, because certainly the defendants here being considered had the right to have allowed them the one-third part of the lands to which William Holden was entitled as an heir at law of his deceased wife. It is the judgment of this court that the judgment of the circuit court be reversed, and the action remanded to the circuit court for a new trial.

JONES, J. I concur in the conclusion reached in the opinion of Mr. Justice POPE. While it is true, in a case of this kind, the court cannot review the findings of fact by the circuit court, yet, if such findings are based upon or influenced by some error of law, the judgment based upon such finding is reversible for error of law. The conclusion of the circuit court that the heirs at law of Naomi Holden were in actual and exclusive possession of the land at the time of the rendition of the judgment against William Holden as administrator was not based wholly upon the evidence, but was necessarily influenced by his view (1) that William Holden was not the administrator of Naomi Holden; and (2) that the burden of proof rested on the defendants to show that the heirs at law were not in the actual and exclusive possession of said land. I concur in the view of Mr. Justice POPE that it was error of law for the circuit court to reverse the finding of the master that William Holden was duly appointed as administrator of Naomi Holden. Entertaining the view that William Holden was not the administrator, it was natural for the circuit court to conclude that the master was in error in holding that William Holden was in possession as administrator. In my opinion, also, the circuit court erred, as matter of law, in holding that the burden of proof was upon the defendants to show that the heirs at law of Naomi Holden were not in the actual and exclusive possession at the rendition of the judgment. It is true that when plaintiffs showed a common source of title in Naomi Holden, and that they were her heirs at law, this cast the burden upon the defendants; but, when it appeared that defendants were in possession as purchasers at a sale under a judgment against the administrator of Naomi Holden, this was a valid defense, unless plaintiffs should show that at the rendition of such judgment they were in exclusive and actual possession as heirs at law. An exception to this rule is where the heirs at law are in the actual and exclusive possession at the rendition of the judgment and the sale. But, to avail themselves of this exception, plaintiffs must show the facts upon which the exception is based, as against purchasers in possession.

GARY, A. J. (dissenting). The issue as to exclusive possession was properly triable by a jury on the law side of the court. The waiver of that mode of trial does not give this court the right to review the findings of fact by the circuit judge. I therefore dissent from the opinion of Mr. Justice POPE.

MEMORANDUM DECISIONS.

HILL v. MUTUAL RESERVE FUND LIFE ASS'N. (Supreme Court of North Carolina. June 9, 1900.) Appeal from superior court, Craven county; Hoke, Judge. Action by E. G. Hill against the Mutual Reserve Fund Life Association. Judgment for plaintiff. Defendant appeals. Affirmed. Shepherd & Busbee, J. W. Hinsdale, and Sewell Tyng, for appellant. W. W. Clark, for appellee.

DOUGLAS, J. This case was argued with those of Strauss and Street against same defendant. 36 S. E. 352, 1024. As it involves the same principles of law and, with one exception, facts practically identical, it is governed by that decision. It appears that the plaintiff was present by proxy when the objectionable resolution was passed, but that fact does not affect our opinion. It is quite common for members of an association to send their proxies by request to the secretary or president, in order to permit a meeting to be held; but we cannot suppose that by any such formal act they intend to waive their vested rights, or to release the association from its contractual obligations. The judgment is affirmed.

McCALL v. GARDNER et al. (Supreme Court of North Carolina. May 29, 1900.) Appeal from superior court, Buncombe county; McNeill, Judge. Quo warranto by the state, on relation of R. S. McCall, against one Eaves and others, to try title to an office. From an order overruling relator's motion for a reference to ascertain emoluments of the office while defendant was in wrongful possession thereof, relator appeals. Affirmed. Frank Carter, for appellant.

FURCHES, J. This appeal relates to the defendant Eaves only, and the facts as to him are substantially the same as those in McCall v. Webb (at this term) 36 S. E. 174. This case is therefore governed by the opinion in that case, and the judgment of the court below is affirmed.

STATE ex rel. MOTT v. GRIFFITH. (Supreme Court of North Carolina. June 5, 1900.) Appeal from superior court, Forsyth county; Shaw, Judge. Action by the state, on relation of W. L. Mott, against E. A. Griffith, to try

pellant. Glenn & Manly, for appellee.

FURCHES, J. From the facts agreed in this case it appears to us that the same questions of law are presented for our determination that were presented in the case of White v. Murray (at this term) 35 S. E. 256, and this case is controlled by the opinion in that case. The judgment of the court below, that the plaintiff could not recover, must be affirmed. Affirmed.

STATE ex rel. WILSON v. NEAL. (Supreme Court of North Carolina. June 5, 1900.) Appeal from superior court, Forsyth county; Shaw, Judge. Action by the state, on relation of N. S. Wilson, against Stephen T. Neal, to try the title to the office of clerk of the Western district criminal court for Forsyth county. From a judgment dismissing his complaint, relator appeals. Affirmed. Holton & Alexander and Watson, Buxton & Watson, for appellant. Glenn & Manly, for appellee.

FURCHES, J. From the facts agreed in this case it appears that the same questions of law are presented for our consideration and decision that were presented in the case of White v. Murray (decided at the present term of this court) 35 S. E. 256. The opinion in that case must govern us in deciding this case, and the judgment of the court below, holding that plaintiff could not recover, is affirmed.

STREET v. MUTUAL RESERVE FUND LIFE ASS'N. (Supreme Court of North Carolina. June 9, 1900.) Appeal from superior

pellant. W. W. Clark, for appellee.

DOUGLAS, J. This case was argued with that of Strauss v. Association, 36 S. E. 352, and, as it involves the same principles and facts almost identical, it is governed by the decision in that case. The judgment is affirmed.

McCABE v. SOUTHERN RY. CO. (Supreme Court of South Carolina. Aug. 10, 1900.) Appeal from common pleas circuit court of Richland county; O. W. Buchanan, Judge Action by William McCabe against the Southern Railway Company for $25,000 for the negligent killing of intestate by defendant on its road within the state. Defendant's petition to remove the cause to the federal court was denied, plaintiff had judgment, and defendant appeals. Reversed. B. L. Abney and John P. Thomas, Jr., for appellant. Andrew Crawford and J. S. Muller, for respondent.

JONES, J. The appeal in this case raises the questions of the right of the defendant company to remove the cause to the circuit court of the United States on the ground of diverse citizenship and nonresidence, and the jurisdiction of the state court to proceed further after the due filing of the requisite petition and bond for removal. The question is disposed of in the recent case of Wilson v. Railway Co., 36 S. E. 701, followed in the recent case of Calvert v. Railway Co., Id. 750, which require a reversal of the judgment below in this case. The judgment of the circuit court is reversed.

POPE, J., dissents.

END OF CASES IN VOL. 86.

Conditional Order

for the West Publishing Co.'s proposed Reprint of the Alabama Reports.

..... 1900.

WEST PUBLISHING CO., St. Paul, Minn.

Gentlemen: In the event of your issuing a reprint of the Alabama Reports down to the Southern Reporter, as proposed in your announcement of Feb. 15, 1900 (18 preliminary volumes and vols. 1 to 80, Ala. Rep., bound in approximately from 30 to 35 books), ... agree to take one set, at $2.50 per original volume (being $245 for the complete reprint of 98 vols.), payable as the books of the reprint are delivered.

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ALLOWANCE.

To surviving wife, husband, or children of decedent, see "Executors and Administrators," § 3.

ALTERATION OF INSTRUMENTS.

Where a mortgage was interlined, after its execution, at the request of the mortgagor, by inserting the rate of interest, in the absence of fraud such interlineation did not render it void.—Gunter v. Addy (S. C.) 553.

The fact that a mortgage was interlined, after its execution, at the request of the mortgagor, by inserting after the description the number of acres, did not render it void.—Gunter v. Addy (S. C.) 553.

AMENDMENT.

Of pleadings, see "Pleading."
Of statute, see "Statutes," § 3.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Appeal and Error," § 2.

ANIMALS.

See "Game."
Carriage of live stock, see "Carriers," § 2.
Injuries from operation of railroads, see "Railroads," § 7.

ANSWER.

In pleading, see "Equity," § 4; "Pleading," § 3.

APPEAL AND ERROR.

See "Certiorari"; "Exceptions, Bill of"; "New Trial."
Accounting by executor or administrator, see "Executors and Administrators," § 8.

Law," §§ 17, 18; "Homicide," § 6; "Larceny," § 1.

—— of proceedings of justices of the peace, see "Justices of the Peace."

§ 1. Nature and grounds of appellate jurisdiction.

The supreme court will not pass on propositions of law not presented by exceptions or defects apparent on the face of the record.—Robinson v. Lamb (N. C.) 29.

§ 2. Decisions reviewable.

The supreme court has no jurisdiction of a writ of error complaining of the overruling of a demurrer to a sheriff's answer to a money rule, where there had been no final judgment on the rule.—United Glass Co. v. McConnell (Ga.) 58.

While defendant may bring up for review decision overruling demurrer to plaintiff's petition, he cannot also except to a decision striking his answer or a portion thereof.—Turner v. Camp (Ga.) 76.

Striking ground of motion for new trial *held* not reviewable.—Wood v. Collins (Ga.) 423.

Where, on petition to marshal assets of decedent's estate, the court adjudicated against a particular claim held by a corporation, but no final judgment was entered, the order was not proper subject-matter of direct bill of exceptions, but of exceptions pendente lite.—Atlanta Nat. Building & Loan Ass'n v. Jones (Ga.) 968.

Where a case is submitted to the court, a writ of error will lie, though no right to except was expressly reserved.—Gleason v. Traynham (Ga.) 969.

An appeal does not lie from an order denying a motion to dismiss the return of a justice of the peace to a writ of recordari.—Merrell v. McHone (N. C.) 35.

In an action wherein defendant pleads a plea in bar, an order referring the cause, made contrary to defendant's objection, prior to the disposition of the plea in bar, is appealable.—Austin v. Stewart (N. C.) 37.

Defendant having excepted to an order referring a cause before disposing of a plea in bar, an appeal from an order referring the cause after dismissal by referee will not be dismissed.—Austin v. Stewart (N. C.) 37.

An appeal may be taken from an order allowing to a receiver of an insolvent bank, before final settlement, commissions and charges objected to by the creditors.—Battery Park Bank v. Western Carolina Bank (N. C.) 39.

An appeal from a refusal of the trial court to grant a motion, and from an order allowing defendant to verify an answer, *held* premature.—Best v. Dunn (N. C.) 126.

Under Clark's Code, § 548, an appeal from an order dismissing an attachment against the assets of an insolvent, and directing the ascertainment of plaintiff's claim, in which other creditors might file pleadings, cannot be entertained; such order not being a final judgment.—Brown v. Nimocks (N. C.) 278.

Order sustaining demurrer to declaration, without judgment of dismissal, is not final, and writ of error will not lie therefrom.—Gillespie v. Coleman (Va.) 377.

A decree confirming and settling the accounts of the representatives of a deceased trustee, without directing judgment or making any disposition of the fund, *held* not a final decree, and hence no appeal was necessary, until a final decree was rendered, to review errors therein.—Southern Ry. Co. v. Glenn's Adm'r (Va.) 395.

of appellate court.—Cash v. Humphreys (Va.) 517.

§ 3. Right of review.

Mere statement by a party or his attorney that there will be no appeal, made without consideration, does not preclude an appeal.—Southern Ry. Co. v. Glenn's Adm'r (Va.) 395.

§ 4. Presentation and reservation in lower court of grounds of review.

A complaint that the court erred in giving the particular instruction raises only the question of the soundness in the abstract of the proposition announced.—Central of Georgia Ry. Co. v. Bond (Ga.) 299.

Affidavits on motion for new trial as to newly-discovered evidence will not be considered, where there is no ground in the motion for new trial on account of newly-discovered evidence.—Fletcher v. Collins (Ga.) 646.

Grounds of motion for new trial which are not filed cannot be considered on appeal.—Fletcher v. Collins (Ga.) 646.

Defect in evidence showing plaintiff a receiver cannot be cured on appeal after argument.—Person v. Leary (N. C.) 35.

Defendant, by failing to object that court had no jurisdiction to try a case at an adjourned day of special term, where regular term intervened, *held* to have waived objection.—Short v. Gill (N. C.) 336.

Where testimony is objected to and excluded, and on a subsequent hearing admitted without objection, the supreme court, on appeal, properly regarded it as not objected to.—Ross v. Jones (S. C.) 1; Ormand v. Same, Id.; Miller v. Same, Id.

Where the only objections to testimony in the record are the words, "Objected to," the supreme court would be justified, on appeal, in regarding the testimony as not objected to.—Ross v. Jones (S. C.) 1; Ormand v. Same, Id.; Miller v. Same. Id.

Where no notice has been given by a party that the supreme court would be asked to sustain the judgment on a ground other than that on which the circuit judge rested his judgment, such ground cannot be considered.—Southern Ry. Co. v. Sarratt (S. C.) 504.

An instruction misstating the issues made by the pleadings, to which the court's attention was not called at the trial, cannot be considered on appeal.—Bowen v. Southern Ry. Co. (S. C.) 590.

A finding of fact cannot be reversed, in the absence of a specific exception assigning error therein.—British & American Mortg. Co. v. Bates (S. C.) 917; Same v. Peacock, Id.; Same v. All, Id.; Same v. Knepton. Id.

Under Code, §§ 3451, 3452, where defendants against whom a decree had been entered by default made no motion in the trial court to vacate it, errors in such decree will not be considered on appeal.—Smith's Ex'r v. Powell (Va.) 522.

§ 5. Parties.

A levying officer ruled for money, and having no interest in the result, is not necessary party to bill of exceptions sued out by one of the contestants for the fund.—De Vaughn v. Byrom (Ga.) 267.

All formal parties in a trial court are proper parties to a writ of error, though not always necessary.—Western Union Tel. Co. v. Griffith (Ga.) 859.

A bill of exceptions may be amended to include the names of necessary parties as plain-

Only such litigants as were co-parties below can properly appear as parties plaintiff in error.—Western Union Tel. Co. v. Griffith (Ga.) 859.

Person interested as a party in a trial court may be made plaintiff in error in the appellate court in connection with person suing out a bill of exceptions.—Macon Nav. Co. v. Schofield (Ga.) 965.

§ 6. Requisites and proceedings for transfer of cause.

Where bill of exceptions is not sued out in due time, the writ of error must be dismissed.—Chipman v. Cornwell (Ga.) 923.

On appeal from the court of ordinary, the bond under Civ. Code, § 4466, is properly made payable to the appellee, and not to the ordinary.—Sims v. Walker (Ga.) 966.

Judgment entered after adjournment of court is "rendered at chambers," within Code, § 345, providing that notice of appeal from judgment rendered at chambers must be served within 10 days after written notice of such judgment. (By divided court.)—Appleby v. South Carolina & G. R. Co. (S. C.) 109.

§ 7. Effect of transfer of cause or proceedings therefor.

Under Code, § 558, the trial court, after final judgment, which is appealed from, determining the right to an office, may properly order a restitution of the books and papers of the office, of which relators have taken possession without legal process and without defendant's consent.—Herring v. Pugh (N. C.) 287.

§ 8. Record and proceedings not in record.

Transcript of record must be written or printed on white paper, and, if written, with pen or typewriter on one side of the paper only.—In re Contempt by Four Clerks (Ga.) 237.

The various parts of the transcript must be arranged in order of time.—In re Contempt by Four Clerks (Ga.) 237.

As against a clerk of court, an illegible transcript will be treated as no transcript.—In re Contempt by Four Clerks (Ga.) 237.

If clerk of lower court delays transmission of original bill of exceptions or the transcript beyond 10 days from the time of the filing of the bill of exceptions on ordinary writ of error, it is his duty to certify on the transcript the cause of delay.—In re Contempt by Four Clerks (Ga.) 237.

It is the duty of clerk of trial court to transmit transcript, though plaintiff in error has neither filed a pauper affidavit nor paid the costs.—In re Contempt by Four Clerks (Ga.) 237.

When, in making suggestion of a diminution of record, it is alleged that brief of evidence has been changed, and it is not alleged that copy of brief in the transcript is not a true copy, the suggestion will not be entertained.—Clark v. State (Ga.) 297.

A ground of motion for new trial alleging error in an instruction must set forth the language complained of.—Central of Georgia Ry. Co. v. Bond (Ga.) 299.

Whether permitting an answer to a particular question was prejudicial cannot be determined where it is not shown what the answer was.—Central of Georgia Ry. Co. v. Bond (Ga.) 299.

Assignments of error complaining of rulings on new trial cannot be considered when the for in admitting and rejecting evidence cannot be reviewed, where the motion does not state the evidence to which such objections relate.—Commercial Pub. Co. v. Campbell Printing-Press & Mfg. Co. (Ga.) 756.

Grounds of motion for new trial not approved by the trial court cannot be considered.—Atlanta Mach. Works v. Pope (Ga.) 950.

Where bill of exceptions recites order passed on specified day, and record shows it was passed on a different day, the record will control.—Sweatman v. Wall (Ga.) 954.

Where assignment of error is in the granting of a nonsuit, and no effort has been made to brief the evidence, the judgment will be affirmed.—McLeod v. Florida Cent. & P. R. Co. (Ga.) 965.

The appellate court will not consider facts which appear only in the exceptions or in the argument of counsel, and which do not appear in the record.—Burkhim v. Pinkhussohn (S. C.) 908.

§ 9. Assignment of errors.

Assignment that the verdict is contrary to law will not authorize the court to pass on the question whether petition is good as against a general demurrer.—Roberts v. Keeler (Ga.) 617.

A general complaint in a motion for a new trial that the verdict is contrary to law *held* not a sufficient assignment of error.—Roberts v. Keeler (Ga.) 617.

Assignment of error *held* not sufficiently specific.—Long v. Harrison (Ga.) 925.

Assignments of error on appeal from a judgment denying a new trial *held* to present no cause for reversing the judgment.—Wight v. Schmidt (Ga.) 937.

Under Civ. Code, § 5584, the court cannot decide any question unless raised by special assignment of error in bill of exceptions.—Collins v. Carr (Ga.) 959.

Bill of exceptions considered, and *held* not to contain a special assignment of error.—Collins v. Carr (Ga.) 959.

Assignment of error in an action tried by the court *held* sufficiently specific.—Gleason v. Traynham (Ga.) 969.

§ 10. Dismissal, withdrawal, or abandonment.

Where it was plain that a writ of error was premature, the supreme court will refuse an application to allow the bill of exceptions to be withdrawn and filed in the court below as exceptions pendente lite.—United Glass Co. v. McConnell (Ga.) 58.

Writ of error will be dismissed for insufficient service of bill of exceptions, though no notice of motion to dismiss was given plaintiff in error.—Whitley Grocery Co. v. Walker (Ga.) 426.

Where bill of exceptions is prematurely sued out, writ of error will be dismissed.—Atlanta Nat. Building & Loan Ass'n v. Jones (Ga.) 988.

§ 11. Hearing and rehearing.

Remark of supreme court that it must not be understood as expressing any dissatisfaction with rulings of the lower court on the competency of certain evidence *held* a decision that such evidence was competent.—Ross v. Jones (S. C.) 1; Ormand v. Same, Id.; Miller v. Same, Id.

§ 12. Review—Scope and extent in general.

When the question in cross bill of exceptions controls the case as a whole, that question

Jackson v. Warthen (Ga.) 234; Warthen v. Jackson, Id.

Where the effect of a judgment on appeal is to leave the case to be again tried in the court below, questions raised in cross bill of exceptions as to matters probably arising at the next trial will be determined.—Holmes v. Langston (Ga.) 251; Langston v. Holmes, Id.

The supreme court has no jurisdiction to inquire whether an alteration had been made in original papers before the record for the supreme court was made up.—Clark v. State (Ga.) 297.

Where demurrer to petition is based on several grounds, and some are sustained, judgment of dismissal will be affirmed, whether those grounds were sufficient or not, if other grounds were good.—Crittenden v. Southern Home Building & Loan Ass'n (Ga.) 643.

Where issues submitted arise on the pleading, and every phase of the parties' contentions can be so presented thereunder, they cannot be reviewed.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

Where, several years subsequent to a decree in favor of plaintiff, a commission was appointed by the trial court to determine whether a note given in satisfaction of such decree had been accepted, on appeal from a decision on that question errors in the original decree will not be considered. — Smith's Ex'r v. Powell (Va.) 522.

§ 13. —— Parties entitled to allege error.

That court treated a deed as ambiguous, when it was not so, *held* not prejudicial to one whose contention as to its real meaning was not well founded.—St. John v. Leyden (Ga.) 610.

Error cannot be predicated upon exclusion of evidence, when court announces that it may be offered "later on," and offer is not renewed. —State v. Weaver (S. C.) 499.

An exception to instructions will not be considered on appeal, where the objecting party has no interest in the property in controversy. —Ex parte Neal Loan & Banking Co. (S. C.) 584; Lanahan v. Bailey Liquor Co., Id.

§ 14. —— Discretion of lower court.

First grant of new trial will not be reviewed, under Civ. Code, § 5585.—McNamara v. Cox (Ga.) 60.

Where the evidence on the sole issue submitted is conflicting, the court's discretion in refusing a new trial will not be reviewed on appeal. —Gramling v. Pool (Ga.) 430.

Discretion of court in refusing injunction, where the evidence is conflicting and there is no principle of law involved, will not be disturbed.—Cutliff v. Burk (Ga.) 459.

First grant of new trial under Civ. Code, § 5585, will not be reviewed.—Killian v. Banks (Ga.) 635.

First grant of new trial, where evidence was conflicting, will not be disturbed.—Zipperer v. Zipperer (Ga.) 921.

The appellate court will in no case overrule as erroneous a refusal to direct a verdict.— Western & A. R. Co. v. Callaway (Ga.) 967.

Under Code, § 379 (4), a receiver's allowance of commissions does not rest exclusively in the discretion of the court below, but its exercise may be reviewed when the allowance is made on a wrong principle, or appears clearly inadequate or excessive.—Battery Park Bank v. Western Carolina Bank (N. C.) 39.

§ 15. —— Questions of fact, verdicts, and findings.

Where two successive juries have found in favor of divorce, and there was some evidence to sustain the decree, the court, on appeal, will not interfere with refusal of a new trial.— Gordon v. Gordon (Ga.) 296.

Where it does not appear that general demurrer to petition was sustained, but case went to trial on the merits, *held*, petition was sufficient to sustain verdict for plaintiff.—St. John v. Leyden (Ga.) 610.

Where there are certain issues of fact which must be resolved affirmatively to sustain finding for defendant, and there is no evidence as to them, finding for defendant is contrary to law. —Davis v. Mims (Ga.) 689.

Evidence *held* to show defendant represented by attorneys, so that the agreement that a judgment might be rendered in a county other than that of trial was binding on him.—Ladd v. Teague (N. C.) 45.

A verdict on conflicting evidence will not be disturbed on appeal.—McMillan v. Wilmington & W. R. Co. (N. C.) 129.

Findings of fact by the trial court cannot be reviewed on appeal.—Davison v. West Oxford Land Co. (N. C.) 162.

Findings of fact by referee, sustained by the trial court, *held* conclusive on appeal.—Dunn v. Beaman (N. C.) 174.

Right of review of findings on facts defined. —Lenoir v. Linville Imp. Co. (N. C.) 185.

A finding that defendant, in the exercise of ordinary care, might have seen plaintiff in time to have avoided injuring him, cannot be reviewed on appeal.—Wheeler v. Gibbon (N. C.) 277.

A referee's findings as to the laws of New York, confirmed by circuit judge, *held* findings of fact, and not subject to review on appeal; and hence a contract thereby determined to be binding is enforceable. — Ebaugh v. Eastern Building & Loan Ass'n (S. C.) 535.

An exception that the circuit judge erred in sustaining the finding of the referee that an alleged payment should not be allowed is not available, unless established by a preponderance of the evidence.—Allen v. Petty (S. C.) 586.

A verdict settling a boundary dispute, rendered on conflicting evidence, will not be disturbed on appeal.—Fry v. Stowers (Va.) 482.

A decree based on a commissioner's report, doing substantial justice, affirmed where the record on appeal was unsatisfactory.—Browning's Ex'r v. Browning (Va.) 525.

A commissioner's finding, based on conflicting evidence, will not be disturbed on appeal.— Carper v. Marshall (Va.) 526.

The appellate court will not set aside a verdict unless the evidence is plainly insufficient to support it. — Southern Ry. Co. v. Dawson (Va.) 996.

A verdict will not be disturbed for excessive damages when there is nothing to indicate that the jury acted from improper motive or misconception.—Southern Ry. Co. v. Dawson (Va.) 996.

§ 16. —— Harmless error.

Admission of parol evidence to explain a will *held* harmless error, where it supported the construction as shown by the will.—Cochran v. Hudson (Ga.) 71.

Whether an auditor erred in allowing amendment to pleading *held* immaterial, when his act

had not been proved, is cured when execution is thereafter established.—Ray v. Camp (Ga.) 242.

Any errors of court in rulings complained of in motion for new trial *held* harmless.—St. John v. Leyden (Ga.) 610.

Rejection of evidence *held* harmless error where it could not have affected the result.—Hunnicutt v. Chambers (Ga.) 853.

Error of judge in propounding to defendant questions as to fact not stated in answer *held* not ground for reversal, where it had no material bearing on result.—Hartley v. McGee (Ga.) 926.

Where court had no jurisdiction of an action, refusal of new trial was not error.—Crawford v. Wheeler (Ga.) 954.

Where the court may have given instructions not applicable to issues involved, where it affirmatively appears that jury was not misled, the error was harmless.—Taylor v. Cantrell (Ga.) 968.

The joining of improper parties with a plaintiff is harmless error.—Carter v. Wilmington & W. R. Co. (N. C.) 14.

Where a special instruction, given at the request of a defendant, does not injure the plaintiff, and his exception thereto is in conflict with his prayer for judgment, the judgment will not be reversed therefor.—Lassiter v. Norfolk & C. R. Co. (N. C.) 48.

Remark of a judge in the hearing of the jury on denying defendant's motion to nonsuit plaintiff, on the ground that there was no evidence, to the effect that a certain fact was some evidence of liability, is harmless.—McMillan v. Wilmington & W. R. Co. (N. C.) 129.

The court's failure to submit whether or not an isolated fact was per se negligence is not reversible error, where it placed before the jury all the facts as a whole, and properly instructed in regard thereto.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

A judgment for plaintiff will not be reversed, where the trial court erred in holding that defendant's answer was not verified, where plaintiff was entitled to recover on the merits, though it was verified.—Darwin v. Moore (S. C.) 539.

Where the agent testified, in an action on a life policy, that the company's rules forbade delivery of policies to sick applicants, a prior ruling excluding an agent's manual showing the same rule, if error, was harmless.—Going v. Mutual Ben. Life Ins. Co. (S. C.) 556.

In an action on a note, error in allowing limitations to be interposed as an amendment to the reply was rendered harmless by a finding that they had no application.—Allen v. Petty (S. C.) 586.

A party cannot complain of a modification of an instruction, though the same be good law, which was not prejudicial to him.—Bowen v. Southern Ry. Co. (S. C.) 590.

In an action for the wrongful rescission of plaintiff's contract to erect certain buildings for defendant, the error, if any, of allowing an answer to a question as to how long it took to complete the work, was harmless.—Jenkins v. Charleston St. Ry. Co. (S. C.) 703.

§ 17. —— Error waived in appellate court.

Assignments of error not argued in the briefs will be treated as waived.—Moss v. Bohanon (Ga.) 954.

or such rulings will not be reversed on a subsequent appeal.—James v. Withers (N. C.) 178.

Judgment affirmed on divided opinion *held* res judicata as to particular case.—Johnson v. Charleston & S. Ry. Co. (S. C.) 851.

§ 19. Determination and disposition of cause.

The court with jurisdiction of person and subject-matter has power to take proper steps to have service duly made.—Devereaux v. Atlanta Railway & Power Co. (Ga.) 939.

A party against whom a verdict has been rendered, who, without motion for new trial, sues out a direct bill of exceptions, must not only show error was committed, but that adverse verdict resulted therefrom.—Western & A. R. Co. v. Callaway (Ga.) 967.

Where, on appeal from an order sustaining a demurrer, the demurrer is overruled as to one cause of action of the complaint, defendant, on remand of the case, may answer over, under Code, § 272.—Sloan v. Carolina Cent. Ry. Co. (N. C.) 21.

On filing a remittitur from the supreme court affirming a judgment of the trial court, the latter has no authority to modify its former judgment in any respect.—Merrimon v. Lyman (N. C.) 44.

Where the case on appeal contained testimony as to a master's negligence, the giving of which was shown to be doubtful by statements of the trial judge and his certificate in response to certiorari, and error on the issue of damages required reversal of the case, a new trial after reversal should not be confined to such issue.—Smith v. Wilmington & W. R. Co. (N. C.) 170.

After affirmance of judgment for plaintiff in supreme court, it is too late to apply for further relief in the court below.—McCall v. Webb (N. C.) 174.

Evidence admitted as competent by the trial court will be *held* competent on appeal, where the court is equally divided.—Boone v. Peebles (N. C.) 193.

Where the money paid by defendants for testator's land had been used to discharge testator's debts, but defendant's answer to a complaint filed by testator's children to set aside the sale did not formally plead their right of subrogation, the court, on appeal, will not decide that question, but will remand the cause, with leave to defendants to amend their answer.—Hunter v. Hunter (S. C.) 734.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 3.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.
Of receiver, see "Receivers," § 1.
Of trustee, see "Trusts," § 1.

ARBITRATION AND AWARD.

§ 1. Arbitrators and proceedings.

In the absence of a statutory requirement, it is not necessary that witnesses before a board of arbitrators should be sworn.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

Where the action of the board of arbitrators at its meeting had been communicated to plaintiff, and no objection made by him thereto, he

Where a submission to arbitration provided for two arbitrators, who were to call in an umpire in case of differences between them, it was not necessary for the umpire, when called in, to examine witnesses, etc.; but it was proper for him to arrive at his conclusions from the findings of the other two.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

Evidence *held* sufficient to show that one of the parties to an arbitration had received notice of the meeting of the board.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

§ 2. Award.

The fact that defendant, in a case before arbitrators, had admitted items at a certain price, did not preclude the board from allowing a less price.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

Objection to the award of a board of arbitrators on the ground that no allowance was made for painting extra woodwork *held* not well taken, where the award showed an allowance for extra woodwork complete.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

It is no objection to an award of arbitrators that it was not signed by the umpire until the morning after the others had signed it, where the terms of the submission did not require any formal publication thereof.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

Findings of a board of arbitrators, made in good faith after full consideration, will not be disturbed for mere errors of judgment.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

The fact that an agent of one of the parties was present at sittings of the board of arbitrators did not invalidate the award, where no objection was made to his presence by the other party.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

ARGUMENT OF COUNSEL.

See "Trial," § 5.
In criminal prosecutions, see "Criminal Law," § 8.

ARREST.

Illegal arrest, see "False Imprisonment."

ARSON.

Evidence *held* insufficient to sustain conviction.—Green v. State (Ga.) 609.

ASSAULT AND BATTERY.

§ 1. Criminal responsibility.

Facial expressions of contempt do not constitute abusive language, within statute declaring that such language may amount to a justification.—Behling v. State (Ga.) 85.

An owner of land *held* not entitled to commit an assault on a technical trespasser with a deadly weapon to compel him to leave.—Montgomery v. Commonwealth (Va.) 371.

ASSESSMENT.

Of compensation for property taken for public use, see "Eminent Domain," § 3.
Of damages, see "Damages," § 3.
Of expenses of public improvements, see "Municipal Corporations," § 4.
Of loss on insured, see "Insurance," § 3.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 9.
"Dower," § 3.
For benefit of creditors, see "Assignments for Benefit of Creditors."
Fraud as to creditors, see "Fraudulent Conveyances."
In bankruptcy, see "Bankruptcy," § 1.
Of lease, see "Landlord and Tenant."
Of mortgages, see "Mortgages."

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

§ 1. Requisites and validity.

Allotment of assignor's homestead exemption by three of his neighbors, at request of trustee, does not render assignment presumptively fraudulent.—Jordan v. Newsome (N. C.) 154.

Preference to assignor's mother-in-law will not invalidate assignment.—Jordan v. Newsome (N. C.) 154.

Preference to fictitious claim renders deed fraudulent only as to such claim.—Jordan v. Newsome (N. C.) 154.

Admissions in complaint *held* sufficient to show that general assignment was supported by valid indebtedness.—Jordan v. Newsome (N. C.) 154.

Where deed reserves debtor's homestead exemptions, it is not invalid, under Const. art. 10, § 8, because wife did not join therein.—Jordan v. Newsome (N. C.) 154.

Transfer of all one's property in the state on valid consideration *held* not an assignment for benefit of creditors.—Ex parte Neal Loan & Banking Co. (S. C.) 584; Lanahan v. Bailey Liquor Co., Id.

§ 2. Rights and remedies of creditors.

Evidence *held* sufficient to authorize an instruction that a claim preferred in an assignment for creditors was fictitious.—Jordan v. Newsome (N. C.) 154.

Complaint declaring on promise by debtor to make a new note for balance due on creditor's notes, on creditor's surrendering them to debtor's assignee for benefit of creditors and receiving half cash, *held* not demurrable as declaring on a promise fraudulent as to other creditors.—Wittkowsky v. Baruch (N. C.) 156.

ASSOCIATIONS.

See "Beneficial Associations"; "Building and Loan Associations"; "Religious Societies."

ASSUMPSIT, ACTION OF.

See "Account Stated"; "Work and Labor."

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 6.

ASYLUMS.

See "Reformatories."

ATTACHMENT.

See "Garnishment."
Effect of proceedings in insolvency, see "Insolvency," § 1.
Exemptions, see "Exemptions"; "Homestead."

§ 1. Proceedings to procure.

Under 23 St. at Large, p. 30, amending Code, § 250, *held*, that an affidavit for attachment may be filed within 48 hours after issue of the warrant.—Ferst v. Powers (S. C.) 744.

A verified complaint and affidavits for attachment *held* a sufficient compliance with Code, § 250, requiring affidavits for attachment to show a cause of action, the amount and grounds thereof, and that defendant has assigned his property in fraud of creditors.—Ferst v. Powers (S. C.) 744.

An undertaking in attachment *held* sufficiently signed by plaintiffs, where their names were signed thereto by agents under authority of telegrams thereto attached.—Ferst v. Powers (S. C.) 744.

§ 2. Proceedings to support or enforce.
A complaint claiming for goods sold and delivered, and seeking to set aside an assignment as in fraud of creditors, *held* to sufficiently state a cause of action at law to justify resort to attachment.—Ferst v. Powers (S. C.) 744.

§ 3. Quashing, vacating, dissolution, or abandonment.
Evidence *held* immaterial on question of fraud in conveyance by mother to daughter.—Cooley v. Abbey (Ga.) 786.

Conveyance by insolvent mother to her daughter and son-in-law in good faith for a proper consideration *held* not fraudulent.—Cooley v. Abbey (Ga.) 786.

Denial of truth of ground of attachment *held* a traverse of such ground.—Cooley v. Abbey (Ga.) 786.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 5.
—— in criminal prosecutions, see "Criminal Law," § 8.
Attorneys as public officers, see "Attorney General."
—— in fact, see "Principal and Agent."

ATTORNEY GENERAL.

A solicitor general, for services rendered on appeal in criminal case, when accused was indicted for felony and convicted of a misdemeanor, is entitled to a fee of $15.—In re Maddox (Ga.) 859.

AUTHORITY.

Of agent, see "Principal and Agent," § 2.
Of justice of the peace, see "Justices of the Peace," § 1.

AWARD.

See "Arbitration and Award," § 2.

BAILMENT.

See "Pledges."
Embezzlement or larceny by bailee, see "Embezzlement."

BANISHMENT.

Right to impose perpetual banishment as punishment for crime, see "Criminal Law," § 19.

BANKRUPTCY.

See "Assignments for Benefit of Creditors"; "Insolvency."

§ 1. Assignment, administration, and distribution of bankrupt's estate.
A life insurance policy, though payable to bankrupt's legal representatives, if it has no cash surrender value, does not vest in trustee of the bankrupt's estate.—Morris v. Dodd (Ga.) 83.

BANKS AND BANKING.

§ 1. Functions and dealings.
Where the president of a bank had ... authority to take in payment of notes ... other than cash, his doing so in a ... case was binding on the bank.—Merch... Nat. Bank v. Camp (Ga.) 201.

Where president of bank knew that ... stock had not been fully paid up, and ... ed a transfer, the bank is liable ... —Fouché v. Merchants' Nat. Bank (Ga.) ... Merchants' Nat. Bank v. Fouché, Id.

BAR.

Of action by former adjudication, see "... ment," § 4.

BASTARDS.

§ 1. Illegitimacy in general.
Evidence *held* sufficient to establish ... macy.—Cooley v. Cooley (S. C.) 563.

BATTERY.

See "Assault and Battery."

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Bu... and Loan Associations."
Mutual benefit insurance associations, ... surance," § 11.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

BETTING.

See "Gaming."

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF EXCHANGE.

See "Bills and Notes."

BILLS AND NOTES.

§ 1. Requisites and validity.
Plaintiff, to whom notes were assigned ... maturity, *held* not entitled to recover ... for failure of consideration.—Battery ... Bank v. Loughran (N. C.) 281.

§ 2. Construction and operation.
A note and mortgage securing the same ... ten in New York and payable there, ... other state and executed there, and ... turned to New York, are made in ... state, and not in New York.—British ... ican Mortg. Co. v. Bates (S. C.) 917; ... Peacock, Id.; Same v. All, Id.; Same v. ... ton, Id.

§ 3. Rights and liabilities on indorsement or transfer.
Fraud in transaction inducing execu... note cannot be set up against bona fide ... chaser.—Walters v. Palmer (Ga.) 79.

One holding note as transferee there... sumed, in the absence of evidence to the ... trary, to be a bona fide holder for ... Walters v. Palmer (Ga.) 79.

Citizens' Banking Co. (Ga.) 460.

Sale by payee of negotiable note *held* not to make seller a borrower from the purchaser, though he indorsed the note.—Campbell v. Morgan (Ga.) 621; Morgan v. Campbell, Id.

Note for price of patent right, failing to set forth the consideration upon its face as provided by statute, *held* not void in hands of bona fide holder.—Smith v. Wood (Ga.) 649.

Under Acts 1897-98, pp. 896, 918, § 27, where a payee transferred a note to his creditor as collateral, the creditor was a holder for value to the extent of his lien.—Payne v. Zell (Va.) 379.

The holder of a note indorsed to him before maturity, and before complaint by the maker of a failure of consideration, was a holder without notice of such failure.—Payne v. Zell (Va.) 379.

Under Acts 1897-98, pp. 896, 918, § 25, where a payee transferred a note to his creditor in part payment of his indebtedness, the creditor was a holder for value.—Payne v. Zell (Va.) 379.

§ 4. Payment and discharge.

Payment of a note to the president of a bank *held* to discharge the makers, whether the paper was that of the president individually or that of the bank.—Merchants' Nat. Bank v. Camp (Ga.) 201.

§ 5. Actions.

Evidence in action on note, where defense was payment in part, *held* to sustain verdict for plaintiff.—Hannah v. Johnson (Ga.) 462.

Payee in possession of note is presumed to own it, though his indorsement thereon is uncanceled.—Bomar v. Equitable Mortg. Co. (Ga.) 601.

Answer in action on note for property bought, alleging that defendant was induced to sign the same by false and fraudulent representations as to the value and character of the property, *held* to state a good defense.—Carithers v. Levy (Ga.) 958.

In action on a note, oral evidence was admissible to show that part of the consideration was to protect plaintiff's testator as surety on defendant's bond, and that the bond had been discharged.—Trimmier v. Liles (S. C.) 652.

BOARD OF HEALTH.

See "Health," § 1.

BONA FIDE PURCHASERS.

Of bill of exchange or promissory note, see "Bills and Notes," § 3.

BONDS.

In legal proceedings, see "Appeal and Error," § 6; "Attachment," § 1; "Garnishment," § 6; "Injunction," § 6.
Municipal bonds, see "Municipal Corporations," § 8.
Of guardian, see "Guardian and Ward."
Sureties on bonds, see "Principal and Surety."

BOUNDARIES.

§ 1. Evidence, ascertainment, and establishment.

Running by processioners of a line between adjoining landowners, where none had been established, *held* unauthorized, and the superior old trees marked as pointers at the end of a line alleged to be the true line of a survey mistakenly described in a grant *held* insufficient to justify submission of the question to the jury.—Tucker v. Satterthwaite (N. C.) 188.

BREACH.

Of condition, see "Insurance," §§ 4, 5.
Of contract, see "Contracts," § 3; "Sales," § 4; "Vendor and Purchaser," § 2.

BRIDGES.

§ 1. Regulation and use for travel.

Where corporate limits of city are extended to include a highway and a bridge over stream crossing the same, the city is chargeable with the duty of keeping it in repair after the county had relinquished its jurisdiction.—Commissioners of Roads and Revenues of Polk County v. City of Cedartown (Ga.) 50.

A city is not liable for injuries from a defective bridge over a road on private property in no way controlled by the city.—City of Sandersville v. Hurst (Ga.) 757.

BROKERS.

See "Principal and Agent."

§ 1. Compensation and lien.

A broker *held* not entitled to commissions, on ground that annulling agreement of sale was due to misrepresentations of vendor, where no agreement would have been made but for the representation.—Crockett v. Grayson (Va.) 477.

Broker *held* not entitled to commission where contract for sale was annulled by vendee, pursuant to the contract, on discovery that liens on property were greater than represented by vendor.—Crockett v. Grayson (Va.) 477.

BUILDING AND LOAN ASSOCIATIONS.

A stockholder suing a corporation, alleging certain amendments to by-laws to be in violation of its contract, must set out the contract.—Crittenden v. Southern Home Building & Loan Ass'n (Ga.) 643.

Where petition in action against association by stockholder alleges right to recover certain amount as withdrawal value, the particular terms of the contract should be set out.—Crittenden v. Southern Home Building & Loan Ass'n (Ga.) 643.

Rights and liabilities of parties to loan from a building association, who executed a bond to secure the loan, and also under mortgage executed as additional security determined.—Meares v. Monroe Land & Improvement Co. (N. C.) 130.

Where, after withdrawal of a member of a building association, but before his withdrawal became effective, it changed its by-laws, so as to repeal prior provision for withdrawal fund, he was entitled to a receiver and to compel a dissolution of the association.—Andrews v. Roanoke Bldg. Ass'n & Inv. Co. (Va.) 531.

The withdrawing member's right to sue to compel its dissolution *held* not barred by limitations, where no fund existed since his withdrawal out of which his claim could have been recovered.—Andrews v. Roanoke Bldg. Ass'n & Inv. Co. (Va.) 531.

BY-LAWS.

Of corporations in general, see "Corporations," § 1.

§ 1. Right of action and defenses.
A deed will not be canceled because of a breach by grantee of a promise made by him in consideration of the deed.—Brand v. Power (Ga.) 53.

Equity will not decree cancellation of a paper where it is not essential to protection of party asking.—Hairalson v. Carson (Ga.) 319.

§ 2. Proceedings and relief.
A bill to cancel a deed because of breach by grantee of a promise in consideration thereof cannot be amended, to set up that grantor was mentally incompetent or to allege fraud.—Brand v. Power (Ga.) 53.

CARRIERS.

§ 1. Carriage of goods.
Evidence *held* insufficient to show acquiescence in unauthorized contract of agent.—Central of Georgia Ry. Co. v. Felton (Ga.) 93.

Railroad company can repudiate an unauthorized contract of its agent which he attempts to make with himself.—Central of Georgia Ry. Co. v. Felton (Ga.) 93.

Liability of common carrier of goods is that of insurer, from which he is excused only by act of God or the public enemy.—Central of Georgia Ry. Co. v. Lippman (Ga.) 202.

A carrier of goods may with certain restrictions make an express contract as to his liability.—Central of Georgia Ry. Co. v. Lippman (Ga.) 202.

Where goods arrived at destination, and are deposited by the railroad company in a place of safety, its liability as a warehouseman begins.—Georgia & A. Ry. v. Pound (Ga.) 312.

To prove a usage, it must be affirmatively shown that it was of an established and general nature, and that notice by carrier, given in pursuance thereof, warranted the inference that he intended to remain liable as common carrier, and not as warehouseman.—Georgia & A. Ry. v. Pound (Ga.) 312.

Evidence *held* insufficient to establish custom of carrier to remain liable as such after goods had been deposited in warehouse.—Georgia & A. Ry. v. Pound (Ga.) 312.

Under Code, § 1964, the refusal of a railroad company to ship each head of a lot of cattle was a separate offense, for which a penalty might be recovered.—Carter v. Wilmington & W. R. Co. (N. C.) 14.

A complaint against a railroad, alleging that defendant wrongfully allowed one who had agreed to purchase cotton of plaintiff to examine the same without production of bill of lading, which had draft attached, by reason of which examination purchaser did not accept, *held* demurrable.—Sloan v. Carolina Cent. Ry. Co. (N. C.) 21.

A complaint against a carrier for wrongfully allowing one to examine goods without production of bill of lading, and for allowing the goods to remain in cars without notifying plaintiff in order to charge demurrage, *held* not demurrable for misjoinder of causes of action, under Clark's Code (3d Ed.) 267, note 1.—Sloan v. Carolina Cent. Ry. Co. (N. C.) 21.

§ 2. Carriage of live stock.
A carrier of live stock may limit his liability to cases only of gross negligence.—Cooper v. Raleigh & G. R. Co. (Ga.) 240.

A common carrier of live stock is, under certain circumstances, exempt from liability for injuries caused by the nature of the animals.—Cooper v. Raleigh & G. R. Co. (Ga.) 240.

The burden rests on a carrier of live stock to show that he is not liable for injuries to live stock by reason of some cause which the law recognizes as an excuse.—Cooper v. Raleigh & G. R. Co. (Ga.) 240.

Where a contract for shipment of live stock provided that shipper should unload at his own risk, he may either be present or have some one representing him at the unloading of the stock; but failure of the shipper to be present will not defeat a recovery, unless the damages claimed resulted from such failure.—Cooper v. Raleigh & G. R. Co. (Ga.) 240.

Where evidence in action for damage to live stock showed that it resulted from negligent failure of plaintiff to attend to such stock, the verdict for plaintiff will be set aside.—Central of Georgia Ry. Co. v. Rogers (Ga.) 946.

The shipper's failure to give a formal written notice of his intention to demand compensation for damages to cattle shipped, under special contract requiring written notice before suit, *held* not to preclude his recovery where he signed a receipt for the cattle at destination under protest because of their damaged condition.—Hinkle v. Southern Ry. Co. (N. C.) 348.

The burden *held* on a carrier, where a shipment of cattle was under a special contract, to bring the injury complained of within its exceptions, and to show that it was not caused by its own negligence.—Hinkle v. Southern Ry. Co. (N. C.) 348.

Where horses shipped over several connecting lines were injured in shipment, an instruction that, if they were shipped under special contract, plaintiff could not recover by merely proving they were in good condition when loaded, or at any intermediate point, and not in good condition when they arrived at their destination, but must also show that the injury did not arise from their crowded condition in the car, nor from concussion incident to running freight trains, was proper.—Milam v. Southern Ry. Co. (S. C.) 571.

Where horses were injured in shipment, an instruction that if shipper failed to feed and rest them during shipment, according to his contract, he could not recover, was properly refused.—Milam v. Southern Ry. Co. (S. C.) 571.

Where horses transported by successive carriers were injured in shipment, an instruction that if they were shipped under special contract, in order to hold defendant liable for the injury, the jury must find that such injury occurred on defendant's line and because of its negligence, was proper.—Milam v. Southern Ry. Co. (S. C.) 571.

An instruction that where horses had been transported by successive carriers, and they were in good condition when first delivered, and damaged when they arrived at their destination, the law presumed that the damages were occasioned while they were in the hands of the last railway company, was properly refused.—Milam v. Southern Ry. Co. (S. C.) 571.

Where the court instructed that, before plaintiff could recover from defendant, they must be satisfied by the preponderance of evidence that the horses shipped by plaintiff over defendant's line of railway were injured while in possession of defendant, was proper.—Milam v. Southern Ry. Co. (S. C.) 571.

Where the evidence as to the appearance of horses on their arrival at their destination was conflicting, a motion for a nonsuit in an action for damages for improper care of them during shipment was properly denied; such question

A passenger *held* guilty of remaining in a car other than that to which he had been assigned, and liable to prosecution under Pen. Code, § 528.—Brown v. State (Ga.) 68.

A carrier of passengers is bound to extraordinary diligence, which he cannot waive.—Central of Georgia Ry. Co. v. Lippman (Ga.) 202.

Express contract entered into, under the terms of which a carrier is released from liability to passenger for personal injuries on freight train, cannot be enforced.—Central of Georgia Ry. Co. v. Lippman (Ga.) 202.

A carrier receiving a passenger on a freight train is bound by the same standard of diligence as if the passenger were on a regular passenger train.—Central of Georgia Ry. Co. v. Lippman (Ga.) 202.

A passenger voluntarily seeking to be transported by freight train assumes the risk of the usual necessary jars occurring in operation of the train.—Central of Georgia Ry. Co. v. Lippman (Ga.) 202.

A carrier of passengers cannot limit his liability from consequences of his own negligence by notice or express contract.—Southern Ry. Co. v. Watson (Ga.) 209.

A regulation limiting the time of transportation, and providing for refunding the price of any unused part of ticket after the limited period, *held* reasonable.—Southern Ry. Co. v. Watson (Ga.) 209.

A regulation fixing a time limit to a ticket, if otherwise reasonable, becomes a part of the contract; and where, after the limit, the passenger tenders the ticket, and is ejected for refusal to pay, he has no right of action against the carrier.—Southern Ry. Co. v. Watson (Ga.) 209.

No right of action accrues to passenger for ejection after ticket has expired under reasonable regulation of company.—Southern Ry. Co. v. Howard (Ga.) 213.

One taking passage on freight train *held* entitled to carriage only to a place in the city at which the run of the train on its usual schedule is terminated.—Southern Ry. Co. v. Howard (Ga.) 213.

Complaint in action by passenger against railroad for personal injuries *held* to state a cause of action.—Garland v. Southern Ry. Co. (Ga.) 595.

Petition in action for ejectment of passenger *held* to state a cause of action.—McIver v. Florida Cent. & P. R. Co. (Ga.) 775.

Where the complaint showed that the train on which plaintiff was a passenger stopped on a trestle, and that plaintiff, by reason of the darkness, fell from the trestle to the ground, and did not negative plaintiff's knowledge of the position of the train, the complaint shows contributory negligence.—Jarrell v. Charleston & W. C. Ry. Co. (S. C.) 910.

Where complaint merely alleged the negligent delay of the train on which plaintiff was a passenger, and its stopping on a high trestle, and that plaintiff, by reason of the darkness and the poor lights furnished, missed his footing and fell to the ground, it fails to show negligence of defendant to be the proximate cause of the injury.—Jarrell v. Charleston & W. C. Ry. Co. (S. C.) 910.

No presumption of negligence by the carrier arises from the fall of a passenger from a train, unless the fall is shown to be the result of some act or omission of the carrier.—Jarrell v. Charleston & W. C. Ry. Co. (S. C.) 910.

want of negligence.—Southern Ry. Co. v. Dawson (Va.) 996.

CAUSA MORTIS.

See "Gifts," § 2.

CAUSE OF ACTION.

See "Action"; "Malicious Prosecution," § 2.

CERTIORARI.

Review of proceedings before justices of the peace, see "Justices of the Peace," § 3.

§ 1. Nature and grounds.

Evidence being conflicting on question of negligence, certiorari after verdict for plaintiff *held* properly overruled.—Georgia Railroad & Banking Co. v. Pounds (Ga.) 687.

Under Const. art. 5, §§ 15, 19, and Code Civ. Proc. § 57, certiorari will not lie to a judgment of the probate court declaring a person to be of unsound mind which was rendered without notice to such person.—Ex parte Gregory (S. C.) 433; In re Buffington, Id.

§ 2. Proceedings and determination.

A writ of certiorari issued on the sanction of a city court judge is void.—Kieve v. Ford (Ga.) 293.

Petition for certiorari, where no error is assigned in judgment sought to be reviewed, except to allege that the same was error, *held* not to comply with statute requiring a distinct setting forth of errors complained of.—Papworth v. City of Fitzgerald (Ga.) 311.

Where question whether written notice of petition for certiorari had been given in due time depends on conflicting evidence, ruling of trial court will not be disturbed.—Shearouse v. Morgan (Ga.) 927.

Judgment dismissing certiorari because notice of sanction was not given in due time will not be disturbed because judge dismissed without giving attorney for plaintiff opportunity to reply to affidavit by defendant's attorney, no substantial right being affected. — Shearouse v. Morgan (Ga.) 927.

Where original application for a writ is void, a renewal thereof within six months is ineffectual.—Hamilton v. Phenix Ins. Co. (Ga.) 960.

Where certiorari has been judicially decreed void, it cannot be renewed, and, not having been presented for sanction within 30 days after the verdict which it seeks to review, it should be dismissed.—Hamilton v. Phenix Ins. Co. (Ga.) 960.

CHALLENGE.

To juror, see "Jury," § 3.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of civil action, see "Venue," § 3.

CHARGE.

To jury in civil actions, see "Trial," §§ 7-9½; —— in criminal prosecutions, see "Criminal Law," § 10.

enforcement.

Where bequest of income to charities available to the object designated, it c be diverted to other charities; it not s that it was impossible to devise a sch approximate to the bequest.—Ford v. (Ga.) 841.

Trustees appointed to carry out a income for the benefit of the cor *held* not required to make returns t of ordinary, under Civ. Code, § 31 Thomas (Ga.) 841.

Where testator devised the incor be appropriated to the erection of and the same was not sufficient same, it was not error to refus application to a technological s Thomas (Ga.) 841.

CHATTEL MORTG

See "Pledges."

§ 1. Foreclosure.

Making of affidavit requir constitute foreclosure, with De Vaughn v. Byrom (Ga.)

Where owner gives mor and sells the property, gagee cannot foreclose, s hands of levying officer, sale in preference to ju v. Beland (Ga.) 296.

CH

See "False Pretenses.

CI

See "Bills and Not

See "Guardian a

See "Religious

See "Process

See "Muni

Citizensh
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COMMON CARRIERS.

e "Carriers."

COMMON SCHOOLS.

e "Schools and School Districts," § 1.

COMPENSATION.

r performance of contract, see "Contracts," 2.
r property taken for public use, see "Eminent Domain," § 2.
r services, see "Master and Servant," § 1.
executor or administrator, see "Executors nd Administrators," § 8.
receiver, see "Receivers," § 4.
trustee, see "Trusts," § 2.

COMPETENCY.

experts as witnesses, see "Evidence," § 10.

COMPLAINT.

civil actions, see "Pleading," § 2.

OMPOSITIONS WITH CREDITORS.

e "Compromise and Settlement."

Where creditor gives notes and pays money single creditor in fraud of composition, in tion on notes, debtor may set up the fraud d recover the money paid.—Brown v. Everett-dley-Ragan Co. (Ga.) 813.

Where creditor of failing debtor ostensibly rees with other creditors and debtor for a mpromise, and by secret agreement obtains oney and notes in addition to those paid to ier creditors, the transaction is fraudulent, d the notes void.—Brown v. Everett-Ridley-gan Co. (Ga.) 813.

OMPROMISE AND SETTLEMENT.

e "Compositions with Creditors"; "Payment"; "Release."

Under Code, § 574, creditor, surrendering tes to assignee for benefit of creditors under reement that he was to receive half of the ount due and a new note from debtor for lance, *held* precluded from suing on surrendered notes.—Wittkowsky v. Baruch (N. C.) 3.

CONCLUSION.

witness, see "Evidence," § 10.

CONDEMNATION.

king property for public use, see "Eminent Domain."

CONDITIONAL SALES.

e "Sales," § 6.

CONDITIONS.

deeds, see "Deeds," § 2.
insurance policies, see "Insurance," §§ 4, 5.

CONFESSION.

missibility in evidence, see "Criminal Law," 4.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 1.

CONSIDERATION.

Of bill of exchange or promissory note, see "Bills and Notes."
Of contract, see "Contracts," § 1.

CONSTABLES.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

Provisions relating to particular subjects, see "Commerce," § 1; "Intoxicating Liquors," § 1; "Taxation," § 1.
—— enactment and validity of statutes, see "Statutes," § 1.
—— subjects and titles of statutes, see "Statutes," § 2.

§ 1. Distribution of governmental powers and functions.

Where court is created by constitution, the legislature, without express constitutional authority, cannot define what are contempts, and declare that court shall have jurisdiction over no acts except those specified.—Bradley v. State (Ga.) 630; Looney v. Same, Id.

§ 2. Vested rights.

Act Dec. 21, 1897, relating to allowance of improvements in ejectment, *held* not to interfere with any vested right of the owner.—Mills v. Geer (Ga.) 673.

§ 3. Obligation of contracts.

A franchise to establish and operate a ferry, granted by Priv. Laws 1873–74, c. 27, *held* not a contract, but a mere gratuity, and hence the legislature was not prohibited from limiting the extension of the franchise under Act 1897, c. 103.—Robinson v. Lamb (N. C.) 29.

Laws 1899, c. 128, § 2, prohibiting the bringing of an action against a town to recover fines and penalties collected, *held* in violation of contract clause of the federal constitution.—Board of Education of Vance County v. Town of Henderson (N. C.) 158.

§ 4. Retrospective and ex post facto laws.

Act Dec. 21, 1897, allowing value of improvements under certain circumstances to defendants in ejectment, *held* not unconstitutional as a retroactive act.—Mills v. Geer (Ga.) 673.

§ 5. Equal protection of laws.

The refusal to permit a foreign corporation, which has become a domestic corporation under Pub. Laws 1899, c. 62, to remove an action against it to the United States circuit court, *held* not to abridge its privileges as a United States citizen guarantied by United States constitution.—Debnam v. Southern Bell Tel. Co. (N. C.) 269.

§ 6. Due process of law.

An order, in a proceeding for the recovery of an office, compelling relators, without notice, before hearing, to deliver the books of the office, *held* not invalid, as depriving them of private property without due process of law.—Herring v. Pugh (N. C.) 287.

CONTEMPT.

§ 1. Acts or conduct constituting contempt of court.

Relators, in a proceeding to recover an office, cannot relieve themselves of contempt for disobeying a court's order to deliver the books of

der of the court.—Herring v. Pugh (N. C.) 287.

§ 2. Power to punish and proceedings therefor.

Civ. Code, § 4046, in so far as it seeks to limit jurisdiction of constitutional courts to punish contempts to certain specified acts, is not binding on such courts.—Bradley v. State (Ga.) 630; Looney v. Same, Id.

That a given act may be indictable does not deprive the court of the power of dealing with it as a contempt.—Bradley v. State (Ga.) 630; Looney v. Same, Id.

The granting of a rule to show cause for contempt for disobeying an order is not defective because of the failure to serve respondents with notice of the order on which the contempt is based, where they appeared at the hearing of the contempt rule and declined to obey the order.—Herring v. Pugh (N. C.) 287.

A judge outside the judicial district in which respondents reside, and in which an alleged contempt was committed, may hear and determine the contempt, where the respondents appear and answer the rule, and make no objection to the jurisdiction.—Herring v. Pugh (N. C.) 287.

Respondents do not purge themselves of contempt in disobeying a court's order by answer disclaiming any intention to commit a contempt, where they refused to obey the order, which it was in their power to obey.—Herring v. Pugh (N. C.) 287.

CONTEST.

Of election, see "Elections," § 1.

CONTINGENT REMAINDERS.

Creation, see "Wills," § 7.

CONTINUANCE.

In criminal prosecution, see "Criminal Law," § 5.

Discretion of trial judge in refusing continuance will not be controlled where evidence as to the ground was conflicting.—Fletcher v. Collins (Ga.) 646.

Motion for continuance in behalf of claimant *held* erroneously denied.—Morse v. Lowe (Ga.) 688.

Refusal of continuance *held* not error, where answer filed by defendant was without merit and properly stricken.—Garlington v. Fletcher (Ga.) 920.

Refusal of continuance because of defendant's absence to keep a business engagement made several weeks before, when no effort was made to change the day set for trial till the case was called, *held* not error.—Payne v. Zell (Va.) 379.

CONTRACTS.

See "Intoxicating Liquors," § 4.
Agreements within statute of frauds, see "Frauds, Statute of."
Alteration, see "Alteration of Instruments."
Ground for mechanics' liens, see "Mechanics' Liens," § 1.
Impairing obligation, see "Constitutional Law," § 3.
Making bequest or devise, see "Wills," § 1.
Novation, see "Novation."
Of particular classes of parties, see "Carriers," §§ 1, 3; "Master and Servant"; "Municipal Corporations," § 3.
Parol or extrinsic evidence, see "Evidence," § 9.
Particular classes of express contracts, see "Bills and Notes"; "Covenants"; "Guaranty"; "Indemnity"; "Insurance"; "Landlord and Tenant"; "Partnership"; "Principal and Agent"; "Principal and Surety"; "Sales"; "Subscriptions"; "Vendor and Purchaser."
—— employment, see "Master and Servant."
Particular classes of implied contracts, see "Account Stated"; "Work and Labor."
—— modes of discharging contracts, see "Payment"; "Release."
Specific performance, see "Specific Performance."
Subrogation to rights or remedies of creditors, see "Subrogation."
Transportation of goods, see "Carriers," § 1.

§ 1. Requisites and validity.

Weakness of mind, not amounting to imbecility, *held* not to warrant setting aside a contract; there being no proof of fraud or undue influence.—Nance v. Stockburger (Ga.) 100.

Promise to pay rent to prevent unlawful eviction *held* not binding.—Smith v. Coker (Ga.) 107.

Where instrument signed by one partner and by an agent of the other, with a clause reciting that "this contract shall not be considered binding until approved in writing by" the second party, it is only a proposal to contract.—Barnes Cycle Co. v. Schofield (Ga.) 965.

Where a creditor agreed to an extension payment of a larger sum than the interest due, and the creditor received same, he was bound by the agreement, though based on payment of usurious interest.—Fleming v. Barden (N. C.) 17.

§ 2. Construction and operation.

Building contract *held* not divisible because of stipulation that at certain stage of completion owner may suspend further work on payment of a fixed sum.—Hunnicutt & Bellingrath Co. v. Van Hoose (Ga.) 669.

Where contractor estimated 928,339 brick for a wheel pit, but had only put in 519,020, the difference constituted an "omission," within the meaning of the contract providing for the submission of differences to arbitrators.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

Where it appeared that defendants had paid for certain wood as material to be used by plaintiff in constructing a mill house under the terms of a contract, and the latter had disposed thereof, the wood constituted a proper item of charge against plaintiff in a case before the board of arbitration.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

Under the terms of a building contract calling for a gross sum for all of the work done, and providing for the submission of questions of extra work, etc., to arbitration, and that the cost of the extra work was to be determined by the contract price, it was proper for the board to determine the value of such extra work by the current market price thereof.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

Where contractors had agreed to furnish ventilators worth $35, and there was evidence to show that they were of inferior quality, and worth only $10, the difference constituted an "omission," which it was proper for arbitrators to consider under the terms of the contract.—Rounds v. Aiken Mfg. Co. (S. C.) 714.

§ 3. Performance or breach.

Where plaintiff contracted to ship a stated amount of merchandise to defendants, and to pay a stipulated sum per barrel for shortage, he was not liable for such shortage as was caused

§ 4. Actions for breach.

Action on contract, based on alleged breach of contract made by defendant with another party, *held* not maintainable, where petition did not show any privity of contract between plaintiffs and defendants.—Davis v. South Side Mfg. Co. (Ga.) 223.

Damages in the nature of expenses incurred because of breach of contract may be pleaded in defense to an action on the contract.—Gore v. Malsby (Ga.) 315.

An answer denying liability on a written contract because, through ignorance, defendant was induced to sign it by fraudulent representations, and to make a contract different from that he believed he was making, *held* not demurrable, as seeking to vary the terms of a written contract.—Gore v. Malsby (Ga.) 315.

An action cannot be maintained on an agreement to pay a stockholder 100 cents on the dollar for corporate stock within 90 days, without proof of tender of the stock and demand of payment in accordance with the agreement.—Morris v. Veach (Ga.) 753.

Where another was made party to pending suit, and action resolved itself into one between a newly-made party and plaintiff, who brought him into litigation, *held* error to grant a nonsuit against such newly-made party, where there was sufficient evidence to entitle him to judgment.—Spears v. Scott (Ga.) 950.

CONTRADICTION.

Of witness, see "Witnesses," § 3.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 2.

CONVERSION.

Wrongful conversion of personal property, see "Trover and Conversion."

CONVEYANCES.

By or to particular classes of parties, see "Executors and Administrators," § 6; "Husband and Wife," § 2.
In fraud of creditors, see "Fraudulent Conveyances."
Mortgaged property, see "Mortgages," § 6.
Particular classes of conveyances, see "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CORPORATIONS.

Particular classes of corporations, see "Beneficial Associations"; "Building and Loan Associations"; "Municipal Corporations"; "Railroads," § 1; "Religious Societies"; "Street Railroads," § 1.
Taxation of corporations and corporate property, see "Taxation," § 2.

§ 1. Corporate name, seal, domicile, by-laws, and records.

Amendments to by-laws of corporation *held* not fraudulent as to a particular stockholder because made without his knowledge or not ratified by him.—Crittenden v. Southern Home Building & Loan Ass'n (Ga.) 643.

Business corporation may amend its by-laws when not inconsistent with its charter or constitution.—Crittenden v. Southern Home Building & Loan Ass'n (Ga.) 643.

for unpaid subscription.—Fouché v. Merchants' Nat. Bank (Ga.) 256; Merchants' Nat. Bank v. Fouché, Id.

In suit by creditors against holder for unpaid subscription, where defendant pleads no ownership, a contract entered into by defendant at about that time, showing ownership, *held* admissible.—Fouché v. Merchants' Nat. Bank (Ga.) 256; Merchants' Nat. Bank v. Fouché, Id.

To enable creditor to recover from one alleged to be a stockholder, it must appear that he was in fact a stockholder, when he was in law liable.—Fouché v. Merchants' Nat. Bank (Ga.) 256; Merchants' Nat. Bank v. Fouché, Id.

Shareholders of insolvent corporation liable on unpaid stock subscription *held* not entitled to set off, in proceedings to enforce the subscription, debts due to them by the corporation.—Wilkinson v. Bertock (Ga.) 623.

In action by creditor to enforce subscription to insolvent corporation, right of stockholder to set off debt due by corporation in defense to a common-law action to enforce individual liability does not apply.—Wilkinson v. Bertock (Ga.) 623.

When stockholders intervene in a suit against corporation, and allege refusal of officer to defend through fraud, it was not error to refuse to permit them to defend in name of corporation when they decline to proceed in their own names in behalf of themselves and other stockholders who might join.—Cornell v. Sims (Ga.) 627.

§ 3. Insolvency and receivers.

A corporation is not liable to an officer for salary while the corporation is in a receiver's hands, since performance of the contract between the two was rendered impossible by judicial action, and not by the fault of the corporation—Lenoir v. Linville Imp. Co. (N. C.) 185.

§ 4. Foreign corporations.

A foreign corporation, by compliance with Pub. Laws 1899, c. 62, becomes a domestic corporation, and not a mere licensee authorized to do business in the state.—Debnam v. Southern Bell Tel. Co. (N. C.) 269.

CORRECTION.

Of irregularities and errors at trial, see "Trial," § 11.
Of record on appeal or writ of error, see "Appeal and Error," § 8.

COSTS.

§ 1. On appeal or error, and on new trial or motion therefor.

Where defendant in error brings up immaterial portions of the record, the costs thereof will be paid by him.—Cochran v. Hudson (Ga.) 71.

An affidavit for appeal in forma pauperis must be entitled in the cause.—Parks v. State (Ga.) 73.

Where no brief of evidence was filed on motion for new trial, or brought to the court in the record, damages for delay will be awarded against plaintiff in error.—Brooks v. Proctor (Ga.) 99.

Where a writ of error is palpably without merit, damages for delay will be awarded.—Southern Ry. Co. v. Hooper (Ga.) 232.

Damages for frivolous appeal cannot be enforced in claim cases.—Adams v. Carnes (Ga.) 597.

COUNTIES.

See "Municipal Corporations."

§ 1. Government and officers.
Under 18 St. at Large, pp. 581, 582, § 252, and Rev. St. 1893, § 274, an auditor who holds over for 1 month and 26 days after his term of office has expired is not entitled to the whole of additional compensation allowed thereby, but only to his proportionate share.—Finley v. Laurens County (S. C.) 588.

Code, § 3178, prohibiting removal of records of county clerk's office out of the county where office is located, is not violated by location of clerk's office in incorporated city.—Board of Norfolk County Sup'rs v. Cox (Va.) 380.

§ 2. Property, contracts, and liabilities.
A county is not liable for a tort committed by a chain-gang superintendent, though done under instructions of the county authorities.—Bailey v. Fulton County (Ga.) 596.

Under Code, §§ 3120, 3176, land selected by board of supervisors for erection of clerk's office must be within limits of county.—Board of Norfolk County Sup'rs v. Cox (Va.) 380.

COURTS.

Clerks, see "Clerks of Courts."
Contempt of court, see "Contempt."
Judges, see "Judges."
Justices' courts, see "Justices of the Peace."
Province of court and jury, see "Trial," § 7.
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Right to trial by jury, see "Jury," § 1.
Trial by court without jury, see "Trial," § 10.

§ 1. Courts of general original jurisdiction.
That sustaining a demurrer to a portion of complaint reduced the damages below $200 did not oust the superior court of jurisdiction, where sum originally demanded is not so palpably bad faith as to be fraud on jurisdiction of the court.—Sloan v. Carolina Cent. Ry. Co. (N. C.) 21.

§ 2. Courts of limited or inferior jurisdiction.
Condemnation of land in incorporated town for county clerk's office does not subject same to conflict of jurisdiction between city and county courts.—Board of Norfolk County Sup'rs v. Cox (Va.) 380.

COVENANTS.

In insurance policies, see "Insurance," § 5.

§ 1. Actions for breach.
Petition claiming as measure of damages value of property to which title failed *held* amendable, so as to make the same the purchase price.—St. John v. Leyden (Ga.) 610.

Evidence *held* to show breach of warranty as to title of land.—St. John v. Leyden (Ga.) 610.

Evidence in action for breach of warranty *held* to sustain verdict for plaintiff.—St. John v. Leyden (Ga.) 610.

Pleading construed, and *held* to be an action for breach of warranty of title to land.—St. John v. Leyden (Ga.) 610.

COVERTURE.

See "Husband and Wife."

CREDITORS.

See "Assignments for Benefit of Creditors"; "Compositions with Creditors"; "Creditors' Suit"; "Fraudulent Conveyances"; "Insolvency."
—— of heirs and distributees, see "Descent and Distribution," § 2.
—— subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of assignments, see "Assignments for Benefit of Creditors," § 2.

Creditors' bill *held* maintainable, though plaintiff has no existing lien on property of main defendant.—Kruger v. Walker (Ga.) 794.

Party with whom judgment debtor made fraudulent conspiracy to conceal property *held* proper party defendant.—Kruger v. Walker (Ga.) 794.

Objection by demurrer that petition failed to show that judgment declared on was binding on individual assets of firm *held* cured by amendment.—Kruger v. Walker (Ga.) 794.

A judgment creditor is entitled to pursue successive actions on his judgment until satisfaction is obtained.—Kelly v. Hamblen (Va.) 491.

In an action to subject defendant's land to the lien of certain judgments, *held* error to sustain exceptions to an answer showing that there is other property of the debtor and his alienees subsequent to defendant still liable for such judgments.—Kelly v. Hamblen (Va.) 491.

CRIMINAL LAW.

Conviction of offense included in that charged, see "Indictment and Information," § 1.
Indictment, information, or complaint, see "Indictment and Information."
Particular offenses, see "Arson"; "Assault and Battery," § 1; "Contempt"; "Embezzlement"; "False Pretenses"; "Gaming," § 1; "Homicide"; "Intoxicating Liquors," §§ 2, 3; "Larceny"; "Trespass," § 2; "Vagrancy."
Penalties, see "Penalties."
Reformatories, see "Reformatories."

§ 1. Jurisdiction.
Acts 1899, c. 371, *held* void, as infringing the constitutional jurisdiction of superior courts under Const. art. 4, §§ 2, 8, 10, 11, 18, 27.—Mott v. Commissioners of Forsyth County (N. C.) 330.

§ 2. Former jeopardy.
Where, in indictment for larceny, the ownership is erroneously laid, defendant is not placed in jeopardy, so as to bar a prosecution under another indictment charging him with stealing the same property belonging to the rightful owner.—State v. Council (S. C.) 663.

§ 3. Arraignment and pleas, and nolle prosequi or discontinuance.
Refusal to allow withdrawal of plea of not guilty, and finding of plea in abatement, *held* a proper exercise of the court's discretion.—Reed v. Commonwealth (Va.) 399.

§ 4. Evidence.
Evidence offered to prove an alibi should be considered in connection with all the testimony to determine whether guilt of accused has been established beyond a reasonable doubt.—Lucas v. State (Ga.) 87.

Nonexpert witnesses can testify that they knew accused, and had seen nothing to indicate insanity.—Herndon v. State (Ga.) 634.

Any witness, after examining a physical instrument, may testify in his opinion that it is a deadly weapon.—Perry v. State (Ga.) 781.

The law of circumstantial evidence does not apply where the state proved a positive confession.—Perry v. State (Ga.) 781.

Medical expert *held* competent to testify to an opinion that the blow struck came from the rear of the injured person.—Perry v. State (Ga.) 781.

Evidence of defendant's possession of weapons *held* admissible, as showing preparation for a homicide.—State v. Kinsauls (N. C.) 31.

Instruction to jury as to admissibility of confession *held* not erroneous.—State v. Baker (S. C.) 501.

Confession made by defendant upon preliminary examination *held* competent to go to jury. —State v. Baker (S. C.) 501.

A physician who attended the deceased may base his opinion as to the cause of decedent's death on his observation and examination of the deceased, without a hypothetical statement of facts.—State v. Foote (S. C.) 551.

Where defendant, having shot deceased, was stopped by another, who, seeking to restrain him, was also shot by him and killed, evidence of the other killing was admissible as part of the res gestæ.—Reed v. Commonwealth (Va.) 399.

§ 5. Time of trial and continuance.

Refusal to continue case a second time *held* proper.—Baker v. State (Ga.) 607.

Where defendant moved for a continuance, and produced a doctor's certificate that his nervous condition was disturbed and disordered, but defendant's appearance and manner did not indicate any nervous trouble, his motion was properly denied.—State v. Lee (S. C.) 706.

§ 6. Trial—Course and conduct of trial in general.

Where persons put their character in issue, it is error for judge to ask witness questions manifestly indicating that judge did not believe accused were of good character.—Jaques v. State (Ga.) 104.

It is discretionary with court to suspend trial to allow expert to examine indenture in skull of accused, in order to testify as to its effect upon accused as to sanity or insanity.—Herndon v. State (Ga.) 634.

§ 7. —— Reception of evidence.

Accused has no legal right to make more than one statement.—Sharp v. State (Ga.) 633.

A conviction will not be reversed because evidence not in rebuttal was admitted after the close of defendant's case.—Reed v. Commonwealth (Va.) 399.

§ 8. —— Arguments and conduct of counsel.

Improper remarks by prosecuting attorney, unrebuked, *held* no ground for reversal, where no objection is made.—Herndon v. State (Ga.) 634.

Waiver of argument to jury does not preclude state from reading to jury confession introduced in evidence on trial.—State v. Baker (S. C.) 501.

§ 9. —— Province of court and jury in general.

Whether defendant had mental capacity to deliberate is a question for the jury, on conflicting evidence.—State v. Jones (N. C.) 38.

§ 10. —— Necessity, requisites, and sufficiency of instructions.

Failure to charge that a confession alone, uncorroborated by other evidence, will not justify conviction, *held* cause for new trial.—Lucas v. State (Ga.) 87.

Where a witness on criminal prosecution testified that his evidence before the grand jury was false, it was error to fail to charge that, if witness knowingly swears falsely to a material matter, his testimony must be disregarded, unless corroborated.—Plummer v. State (Ga.) 233.

Where there was no corroboration of a witness shown to have sworn falsely, it was error to charge that, if he had been impeached and restored to confidence of the jury, he should be believed in preference to the impeaching evidence.—Plummer v. State (Ga.) 233.

A judge can base an instruction on the statement of the accused.—Gay v. State (Ga.) 857.

It is reversible error to charge on the subject of corroboration, when there is no corroborating evidence in the case.—Coney v. State (Ga.) 907.

Failure to recapitulate evidence in charges in a criminal trial *held* not error, in absence of request therefor.—State v. Kinsauls (N. C.) 31.

Giving an instruction in a criminal case not applicable to the facts is not error, unless the principle stated is erroneous, or might confuse or mislead a jury.—Reed v. Commonwealth (Va.) 399.

§ 11. —— Requests for instructions.

Where counsel submits certain propositions of law, without request to charge, it is enough if the court charges substantially the law applicable to the case.—State v. Wine (S. C.) 439.

Failure to charge on self-defense *held* not error, in absence of request.—State v. Chiles (S. C.) 496.

§ 12. —— Custody, conduct, and deliberations of jury.

Remarks of a preacher in prayer and sermon, at which jury attended during trial, *held* not misconduct prejudicial to the prisoner.—State v. Kinsauls (N. C.) 31.

In the absence of evidence of prejudice, judge allowing juror to receive a letter *held* not error. —State v. Wine (S. C.) 439.

Failure of the record to show that the usual oath was administered to the officer in charge of a jury on its adjournment from day to day *held* no ground for reversing a conviction.—Reed v. Commonwealth (Va.) 399.

The fact that one of the deputy sheriffs who had charge of the jury in a criminal case was a witness for the state is no ground for reversal of a conviction in such case.—Reed v. Commonwealth (Va.) 399.

§ 13. —— Verdict.

Verdict *held* sufficient in form, and a subsequent addition thereto not prejudicial.—State v. Kinsauls (N. C.) 31.

§ 14. —— Waiver and correction of irregularities and errors.

Where, on objection to state counsel's remarks in a criminal case, the judge stops him, and cautions the jury to disregard such remarks, no error is committed.—State v. Kinsauls (N. C.) 31.

§ 15. Motions for new trial and in arrest.

Dismissal of motion for new trial for want of brief of evidence *held* proper, where no brief was filed within the time prescribed by order

be reversed.—Clark v. State (Ga.) 297.

New trial for newly-discovered evidence as to insanity of accused *held* properly denied.—Baker v. State (Ga.) 607.

Evidence *held* to sustain conviction of murder.—Baker v. State (Ga.) 607.

After verdict of guilty, a new trial should not be granted, on the ground of bias of a juror who qualified himself on his voir dire, on the uncorroborated evidence of one witness.—Turner v. State (Ga.) 686.

Newly-discovered evidence tending to impeach a witness affords no cause for granting a new trial.—Carmichael v. State (Ga.) 872.

Motion for new trial after close of term for misconduct of jury known at the time *held* too late.—State v. Kinsauls (N. C.) 31.

A motion in arrest admits truth of allegations of indictment.—State v. Newcomb (N. C.) 147.

The fact that a judge stated, in his refusal to grant a new trial because of the insufficiency of the evidence, that the jury had the right to discredit the testimony of an expert, does not make the refusal erroneous.—State v. Foote (S. C.) 551.

§§ 16, 17. Appeal and error, and certiorari—In general.

A ground of a motion for new trial assigning error in excluding evidence, but not setting it forth, cannot be considered.—Lucas v. State (Ga.) 87.

Where defendant pleads guilty to a charge in a court having no jurisdiction, he can bring certiorari to review error of court in imposing penalty.—Williams v. City Council of Augusta (Ga.) 607.

Grounds of motion for new trial not approved by presiding judge cannot be considered on appeal.—Sharp v. State (Ga.) 633.

Where there is no return or acknowledgment of service indorsed on the bill of exceptions, the writ of error will be dismissed.—Crow v. State (Ga.) 858.

Under Code, § 1237, the state cannot appeal from a judgment on general verdict.—State v. Savery (N. C.) 22.

Failure of prisoner's counsel to ask for fuller instructions precludes objection on appeal that fuller instructions were not given.—State v. Kinsauls (N. C.) 31.

In a capital case, specific exceptions to judge's charge may be inserted nunc pro tunc.—State v. Kinsauls (N. C.) 31.

Exception to charge "as given" *held* too broad to be available under Code, § 550.—State v. Kinsauls (N. C.) 31.

Finding of fact by judge on criminal trial that a juror was indifferent *held* not reviewable.—State v. Kinsauls (N. C.) 31.

Failure of prisoner to exhaust peremptory challenges precludes review of exceptions to jurors.—State v. Kinsauls (N. C.) 31.

A cause will not be reversed because of erroneous reason assigned for proper ruling.—State v. Weaver (S. C.) 499.

New trial will not be granted upon reversal of cause for illegal sentence.—State v. Baker (S. C.) 501.

Transcribing on the minute book of the county court a judgment of the circuit court reversing a judgment of such court was a sufficient compliance with Code, § 4060, and hence the court must show what the party offering the witness expected to prove by him.—Jackson v. Commonwealth (Va.) 487.

§ 18. —— Review.

A charge as to presumption arising from recent possession of stolen goods *held* not prejudicial to the accused.—Joseph v. State (Ga.) 61.

Statement of accused *held* to justify a charge on the law of voluntary manslaughter.—Gay v. State (Ga.) 857.

The court will not pass on assignments of error requiring consideration of evidence when the brief thereof is a full report of the examination, embracing needless matter.—Carmichael v. State (Ga.) 872.

Recapitulation of evidence in judge's charge in a criminal trial will be presumed where the record does not show the contrary.—State v. Kinsauls (N. C.) 31.

Action of trial court in rescinding during term order setting aside verdict of conviction *held* not reviewable, in absence of abuse of discretion.—State v. Chestnutt (N. C.) 278.

The overruling of a motion for a new trial on the ground of insufficiency of the evidence will not be reviewed on appeal, if the verdict is supported by some evidence.—State v. Foote (S. C.) 551.

An instruction leaving an inference to be drawn by the jury from facts undisputed and uncontradicted by evidence in a criminal case is not prejudicial error.—State v. Ross (S. C.) 659.

An instruction in a criminal case, in no respect prejudicial to defendant, cannot be urged as ground for reversal.—State v. Ross (S. C.) 659.

Where an instruction in a criminal case is proper when considered in connection with the whole charge, error based on it when taken separately is harmless.—State v. Lee (S. C.) 706.

Where defendant was on trial for murder, error based on the failure of the trial court to give an instruction in his preliminary charge was harmless, where such an instruction was given in the final charge.—State v. Lee (S. C.) 706.

§ 19. Punishment and prevention of crime.

Court cannot impose sentence of perpetual banishment from state for grand larceny.—State v. Baker (S. C.) 501.

The severity of a sentence for violating a city ordinance, within the limits of the ordinance and the city charter, is discretionary with the trial court.—City Council of Greenville v. Kemmis (S. C.) 727.

CROPS.

See "Agriculture."

CROSS-EXAMINATION.

See "Witnesses," § 2.

CURTESY.

See "Dower."

Under Const. art. 10, § 6, a husband has no right of curtesy in land devised by his wife.—Tiddy v. Graves (N. C.) 127.

CUSTODY.

f jury, see "Criminal Law," § 12.

CUSTOMS AND USAGES.

What is a reasonable time for a grantee of timber deed to exercise the privileges granted ereby cannot be determined with reference local usage, unless such usage is so general to become a part of the contract by implica-n.—Goette v. Lane (Ga.) 758.

Charge in reference to custom regulating time thin which party should exercise his rights der a contract *held* erroneous, where the evi-nce did not establish the existence of a cus-m of universal observance.—Goette v. Lane a.) 758.

DAMAGES.

e "Death," § 1.
each by vendee of contract for sale of land, see "Vendor and Purchaser," § 2.
mpensation for property taken for public se, see "Eminent Domain," § 2.
juries caused by public improvements, see "Municipal Corporations," § 4.
replevin, see "Replevin."

1. Grounds and subjects of compensatory damages.

In an action for the wrongful rescission of intiff's contract to erect buildings for defend-t, the prospective profits on the contract may recovered as part of the damages.—Jenkins Charleston St. Ry. Co. (S. C.) 703.

2. Measure of damages.

Where a fence is destroyed by fire, plaintiff nnot recover for services in calling his neigh-rs and friends to assist in putting it out.—uthern Ry. Co. v. Ward (Ga.) 78.

Where a fence is burned by a railroad, the lue of the field for pasture cannot be recov-d for a longer period than necessary to re-ce the fence.—Southern Ry. Co. v. Ward a.) 78.

3. Pleading, evidence, and assessment.

n action for personal injuries, instruction on right of plaintiff to recover for his de-ased capacity to work *held* proper.—City Coun-of Augusta v. Owens (Ga.) 830.

An action for personal injuries *held* open to nurrer on the ground that expenses incurred medical attention were not therein alleged. Vestern Union Tel. Co. v. Griffith (Ga.) 859.

DEATH.

Actions for causing death.

he measure of damages for death of hus-d is the full value of his life, though he was ng apart from his wife at the time of his th.—Central of Georgia Ry. Co. v. Bond .) 299.

father, whose monthly wages were more n enough to afford him individually a supt, *held* not dependent, under Civ. Code, § S, so as to be entitled to recover the full ue of the life of an unmarried minor son.—rgia Railroad & Banking Co. v. Spinks (Ga.)

man whose earnings are sufficient to ade-tely support himself is not dependent, with-Civ. Code, § 3828, though chargeable with ntenance of others.—Georgia Railroad & king Co. v. Spinks (Ga.) 855.

ction for wrongful death of husband or ier *held* not maintainable where he, while ife, voluntarily settled with the wrongdoer. uthern Bell Telephone & Telegraph Co. v. sin (Ga.) 881.

An administrator *held* entitled, under Code, §§ 1498, 1499, to recover, for the negligent killing of his five months old intestate, damages measured by the difference between the probable gross income and probable cost of living of such infant.—Russell v. Windsor Steamboat Co. (N. C.) 191.

Expectancy of life of child, when not fixed by statute, may be sworn by evidence.—Russell v. Windsor Steamboat Co. (N. C.) 191.

Under Rev. St. § 2316, a pecuniary loss need not be shown in action for death of infant.—Mason v. Southern Ry. Co. (S. C.) 440.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Fraudulent Conveyances"; "Insolvency."

DECEDENTS.

Estates, see "Executors and Administrators."
Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECEIT.

See "Fraud."

DECLARATION.

In pleading, see "Pleading," § 2.

DECLARATIONS.

As evidence in civil actions, see "Evidence," § 6.

DEDICATION.

§ 1. Nature and requisites.

On trial of issue as to whether certain land was dedicated by a county, *held* not error to exclude evidence as to what "the public understood" in regard to the dedication; no declaration of county authorities being shown.—Bennett v. Mitchell County (Ga.) 461.

Purchaser of lots, having been induced to buy under a map showing a dedication of a court, *held* entitled to enjoin the building thereon, though the dedication had never been formally accepted by public authorities.—Conrad v. West End Hotel & Land Co. (N. C.) 282.

Facts *held* to show an irrevocable dedication of a court to public purposes.—Conrad v. West End Hotel & Land Co. (N. C.) 282.

DEEDS.

Cancellation, see "Cancellation of Instruments."
Covenants in deeds, see "Covenants."
Deed of homestead, see "Homestead."
Estoppel by deed, see "Estoppel," § 1.
In fraud of creditors, see "Fraudulent Conveyances."
Of trust, see "Assignments for Benefit of Creditors," § 1; "Mortgages."
Parol or extrinsic evidence, see "Evidence," § 9.

§ 1. Requisites and validity.

Delivery is complete when deed is accepted.—Stallings v. Newton (Ga.) 227.

Delivery of deed *held* essential to validity.—Stallings v. Newton (Ga.) 227.

Evidence *held* not to show fraud or false representations in obtaining deeds, requiring their cancellation in equity.—Johnson v. Franklin (S. C.) 664; McGill v. Same, Id.

Evidence raising only a strong suspicion that a deed from a son to his father was obtained

Deed construed, and *held*, that reservation therein conferred on grantor a mere power to sell and reinvest for benefit of grantees.—Ellis v. Gray (Ga.) 97.

Deed conveying interest in growing timber construed, and *held* that payment of balance of price on each lot was not a condition precedent to right to enter and cut timber.—McRae v. Stillwell (Ga.) 604.

A deed conveying a determinable interest in growing timber *held* entitled to be recorded as conveying an interest in realty.—McRae v. Stillwell (Ga.) 604.

Deed construed, and *held* to convey to grantees timber suitable for purposes indicated therein, and to authorize removal within a reasonable time, and forfeiture of rights under deed on failure so to do.—McRae v. Stillwell (Ga.) 604.

§ 3. Pleading and evidence.

A legal registry of a deed raises a presumption of delivery.—Stallings v. Newton (Ga.) 227.

DEFAMATION.

See "Libel and Slander."

DELAY.

In transportation or delivery of goods by carrier, see "Carriers," § 1.
Laches, see "Equity," § 2.

DELIVERY.

Of deed, see "Deeds," § 1.
Of goods by carrier, see "Carriers," § 1.
—— sold, see "Sales," § 4.

DEMURRER.

In pleading, see "Pleading," § 4.
To evidence, see "Trial," § 6.

DENIALS.

In pleading, see "Pleading," § 3.

DEPOSITIONS.

See "Witnesses."

No objection to written interrogatories as leading will prevail, unless filed with interrogatories before issuing commission.—Franks v. Gress Lumber Co. (Ga.) 314.

Where a deposition transmitted by mail was by the postmaster, in the presence of the parties, delivered to the justice, pending trial, and on objection that it had not been indorsed as required by Civ. Code, § 5310, the justice made the proper indorsement, it was a sufficient compliance with the law.—Keys v. Flemister (Ga.) 948.

Under Code, § 3363, a notice served in Richmond at 3:45 p. m., May 24th, on counsel of nonresident, to take the deposition of a party at Hampton, Va., on May 26th, was not served in a reasonable time, where nonresident resided in Baltimore.—Payne v. Zell (Va.) 379.

DESCENT AND DISTRIBUTION.

See "Dower"; "Executors and Administrators."

§ 1. Persons entitled and their respective shares.

An heir is not disinherited without express devise or necessary implication thereof.—Baer v. Forbes (W. Va.) 364.

Heirs and distributees of a decedent cannot acquire title to his choses in action, without administration proceedings, merely by taking possession, so as to authorize the maintenance of an action thereon in their own name.—Darwin v. Moore (S. C.) 539.

Where an administrator was entitled to one-third of intestate's land as her heir at law, his creditors could sell his share under a judgment secured against him in his individual capacity.—Hendrix v. Holden (S. C.) 1010.

DESCRIPTION.

Of devisees or legatees in will, see "Wills," § 4.
Of property devised or bequeathed, see "Wills," § 5.

DETINUE.

See "Replevin."

DEVISES.

See "Wills."

DILIGENCE.

Of party asking relief, see "Specific Performance," § 2.

DIRECTING VERDICT.

In civil actions, see "Trial," § 6.

DISCHARGE.

From indebtedness, see "Release."
From liability as surety, see "Principal and Surety," § 2.

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," § 14.

DISMISSAL AND NONSUIT.

At trial, see "Trial," § 6.
Dismissal of appeal or writ of error, see "Appeal and Error," § 10; "Criminal Law," § 17.

§ 1. Involuntary.

Motion to reinstate after expiration of term at which order of dismissal was entered *held* erroneously granted, no sufficient excuse for the delay being shown.—Watkins v. Brizandine (Ga.) 807.

Where action is dismissed, unless petition is amended within certain time, it is too late, where amendment is not filed, to except to the order of dismissal, but same should be made subject-matter of direct bill of exceptions.—Chipman v. Cornwell (Ga.) 923.

Where court dismisses case because petition does not set forth cause of action, and allows plaintiff certain time to amend petition, and he fails so to do, the effect of the order is to dispose of the case.—Chipman v. Cornwell (Ga.) 923.

DISQUALIFICATION.

Of judge, see "Judges," § 1.

DISTRESS.

For rent, see "Landlord and Tenant," § 4.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution"; "Executors and Administrators," § 5.
Of proceeds of sale on execution, see "Execution," § 6.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

DIVORCE.

§ 1. Jurisdiction, proceedings, and relief.

Where it was shown that, less than three years before a divorce was decreed for abandonment in favor of a husband, he had lived and cohabited with his wife for several months, *held* not error to set aside the decree.—Willard v. Willard (Va.) 518.

Circumstances reviewed in a proceeding by a wife for rehearing of a divorce case, and such wife *held* not precluded by laches from the right to file an amended cross bill and procure proof of its allegations.—Willard v. Willard (Va.) 518.

Under Code, § 3233, a wife, against whom divorce was decreed without appearance or service of process, *held* entitled to a rehearing.—Willard v. Willard (Va.) 518.

§ 2. Alimony, allowances, and disposition of property.

On attachment for contempt against husband for failing to pay to his wife temporary alimony, the court can modify his order so as to reduce the amount.—Gordon v. Gordon (Ga.) 296.

In contempt proceedings for failure to pay temporary alimony to wife, the court can adjudge that part of the costs be paid by the wife.—Gordon v. Gordon (Ga.) 296.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 8.

DOMICILE.

Of parties as affecting venue, see "Venue," § 2.

DONATIONS.

See "Gifts."

DOWER.

§ 1. Nature and requisites.

A widow is entitled to dower in lands of which her husband was seised during the marriage unless the lands were bought and paid for by another and conveyed to him by inadvertence.—Gardner v. Gardner (Va.) 985.

A widow is not entitled to dower in land which her husband has agreed to devise to another before his marriage.—Burdine v. Burdine's Ex'r (Va.) 992.

§ 2. Inchoate interest.

Where a wife indorses her release of dower on a deed to her husband's land, which was free from her claim of dower.—Lavender v. Daniel (S. C.) 546; Same v. Lavender, Id.; Same v. Humphries, Id.

A deed of separation, by which both husband and wife release dower and curtesy, *held* not a statutory jointure, releasing dower, within Code, §§ 2270, 2271.—Land v. Shipp (Va.) 391.

A wife is entitled to dower in lands mortgaged by her husband after deed of separation in which she releases her dower, in which mortgage she does not join, since her release of dower is absolutely void.—Land v. Shipp (Va.) 391.

Release of a wife's dower *held* not authorized by Married Woman's Act, c. 103 (Code, § 2284), authorizing a married woman to contract with reference to her separate estate.—Land v. Shipp (Va.) 391.

§ 3. Rights and remedies of widow.

Widow adjudged entitled to dower *held* also entitled to damages for detention equal to one-third of rents and profits of lands from date of her demand for dower.—Brown v. Morisey (N. C.) 284.

Under Rev. St. 1893, § 1902, where a widow receipted for her distributive share of an estate, and thereafter sought to retract her election and claim dower, the burden is on her to show that she was misled as to the condition of the estate.—Lavender v. Daniel (S. C.) 546; Same v. Lavender, Id.; Same v. Humphries, Id.

A consideration to a wife for release of dower to her husband need not be returned as a condition to an assignment of dower, since such release is absolutely void.—Land v. Shipp (Va.) 391.

DUE PROCESS OF LAW.

See "Constitutional Law," § 6.

DYING DECLARATIONS.

See "Homicide," § 4.

EASEMENTS.

Public easements, see "Dedication"; "Highways."

§ 1. Extent of right, use, and obstruction.

In order to sustain application for removal of obstruction of private way based on prescription, plaintiff must show uninterrupted use for seven years, and that it did not exceed 15 feet in width, and that it was the same 15 feet originally appropriated.—Buchanan v. Parks (Ga.) 947.

EJECTION.

Of passenger, see "Carriers," § 3.

EJECTMENT.

§ 1. Right of action and defenses.

Under Code, §§ 143, 146, the pleading by defendant, in actions for the possession of real estate, of limitations, does not throw on plaintiff the burden of showing that he has been in possession within 20 years, where he shows title, since the presumption created by section 146 can only be rebutted by proof on the part of defendant that he had been in adverse possession for 20 years.—Conkey v. John L. Roper Lumber Co. (N. C.) 42.

Equitable title of the owner of mortgage is sufficient to sustain action by him for posses-

title, which the party owning it could assert.—Wilson v. Braden (W. Va.) 367.

Defendant in possession cannot defeat recovery by showing transfer of title before action.—Wilson v. Braden (W. Va.) 367.

§ 2. Pleading and evidence.

Under Acts 1885, c. 147, and Code, § 1546, where plaintiff and defendant had a common grantor, and plaintiff's deed, though given long after defendant's, was recorded first, the burden of proving plaintiff's deed fraudulent rested on defendant.—Austin v. Staten (N. C.) 338.

The burden of proof is on defendant, alleging title in third person, to prove the same.—Wilson v. Braden (W. Va.) 367.

§ 3. Trial, judgment, enforcement of judgment, and review.

Where plaintiff shows perfect paper title to land in controversy, and defendant shows seven years' adverse possession under written evidence of title, *held* proper to direct verdict for defendant.—Briscoe v. Holder (Ga.) 960.

Where plaintiff in ejectment recovers an excessive judgment, it will be reversed on appeal, with direction to grant a new trial unless plaintiff remit the excess by accurate release entered of record.—Fry v. Stowers (Va.) 482.

Instructions that disclaimer of title can only be made by deed or court record, and that a party's admissions as to a boundary dispute are to be given the same weight as in other actions, *held* not conflicting.—Fry v. Stowers (Va.) 482.

It is error not to impose terms on a party in ejectment achieving an excessive recovery, either to remit excess or suffer new trial, the same as in any other action.—Fry v. Stowers (Va.) 482.

A disclaimer of excess recovered in ejectment, failing to accurately describe such excess, will not prevent a new trial unless accurate release be entered of record.—Fry v. Stowers (Va.) 482.

§ 4. Damages, mesne profits, improvements, and taxes.

Defendant, claiming credit for improvements made by his predecessor, is liable for mesne profits chargeable to his predecessor.—Mills v. Geer (Ga.) 673.

Under Act Dec. 21, 1897, where defendant has been in bona fide possession under adverse claim, he may plead as set-off permanent improvements placed thereon by himself or other bona fide claimants prior to the act.—Mills v. Geer (Ga.) 673.

Where plaintiffs have been in possession or enjoyed rents from land of defendant, which they had received in lieu of land involved in suit, defendant has a right to plead such benefits as a set-off to plaintiffs' claim for mesne profits against him.—Mills v. Geer (Ga.) 673.

ELECTIONS.

§ 1. Contests.

Under Code, § 160, the corporation court of a city has no jurisdiction to determine contests over election of members of the common council of the city.—Mitchell v. Witt (Va.) 528.

ELECTRICITY.

Petition in action against telephone companies for injuries caused by negligently allowing their wires to remain in contact *held* demurrable for failing to set out at what points and telephone companies for injuries caused by breaking wires *held* not open to demurrer for misjoinder of parties defendant.—Western Union Tel. Co. v. Griffith (Ga.) 859.

EMBEZZLEMENT.

Evidence *held* insufficient to sustain conviction of larceny after trust.—Almand v. State (Ga.) 215.

An indictment charging defendant with conversion of money and a check intrusted to him by his tenant *held* not to charge embezzlement under Code, § 1014.—State v. Keith (N. C.) 169.

Landlord who converts tenant's share of proceeds of sale of crop, of which he was entitled to one-half is not guilty of embezzlement, under Code, § 1014.—State v. Keith (N. C.) 169.

EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," § 4.

§ 1. Nature, extent, and delegation of power.

Act Dec. 7, 1897, confers no power to condemn a water right, but only to condemn easements on land of others in order to run lines of wire, maintain dams, etc., for use necessary to transmit electricity.—Oconee Electric Light & Power Co. v. Carter (Ga.) 457.

Railroad owned by a partnership engaged in the sawmill business and used in operating it *held* not property used for public uses.—Garbutt Lumber Co. v. Georgia & A. Ry. (Ga.) 942.

Under Code, §§ 834, 925, board of supervisors is entitled to condemn land in city for enlargement of county clerk's office.—Board of Norfolk County Sup'rs v. Cox (Va.) 380.

§ 2. Compensation.

There is no law in force in the state which provides a method for fixing compensation to be paid the owner of a railroad sought to be crossed, when the right to cross is refused.—Garbutt Lumber Co. v. Georgia & A. Ry. (Ga.) 942.

§ 3. Proceedings to take property and assess compensation.

Proceedings in question *held* to show on their face an effort to condemn in a manner not authorized by Pol. Code, § 658 et seq.—Garbutt Lumber Co. v. Georgia & A. Ry. (Ga.) 942.

Civ. Code, § 4657 et seq., providing a method of taking private property for public use, does not apply where property is sought to be taken for a private purpose.—Garbutt Lumber Co. v. Georgia & A. Ry. (Ga.) 942.

Under Rev. St. § 1747, an order of the circuit court granting an appeal from the verdict of the jury impaneled by the clerk to assess compensation for land taken for a railroad, which recites that the court was satisfied of the reasonable sufficiency of the grounds of appeal, cannot be reviewed by this court.—Chesterfield & K. R. Co. v. Johnson (S. C.) 919.

§ 4. Remedies of owners of property.

Where a landowner had knowledge of the first entry on his land by a railroad company for the construction of its road, and made no objection in the manner prescribed by statute, his consent will be presumed.—Rankin v. Sievern & K. R. Co. (S. C.) 997.

EMPLOYES.

See "Master and Servant."

ENTRY.

Re-entry by landlord, see "Landlord and Tenant," § 5.

ENTRY, WRIT OF.

See "Ejectment."

EQUITY.

Equitable estoppel, see "Estoppel," § 2.
Particular subjects of equitable jurisdiction and equitable remedies, see "Cancellation of Instruments"; "Creditors' Suit"; "Fraudulent Conveyances"; "Injunction"; "Receivers"; "Specific Performance"; "Trusts."
Relief against judgment, see "Judgment," § 2.

§ 1. Jurisdiction, principles, and maxims.

Equity cannot sell life estate with contingent remainders, even with consent of parties having present interest, where estate in remainder cannot be ascertained during life of life tenant.—Hutchison v. Hutchison (N. C.) 149.

Code, c. 138, does not affect the jurisdiction of courts of equity to decree specific delivery of title papers.—Kelly v. Lehigh Min. & Mfg. Co. (Va.) 511.

§ 2. Laches and stale demands.

Where plaintiff's assignor of a note released the trust deed securing it, and no action was taken to set aside the release as having been obtained by fraud for more than four years after discovery of the alleged fraud, the laches will bar an action to set aside the release.—National Mut. Building & Loan Ass'n v. Blair (Va.) 513.

§ 3. Parties and process.

Where defendants, without service, appeared and demurred, and demurrer was overruled, and on the record waive their right to answer or plead, *held* not error to proceed without process issued.—Root-Tea-Na-Herb Co. v. Rightmire (W. Va.) 359.

§ 4. Pleading.

A petition setting forth separate causes of action against different defendants *held* demurrable on the ground of misjoinder, where there are no allegations showing a joint liability.—Shingleur v. Swift (Ga.) 222.

Petition setting forth separate causes of action against different defendants *held* demurrable on the ground of multifariousness.—Shingleur v. Swift (Ga.) 222.

A grantor's answer to a bill in equity to compel him to deliver his muniments of title to the land conveyed to plaintiff *held* sufficient.—Kelly v. Lehigh Min. & Mfg. Co. (Va.) 511.

§ 5. Hearing, submission of issues to jury, and rehearing.

On return of a master's report, the chancellor has power of his own discretion to submit one of the issues therein to a jury.—Trimmier v. Liles (S. C.) 652.

Where the chancellor, on return of a master's report, submitted one of the issues therein to a jury, an objection that he had no authority to order the issue to be tried at some other term of court *held* not well taken.—Trimmier v. Liles (S. C.) 652.

Where the chancellor, on return of a master's report, submitted one of the issues therein to a jury, he had power to designate which party should uphold the affirmative of the issue.—Trimmier v. Liles (S. C.) 652.

by ordering that proportion of the proceeds to be paid to him, and the amendment was not called to the attention of the master until five months after he had paid the proceeds of the sale to the parties entitled thereto under the original decree, the master was liable to petitioner for one-sixth of the proceeds.—Ex parte Murdaugh (S. C.) 568; Mayfield v. Murdaugh, Id.

The court has discretion to order a reference to take testimony, pending a motion for the submission of the issues to a jury under a rule of court.—Barnwell v. Marion (S. C.) 818.

ERROR, WRIT OF.

Review, see "Appeal and Error."

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 1.
Of railroads, see "Railroads," § 3; "Street Railroads," § 1.
Of trusts, see "Trusts," § 3.

ESTATES.

Created by deed, see "Deeds," § 2.
—— by will, see "Wills," § 6.
Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."
Estates for years, see "Landlord and Tenant."
Particular estates, see "Curtesy"; "Dower"; "Life Estates"; "Remainders."
Tenancy in common, see "Tenancy in Common."

ESTOPPEL.

By judgment, see "Judgment," §§ 4, 5.
To avoid or forfeit insurance policy, see "Insurance," § 6.
To take appeal, see "Appeal and Error," § 3.

§ 1. By deed.

That a deed conveying designated interest in specified property also purported to convey all grantor's interest by inheritance from a named decedent *held* not to estop grantee from claiming as against persons claiming exclusively under alleged will of such decedent.—James v. Cherokee Lodge No. 66 (Ga.) 69.

A creditor, by accepting a mortgage in his favor, executed without a request, and of which he had no knowledge until it was tendered to him, ratified the acts of the person who procured the execution of the instrument.—Atlas Tack Co. v. Exchange Bank (Ga.) 939.

Obligees in bond given to stay an injunction *held* estopped by its recitals in suit thereon, though the recitals contradict the record in the injunction suit.—Blankenship v. Ely (Va.) 484.

§ 2. Equitable estoppel.

The fact that a husband was present and did not object to the sale of land under a mortgage foreclosure, after the mortgage had been discharged, *held* not to estop heirs of a deceased wife, who was the previous owner of the property, from maintaining an action to recover the property from the purchaser.—Fleming v. Barden (N. C.) 17.

Where plaintiff repudiated the acceptance of a note by his attorney in satisfaction of a decree, he was not estopped from enforcing the decree on the ground that the defendants were prevented by such acceptance from taking an appeal.—Smith's Ex'r v. Powell (Va.) 522.

EVIDENCE.

See "Depositions"; "Witnesses."
Applicability of instructions to evidence, see "Trial," § 8.
As to particular facts or issues, see "Adverse Possession," § 2; "Payment," § 2.
In particular civil actions or proceedings, see "Ejectment," § 2; "Replevin," § 3.
—— actions for causing death, see "Death," § 1.
In particular criminal prosecutions, see "Criminal Law," § 4; "Homicide," § 4; "Larceny," § 1.
Questions of fact for jury, see "Trial," § 6.
Reception at trial, see "Criminal Law," § 7; "Trial," § 4.
Review on appeal or writ of error, see "Appeal and Error," § 15.
Verdict or findings contrary to evidence, see "New Trial," § 1.

§ 1. Judicial notice.

The court will take judicial notice that a certain county within a state is embraced in a particular judicial circuit.—Barnwell v. Marion (S. C.) 818.

The court will take judicial notice that a certain day was the first day for the holding of a session of court in a particular judicial circuit within the state.—Barnwell v. Marion (S. C.) 818.

The court will take judicial notice that a particular circuit judge was regularly assigned to hold court in a certain circuit within the state at a certain time.—Barnwell v. Marion (S. C.) 818.

The court will take judicial notice that a certain person is judge of a particular judicial circuit within the state.—Barnwell v. Marion (S. C.) 818.

§ 2. Presumptions.

There being no evidence that the citation requiring persons opposing an administrator's appointment to show cause was not published as required by Rev. St. 1893, § 2027, the court will presume that the required publication was made.—Hendrix v. Holden (S. C.) 1010.

§ 3. Relevancy, materiality, and competency in general.

Evidence tending to show similar dealings between alleged principal and other persons *held* inadmissible to establish agency.—Conyers v. Ford (Ga.) 947.

Where value of realty at a specified date was material, rejecting evidence as to what it brought at public sale several years thereafter was not error.—First State Bank v. Carver (Ga.) 960.

§ 4. Best and secondary evidence.

Certified copies of registered deeds *held* inadmissible where there was no evidence that originals were lost or destroyed.—Smith v. Coker (Ga.) 105.

Election of an officer cannot be proved by parol, nor by precinct returns of election.—Fletcher v. Collins (Ga.) 646.

That two bailiffs were regularly elected in a given militia district cannot be shown by parol evidence of the justice of the district.—Fletcher v. Collins (Ga.) 646.

§ 5. Admissions.

Declarations of assignor of note after he had parted with title cannot affect his assignee.—National Bank v. Exchange Bank (Ga.) 265.

Admissions by administrator after his appointment *held* admissible against estate.—Horkan v. Benning (Ga.) 432.

On trial of claim case wherein a corporation was claimant, a memorandum in reference to question involved, delivered to plaintiff in execution by one not shown to be an officer of the corporation, *held* inadmissible over objection of claimant.—First State Bank v. Carver (Ga.) 960.

§ 6. Declarations.

Sayings of decedent *held* not competent on the question of pedigree by proof that such person said he was a relative of the person whose pedigree is the subject of inquiry.—Greene v. Almand (Ga.) 957.

§ 7. Hearsay.

Statements made by a witness, and not testified to by him while on the stand, are inadmissible.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

Testimony by a third party as to what message an insurance agent gave G. for the insured, and as to what G. said with reference to the message the next morning, was hearsay evidence, and inadmissible.—Going v. Mutual Ben. Life Ins. Co. (S. C.) 556.

§ 8. Documentary evidence.

Testimony as to correctness of accounts taken from books which witnesses did not keep *held* inadmissible.—Jenkins v. National Mut. Building & Loan Ass'n (Ga.) 945.

Ex parte map or plat of scene of accident may be used in evidence to explain testimony of witness.—Arrowood v. South Carolina & G. Extension Ry. Co. (N. C.) 151.

Entries in the minute books of a corporation, which are no part of the minutes of any meeting, and which were made without authority from the corporation, are inadmissible against it.—Davison v. West Oxford Land Co. (N. C.) 162.

Where defendant was allowed to introduce a contract for a pass, signed by plaintiff, which was on the back of a waybill for shipment of plaintiff's stock, it was not error to refuse to admit the waybill before it had been proven, in order to allow defendant to move for a nonsuit.—Milam v. Southern Ry. Co. (S. C.) 571.

§ 9. Parol or extrinsic evidence affecting writings.

Parol evidence *held* inadmissible to show testator's intention, when the language of the will is unambiguous.—Cochran v. Hudson (Ga.) 71.

A witness, knowing the fact, may testify that certain securities had never been delivered to a corporation, irrespective of what may appear as to the matter upon its minutes.—Fouché v. Merchants' Nat. Bank (Ga.) 256; Merchants' Nat. Bank v. Fouché, Id.

Parol evidence as to consideration of deed *held* admissible.—Stone v. Minter (Ga.) 321.

Absolute and unconditional note cannot be changed by evidence of parol agreement.—Stapleton v. Monroe (Ga.) 428.

Parol evidence *held* admissible to show that a bill of sale was given to secure debt, and not to convey absolute title.—Florida Cent. & P. R. Co. v. Usina (Ga.) 928.

An absolute deed *held* not changed to a conditional conveyance by parol proof that the real consideration was a promise by the grantee to support the grantor and wife during life.—Lavender v. Daniel (S. C.) 546; Same v. Lavender, Id.; Same v. Humphries, Id.

In an action to determine liability on certain subscription notes, where certain conditions were not expressed in the notes, the subscribers

ıay show the conditions on which such notes ere given, and that they were not performed. -Catt v. Olivier (Va.) 980.

10. Opinion evidence.
A nonexpert witness cannot testify as to his pinion, without stating the facts on which it s based.—Central of Georgia Ry. Co. v. Bond Ga.) 299.

Nonexpert witnesses may testify to matters f fact depending on ordinary powers of ob- ervation and requiring no special training.— .rrowood v. South Carolina & G. Extension ty. Co. (N. C.) 151.

A keeper of a livery and sale stable, who had xamined the horses before shipment, may, tes- ify as to whether he sold them for less than heir value by reason of injuries sustained in hipment.—Milam v. Southern Ry. Co. (S. C.) 71.

An agent of a connecting railroad, who had ollected bills for defendant company for feed- ıg plaintiff's horses during shipment, may tes- ify as to such bills in an action for damages o the horses.—Milam v. Southern Ry. Co. (S. .) 571.

In an action for the wrongful rescission of laintiff's contract to erect buildings for de- endant, evidence of the difference between laintiff's bid and what the buildings would ave cost him was admissible.—Jenkins v. harleston St. Ry. Co. (S. C.) 703.

11. Evidence at former trial or in other proceeding.
Evidence as to what a deceased witness testi- ed in a previous trial *held* inadmissible, where he issues were not substantially the same.— Vhitaker v. Arnold (Ga.) 231.

Evidence of absent witness on former trial, ıcorporated in brief of evidence, *held* admis- ible where nonresidence of such witness was hown.—Owen v. Palmour (Ga.) 969.

12. Weight and sufficiency.
Where there was positive evidence to over- ome the legal presumption on which the plain- ff's case rested, and the witnesses were not di- ectly contradicted, and the circumstantial evi- ence was consistent with their testimony, the ositive testimony must control.—Georgia S. & . Ry. Co. v. Thompson (Ga.) 945.

EXAMINATION.

)f witnesses in general, see "Witnesses," § 2.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," § 4.

1. Nature, form, and contents in general.
Bill of exceptions sued out when it was im- ossible to ascertain whether exceptions were aken to what was done at a former term, or o an order directing entry of original order of ismissal made at former term, *held* insufficient, s not simply pointing out alleged errors.— weatman v. Wall (Ga.) 954.

2. Settlement, signing, and filing.
Acknowledgment of service of bill of excep- ions, entered before the same was certified by ial judge, is insufficient.—Whitley Grocery Co. . Walker (Ga.) 426.

Under Civ. Code, § 5528, where a judge akes interlineations in bill of exceptions, and hen certifies it, as corrected, to be true, such orrections will be considered a part of the bill. -McCullough Export Lumber & Warehouse o. v. National Bank (Ga.) 465.

Where bill of exceptions is corrected by inter- neations and verified by certificate of judge, the writ of error will not be dismissed, where interlineations and note did not contradict re- citals in the bill of exceptions.—McCullough Export Lumber & Warehouse Co. v. National Bank (Ga.) 465.

Service of bill of exceptions cannot be shown in supreme court by parol statements of coun- sel.—Crow v. State (Ga.) 858.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCUSABLE HOMICIDE.

See "Homicide," § 8.

EXECUTION.

See "Attachment"; "Garnishment"; "Judicial Sales."

Exemptions, see "Exemptions"; "Homestead."

Of judgment of foreclosure, see "Mortgages," § 9.

§ 1. Property subject to execution.
Refusal to enjoin execution sale *held* proper.— Koch v. Brockhan (Ga.) 695.

Where creditor, holding land under deed from guardian individually and as guardian, to se- cure note of guardian and ward, reconveys to guardian, the ward being dead and the guard- ian being sole heir, he can levy on the land in its entirety as the individual property of sur- viving guardian.—Koch v. Brockhan (Ga.) 695.

§ 2. Issuance, form, and requisites of writ.
An execution is illegally issued when signa- ture of the clerk is not affixed by him or his authority.—Williams v. McAuthur (Ga.) 301.

§ 3. Lien, levy or extent, and custody of property.
A levying officer may sue for a breach of a forthcoming bond in his own name.—Turner v. Camp (Ga.) 76.

§ 4. Stay, quashing, vacating, and relief against execution.
Whether affidavit of illegality should be ac- cepted is to be drawn by an inspection of the paper.—Williams v. McAuthur (Ga.) 301.

Remedy of claimant is by motion to dismiss levy, and not by motion to quash attachment or judgment upon which execution was based.— Morrison v. Anderson (Ga.) 462.

As one upon whose property an execution against another issued by a tax collector is lev- ied may interpose a claim, injunction to prevent threatened sale will not be granted.—Racine Iron Co. v. McCommons (Ga.) 866.

Where execution against an individual is lev- ied on property of a corporation, defendant cannot interpose affidavit of illegality on ground that execution is proceeding against property of such corporation.—State v. Sallade (Ga.) 922.

Where affidavit of illegality is filed by one not a defendant, it should be dismissed.—State v. Sallade (Ga.) 922.

Defendant in execution cannot file affidavit of illegality until execution has been levied.—State v. Sallade (Ga.) 922.

Affidavit of illegality alleging that judgment was rendered by a justice out of his district *held* good.—Hilson v. Kelley (Ga.) 966.

§ 5. Claims by third persons.
Where a husband turned over land to his wife, telling her and their children to support themselves, a crop produced thereon by labor of wife and children *held* not subject to judg-

erty belonging to defendant in execution at time of levy, verdict for plaintiff was unwarranted.—Sams v. Thompson Hiles Co. (Ga.) 104.

Judgment for plaintiff in execution against claimant *held* not binding on one to whom the latter had conveyed before claim was filed.—Smith v. Coker (Ga.) 107.

That levying officer, against whom rule was sued out, answered that fund in his hands was claimed by another execution creditor, did not make such creditor a party to the proceeding.—Jones v. Coney (Ga.) 321.

Commission of errors in entering a judgment *held* no cause for granting a new trial.—Adams v. Carnes (Ga.) 597.

Under Civ. Code, § 4627, 10 per cent. damages cannot be rendered against the claimant unless the value of the property exceeds full amount of the execution.—Adams v. Carnes (Ga.) 597.

Privilege of claimant to withdraw his claim one time without consent of plaintiff in fi. fa. must be exercised before judgment finding property subject, and claimant cannot withdraw claim after appeal to superior court without plaintiff's consent.—Adams v. Carnes (Ga.) 597.

Where, after levy, a claim is interposed, the officer should transmit execution, with entries, to the court, together with the claim papers.—Brannon v. Barnes (Ga.) 689.

On trial of claim case, evidence that claimant has in two other cases filed claims to land levied on by different parties in his own domicile *held* inadmissible on question as to whether claim was made for delay.—Ray v. Atlanta Trust & Banking Co. (Ga.) 769.

Where, on trial of claim case, claim is withdrawn, and verdict rendered against plaintiff for damages, the court cannot consider complaints, in a motion for a new trial of the damage case, of rulings made in the trial of the claim case.—Ray v. Atlanta Trust & Banking Co. (Ga.) 769.

On trial of issue whether claim was made for delay only, counsel for claimant cannot testify as to what the evidence of his client would have been, if the court had allowed such evidence to be produced.—Ray v. Atlanta Trust & Banking Co. (Ga.) 769.

It is proper to strike an answer filed by defendant, in the nature of a cross bill, setting forth matters that should have been put in issue on trial of former case as to the same matter in which he was party.—Garlington v. Fletcher (Ga.) 920.

Tender to sheriff of affidavits requisite to interposition of claim in forma pauperis *held* not to make a claim case, where sheriff refuses to accept the same.—Jolley v. Hardeman (Ga.) 952.

Where two fi. fas. in favor of same plaintiff were levied upon realty claimed by a third person, *held*, that a charge restricting verdict to a mere general finding as to whether or not the property was subject was, under the circumstances, error.—First State Bank v. Carver (Ga.) 960.

Where issues in claim case were whether the deed under which claimant asserted title was one of bargain and sale, or merely given to secure a debt, and the amount of the debt, a general finding that the property levied on was subject did not cover the issues.—First State Bank v. Carver (Ga.) 960.

When property subject to mortgage which has not been foreclosed is levied on by process junior to that of mortgage, the entire estate cannot be sold, so as to allow mortgagee to claim proceeds of sale.—De Vaughn v. Byrom (Ga.) 267.

Where property is sold under execution, and purchaser refuses to comply with bid, but after second sale pays the amount of his bid at first sale, rule for determining distribution of proceeds established.—De Vaughn v. Byrom (Ga.) 267.

Unforeclosed mortgage cannot be basis of claim for money on rule to distribute.—De Vaughn v. Byrom (Ga.) 267.

An ordinary cotton press *held* not "liable to deteriorate from keeping," within Civ. Code, § 5463, authorizing speedy sale of such property on levy of execution.—Jolley v. Hardeman (Ga.) 952.

§ 7. Wrongful execution.

A complaint in an action for damages done plaintiff's reputation and credit by unlawfully seizing and selling his property was sufficient on demurrer for want of facts, without an allegation of value.—Long v. Hunter (S. C.) 579.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."
Testamentary trustees, see "Trusts."
Testimony as to transactions with decedents, see "Witnesses," § 1.

§ 1. Appointment, qualification, and tenure.

On appeal by original caveator from order of ordinary vesting administration in clerk of the superior court, *held* error to dismiss appeal on the ground that there had been no caveat to appointment of clerk.—Hancock v. Minshew (Ga.) 296.

Payment for burial clothes with the purpose of obtaining administration thereby is not sufficient to give a right to the appointment as administrator.—Burkhim v. Pinkhussohn (S. C.) 908.

Under Rev. St. 1893, § 2067, *held*, that a nonresident cannot be appointed administrator.—Burkhim v. Pinkhussohn (S. C.) 908.

§ 2. Collection and management of estate.

Where will authorizes the executor to borrow money to pay debts it implies the power to pay attorney's fees, if necessary to collect debt by suit.—Fletcher v. American Trust & Banking Co. (Ga.) 767.

Where executor borrows money under power in will, *held* not incumbent on lender to ascertain whether there are debts to be paid by the loan.—Fletcher v. American Trust & Banking Co. (Ga.) 767.

Executor *held* authorized by will to borrow money to pay debts and to secure loan by mortgage.—Fletcher v. American Trust & Banking Co. (Ga.) 767.

Where, under power to borrow money to pay debts, executor borrows more money than is necessary, the estate is liable to the lender for the full amount, where there is no fraud by the lender.—Fletcher v. American Trust & Banking Co. (Ga.) 767.

§ 3. Allowances to surviving wife, husband, or children.

Where the ordinary has complied with statutory requirements as to year's support, it is too

set aside in money, administrator, on execution for collection of the same, cannot show that he is entitled to credit for moneys advanced from the estate to widow before her year's support was set aside.—Fulghum v. Fulghum (Ga.) 602.

Widow's right to year's support is superior to chattel mortgage given by deceased husband to secure purchase money.—Puffer v. Caldwell (Ga.) 927.

Neither a widow nor her agent can apply proceeds of year's support, set apart for herself and minor children, to her individual debt.—Hill v. Van Duzer (Ga.) 966.

Claim of widow and children for a year's support *held* superior to material man's lien on property of decedent, attaching as the result of a contract made by him.—Gleason v. Traynham (Ga.) 969.

§ 4. Allowance and payment of claims.

An award in arbitration proceedings against a decedent's estate *held* properly disallowed in a creditors' suit against the estate, under Code, § 1448.—Dunn v. Beaman (N. C.) 172.

That an administratrix and heirs were parties to a creditors' bill against the estate did not entitle them to refer a claim of the heirs to arbitration, as authorized by Code, § 1426, and require the allowance of the award in the creditors' suit.—Dunn v. Beaman (N. C.) 172.

§ 5. Distribution of estate.

An executor cannot claim a life estate in land contrary to a devise in the will.—Tiddy v. Graves (N. C.) 127.

Under Rev. St. 1893, § 2048, it is proper to provide for payment of expense of last illness and funeral expenses before applying a fund to payment of decedent's judgment indebtedness.—De Loach v. Sarratt (S. C.) 532.

§ 6. Sales and conveyances under order of court.

Allegations in a caveat to an application to sell lands that administrator is in collusion with the widow to sacrifice the property of the estate *held* without merit.—Jackson v. Warthen (Ga.) 214.

It is not good ground for objection to application by administrator for sale of decedent's land to pay debts that the market is depressed.—Jackson v. Warthen (Ga.) 214.

That claim of caveating creditor is disputed does not afford cause for denying application to sell lands.—Jackson v. Warthen (Ga.) 214.

Where probate proceedings by an executrix for the sale of testator's land to pay his debts contained no order of sale, they conferred no power on her to make the conveyance.—Hunter v. Hunter (S. C.) 734.

§ 7. Actions.

Persons whose interest in lands advertised by administrator for sale are antagonistic cannot, because insolvents, be joined as co-defendants to an equitable petition by administrator for appointment of receiver and adjudication of conflicting claims.—Webb v. Parks (Ga.) 70.

A verified return of testator's executor approving the order recorded *held* admissible as prima facie evidence of payment of the money bequest.—Crawford v. Clark (Ga.) 404.

The administrator of a remainder-man or of an executory legatee may sue the personal representative of the life tenant, who had in his or her lifetime received a money bequest from the testator's representative.—Crawford v. Clark (Ga.) 404.

Modification of a judgment against an executor de bonis testatoris *held* not to preclude the judgment creditor from bringing a suit against the executrix personally on suggesting a devastavit.—Porter v. Rountree (Ga.) 761.

An action of claim and delivery cannot be maintained against an executor of an estate to recover possession of personal property unlawfully withheld by him.—Elmore v. Elmore (S. C.) 656.

Judgment against an administrator *held* enforceable by sale of testator's land, without proceedings against the heirs.—Hendrix v. Holden (S. C.) 1010.

Sale of land on judgment secured against administrator within one year of the grant of administration *held* valid, notwithstanding Rev. St. 1893, § 2322.—Hendrix v. Holden (S. C.) 1010.

§ 8. Accounting and settlement.

Turning over by executor of stocks and bonds in discharge of general legacy is not a delivering over of property in kind, within Civ. Code, § 3487, allowing compensation.—Walton v. Gairdner (Ga.) 666; Weed v. Same, Id.

An executor, delivering stocks or bonds in discharge of general legacy, *held* not entitled to commission, under Civ. Code, § 3484.—Walton v. Gairdner (Ga.) 666; Weed v. Same, Id.

Where last payment of administrator was made July 6, 1891, he was properly charged with interest on sum in his hands January 1, 1891, less payments up to July 6, 1891, until the decree of judge of probate on final accounting.—Tucker v. Richards (S. C.) 3.

Where an executor's disbursements during any given year exceed receipts of such year, the administrator is to be charged interest on sum found by adding to the annual balance in hands of trustee on January 1st in any year the receipts for that year, and deducting from result amount of disbursements of that year.—Tucker v. Richards (S. C.) 3.

Where administrators, by their maladministration, render litigation necessary on part of creditors of an estate to enable them to secure payment of their claims, such administrators are personally liable for costs of such litigation.—De Loach v. Sarratt (S. C.) 532.

Administrators indorsed a check given in payment of life insurance on the life of their decedent to one who collected the check and deposited the proceeds in his own name as trustee. *Held*, that the administrators never received or paid out the money, so as to entitle them to commissions thereon.—De Loach v. Sarratt (S. C.) 532.

In a suit by an assignee of a residuary legatee against the administrator's estate for a settlement of accounts, it must be presumed that money collected by the administrator, after receipts of the residuary legatees had been given in full settlement of their interests, was embraced in such receipts.—Tate v. Jones (Va.) 984.

Where an assignee of a residuary legatee delayed suing for a settlement of the administrator's accounts until over 20 years after the assignment, his right of action was barred by laches.—Tate v. Jones (Va.) 984.

§ 9. Foreign and ancillary administration.

Under Code, § 1374, certified copy of judgment rendered in another state is sufficient property to authorize issue of letters of ancillary administration.—Morefield v. Harris (N. C.) 125.

The finding of fact, by a court in Florida, that appellant was a fit and proper person to administer an estate, was not binding on a South Carolina court in appointing an administrator for the same estate.—Burkhim v. Pinkhussohn (S. C.) 908.

EXEMPTIONS.

See "Homestead."

§ 1. Nature and extent.

Sum due for labor on contract by which compensation was measured by amount done *held* not exempt from garnishment, though payments were made at the end of every four weeks.—Moore v. Hendry (Ga.) 921.

§ 2. Protection and enforcement of rights.

Amendment to objections to allowance of exemption which in general terms alleges that head of family owned property not scheduled, without further describing it, *held* properly disallowed.—Wood v. Collins (Ga.) 423.

A creditor, who files objections to allowance of exemption because specified articles were omitted from the schedule, should on trial be confined to such articles.—Wood v. Collins (Ga.) 423.

Where wife had actually disposed of money given to her by husband before applying for exemption out of his property, her failure to include it in her schedule will not vitiate her application.—Wood v. Collins (Ga.) 423.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 10.

EX POST FACTO LAWS.

Constitutional restrictions, see "Constitutional Law," § 4.

FACTORS.

See "Principal and Agent."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

§ 1. Civil liability.

An imprisonment from an arrest under a valid warrant will not give right of action for false imprisonment.—Page v. Citizens' Banking Co. (Ga.) 418.

FALSE PRETENSES.

An offense forbidden by Pen. Code, § 670, is complete when the owner is deprived of his property, and subsequent repentance is no bar to a prosecution.—Lowe v. State (Ga.) 856.

FEES.

Foreclosure, see "Mortgages," § 9.

FELLOW SERVANTS.

See "Master and Servant," § 5.

FERRIES.

§ 1. Establishment and maintenance.

To establish a private ferry no franchise is required.—Hudspeth v. Hall (Ga.) 770.

Right to establish public ferry is a franchise, which can only be granted by proper county authorities.—Hudspeth v. Hall (Ga.) 770.

While owner of private ferry may toll from persons incidentally crossing, he cannot maintain ferry for use of [illegible] Hudspeth v. Hall (Ga.) 770.

Proper authorities may grant additional public ferries over the same stream, as public convenience demands.—Hudspeth v. Hall (Ga.) 770.

Where one without franchise establishes public ferry, he will be enjoined to protect interest of one holding franchise.—Hudspeth v. Hall (Ga.) 770.

§ 2. Regulation and operation.

The superior court *held* to have no power to establish ferry rates, in the first instance, the county commissioners are authorized to establish by Code, § 2046.—Robinson v. Lamb (S. C.) 29.

FILING.

Pleading, see "Pleading," § 7.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 12.

FINDINGS.

On reference, see "Reference," § 3.
Review on appeal or writ of error, see "Appeal and Error," § 15.

FIRES.

See "Arson."
Caused by operation of railroad, see "Railroads," § 8.

FISH.

Salary and compensation of chief inspector appointed under the act promoting the oyster industry, determined.—White v. Worth (Ga.) 132.

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 2.
Of mortgage, see "Chattel Mortgages," § 1; "Mortgages," § 8.

FOREIGN ADMINISTRATION.

See "Executors and Administrators," § 9.

FOREIGN CORPORATIONS.

See "Corporations," § 4.

FOREIGN JUDGMENTS.

See "Judgment," § 7.

FOREIGN RECEIVERSHIP.

See "Receivers," § 5.

FORMER ADJUDICATION.

See "Judgment," §§ 4, 5.

FORMS OF ACTION.

See "Action," § 1; "Replevin."

FRANCHISES.

See "Ferries," § 1.

§ 1. Actions.
A defense of fraud and misrepresentation should allege knowledge on part of plaintiff.—Gem Chemical Co. v. Youngblood (S. C.) 437.

FRAUDS, STATUTE OF.

§ 1. Promises to answer for debt, default, or miscarriage of another.
Parol promise to see that certain notes were paid *held* within the statute.—Bluthenthal v. Moore (Ga.) 689.

Agreement to assume debt of another on extension of further credit *held* an original undertaking, which need not be in writing.—Ferst v. Bank of Waycross (Ga.) 773.

§ 2. Operation and effect of statute.
An agreement by a parent with her daughter and intended husband to convey lot, if he will build house thereon, after marriage, *held* taken out of the operation of the statute by the marriage and the building of the house.—Bell v. Sappington (Ga.) 780.

An insurance company cannot defeat a recovery on a fire policy which contains a condition that it shall be void if the insured is not the unconditional owner of the property by showing that the conveyance to insured was not in writing as required by the statute of frauds.—Cowell v. Phœnix Ins. Co. (N. C.) 184.

FRAUDULENT CONVEYANCES.

§ 1. Transfers and transactions invalid.
Assignment by husband of life policy to wife, where it had no cash surrender or market value at the time, and where subsequent premiums were paid out of her funds or funds advanced to her by others, *held* not fraudulent as to insured's creditors, who extended credit on the faith of his representations in general terms that he had life policy payable to his estate.—Brooke v. Morris (Ga.) 937.

A mortgage of a corporation to secure a note on which the directors were individually liable, to be valid, must be explicit in its terms, so as to show an agreement by the directors with the corporation, at the time of becoming liable, for additional security by way of mortgage to be given on a demand.—Atlas Tack Co. v. Exchange Bank (Ga.) 939.

Validity of mortgage executed in favor of the creditor of an insolvent trading corporation, to secure a note on which the directors were liable as indorsers, determined.—Atlas Tack Co. v. Exchange Bank (Ga.) 939.

Where one makes a conveyance to his wife when he was a surety, and the obligation was thereafter paid by the principal, such a debt cannot be counted against him in determining whether he was insolvent when he made the conveyance.—Ayers v. Harrell (Ga.) 946.

Where one makes a voluntary deed to his wife, and some time thereafter dies, the value of his other property when the deed was made is the true test of his solvency at that time.—Ayers v. Harrell (Ga.) 946.

Complaint alleging transfer in fraud of creditors by assignee for benefit of creditors to wife of assignor for nominal consideration *held* good as to wife on demurrer.—Wittkowsky v. Baruch (N. C.) 156.

Facts *held* not sufficient to show knowledge of the grantee of land of the fraudulent intent of his grantor in conveying to hinder and delay creditors.—Newberry v. Bank of Princeton (Va.) 515.

debt, without fraudulent intent, *held* not to make the conveyance fraudulent in fact, but it stands for the benefit of all creditors, including the one preferred.—Herold v. Barlow (W. Va.) 8.

Where conveyance by insolvent is for part cash and part antecedent debt, as to such debt the conveyance will be *held* a preference, inuring to the benefit of all the creditors.—Herold v. Barlow (W. Va.) 8.

§ 2. Rights and liabilities of parties and purchasers.
An executed contract of conveyance is valid as between the parties although executed for the purpose of defrauding the grantor's creditors.—McManus v. Tarleton (N. C.) 338.

§ 3. Remedies of creditors and purchasers.
Evidence considered, and *held*, that a deed of trust was prior in lien to certain judgments.—Root-Tea-Na-Herb Co. v. Rightmire (W. Va.) 359.

GAME.

See "Fish."

Indictment under Act Dec. 6, 1898, for killing baited doves, *held* not to set forth any offense.—Harris v. State (Ga.) 232.

GAMING.

§ 1. Criminal responsibility.
A furnished room in a hotel, rented and occupied by defendant, is his "place," within an ordinance making it unlawful for any person to permit his place to be used as a place for gaming.—City Council of Greenville v. Kemmis (S. C.) 727.

GARNISHMENT.

See "Attachment"; "Exemptions," § 1.

§ 1. Nature and grounds.
Where tax execution has been transferred by tax collector to a private person, the latter cannot base on it garnishment proceedings against debtor of defendant in execution.—Davis v. Millen (Ga.) 803.

§ 2. Persons and property subject to garnishment.
Where officer of a company has been garnished both as an officer and individual, and answers that as an individual he has no property and owes no debts to the defendant, but as an officer he has in his hands money of the company, *held* error to enter judgment for the amount admitted to be in his hands as such officer.—Macon Nav. Co. v. Schofield (Ga.) 965.

§ 3. Proceedings to procure.
Where plaintiff brings two suits in the same court against the same defendant on different causes of action, one summons of garnishment based thereon, and bond to obtain the garnishment, were illegal and void.—Morgan v. Latham (Ga.) 99.

§ 4. Writ or summons and notice, service, and return.
Where officer in garnishment makes return that he served the garnishee with a summons of garnishment, it means that the summons directed garnishee to file his answer in the court in which garnishment was pending.—O'Neill Mfg. Co. v. Ahrens & Ott Mfg. Co. (Ga.) 66.

§ 5. Proceedings to support or enforce.
Allegation of garnishee that summons served directed him to answer in another court was a

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O'Neill Mfg. Co. v. Ahrens & Ott Mfg. Co. (Ga.) 66.

Where garnishee was in default in making answer at term directed, there was no error, after lapse of several terms, to refuse to allow garnishee to answer.—O'Neill Mfg. Co. v. Ahrens & Ott Mfg. Co. (Ga.) 66.

Where, three days after plaintiff obtained judgment against defendant, the garnishee filed an answer denying indebtedness, and showed good reason for not answering in due time, it was error to strike the answer and enter judgment against garnishee.—Atlanta Journal v. Brunswick Pub. Co. (Ga.) 929; Brunswick Pub. Co. v. Atlanta Journal, Id.

§ 6. Liabilities on bonds or undertakings.

Where proceedings in garnishment were totally void and illegal, plaintiff *held* not entitled to judgment on the garnishment bond.—Morgan v. Latham (Ga.) 99.

GIFTS.

Charitable gifts, see "Charities."

§ 1. Inter vivos.

Burden is on party claiming money of testator as a gift to prove the gift and delivery before death of the donor.—Duckworth v. Orr (N. C.) 150.

Evidence reviewed, and *held* to show a gift by insured to his wife of his life policy before an assignment for the benefit of his creditors.—Barron v. Williams (S. C.) 561.

A gift of an insurance policy by the insured to his wife *held* not void as to creditors where insured's property, including the cash surrender value of the policy, did not exceed his homestead exemption.—Barron v. Williams (S. C.) 561.

§ 2. Causa mortis.

In action to determine validity of gift causa mortis, *held* error to direct verdict against donee.—Sorrells v. Collins (Ga.) 74.

Evidence *held* to show delivery sufficient to sustain a gift causa mortis.—Sorrells v. Collins (Ga.) 74.

To render a gift causa mortis valid, it is not necessary that delivery should be made to donee personally.—Sorrells v. Collins (Ga.) 74.

GUARANTY.

See "Indemnity"; "Principal and Surety."

Requirements of statute of frauds, see "Frauds, Statute of," § 1.

§ 1. Requisites and validity.

Indorsement on contract *held* only to be a proposal of guaranty, and not to take effect until original paper becomes a binding contract.—Barnes Cycle Co. v. Schofield (Ga.) 965.

GUARDIAN AND WARD.

§ 1. Custody and care of ward's person and estate.

Where guardian settles with debtor of ward, if the settlement is free from fraud, the ward cannot, on arriving at majority, maintain action against the debtor for balance which he ought to have paid guardian on proper settlement.—Malpass v. Graves (Ga.) 955.

§ 2. Sales and conveyances under order of court.

Prior to Act 1889 a judge of the superior court could not, in vacation, authorize guardian

Code, § 2533, file application to be relieved on reasons other than those relating to misconduct of guardian.—National Surety Co. v. Morris (Ga.) 690.

Application to be relieved as surety on guardian's bond, alleging an act amounting to misconduct and facts showing he was not a proper person, *held* not demurrable.—National Surety Co. v. Morris (Ga.) 690.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 16.

HAWKERS AND PEDDLERS.

A trading corporation is not liable for the special tax levied on peddlers.—Bohannon v. Wrought-Iron Range Co. (Ga.) 907.

HEALTH.

§ 1. Boards of health and sanitary officers.

Under Priv. Laws 1885, c. 120, § 37, a complaint to recover of the town commissioners of Morganton for burning a dwelling house must allege that the burning was done in the negligent exercise of some lawful duty to charge them in their corporate capacity, as the burning of a house is not within the scope of their prescribed duties.—Prichard v. Commissioners of Morganton (N. C.) 353.

Under Priv. Laws 1885, c. 120, § 37, the town commissioners of Morganton have no power to burn a dwelling house to prevent the spread of smallpox, and for so doing are not liable to suit in their corporate capacity.—Prichard v. Commissioners of Morganton (N. C.) 353.

A complaint against county commissioners to recover for the burning of a dwelling house to prevent the spread of smallpox is demurrable unless it shows that the house was declared a nuisance by the superintendent of health, as it fails to show a cause of action against the commissioners in their corporate capacity.—Prichard v. Commissioners of Morganton (N. C.) 353.

Under Code, § 707, subd. 22, the county commissioners are not empowered to burn a dwelling house to prevent the spread of smallpox, and for so doing are not liable to suit in their corporate capacity.—Prichard v. Commissioners of Morganton (N. C.) 353.

HEARING.

By arbitrators, see "Arbitration and Award," § 1.

HEARSAY.

In civil actions, see "Evidence," § 7.

HIGHWAYS.

See "Bridges"; "Municipal Corporations," § 7.

Accidents at railroad crossings, see "Railroads," § 5.

§ 1. Establishment, alteration, and discontinuance.

Where a public highway has been lawfully established, either by dedication or by exercise of right of eminent domain, the easement is good against any and all titles.—Town of Weston v. Ralston (W. Va.) 446.

possession, and the lower court refused to do so, and the property owner bought other pretended titles to such land, equity will cancel the deeds so far as they are a cloud on the public's title, and will enjoin further litigation of the public's right.—Town of Weston v. Ralston (W. Va.) 446.

HOMESTEAD.

See "Exemptions."

§ 1. Transfer or incumbrance.

Under Code, § 3634, a deed of the homestead by the husband alone is void.—Virginia & T. Coal & Iron Co. v. McClelland (Va.) 479.

Code, § 3634, is not unreasonable, and does not impair the rights granted by Const. art. 11.—Virginia & T. Coal & Iron Co. v. McClelland (Va.) 479.

§ 2. Rights of surviving husband, wife, children, or heirs.

A devise of part of testator's real estate to a son in fee, and of the balance to his widow for life with remainder to his son, will defeat the widow's right to claim homestead.—Ex parte Bullock (S. C.) 563.

§ 3. Protection and enforcement of rights.

It is not necessary for applicant to fix valuation of realty sought to be set apart.—Wood v. Collins (Ga.) 423.

Allotment of debtor's homestead exemption by persons appointed by trustee under deed of general assignment is invalid.—Jordan v. Newsome (N. C.) 154.

Exceptions to report of commissioners to appraise homestead should set out facts on which exceptions are based.—Bleckley v. Shirley (S. C.) 503.

Exception to report of commissioners appointed to appraise homestead of judgment debtor will not be considered, in absence of record showing facts in its support.—Bleckley v. Shirley (S. C.) 503.

Appraisement of homestead of judgment debtor may be made by appraisers appointed by sheriff and creditor, where debtor refuses to make appointment.—Bleckley v. Shirley (S. C.) 503.

Under Acts 1896, p. 191, exceptions to report of commissioners to appraise homestead of judgment debtor are triable de novo on testimony taken in open court.—Bleckley v. Shirley (S. C.) 503.

Under Acts 1896, No. 77, § 3, commissioners appointed to appraise homestead of judgment debtor should set apart in their report the debtor's personal property exempt from execution.—Bleckley v. Shirley (S. C.) 503.

HOMICIDE.

§ 1. Manslaughter.

When death results from discharge of a gun in the hands of another, who had no intention to kill, nor to discharge the gun, the discharge being caused by his negligence, the slayer is guilty of involuntary manslaughter.—Austin v. State (Ga.) 52.

§ 2. Assault with intent to kill.

One going in search of another with intent to shoot him *held* not justified.—State v. Chiles (S. C.) 496.

§ 3. Excusable or justifiable homicide.

Provisions of law relating to justifiable homicide where there has been a mutual combat

One may lawfully kill another who is attempting by violence or surprise to commit a felony on his person.—Ragland v. State (Ga.) 682.

An instruction that if the defendant assaulted the deceased, and thereby brought about the necessity of killing him, the defendant could not justify such killing by a plea of necessity, unless he were without fault in bringing about such necessity, was proper.—Jackson v. Commonwealth (Va.) 487.

Where the defendant assaulted the deceased, and killed him by hitting him with a rock as the deceased was running away from him, instruction on the law of self-defense was properly refused.—Jackson v. Commonwealth (Va.) 487.

§ 4. Evidence.

Evidence *held* to authorize conviction.—Sharp v. State (Ga.) 633.

Evidence *held* to sustain conviction.—Perry v. State (Ga.) 781.

Evidence that, shortly after the mortal wound was inflicted, accused made declarations and did acts showing malice, *held* admissible.—Perry v. State (Ga.) 781.

There is no error in excluding evidence offered merely to affect the question of punishment.—Perry v. State (Ga.) 781.

Evidence *held* insufficient to admit statements as dying declarations.—State v. Jaggers (S. C.) 434.

Evidence that person shot was apprehensive of approaching death *held* insufficient to justify admission of allegation denying declarations.—State v. Jaggers (S. C.) 434.

Evidence that deceased had made threats to injure defendant does not authorize the state, in reply, to prove threats made by defendant against deceased before the homicide.—State v. Jaggers (S. C.) 434.

Where deceased was shot by defendant, and there was evidence that they had quarreled frequently for several years prior to the shooting, the admission of a statement of deceased, as a dying declaration, that the shooting was willful and malicious, was not objectionable as the mere expression of an opinion, without facts on which to base it.—State v. Lee (S. C.) 706.

Where deceased was shot by defendant, the admission of a statement of deceased, as a dying declaration, that "he shot me for nothing," was not objectionable as the mere expression of an opinion.—State v. Lee (S. C.) 706.

Where deceased was shot by defendant, who claimed the killing was accidental, evidence of threats made by defendant against deceased several years before the killing was admissible.—State v. Lee (S. C.) 706.

Evidence *held* to sustain a verdict of murder in the first degree.—Reed v. Commonwealth (Va.) 399.

How a bystander dodged or fell when shot by defendant, who was pursuing deceased, *held* irrelevant.—Reed v. Commonwealth (Va.) 3[illegible]

Evidence of defendant's drunkenness on
ing with his wife, whom he killed, was
ble to rebut his testimony that he ha
her, promising to reform, and wishing
with him.—Reed v. Commonwealth

Where the defendant struck
fatal blow as the latter was r
him, the quarrelsome char[illegible]

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ed, and *held* not to authorize charge as to manslaughter.—Baker v. State (Ga.) 607.

Where a given charge is directed to a theory raised by defendant's statement, it should fully cover the theory so raised.—Ragland v. State (Ga.) 682.

Whether advance by a man armed with a stick in the nighttime is equivalent to assault, so as to reduce homicide to voluntary manslaughter, is a question for the jury.—Ragland v. State (Ga.) 682.

Where defense is based on theory that deceased was about to commit a felony on accused, instruction as to law of justifiable homicide in cases of mutual combat was erroneously given.—Ragland v. State (Ga.) 682.

It is not error to refuse a charge inapplicable to the issues.—Perry v. State (Ga.) 781.

Under the evidence, *held*, that instruction that jury could not find defendant guilty of murder in the first degree was properly refused.—State v. Smith (N. C.) 165.

An instruction assuming a state of facts not justified by the evidence is properly refused.—State v. Medlin (N. C.) 344.

A charge that, if the deceased died of a cause independent of the gunshot wound, defendant could not be convicted, but that defendant is liable if the deceased died from a disease brought on by the wound, is not erroneous.—State v. Foote (S. C.) 551.

A charge to ascertain whether defendant or disease caused the deceased's death, and, if caused by defendant, whether it was in self-defense, is not erroneous where there was testimony that the deceased died of a disease brought on by the wound, nor was it objectionable as a charge on the facts.—State v. Foote (S. C.) 551.

Where deceased was shot by defendant, who claimed the killing was accidental, an instruction that if the jury found that the killing was accidental homicide, but occurred when the defendant was in pursuance of an unlawful or felonious act, they should find him guilty of murder, was proper.—State v. Lee (S. C.) 706.

Where no provocation was shown for a homicide, refusal to give an instruction as to different degrees of provocation was not error.—Reed v. Commonwealth (Va.) 399.

An instruction *held* not to preclude the jury from finding defendant guilty of murder in the second degree.—Reed v. Commonwealth (Va.) 399.

Where defendant assaulted deceased, whom he killed with a rock as the deceased was running away from him, an instruction that if the first assault was made by the prisoner with the preconceived design to kill or inflict great bodily harm, then the malice of the first assault communicates itself to the last act of the prisoner, and the killing is murder, was proper.—Jackson v. Commonwealth (Va.) 487.

§ 6. Appeal and error.

Where deceased, who was a physician, was shot by defendant, and statements made by deceased were admitted as dying declarations, the remark of the trial court, in the presence of the jury, that the testimony justified the opinion, and that there was a continuous dying condition, of which the deceased was aware, and of which he was more able to judge, because he was a medical man, was not prejudicial to defendant.—State v. Lee (S. C.) 706.

ministrators," § 3; "Homestead," § 2.

§ 1. Marriage settlements.

Contract by parent with daughter and her intended husband to convey lot, if husband would build a dwelling house thereon, *held* based on sufficient consideration.—Bell v. Sappington (Ga.) 780.

§ 2. Conveyances, contracts, and other transactions between husband and wife.

Where personalty of a husband was set apart as an exemption for the benefit of his wife, though she could subject the income to her support, she was not entitled to recover possession in trover.—Floyd v. Floyd (Ga.) 879.

§ 3. Disabilities and privileges of coverture.

Where a woman voluntarily borrows money, giving note and mortgage therefor, she is bound by contract, though loan was to pay debt of husband, where lender was not the creditor.—Chastain v. Peak (Ga.) 967.

§ 4. Wife's separate estate.

Where a bequest did not create a separate estate in the wife under the law then in force, and the husband took possession, he was entitled to its use during his wife's life.—Crawford v. Clark (Ga.) 404.

In action on married woman's note executed in 1890, plaintiff need not show that contract was for benefit of her separate estate, but only that she contracted with reference to it.—Darwin v. Moore (S. C.) 539.

Land owned by wife will not be subjected to a judgment against husband for the price of materials sold to him with which to enlarge their home on her land, where the wife's title was for a long time of record, and she was not implicated in any fraudulent collusion with her husband to induce the sale.—City Nat. Bank v. Cobb (S. C.) 569.

A husband *held* entitled to recover from his wife the value of the use of his teams in cultivating the wife's farm.—Browning's Ex'r v. Browning (Va.) 108.

A wife *held* to have assumed a debt contracted by the husband before marriage, and to have released him therefrom.—Browning's Ex'r v. Browning (Va.) 108.

§ 5. Actions.

A general motion to dismiss because the suit is by a married woman alone for a tort, she living with her husband, *held* properly overruled.—City of Athens v. Smith (Ga.) 955.

Under Civ. Code, § 2475, a married woman living with her husband may sue in her own name for physical injuries sustained by her.—City of Athens v. Smith (Ga.) 955.

ILLEGITIMATE CHILDREN.

See "Bastards."

IMPEACHMENT.

Of witness, see "Witnesses," § 3.

IMPLIED CONTRACTS.

See "Account Stated."

IMPRISONMENT.

See "False Imprisonment."

Liens, see "Mechanics' Liens."

IMPUTED NEGLIGENCE.

See "Negligence," § 2.

INCUMBRANCES.

On property of intestate, see "Descent and Distribution," § 2.

INDEMNITY.

See "Guaranty"; "Principal and Surety."

Contract of guaranty against liability of a stockholder on stock purchased *held* not an unconditional agreement to pay the par value of the shares within 90 days from the date of the contract.—Morris v. Veach (Ga.) 753.

An agreement to save a stockholder harmless from any loss or damage or liability as a stockholder *held* not an undertaking to guaranty him against loss sustained by reason of the stock becoming worthless in the market.—Morris v. Veach (Ga.) 753.

INDICTMENT AND INFORMATION.

For particular offenses, see "Embezzlement"; "Larceny," § 2.

—— for violation of liquor laws, see "Intoxicating Liquors," § 3.

§ 1. Conviction of offense included in charge.

Though the evidence, in prosecution for assault with intent to maim, was not sufficient to justify a conviction of such offense, defendant might be convicted of the simple assault, as an included offense.—Montgomery v. Commonwealth (Va.) 371.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 3.

INFANTS.

See "Guardian and Ward"; "Parent and Child."

Contributory negligence on part of children, see "Negligence," § 2.

§ 1. Actions.

Record *held* to show service of summons on infant defendants.—Foster v. Crawford (S. C.) 5; Same v. Heath, Id.; Same v. Cunningham, Id.; Same v. Poovey, Id.; Same v. Lancaster Cotton Mills, Id.; Same v. Springs, Id.; Same v. Porter, Id.; Same v. McManus, Id.; Same v. Jones, Id.; Same v. Culp, Id.

An objection, in an action by minors, that their guardian ad litem was illegally appointed and was not a fit person, *held* insufficient for failure to show prejudice.—Griffith v. Cromley (S. C.) 738.

Reappointment of guardian ad litem for minors before commencement of second action for partition of land *held* unnecessary, where complaint in first action was withdrawn before service of summons in second.—Griffith v. Cromley (S. C.) 738.

INFERIOR COURTS.

See "Courts," § 2.

overruled.—Brooks v. Stroud (Ga.) 960.

§ 2. Subjects of protection and relief.

Equity will enjoin municipal authorities from holding elections as to annexation to the city where the ordinance providing for election was void.—City of Macon v. Hughes (Ga.) 247.

A lessee of land, not having complied with the condition precedent to the operation of the lease, had no such "perfect title" as to authorize an injunction against the lessor, under Civ. Code, § 4927, without proof of irreparable damage or insolvency.—Clyatt v. Barbour (Ga.) 468.

Application for injunction to restrain cutting of timber *held* not to show perfect title in plaintiff, as required by statute granting the writ.—Camp v. Dixon (Ga.) 878.

In suit to enjoin prosecution for violation of municipal ordinance, the court will not inquire into validity of ordinance.—City of Bainbridge v. Reynolds (Ga.) 935.

The court will not enjoin prosecution for violation of a municipal ordinance.—City of Bainbridge v. Reynolds (Ga.) 935.

§ 3. Actions for injunctions.

A petition which has no standing as one for injunction, other than by virtue of the general prayer, will not be retained where it shows that plaintiff is not seeking an interlocutory injunction, and that a permanent injunction after a final hearing would be unavailing.—Hairalson v. Carson (Ga.) 319.

Where bill for injunction to restrain cutting of timber did not show perfect title in plaintiff, nor allege nor prove insolvency of defendant, nor irreparable damages, injunction is properly denied.—Camp v. Dixon (Ga.) 878.

§ 4. Preliminary and interlocutory injunctions.

Discretion of court in refusing injunction on conflicting evidence will not be disturbed.—Lamar v. Gardner (Ga.) 640.

§ 5. Writ, order, or decree, service, and enforcement.

Where a court, in injunction proceedings, grants relief on stated conditions, which the party accepts, such conditions are enforceable, though ordering physical acts.—Waycross Air-Line R. Co. v. Southern Pine Co. (Ga.) 641.

§ 6. Liabilities on bonds or undertakings.

The fact that a bond given to stay an injunction does not conform to requirements of decree authorizing it *held* not ground for demurrer to suit thereon.—Blankenship v. Ely (Va.) 484.

IN PAIS.

Estoppel, see "Estoppel," § 2.

INSANE PERSONS.

Testimony as to transactions with persons subsequently incompetent, see "Witnesses," § 1.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

§ 1. Assignment, administration, and distribution of insolvent's estate.

Where commissioner appointed to sell assets of insolvent sells to a banking corporation in which he is a stockholder and director, the

only in an attachment suit against the same debtor in another state, did not affect the lien acquired by the attachment, so as to require plaintiffs to share with other general creditors of the insolvent.—German Looking-Glass Plate Co. v. Asheville Furniture & Lumber Co. (N. C.) 199.

INSTRUCTIONS.

In civil actions, see "New Trial," §§ 1, 7–9½.
In criminal prosecutions, see "Homicide," § 5.

INSURANCE.

§ 1. Insurance agents and brokers.

Policy of insurance *held* not invalid because agent of company, after policy has been placed in his hands, fills blanks therein before delivery, so as to make it a complete contract.—Smith v. Farmers' Mut. Ins. Ass'n (Ga.) 957.

§ 2. The contract in general.

Where an applicant for life insurance reserved the right to inspect policy before paying the first premium, and after its issuance, but before delivery, became fatally ill, he could recover, providing he waived his right and tendered payment.—Going v. Mutual Ben. Life Ins. Co. (S. C.) 556.

§ 3. Premiums, dues, and assessments.

Delivery is essential to validity of note.—Reese v. Fidelity Mut. Life Ass'n (Ga.) 637.

A mutual insurance association, after receiving large assessments from a member, cannot, without his consent, so alter his contract as to increase his assessments.—Strauss v. Mutual Reserve Fund Life Ass'n (N. C.) 352.

§ 4. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

A failure to disclose in an application for insurance an incumbrance on property which is not found to be material or fraudulent will not vitiate the policy within Acts 1893, c. 299, §§ 8, 9.—McCarty v. Imperial Ins. Co. (N. C.) 284; Same v. Scottish Union & National Ins. Co., Id.

§ 5. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Breach of iron-safe clause *held* to avoid insurance on buildings as well as on stock.—Southern Fire Ins. Co. v. Knight (Ga.) 821.

Invoice of goods purchased *held* not an inventory, within the provisions of the iron-safe clause.—Southern Fire Ins. Co. v. Knight (Ga.) 821.

Insurance policy construed, and *held*, that default in premium released company from all liability.—Mutual Life Ins. Co. v. Clancy (Ga.) 944.

Where local agent of life company represented to holder of a policy that time of payment of premium would be changed, and assured made written request therefor, failure to reply *held* not to excuse payment in accordance with the terms of the policy.—Mutual Life Ins. Co. v. Clancy (Ga.) 944.

§ 6. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Application for policy of life insurance and policy construed, and *held*, that actual payment of first premium during good health of applicant was condition precedent to liability of association.—Reese v. Fidelity Mut. Life Ass'n (Ga.) 637.

owner of the land on which it is located.—Cowell v. Phœnix Ins. Co. (N. C.) 184.

§ 7. Risks and causes of loss.

Policy of fire insurance, stipulating that a gin house, which shall at intervals be operated by steam, will not be protected so long as it is so operated, construed.—Edwards v. Planters' & People's Mut. Fire Ass'n (Ga.) 755.

§ 8. Notice and proof of loss.

Insurance company *held* not to have waived defense of failure to serve notice of accident by sending proofs to be filled out after the time for service had expired.—United Benev. Soc. of America v. Freeman (Ga.) 764.

Evidence *held* not to show that insured's failure to give notice of injury within the time prescribed in an accident policy was caused by impossibility of performance.—United Benev. Soc. of America v. Freeman (Ga.) 764.

Where an accident policy required service of proof of injury within 10 days thereafter, and such service was not rendered impossible by the injury, insured, not having served the notice, was not entitled to recover.—United Benev. Soc. of America v. Freeman (Ga.) 764.

Conditions of policy construed, and *held*, that proofs of loss were filed within the time required by the terms of the policy.—Southern Fire Ins. Co. v. Knight (Ga.) 821.

§ 9. Payment or discharge, contribution, and subrogation.

Evidence, to entitle an insurance company to recover back money paid on a policy, must show the policy void because of fraud of insured, or that, after it was issued, he was guilty of conduct rendering it void, and fraudulently concealed such fact.—Rome Grocery Co. v. Greenwich Ins. Co. (Ga.) 63.

To entitle an insurance company to recover money paid on a policy, it is, under Civ. Code, § 2113, incumbent on the company to show that, after payment, it discovered evidence showing itself not liable on the policy.—Rome Grocery Co. v. Greenwich Ins. Co. (Ga.) 63.

§ 10. Actions on policies.

Where, in action on insurance policy, plaintiff's testimony showed affirmatively failure to comply with conditions, a motion to nonsuit should have been sustained.—Southern Fire Ins. Co. v. Knight (Ga.) 821.

Where verdict was right, it is immaterial whether the charges complained of were erroneous or not.—Futrell v. Mutual Ben. Fire Ass'n (Ga.) 947.

Under the evidence in an action on a life policy, it was not error to refuse to submit issues that the agent of the company had waived certain physical defects or did not deem them material to the risk.—Sprinkle v. Knights Templar & Masons Life Indemnity Co. (N. C.) 112.

The burden of proving the fraudulent intent of insured, or the materiality of a misrepresentation in failing to disclose an incumbrance on property, is on the insurer.—McCarty v. Imperial Ins. Co. (N. C.) 284; Same v. Scottish Union & National Ins. Co., Id.

Where a mutual life association violates its contract with a member, the damages to which he is entitled are the amount of premiums and dues paid by him, with interest from the date of each payment.—Strauss v. Mutual Reserve Fund Life Ass'n (N. C.) 352.

Where, in an action on a fire insurance policy providing it should be void if the insured did not own the property in fee simple, plaintiff, on

judgment of nonsuit was erroneous.—Shute v. Manchester Fire Assur. Co. (S. C.) 541.

In an action on a policy, an agent's manual, forbidding agents to deliver policies unless the applicant was in good health at the time of delivery, was inadmissible, without proof that the applicant knew the rule.—Going v. Mutual Ben. Life Ins. Co. (S. C.) 556.

In an action on a life policy, a letter from plaintiff's attorneys to the company, stating that tender of first premium had been made, and that they believed the claim was valid, was properly admitted.—Going v. Mutual Ben. Life Ins. Co. (S. C.) 556.

§ 11. Mutual benefit insurance.

Where, in suit on benefit certificate, defendant's answer denied liability on ground insured had been suspended, the court should not have allowed defendant to prove the certificate not in force by reason of the dissolution of the local commandery of which insured was a member.—Doggett v. United Order of Golden Cross (N. C.) 26.

Where neither benefit certificate nor laws of a society required beneficiary to make proofs of death, a mere showing of the certificate and demand for sum due on death of a member made a prima facie case against society.—Doggett v. United Order of Golden Cross (N. C.) 26.

In suit on benefit certificate, it was no defense that insured's local commandery had been dissolved for nonpayment of assessment, when no notice of such dissolution had been sent such commandery, as required by laws of society.—Doggett v. United Order of Golden Cross (N. C.) 26.

Where, in suit on benefit certificate, defendant claimed the certificate not in force on ground insured had been disconnected for nonpayment of dues, such forfeiture was not established, in absence of showing that insured had received the notice of assessment required by laws of society.—Doggett v. United Order of Golden Cross (N. C.) 26.

If an insurance company, before expiration of time within which proofs of loss may be furnished, denies liability on ground of suspension, such denial is a waiver of the condition requiring proofs of death.—Doggett v. United Order of Golden Cross (N. C.) 26.

INTENT.

Fraudulent, see "Fraudulent Conveyances," § 1.

INTEREST.

See "Usury."

Disqualification as witness, see "Witnesses," § 1.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 2.

INTERROGATORIES.

To witnesses, see "Depositions."

INTERSTATE COMMERCE.

Regulation, see "Commerce."

INTESTACY.

See "Descent and Distribution."

Acts 1884–85, p. 528, relating to local option in Troup county, *held* constitutional.—Robinson v. State (Ga.) 201.

§ 2. Offenses.

Evidence *held* insufficient to sustain conviction for selling liquor without a license.—Huby v. State (Ga.) 301.

Retailing liquor on the Sabbath without a license *held* a violation of a penal statute.—Williams v. City Council of Augusta (Ga.) 607.

On a prosecution for violation of the dispensary law, an instruction that if defendant's place contained the paraphernalia for making liquor, and defendant was engaged in the manufacture of it, he was guilty, was proper.—State v. Ross (S. C.) 659.

A licensed distiller, having no license to sell in quantities less than a gallon, *held* to violate the law by selling a gallon or more, to be left in his custody and taken away in quantities less than a gallon.—McKeever v. Commonwealth (Va.) 995.

§ 3. Criminal prosecutions.

The recorder's court in the city of Augusta *held* to have no jurisdiction of a prosecution for retailing spirituous liquors without license.—Williams v. City Council of Augusta (Ga.) 607.

Indictment under dispensary law need not allege that dispensary was in operation on the date the offense was committed.—State v. Newcomb (N. C.) 147.

On a prosecution for violation of the dispensary law, whether defendant was a manufacturer of liquor was a question for the jury.—State v. Ross (S. C.) 659.

On a prosecution for a violation of the dispensary law, an instruction that no man shall keep a place where liquor "is to be made" *held* not misleading.—State v. Ross (S. C.) 659.

Where indictment charges illegal sale to two jointly, and evidence shows a separate sale to each, it is no ground for reversal.—McKeever v. Commonwealth (Va.) 995.

§ 4. Rights of property and contracts.

Validity of sale of intoxicating liquors on ground of their contraband nature can only be questioned by the state.—Ex parte Neal Loan & Banking Co. (S. C.) 584; Lanahan v. Bailey Liquor Co., Id.

ISSUES.

Trial by jury of issues in equity, see "Equity," § 5.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 2.

JOINDER.

Of causes of action, see "Action," § 2.
Of parties in civil actions, see "Parties," § 1.

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

§ 1. Disqualification to act.

An attorney at law, employed to file petition for appointment of receiver, who thereafter

JUDGMENT.

In injunction proceedings, see "Injunction," § 5.
On appeal or writ of error, see "Appeal and Error," § 19.
Review, see "Appeal and Error."
Sales under judgment, see "Judicial Sales."

§ 1. On trial of issues.

Judgment in suit on note *held* not invalid, though based on verdict, when judgment was signed by the judge, who thus adopted as his own judicial act the jury's finding.—Koch v. Brockhan (Ga.) 695.

Improper incorporation of special lien on land in a judgment, even if erroneous or void, *held* not to invalidate the entire judgment.—Bush v. Bank of Thomasville (Ga.) 900.

§ 2. Equitable relief.

Equity will not set aside judgment in a court of law where petition shows that plaintiff was negligent in making his defense in the action at law.—Berry v. Burghard (Ga.) 459.

§ 3. Collateral attack.

Judgment against an executor de bonis testatoris *held* not subject to collateral attack for fraud or mistake in its rendition in a subsequent suit in the same court in which the judgment was rendered.—Porter v. Rountree (Ga.) 761.

§ 4. Merger and bar of causes of action and defenses.

Where, in rendering judgment on demurrer, the court does not pass on the merits, a judgment dismissing the action is not a bar to another suit.—Papworth v. City of Fitzgerald (Ga.) 311.

Judgment on a similar cause of action between the same parties *held* res judicata.—Brown v. Everett-Ridley-Ragan Co. (Ga.) 813.

Decree in processioning proceeding, under Acts 1893, c. 22, *held* not pleadable in bar of subsequent ejectment.—Vandyke v. Farris (N. C.) 171.

Plaintiff's neglect to ask for fees and emoluments in action of quo warranto to try the title to an office does not estop recovery of same in another action.—McCall v. Webb (N. C.) 174.

§ 5. Conclusiveness of adjudication.

A trustee *held* finally concluded by adjudication in suit by beneficiary, so far as decree was warranted by the pleadings.—Payne v. Bowdrie (Ga.) 89.

Where fund from sale of land was brought for distribution into court, creditors whose judgments were older than the one under which the sale was made, but younger than the deed given to secure the note on which judgment was rendered, could not attack the younger judgment because note was infected with usury.—Bush v. Bank of Thomasville (Ga.) 900.

Purchaser at sheriff's sale *held* the privy of plaintiff in execution, so that judgment in claim case estops claimant from setting up title to the same in action against him for its recovery by the purchaser.—Garlington v. Fletcher (Ga.) 920.

Judgments are conclusive between parties and privies as to all matters in issue, or which might have been put in issue.—Garlington v. Fletcher (Ga.) 920.

Where a demurrer to a complaint for want of facts was overruled, the ruling was binding on its renewal before another judge.—Long v. Hunter (S. C.) 579.

her right to satisfaction out of the proceeds of the sale of such land by allowing the sale on foreclosure to the original grantors to be confirmed and treating the purchase price as paid.—Max Meadows Land & Improvement Co. v. McGavock (Va.) 490.

Plea of res judicata *held* not available where the prior suit involved different property and defendant in the present suit was not a party to the former.—Kelly v. Hamblen (Va.) 491.

Permitting the confirmation of a commissioner's report containing a charge for commissions for the sale of property under a trust deed, without objecting to the amount thereof, *held* to be an adjudication which would prevent a subsequent objection to the amount allowed.—Roller's Adm'r v. Pitman's Adm'r (Va.) 987.

§ 6. Lien.

The holder of the oldest unpaid judgment lien is entitled to be satisfied first out of the property of the debtor, where his lien is a general one.—Max Meadows Land & Improvement Co. v. McGavock (Va.) 490.

§ 7. Foreign judgments.

Where appellant was appointed administrator in Florida, the appointment of another person in South Carolina did not violate Const. U. S. art. 4, § 1, providing that full credit should be given the judicial proceedings of other states.—Burkhim v. Pinkhussohn (S. C.) 908.

A judgment of a foreign state cannot pass title or affect land in the state.—Wilson v. Braden (W. Va.) 367.

§ 8. Payment.

A judgment, having been paid by two partners of the firm, *held* extinguished, and not provable against the estate of the deceased third partner.—Dunn v. Beaman (N. C.) 174.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.

JUDICIAL SALES.

Of property of decedent, see "Executors and Administrators," § 6.
—— of infant, see "Guardian and Ward," § 2.
On execution, see "Execution," § 6.

A purchaser of land at a judicial sale, acting in good faith and without notice, takes a prior title to a prior grantee under a deed unrecorded at the time of the sale.—Ousley v. Bailey (Ga.) 750.

A sale by a trustee or commissioner appointed under decree of a foreign state cannot affect land in the state.—Wilson v. Braden (W. Va.) 367.

Recital in deed, offered to show title of a sale under decree and that parties were duly in court and authority given to make the sale, is no evidence of the facts against strangers to the deed.—Wilson v. Braden (W. Va.) 367.

JURISDICTION.

See "Equity," § 1.
Amount in controversy, see "Appeal and Error," § 2.
Appellate jurisdiction, see "Appeal and Error," § 1.
In actions for divorce, see "Divorce," § 1.
Justices' courts in civil cases, see "Justices of the Peace," § 1.
Of criminal prosecutions, see "Criminal Law," § 1.
Particular courts, see "Courts."

Disqualification or misconduct ground for new trial, see "New Trial," § 1.
Instructions in civil actions, see "Trial," §§ 7–9½.
Questions for jury in civil actions, see "Trial," § 6.
—— in criminal prosecutions, see "Criminal Law," § 9.
Taking case or question from jury at trial, see "Trial," § 6.
Trial by jury of issues in equity, see "Equity," § 5.

§ 1. Right to trial by jury.

In action on unconditional contract in writing, the court can render judgment without intervention of jury.—Bush v. Bank of Thomasville (Ga.) 900.

Under Code, § 274, defendant's consent to a reference of the case to a master to take testimony constituted a waiver of right to trial by jury.—Griffith v. Cromley (S. C.) 738.

§ 2. Qualifications of jurors and exemptions.

Evidence *held* insufficient to support challenge to juror for nonpayment of poll tax.—State v. Weaver (S. C.) 499.

The burden of proof is on one who challenges a juror on the ground of legal disqualification to show that such disqualification exists.—State v. Weaver (S. C.) 499.

§ 3. Competency of jurors, challenges, and objections.

It is too late, after verdict, to complain that proper questions were not propounded to jurors on their voir dire.—Lindsey v. State (Ga.) 62.

Defendants in criminal case *held* not entitled to complain of ruling on challenge for cause, where peremptory challenges are not exhausted.—State v. Weaver (S. C.) 499.

JUSTICES OF THE PEACE.

§ 1. Civil jurisdiction and authority.

Where a justice is disqualified by reason of relationship, any other justice of the county may issue execution and preside on the trial of an issue formed by counter affidavit on levy of execution.—Savage v. Oliver (Ga.) 54.

A justice has no authority to foreclose a chattel mortgage when principal of debt exceeds $100.—De Vaughn v. Byrom (Ga.) 267.

Under Code, § 71, subd. 4, a magistrate has jurisdiction in attachment against a nonresident to at least render judgment in rem.—Bird v. Sullivan (S. C.) 494.

Const. 1895, art. 5, § 23, does not prevent action by attachment against nonresident under a judgment in rem.—Burckhalter v. Jones (S. C.) 495.

Under Acts 1884 (18 St. at Large, p. 751) §§ 1, 2, a magistrate is authorized to issue a warrant to enforce a lien for rent, where the amount claimed does not exceed $100.—Southern Ry. Co. v. Sarratt (S. C.) 504.

§ 2. Procedure in civil cases.

Entry on fi. fa. from justice court *held* not such a compliance with Civ. Code, § 4167, as to authorize constable to levy execution on land.—Eaves v. Garner (Ga.) 688.

Where summons names only a certain man as defendant, and he and his wife are served, and she did not appear or plead, judgment against the wife is void.—Shearouse v. Wolfe (Ga.) 923.

When plaintiff accepted a tender deposited with a justice in full of the demand and costs, after the judgment was rendered against defendant, the justice was without power to set aside the judgment.—Bryson v. Scott (Ga.) 619.

Magistrates are within Const. art. 5, § 26, relating to the charging of juries on questions of fact; they being included in the word "judge."—Marchbanks v. Marchbanks (S. C.) 438.

A nonresident, by appearing at trial and contesting case on merits, gives magistrate jurisdiction to render judgment in personam.—Bird v. Sullivan (S. C.) 494.

Omission of magistrate to sign his name on original summons *held* not a jurisdictional defect, where order of publication is signed and the words, "Magistrate's Summons for Debt," and "By W. [magistrate] to J. [defendant]," appears on face of summons.—Burckhalter v. Jones (S. C.) 495.

§ 3. Review of proceedings.

Where there was ample evidence to sustain a verdict on trial in justice court, there was no error in overruling certiorari thereto.—Shields v. Mills (Ga.) 51.

It is too late, on trial of appeal from justice in action on unconditional contract for defendant, to file a plea, where no defense was made in lower court.—Morgan v. Prior (Ga.) 75.

Finding of superior court that verdict in justice's court was not contrary to evidence *held* not error, where issues of fact were supported by testimony.—Smith v. Coker (Ga.) 105.

Where evidence in action before justice demands the verdict rendered, and there is no error of law, the superior court should not sustain a certiorari.—Whitaker v. Arnold (Ga.) 231.

Petition of certiorari to justice *held* to sufficiently specify the testimony and the alleged errors complained of.—Moran v. Childs (Ga.) 235.

Held not error to refuse to dismiss certiorari to justice because part of the militia district where court was held was omitted from the petition.—Moran v. Childs (Ga.) 235.

Defendant cannot appeal to a jury in the justice court from a part only of the judgment.—Bryson v. Scott (Ga.) 619.

Recordari *held* proper method of bringing up record, when justice refuses to allow an appeal from judgment on attachment against a person alleged to be a nonresident.—Merrell v. McHone (N. C.) 85.

A judgment of the common pleas court affirming a judgment of a magistrate's court is conclusive as to the jurisdiction of the latter court in action on appeal bond.—Tiedman v. Mayer (S. C.) 509.

Circuit court, after dismissing appeal from magistrate on the ground that he was not served with notice and grounds of appeal, has no jurisdiction to entertain motion to reverse the judgment appealed from.—Baker v. Irvine (S. C.) 742.

Code provision for personal service of notice and grounds of appeal on the magistrate *held* satisfied where acceptance of service thereof is signed in the magistrate's name by his authorized agent.—Baker v. Irvine (S. C.) 742.

JUSTIFICATION.

Of homicide, see "Homicide," § 3.

KNOWLEDGE.

Actual or constructive knowledge, see "Notice."
By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.

Effect in equity, see "Equity," § 2.

LANDLORD AND TENANT.

Railroad leases, see "Railroads," § 4.

§ 1. Creation and existence of the relation.

One holding option to purchase land, and entering thereon with permission of vendor, *held* not to become, after expiration of option, a tenant of the owner.—Henry v. Perry (Ga.) 87.

Where landowner contracted with another to furnish land and supplies, and the other was to do the work and receive part of the crop, the relation was that of landlord and cropper.—Hancock v. Boggus (Ga.) 970.

§ 2. Terms for years.

A lessee, without consent of his landlord, cannot transfer his lease.—Bass v. West (Ga.) 244.

Contract set up by tenant as defense in proceedings to eject him as holding over *held* not bad, as too indefinite.—Walker v. Edmundson (Ga.) 800.

In proceedings by landlord to eject tenant as holding over, counter affidavits filed by tenant *held* to set up a good defense.—Walker v. Edmundson (Ga.) 800.

§ 3. Premises, and enjoyment and use thereof.

In case of wrongful eviction, lessee's damages would be the value of the premises for rent during the remainder of the term.—Bass v. West (Ga.) 244.

Where lessee conducts established business, the value of good will and loss of profits occasioned by eviction may be considered in estimating damages therefrom.—Bass v. West (Ga.) 244.

A petition alleging that plaintiff, a tenant, was injured by a defective plank in floor of rented building, and that landlord had notice of "defective condition of the floor," sufficiently alleges notice of defective condition of the plank.—Stack v. Harris (Ga.) 615.

§ 4. Rent and advances.

Where a lease of timber for turpentine purposes required payment of the money before boxing began, such payment was a condition precedent to the lease becoming operative.—Clyatt v. Barbour (Ga.) 468.

A tenant against whom a distress warrant has been sued out, who files a counterclaim affidavit, with no distinct denial of plaintiff's demand, but alleging only that a designated portion of the rent claimed is not due for certain reasons, will be confined in the evidence to such reasons.—Hunnicutt v. Chambers (Ga.) 853.

To render penal a sale by tenant of personalty subject to landlord's lien, it must appear that sale was without landlord's consent, with intent to defraud, and that he suffered loss.—Morrison v. State (Ga.) 902.

On trial for certain personalty subject to landlord's lien, *held* error to omit in charge to state that, to render accused guilty, it must appear that sale was made with intent to defraud landlord.—Morrison v. State (Ga.) 902.

On trial for certain personalty subject to landlord's lien, it must appear that sale was without landlord's consent.—Morrison v. State (Ga.) 902.

If a landlord's lien for supplies or crop is inferior to laborer's special lien, the laborer can-

pensation in cotton raised *held* not to affect landlord's lien, he having no knowledge of such agreement.—Rousey v. Mattox (Ga.) 925.

Where tenant agrees to pay specified portion of the crops as rent, and to cultivate the land in a husbandlike manner, and fails to do so, the landlord can distrain for only the value of such portion of the crops actually made, and not for what might have been made.—Reynolds v. Howard (Ga.) 967.

Where, pending cultivation of crop, the land was sold under execution, and the purchaser relied on agreement with landlord that persons cultivating should pay him the amount agreed to be paid the landlord, the purchaser acquired simply the interest of the landlord, and cannot sue out a distress warrant.—Hancock v. Boggus (Ga.) 970.

In order to maintain distress warrant against counter affidavit denying any sum due, it must be shown that relation of landlord and tenant existed.—Hancock v. Boggus (Ga.) 970.

Code, § 255a, by virtue of the provisions of Rev. St. 1893, § 2519, applies only to proceedings by attachment, and not to proceedings to enforce an agricultural or landlord's lien, except in so far as relates to the affidavits and statements.—Southern Ry. Co. v. Sarratt (S. C.) 504.

§ 5. Re-entry and recovery of possession by landlord.

Owner of land cannot by dispossessory warrant eject, as a tenant at sufferance, holder of option to purchase land entering into possession thereunder after expiration of option.—Henry v. Perry (Ga.) 87.

Affidavit required by Civ. Code, § 4813, in proceedings to oust tenant, may be made before a justice, who need not be in the district where the premises are.—Fletcher v. Collins (Ga.) 646.

Bill to restrain dispossessory warrant against tenant holding over, containing allegations that plaintiff has title by prescription, *held* improperly dismissed on demurrer.—Smith v. Wynn (Ga.) 970.

A landlord who forcibly re-entered after the expiration of a tenancy, and without notice to the tenant caused him and his household goods to be put into the street, is not liable as a trespasser ab initio therefor.—Rush v. Aiken Mfg. Co. (S. C.) 497.

LARCENY.

See "Embezzlement"; "False Pretenses."

§ 1. Offenses, and responsibility therefor.

Where pledgor takes property from pledgee's control with fraudulent intent, he may be convicted of larceny.—Henry v. State (Ga.) 55.

§ 2. Prosecution and punishment.

Indictment *held* sufficient to charge larceny from the person, under Pen. Code, § 175, although there was no allegation that the article was the property of him from whom it was taken.—Hugo v. State (Ga.) 60.

Possession of stolen goods several months after the alleged theft, with failure to account therefor, *held* not to authorize conviction.—Calloway v. State (Ga.) 63.

Where there was no proof of the value of the articles nor of the time at which the larceny was committed, conviction was erroneous.—May v. State (Ga.) 222.

In order that recent possession may be considered as evidence of guilt of larceny, the goods found must be clearly shown to have been stolen.—Turner v. State (Ga.) 686.

Larceny having been clearly shown to have been committed, a charge that it was necessary to find that the thing alleged to have been stolen was so recently in defendant's possession, and immediately after the theft, with his knowledge and consent, *held* not erroneous.—Turner v. State (Ga.) 686.

An indictment for stealing ungathered corn, which alleges that it is the property of the tenant who rents the premises for agricultural purposes, is not bad for not alleging title in the lessor.—State v. Higgins (N. C.) 113.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 18.

LEASES.

See "Landlord and Tenant."

LEGACIES.

See "Wills."

LEGISLATIVE POWER.

See "Constitutional Law," § 1.

LEVY.

Of execution, see "Execution," § 8.

LIBEL AND SLANDER.

§ 1. Words and acts actionable, and liability therefor.

To write and publish of another that he is a liar is libelous.—Colvard v. Black (Ga.) 80.

Where design was to apply libelous charge to a particular person, such person may bring action for libel, though all the public would not understand the meaning of the defamatory matter.—Colvard v. Black (Ga.) 80.

To publish of merchant that he has not confidence of local people, and is considered of small financial responsibility, *held* libelous, if false.—Dun v. Weintraub (Ga.) 808.

To publish of a merchant that he has given unrecorded mortgage *held* not actionable, without allegations of special damage.—Dun v. Weintraub (Ga.) 808.

§ 2. Actions.

An amendment seeking to add to a petition legally setting forth a cause of action for libel, by declaring on another publication, was properly rejected.—Colvard v. Black (Ga.) 80.

LICENSES.

§ 1. For occupations and privileges.

An "emigrant," within the act requiring a license in order to solicit emigrants, is one who quits his country for a lawful reason, with a design to settle elsewhere, taking his family and effects with him.—Varner v. State (Ga.) 93.

Evidence *held* insufficient to convict for soliciting emigrants without a license.—Varner v. State (Ga.) 93.

An ordinance imposing on the business of loaning money on personalty a license tax in a prosecution for selling without a license, the defendant has the burden of showing that he is protected by a license.—State v. Morrison (N. C.) 329.

Under Laws 1899, c. 11, § 27, the issuance of a license to a corporation having several agents and employés traveling and selling organs under that one license protects only the agent who has possession of it.—State v. Morrison (N. C.) 329.

Under Acts 1889–90, c. 244, §§ 27, 28, 32, 33, and Act March 3, 1896, a person selling country produce from his wagon on the market square is not conducting a mercantile business, as to make him liable to a fine for doing business as a merchant without a license.—Brown v. Commonwealth (Va.) 485.

Roanoke City Charter, § 104, imposing a merchant's license, does not apply to a person selling country produce from his wagon on the market square.—Brown v. Commonwealth (Va.) 485.

Under Roanoke City Ordinances, §§ 70, 472, 474, a person selling country produce from his wagon on the market square, and who has paid the curbage tax, is not required to pay a license tax as a merchant in the city.—Brown v. Commonwealth (Va.) 485.

LIENS.

See "Mechanics' Liens."

Acquired by particular remedies or proceedings, see "Judgment," § 6; "Taxation," § 3.
Effect of proceedings in insolvency, see "Insolvency," § 1.
Landlord's lien for rent, see "Landlord and Tenant," § 4.
Mortgage, see "Mortgages," § 8.
Pledge, see "Pledges."
Vendor's lien on lands sold, see "Vendor and Purchaser," § 4.

LIFE ESTATES.

See "Dower"; "Remainders."

Where by the terms of the will a devise of a life estate to testator's wife was burdened with the support of testator's children, an action brought by the children during the lifetime of the wife to set aside the sale of her life interest was not premature.—Hunter v. Hunter (S. C.) 734.

Terms of a will construed, and *held*, that an executrix thereunder had no implied power to sell her life estate.—Hunter v. Hunter (S. C.) 734.

The life tenant has no power to so mortgage the land as to bind the remainder-men.—McDonald v. Woodward (S. C.) 918; Same v. Stewart, Id.

LIMITATION OF ACTIONS.

Laches, see "Equity," § 2.

§ 1. Computation of period of limitation.

Statute is suspended, as to a debtor who removes from the state, until his return to reside therein.—Payne v. Bowdrie (Ga.) 89.

Sale of ward's lands under a decree *held* notice to the ward of the receipt of the price by the guardian, and hence the ward was not entitled to allege constructive fraud to remove the bar of limitations as against creditors' claims against the deceased guardian's estate.—Dunn v. Beaman (N. C.) 172.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Pendency of a claim case *held* not to constitute lis pendens as to an action by the claimant against levying officer and purchaser at execution sale for recovery of property sold.—Jolley v. Hardeman (Ga.) 952.

LIVE STOCK.

Carriage of, see "Carriers," § 2.
Injuries from operation of railroads, see "Railroads," § 7.

LOANS.

By bank, see "Banks and Banking," § 1.

LOGS AND LOGGING.

What was a reasonable time to remove timber from land under conditions of deed *held* to depend upon the circumstances of the case.—McRae v. Stillwell (Ga.) 604.

Deed conveying right to remove pine timber from the grantor's land construed.—Goette v. Lane (Ga.) 758.

LUMBER.

See "Logs and Logging."

MACHINERY.

Liability of employer for defects, see "Master and Servant," § 3.

MALICIOUS PROSECUTION.

§ 1. Nature and commencement of prosecution.

Abandoning the prosecution and procuring order of dismissal *held* a termination of the prosecution, when no further action is taken.—Page v. Citizens' Banking Co. (Ga.) 418.

"Carrying on" prosecution defined.—Page v. Citizens' Banking Co. (Ga.) 418.

Suing out a money rule against an officer leaving an execution *held* equivalent to a civil action against him.—Roberts v. Keeler (Ga.) 617.

§ 2. Want of probable cause.

Issuing a rule nisi against a sheriff *held* not an adjudication that there is probable cause for suing out the same, when the petition does not truly set forth the facts.—Roberts v. Keeler (Ga.) 617.

§ 3. Actions.

A firm, the individual members thereof, and one not a member may be joined as defendants, if prosecution was instituted as a result of the conspiracy.—Page v. Citizens' Banking Co. (Ga.) 418.

Petition in action against firm and its members, alleging that the prosecution was in furtherance of the firm's interests, *held* proper.—Page v. Citizens' Banking Co. (Ga.) 418.

Petition alleging that defendants conspired to injure plaintiff, a corporation, and destroy its business, *held* properly dismissed on general demurrer.—Fulton Grocery Co. v. Maddox (Ga.) 647.

MALICIOUS TRESPASS.

See "Trespass," § 2.

MALPRACTICE.

See "Physicians and Surgeons."

MANDAMUS.

§ 1. Nature and grounds in general.

Solicitor of superior court *held* to have sufficient interest to maintain mandamus to compel county commissioners to draw a grand jury for such court.—Mott v. Commissioners of Forsyth County (N. C.) 330.

§ 2. Subjects and purposes of relief.

Mandamus lies to compel levying officer to accept good affidavit of illegality.—Williams v. McAuthur (Ga.) 301.

Where a state officer is entitled to the salary provided by law, mandamus will issue to the state auditor to issue a warrant for the salary, and to state treasurer to pay it.—White v. Worth (N. C.) 132.

Courts will not interfere by mandamus with the determination of the question of the color of a school child by school trustees, since such determination involves the exercise of a judicial discretion.—Eubank v. Boughton (Va.) 529.

Mandamus will not lie to compel school trustees to receive into a white school a child whom they have decided is a negro, since there is a right of appeal from the board's decision.—Eubank v. Boughton (Va.) 529.

MANDATE.

See "Mandamus."

MANSLAUGHTER.

See "Homicide," § 1.

MARRIAGE.

See "Divorce"; "Husband and Wife."

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

See "Work and Labor."

§ 1. Services and compensation.

That employé, when he received part of wages, gave receipt in full, does not estop him to claim the balance, when he protested against stoppage of portion of wages.—Georgia R. Co. v. Gouedy (Ga.) 691.

In suit by employé against railroad company for wages, company cannot defend by showing mistake whereby company had suffered loss, which loss it had charged to the employé.—Georgia R. Co. v. Gouedy (Ga.) 691.

Declaration in action for recovery of part of salary after wrongful discharge *held* to state a cause of action.—Moore v. Kelley & Jones Co. (Ga.) 802.

§ 2. Master's liability for injuries to servant—Nature and extent in general.

Where an employé, without fault on his master's part, becomes placed in a dangerous

(Ga.) 810.

Rev. St. § 1582, *held* broad enough to include an action against a city for personal injuries sustained by an employé through defendant's mismanagement of a steam roller while repairing its streets.—Barksdale v. City of Laurens (S. C.) 661.

§ 3. —— Tools, machinery, appliances, and places for work.

Where a master's act, alleged to have caused an injury to a servant, was not in fact an act of negligence, it was error to refuse to grant nonsuit in an action against a master for the injury.—Central of Georgia Ry. Co. v. Edwards (Ga.) 810.

Master *held* not liable for an injury to a servant, where master's negligent acts, while contributing to the injury, were not the proximate cause thereof.—Central of Georgia Ry. Co. v. Edwards (Ga.) 810.

Where a master provided for the use of his servants several ways of approach to a building, an instruction that the servants might leave by any one of these ways, and if, in so doing, a servant was injured by the neglect of the master to keep it in repair, he was responsible for the injury, was proper.—Rinake v. Victor Mfg. Co. (S. C.) 700.

§ 4. —— Methods of work, rules, and orders.

A railroad company *held* not guilty of negligence causing injury to fireman.—Brown v. Southern Ry. Co. (N. C.) 19.

§ 5. —— Fellow servants.

A master is not exempt from liability for injuries to a child by negligence of a superintendent, under whose orders the child was at work and which orders he was bound to obey.—Southern Agricultural Works v. Franklin (Ga.) 693.

Master is not liable for injuries caused by an incompetent fellow servant, unless he knew, or by diligence could have known, of the incompetency.—Gunn v. Willingham (Ga.) 804.

Evidence *held* to show plaintiff injured by negligence of a fellow servant.—Gunn v. Willingham (Ga.) 804.

Though immediate cause of the injury is negligence of fellow servant, the master is liable if the servant did this act in obedience to the order of the vice principal, where the order was negligent.—City Council of Augusta v. Owens (Ga.) 830.

Person placed as general superintendent in charge of a rock quarry, with power to direct movements of laborers, and not working himself, *held* a vice principal, and not a fellow servant.—City Council of Augusta v. Owens (Ga.) 830.

§ 6. —— Risks assumed by servant.

An employé injured while mounting a moving car *held* not entitled to recover either under the general rules of law or any Alabama statute.—Quirouet v. Alabama G. S. R. Co. (Ga.) 599.

Master is not liable for injuries caused by defective machinery, where servant had knowledge of defects and did not call master's attention to it.—Gunn v. Willingham (Ga.) 804.

A master is not liable for injuries received by an employe who, as a mere volunteer, does an act outside of the scope of his employment.—Allen v. Hixson (Ga.) 810.

§ 7. —— Contributory negligence of servant.

Evidence *held* to show that emergency under which employé acted was of his own making, so that master was not liable for injuries received than the safe, way of doing certain work, he cannot, under law of Alabama, recover for injuries received.—Quirouet v. Alabama G. S. R. Co. (Ga.) 599.

In an action by an employé against a city for personal injuries, evidence *held* sufficient to show contributory negligence, barring plaintiff's recovery.—Barksdale v. City of Laurens (S. C.) 661.

In action for injuries to employé, petition *held* good against special demurrer.—Southern Agricultural Works v. Franklin (Ga.) 693.

§ 8. —— Actions.

Code Ala. § 2590, rendering a master liable to an employé for injuries caused by defective appliances, does not preclude defense of contributory negligence.—Southern Ry. Co. v. Harbin (Ga.) 218.

Petition in action for injuries received while working in a quarry *held* not subject to special demurrer because failing to allege where the quarry was located.—City Council of Augusta v. Owens (Ga.) 830.

Instruction as to duty of master to furnish a reasonably safe place to work, and that servant could assume that it was safe, *held* correct.—City Council of Augusta v. Owens (Ga.) 830.

In suit by employé against railroad company, admission of rule of railroad company, without proving knowledge of the rule by employé, *held* not error, as such knowledge may be shown after its admission.—Binion v. Georgia, S. & F. Ry. Co. (Ga.) 938.

An instruction permitting a servant to recover for loss of time, payments for medical attention, and endurance of mental anguish *held* erroneous, where there was no evidence of such damage.—Smith v. Wilmington & W. R. Co. (N. C.) 170.

Instruction on contributory negligence *held* not erroneous.—Ward v. Odell Mfg. Co. (N. C.) 194.

In an action by an employé of a city for injuries, evidence *held* sufficient to make a prima facie case.—Barksdale v. City of Laurens (S. C.) 661.

In an action by a city employé for personal injuries, under Rev. St. § 1582, he must show, as part of his case, that he was not guilty of contributory negligence.—Barksdale v. City of Laurens (S. C.) 661.

An instruction that if, after an independent contractor had left the premises, the master adopted and used the structures which such contractor had erected, or acquiesced in their use by his servants, the structures became those of the master, and he was responsible for any injury to his servants occasioned by his neglect to keep them in repair, was proper.—Rinake v. Victor Mfg. Co. (S. C.) 700.

An instruction that where a master allowed an independent contractor to erect appliances on his premises, which the master adopted and used, or acquiesced in their use by his servants while engaged in his work, he was responsible for his servants' safety, *held* proper.—Rinake v. Victor Mfg. Co. (S. C.) 700.

§ 9. Liabilities for injuries to third persons.

An action will lie against a master for injuries resulting from the negligence of a servant while acting within the scope of his authority.—Skipper v. Clifton Mfg. Co. (S. C.) 509.

MASTERS IN CHANCERY.

See "Equity," § 6.

MECHANICS' LIENS.

§ 1. Right to lien.

Where contractor abandons work, leaving building incomplete, and owner completes it, *held*, if the amount required for completion, when added to sums properly paid contractor, exceeded original contract price, owner was not liable to material man for any part thereof.—Hunnicutt & Bellingrath Co. v. Van Hoose (Ga.) 669.

After a building had been completed, surrendered to the owner, and paid for, a material man cannot acquire a lien for material purchased, used thereon by the contractor to remedy a defect in the building, without the owner's knowledge.—Sheehan v. South River Brick Co. (Ga.) 759.

Surrender of a building to the owner, and full payment for services of a contractor performed in substantial compliance with the contract, *held* to terminate all relation between the contractor and the owner as to third parties.—Sheehan v. South River Brick Co. (Ga.) 759.

§ 2. Enforcement.

Petition by subcontractor *held* demurrable where it did not state what part of sum claimed was for work done and what part for material furnished.—Smith v. Van Hoose (Ga.) 77; Van Hoose v. Smith, Id.

MESNE PROFITS.

In ejectment, see "Ejectment," § 4.

MINORS.

See "Infants."

MISREPRESENTATION.

See "False Pretenses"; "Fraud."

MORTGAGES.

Personal property, see "Chattel Mortgages."

§ 1. Requisites and validity.

Where one has conveyed lands to secure debt, and received bond conditioned to reconvey, the grantor's interest is the right to redeem.—Williams v. E. E. Foy Mfg. Co. (Ga.) 927.

Instrument construed, and *held* a deed of trust, and not a mortgage, so that, the trustee dying, another may be appointed with right to foreclose.—Wright v. Fort (N. C.) 118.

§ 2. Recording and registration.

The fact that a trust deed securing purchase money may not have been properly acknowledged and recorded will not affect the priority, as between it and another deed, where the owner of the latter deed had actual knowledge of the existence of the former.—National Mut. Building & Loan Ass'n v. Blair (Va.) 513.

§ 3. Construction and operation.

Under Code, § 1255, one having claim for tort against corporation can reduce claim to judgment, and levy, notwithstanding mortgage.—Williams v. West Asheville & S. S. Ry. Co. (N. C.) 189.

§ 4. Rights and liabilities of parties.

Where a wife mortgaged property to secure her husband's antecedent debt, and the creditor, after the wife's death, granted the husband a mortgagor, having affirmed a mortgage sale in part, is bound thereby in all respects.—Austin v. Stewart (N. C.) 37.

§ 5. Assignment of mortgage or debt.

Assignee of note secured by mortgage *held* entitled to all the benefits of the security thus afforded, though the mortgage had not been assigned.—National Bank v. Exchange Bank (Ga.) 265.

Equitable claim of assignee of note secured by mortgage to surplus of fund arising by sale under superior lien *held* prior to that based on foreclosure of junior mortgage.—National Bank v. Exchange Bank (Ga.) 265.

Assignees of note secured by mortgage, although not foreclosed, have an equitable claim to a fund in court arising from the sale of the mortgaged property under a superior lien; the fund being a balance after satisfying such lien.—National Bank v. Exchange Bank (Ga.) 265.

An assignee of a trust deed who sustained loss from his own and his immediate assignor's negligence in enforcing the security *held* not entitled to recourse against his remote assignor.—Payne's Ex'rs v. Huffman (Va.) 476.

§ 6. Transfer of property mortgaged or of equity of redemption.

The right to redeem is an equitable interest, which may be conveyed, subject to paramount right of original grantee to have all the land appropriated to his debt.—Williams v. E. E. Foy Mfg. Co. (Ga.) 927.

Where original grantor, after delivery of mortgage, conveys all the timber growing on the land, subject to the rights of the mortgagee, he conveys the right to the timber if the grantor redeems, and an equitable right to redeem.—Williams v. E. E. Foy Mfg. Co. (Ga.) 927.

Where mortgagor conveys timber growing on land subject to mortgage, and subsequently conveys to another the right to redeem the land, and such person redeems, he takes title subject to right of grantee of timber to pay proportionate share of original debt and convert his equitable interest in the timber to legal title.—Williams v. E. E. Foy Mfg. Co. (Ga.) 927.

Where one party has equitable interest in land, and another in timber, both acquired after mortgage, they will possess an equal equity, and, when the grantee of land paid the mortgage debt and took a conveyance, the grantee of the timber could contribute his proportion of the amount paid to redeem.—Williams v. E. E. Foy Mfg. Co. (Ga.) 927.

§ 7. Payment or performance of condition, release, and satisfaction.

Release of a trust deed held by a vendor operates as a release of a trust deed held by his grantee of the property, securing the same purchase-money notes which the latter had assumed.—National Mut. Building & Loan Ass'n v. Blair (Va.) 513.

§ 8. Foreclosure by exercise of power of sale.

Where a mortgagee sells mortgaged land on foreclosure under the power of sale in the mortgage, and himself becomes the real purchaser thereof through the intervention of a third person, the mortgagor may disaffirm the sale and have a new sale ordered.—Austin v. Stewart (N. C.) 37.

Where defendants seized and sold plaintiff's property on account of indebtedness, and thereafter advertised a sale of property held as security, they were liable for advertising the sale, if the amount due them was paid prior

On foreclosure of two notes secured by two mortgages describing separate tracts of land, where plaintiff sought to subject to each mortgage the property described therein on rule absolute, it was proper to issue execution accordingly.—Lewis v. Douglas County Co-op. Store (Ga.) 222.

Purchaser at void trustee's sale under a trust deed *held* not entitled to a lien on the land for the price paid.—James v. Withers (N. C.) 178.

Under Code, § 685, claimant for damages for corporation's tort *held* not entitled to intervene in foreclosure of mortgage given by corporation.—Williams v. West Asheville & S. S. Ry. Co. (N. C.) 189.

An answer which alleges that the mortage sued on was in renewal of a former mortgage given to a firm, for which firm a receiver had been appointed, and that the assignment to plaintiff of such former mortgage was made after the appointment of the receiver, though antedated, and in pursuance of a plan to remove the assets of the firm beyond the reach of the court, and which further denies plaintiff's ownership, sufficiently alleges the defense of failure of consideration.—Duckworth v. McKinney (S. C.) 730.

Purchaser at foreclosure sale *held* entitled, before deed passed, to abatement for portion of lands described in decree and advertisement of sale, but previously recovered from mortgagor by title paramount.—People's Bank v. Bramlett (S. C.) 912.

Allowing the confirmation of a commissioner's report containing a charge for commissions for the sale of property under a trust deed, without objecting to the amount thereof, *held* to estop the beneficiary from subsequently insisting that the allowance is too large.—Roller's Adm'r v. Pitman's Adm'r (Va.) 987.

A judgment debtor *held* not entitled to credit for the price paid by a creditor for property transferred to him by a trust deed, when the property was afterwards taken away from the debtor under a vendor's lien.—Deaton Grocery Co. v. Pepper (Va.) 988.

MOTIONS.

Arrest of judgment in criminal prosecutions, see "Criminal Law," § 15.
Change of venue in civil actions, see "Venue," § 3.
Continuance in civil actions, see "Continuance."
Dismissal or nonsuit on trial, see "Trial," § 6.
New trial in civil actions, see "New Trial," § 2.
—— in criminal prosecutions, see "Criminal Law," § 15.
Presentation of objections for review, see "Appeal and Error," § 4.
Quashing or vacating execution, see "Execution," § 4.
Relating to pleadings, see "Pleading," § 8.

The fact that a "presiding judge" appends the words "circuit judge" to his signature to an order will not affect his jurisdiction.—Barnwell v. Marion (S. C.) 818.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1; "Towns."
Injunctions affecting, see "Injunction," § 2.
Mandamus, see "Mandamus," § 2.
Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."
Street railroads, see "Street Railroads."

Georgia Ry. Co. v. Bond (Ga.) 299.

A city ordinance, requiring all scavenger work to be done by a city scavenger, and fixing the time when such work must be done and the rates to be charged for doing it, *held* an unreasonable and unnecessary interference with common right, and hence invalid.—State v. Hill (N. C.) 326.

§ 2. Officers, agents, and employés.

Petition by treasurer for recovery of commission on moneys received and paid out *held* demurrable for uncertainty.—Town of Eastman v. Cameron (Ga.) 462.

Chief executive officer of a municipality cannot grant exclusive right to sell liquor within the corporation.—Fletcher v. Collins (Ga.) 646.

§ 3. Contracts in general.

Ordinance prescribing that all work of a designated kind shall be given exclusively to persons belonging to labor unions *held* illegal.—City of Atlanta v. Stein (Ga.) 932.

§ 4. Public improvements.

Under a provision in a city charter, one insertion of advertisement for tax sale in each calendar week for 30 days preceding the sale *held* sufficient.—Montford v. Allen (Ga.) 305.

If an execution embracing an unpaid street tax also included a tax to which the property levied on was subject, the execution and sale were valid.—Montford v. Allen (Ga.) 305.

A city clerk *held* to have no authority to postpone a tax sale or grant indulgence under tax execution.—Montford v. Allen (Ga.) 305.

City charter construed, and *held*, that a street may be opened in the same manner as provided for opening a public road by county commissioners, and therefore the city is not liable for damages to abutting owner for raising sidewalk without his consent.—Bramlett v. City of Laurens (S. C.) 444.

§ 5. Police power and regulations.

Power to levy license tax on persons exercising any profession or calling within a city does not give power to impose on a legitimate business a prohibitory tax.—Morton v. City of Macon (Ga.) 627.

A city ordinance, making it unlawful for any person to permit his place to be used as a place for gambling, *held* not in conflict with Cr. St. § 391.—City Council of Greenville v. Kemmis (S. C.) 727.

§ 6. Use and regulation of public places, property, and works.

A way connecting a city lot with a public street *held* to become a public street by continuous user for 30 years, and by having been kept in repair by the city.—Carlisle v. Wilson (Ga.) 54.

A city has jurisdiction to entertain petition filed by abutting owner to have a fence obstructing passage removed from a street.—Carlisle v. Wilson (Ga.) 54.

§ 7. Torts.

City is not liable because its mayor required of a person charged with violating city ordinance excessive bond, thereby causing his confinement.—Gray v. City of Griffin (Ga.) 792.

A city is not liable for illegal arrest of person by a police officer, nor his subsequent imprisonment.—Gray v. City of Griffin (Ga.) 792.

A city, maintaining a prison, is not liable in damages to person arrested for injuries sustained by him while confined, because of negligent maintenance of such prison.—Gray v. City of Griffin (Ga.) 792.

Augusta v. Owens (Ga.) 830.

Where the proximate cause of an injury to a pedestrian was defective condition of the street, and a city was negligent in not repairing or protecting the same, it was liable for injury.—City of Milledgeville v. Wood (Ga.) 924.

A town *held* not liable with a lot owner for injuries occasioned by an excavation in a street, as a joint tort feasor, but only for permitting the excavation to remain unguarded.—Brown v. Town of Louisburg (N. C.) 166.

§ 8. Fiscal management, public debt, securities, and taxation.

A solicitor general has no authority, after 20 days from date of service of notice under Act Dec. 6, 1897, relating to validating bonds, to file petition prescribed by the act.—Roff v. Town of Calhoun (Ga.) 214.

§ 9. Actions.

In an action against a city for injuries resulting from waters overflowing a street, facts *held* to present a question for the jury on the question of defendant's having provided sufficient drainage.—Capital Printing Co. v. City of Raleigh (N. C.) 33.

MUTUAL BENEFIT SOCIETIES.

See "Beneficial Associations."

NAVIGABLE WATERS.

See "Ferries"; "Waters and Water Courses."

NEGLIGENCE.

By particular classes of parties, see "Carriers," §§ 1, 3; "Municipal Corporations," § 7; "Physicians and Surgeons."
—— employers, see "Master and Servant," §§ 2–8.
—— railroad companies, see "Railroads," §§ 5–8.
Condition or use of particular species of property, works, or machinery, see "Bridges," § 1; "Electricity"; "Railroads," §§ 5–8.
—— demised premises, see "Landlord and Tenant," § 3.
Of passenger, see "Carriers," § 3.
Of servant, see "Master and Servant," § 7.

§ 1. Acts or omissions constituting negligence.

Definition of negligence *held* sufficient.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

§ 2. Contributory negligence.

A person engaging a hack is not responsible for the negligent conduct of the driver, unless he assumed to direct or control him.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

Plaintiff *held* not entitled to recover when injured by negligence of driver, to which injury defendant did not proximately contribute.—Crampton v. Ivie (N. C.) 351.

Plaintiff *held* not entitled to recover because of his own negligence.—Crampton v. Ivie (N. C.) 351.

Where plaintiff is injured through the negligence of defendant, concurring with that of plaintiff's driver, he cannot recover.—Crampton v. Ivie (N. C.) 351.

An infant 16 months old cannot be guilty of contributory negligence.—Mason v. Southern Ry. Co. (S. C.) 440.

Contributory negligence must be the direct and proximate cause of an injury.—Bowen v. Southern Ry. Co. (S. C.) 590.

ant, a nonsuit was properly awarded.—Barber v. East & W. R. Co. (Ga.) 50.

Where evidence shows plaintiff's injury resulted from a pure accident, and not from any negligence chargeable to defendants, no recovery can be had.—Seaboard & R. R. Co. v. Spencer (Ga.) 921.

The jury having found joint negligence in an injury case, a refusal to instruct that plaintiff's negligence was the proximate cause of the injury was proper.—Wheeler v. Gibbon (N. C.) 277.

An instruction that negligence was a fact for the jury was not error, where the court also defined what negligence was.—Bowen v. Southern Ry. Co. (S. C.) 590.

A complaint which alleges generally that it was defendant's duty to do certain things, without stating any facts out of which the duty arose, fails to state a cause of action.—Dorn v. Georgia, C. & N. Ry. Co. (S. C.) 654.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEW TRIAL.

Costs, see "Costs," § 1.
In criminal prosecutions, see "Criminal Law," § 15.
Necessity of motion for purpose of review, see "Appeal and Error," § 4.

§ 1. Grounds.

A new trial should not be granted because jurors were not properly examined, where questions in substance were those prescribed by statute.—Lindsey v. State (Ga.) 62.

Where verdict is contrary to law, a new trial should be granted on the merits.—Poole v. Baggett (Ga.) 86.

Rejecting evidence offered to prove a given fact *held* not ground for new trial, when opposite party admits the fact.—Whitaker v. Arnold (Ga.) 231.

That an attorney of party to action suggested to a juror, while suffering from sickness, that medicine of a particular kind would benefit him, and procured it for the juror at his own expense, *held* not to require setting aside the verdict, where attorney did not know that such person was a juror, and juror took the medicine, not as a gift, but expected to pay for it.—Barker v. Stewart (Ga.) 238.

Excluding immaterial evidence is not ground for a new trial.—Ray v. Camp (Ga.) 242.

Error in instruction *held* not ground for new trial, where the evidence demanded the finding rendered.—Wood v. Collins (Ga.) 423.

New trial after judgment against claimant on levy of execution *held* improperly granted.—Adams v. Carnes (Ga.) 597.

A grant of a new trial on conflicting evidence is not error.—Buice v. Buice (Ga.) 969.

The supreme court will grant a new trial on petition for rehearing, where the previous opinion was by a bare majority of the court, and grave doubt exists in their minds whether the essential principle of proximate cause was properly explained to the jury.—Crampton v. Ivie (N. C.) 351.

§ 2. Proceedings to procure new trial.

Where no brief of evidence was filed on motion for new trial, there was no error in overruling the motion.—Brooks v. Proctor (Ga.) 99.

superior court, motion for new trial by another claimant, not a party, was properly dismissed, as made by one who had no right in the premises.—Jones v. Coney (Ga.) 321.

Ground of motion *held* not to plainly point out any errors in the instruction.—St. John v. Leyden (Ga.) 610.

Entry on brief of evidence, presented with motion for new trial, *held* not a legal approval of such brief.—Brantley v. Meyer (Ga.) 924; Meyer v. Brantley, Id.

Where motion is made in term, and ordered to be heard in vacation, and through no fault of movant is not heard on such day, it is error to dismiss it because not heard at appointed time.—Helmly v. Davis (Ga.) 927.

Where court inadvertently approves a document as a brief of evidence which was not such, and thereafter revokes the approval and overrules motion for new trial for want of lawful brief, there is no error.—Keys v. Bell (Ga.) 967.

Where time for filing in vacation a brief of evidence on motion for new trial expires, and brief is not filed, motion is properly dismissed.—Western & A. R. Co. v. Callaway (Ga.) 967.

The supreme court will not reverse action of trial court in refusing to accept, as excuse for failing to file brief of evidence on motion for new trial in time, failure of court stenographer to write out the evidence.—Western & A. R. Co. v. Callaway (Ga.) 967.

NONRESIDENCE.

Effect on limitation, see "Limitation of Actions," § 1.

NONSUIT.

Before trial, see "Dismissal and Nonsuit."
On trial, see "Trial," § 6.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of particular facts, acts, or proceedings, see "Lis Pendens"; "Trial," § 1.
—— appeal, see "Appeal and Error," § 6.
—— loss insured against, see "Insurance," § 8.

Acknowledging service of written notice of sanction does not estop person making acknowledgment from claiming that notice was served too late.—Shearouse v. Morgan (Ga.) 927.

NOVATION.

Facts *held* not to show novation.—Deaton Grocery Co. v. Pepper (Va.) 988.

Evidence that, when a trust deed was given by the son of a judgment debtor to the creditor, the parties knew that there had been a vendor's lien on the property, but that the debtor insisted that it had been extinguished, *held* admissible to determine whether the transfer was for security or was a novation.—Deaton Grocery Co. v. Pepper (Va.) 988.

OFFER.

Of proof, see "Trial," § 4.
Proposals for contract, see "Contracts," § 1.

Particular classes of officers, see "Attorney General"; "Clerks of Courts"; "Judges"; "Justices of the Peace"; "Receivers"; "Sheriffs and Constables."
—— bank officers, see "Banks and Banking," § 1.
—— county officers, see "Counties," § 1.
—— health officers, see "Health," § 1.
—— municipal officers, see "Municipal Corporations," §§ 2, 7.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 10.
In criminal prosecutions, see "Criminal Law," § 4.

OPTIONS.

To purchase or sell demised premises, see "Landlord and Tenant," § 2.

ORDERS.

Of court, see "Motions."
Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," §§ 1, 5.

PALACE CARS.

See "Carriers," § 8.

PARENT AND CHILD.

See "Bastards"; "Guardian and Ward"; "Infants."

Discretion of ordinary in awarding mother custody of child *held* properly exercised, under Civ. Code, § 2503.—Lawson v. Lawson (Ga.) 100.

PAROL EVIDENCE.

In civil actions, see "Evidence," § 9.

PARTIES.

Domicile or residence as affecting venue, see "Venue," § 2.
In particular actions or proceedings, see "Libel and Slander," § 2; "Trespass," § 1.
—— foreclosure, see "Mortgages," § 9.
—— on appeal or writ of error, see "Appeal and Error," § 5.
Persons concluded by judgment, see "Judgment," § 5.
To particular classes of conveyances, contracts, or transactions, see "Fraudulent Conveyances," § 2; "Usury," § 1.
—— persons affected by estoppel, see "Estoppel," § 2.

§ 1. Defendants.

Where trust created by will became executed on arrival of beneficiaries at majority, in action by one beneficiary thereafter against legal representatives of the other to recover property received under the will, the trustees were not necessary parties.—Phillips v. Lowther (Ga.) 596.

PARTITION.

§ 1. Actions for partition.

A judgment for costs against defendants in partition, who prevailed on an issue of title

McCarter v. Caldwell (S. C.) 507.

Where a judgment has been recovered, defendant cannot recover the value of his improvements, under the betterment act, since such act only gives a remedy where there has been a judgment against defendant "in an action to recover lands"; partition not being such an action.—Hall v. Boatwright (S. C.) 1001.

Under the betterment act, evidence in action, after partition, that valuable improvements had been made, will not warrant sending the case to the jury.—Hall v. Boatwright (S. C.) 1001.

Since the betterment act was intended to give a remedy where none existed before, it does not apply to a tenant in common who, believing himself sole owner, has made improvements on the common property, as he has ample relief without such act.—Hall v. Boatwright (S. C.) 1001.

PARTNERSHIP.

Subrogation on payment, see "Subrogation."

§ 1. The firm, its name, powers, and property.

Where conveyance under grant to firm was not properly executed by the firm, but purported to be to another firm, composed of the original partnership and another, a conveyance by the latter partnership, executed by all the partners and in the firm name, *held* sufficient to pass title.—McRae v. Stillwell (Ga.) 604.

§ 2. Mutual rights, duties, and liabilities of partners.

One partner, while the partnership is continuing, cannot sue the other at law for damages resulting to the firm by reason of defendant's failure to perform his duties.—Miller v. Freeman (Ga.) 961.

Judgments against a partnership, paid by one partner, cannot be enforced by him against the co-partner's property in the hands of a purchaser.—Sands' Adm'r v. Durham (Va.) 472.

§ 3. Rights and liabilities as to third persons.

A firm may be liable for malicious prosecution when the process of arrest was sued out in the interest of the firm and under direction of the members.—Page v. Citizens' Banking Co. (Ga.) 418.

A firm *held* liable in an action for malicious prosecution where same was instituted by direct authority of members.—Page v. Citizens' Banking Co. (Ga.) 418.

It is not lawful to levy execution against individual on property of a firm of which he was a member.—Jolley v. Hardeman (Ga.) 952.

§ 4. Dissolution, settlement, and accounting.

An accounting may be had by one partner against the other, without a dissolution, where the firm has by agreement several years to run, and the partnership articles contemplate a settlement at the end of each season.—Miller v. Freeman (Ga.) 961.

PASSENGERS.

See "Carriers," § 3.

PAYMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 4.
Of premiums, see "Insurance."
Subrogation on payment, see "Subrogation."

after a reasonable time from notice of condition, will be bound thereby if he does not return the money received.—Jenkins v. National Mut. Building & Loan Ass'n (Ga.) 945.

§ 2. Pleading, evidence, and province of court and jury.

Evidence in action by administrator *held* insufficient to show payment of claim sued on.—Simmons v. Thornton (Ga.) 685.

A defense based on statutory presumption of payment or abandonment *held* not maintainable since the Code of 1868.—Boone v. Peebles (N. C.) 193.

PEDDLERS.

See "Hawkers and Peddlers."

PEDIGREE.

Declarations as evidence, see "Evidence," § 6.

PENALTIES.

§ 1. Actions and other proceedings.

Penalties claimed against the same defendant under the same statute may be properly joined.—Carter v. Wilmington & W. R. Co. (N. C.) 14.

The penalty provided by Code, § 1964, for a transportation company's refusal to ship freight, may be recovered by any person who will sue therefor.—Carter v. Wilmington & W. R. Co. (N. C.) 14.

PERSONAL INJURIES.

See "Negligence."
To employé, see "Master and Servant," §§ 2–8.
To passenger, see "Carriers," § 3.
To person on or near railroad tracks, see "Railroads," § 6.
To traveler on highway, see "Municipal Corporations," § 7.
—— crossing railroad, see "Railroads," § 5.

PHYSICIANS AND SURGEONS.

Allegations of petition in action against physician for malpractice, and testimony, considered, and *held*, that court was not authorized to conclude that plaintiff's case was based on negligent treatment caused by amputation of leg, but there was evidence to go to the jury whether plaintiff suffered damages in pain and suffering, though treatment of physician may not have caused loss of limb.—Moon v. McRae (Ga.) 635.

PLEA.

In criminal prosecution, see "Criminal Law," § 3.

PLEADING.

See "Damages," § 3.
Applicability of instructions to pleadings, see "Trial," § 8.
In particular actions or proceedings, see "Equity," § 4; "Libel and Slander," § 2; "Negligence," § 3; "Trespass," § 1; "Trover and Conversion," § 1.
—— foreclosure, see "Mortgages," § 9.
—— indictment or criminal information or complaint, see "Indictment and Information."

§ 1. Form and allegations in general.

Words in petition, whatever may be their true intent and meaning when standing alone,

t be construed in connection with all the gations of the petition.—Johnson v. Ameri- Freehold Land Mortg. Co. (Ga.) 614.

Declaration, complaint, petition, or statement.

here petition does not allege that defendant f the county in which suit is brought, it ld be dismissed on special demurrer.— therly v. Southern Co-operative Foundry (Ga.) 59.

here a petition contains averments which ld have been stricken out on special de- rers filed, the refusal to strike them out round for new trial.—Southern Ry. Co. v. rd (Ga.) 78.

action on contract of employment, set- out part of the correspondence leading up he contract, special demurrer on the ground it was not set forth in full *held* improperly ained, as the entire correspondence was lusage.—Moore v. Kelley & Jones Co. (Ga.)

Plea or answer, cross complaint, and affidavit of defense.

here a petition alleges that defendant is bted on open account, and in another par- ph that he refuses to pay the same, answer ifically denying all the allegations in these graphs is good.—De Soto Plantation Co. Hammett (Ga.) 304.

here answer does not deny allegations, but act admits them to be true, no issue of fact resented.—Hartley v. McGee (Ga.) 926.

dmission by answer of paragraph of com- nt in action alleging right of curtesy *held* admission only that the husband still sur- s, and not that he was entitled to curtesy alleged in the complaint.—Tiddy v. Graves C.) 127.

here defenses to suit on a bond are equally ilable and availed of under general issue, s not error to reject special pleas.—Blank- ip v. Ely (Va.) 484.

Demurrer or exception.

dealing with demurrer, the judge should dispose of it, and, where petition is dis- sed, it is not a proper practice to deal with urrer to an answer thereto.—Page v. Citi- s' Banking Co. (Ga.) 418.

here petition is unnecessarily voluminous or sufficiently clear, its defects can be reached a special demurrer.—South Carolina & G. Co. v. Augusta Southern R. Co. (Ga.) 593.

here a demurrer to a complaint admitted s which constituted a cause of action, it error to sustain the demurrer to such por- of the complaint.—Sloan v. Carolina Cent. Co. (N. C.) 21.

here a complaint pleads a statute which has existence, a demurrer to the complaint does admit that such statute exists.—Prichard v. missioners of Morganton (N. C.) 353.

complaint alleging that defendants adver- d a sale of mortgaged property after pay- t *held* sufficient on demurrer for want of s.—Long v. Hunter (S. C.) 579.

Amended and supplemental pleadings and repleader.

nder Act December 21, 1897, amending Civ. e, § 5057, it is within the discretion of trial ge to allow amendment to answer without lavit required by the section.—Marsh v. (Ga.) 230.

ie at whose instance another was made par- a pending suit cannot, after latter has filed wer in nature of cross bill, amend his plead- , so as to prevent hearing on the merits.— irs v. Scott (Ga.) 950.

Under Code, § 273, defect of parties plaintiff may be cured by amendment before trial.—Mills v. Callahan (N. C.) 164.

Under Code, § 194, complaint against railroad company for damages from fire set by its negligence may be amended after commencement of trial by alleging that plaintiff's buildings were thereby destroyed.—Brown v. Carolina Midland Ry. Co. (S. C.) 852.

§ 6. Signature and verification.

Where the verification of an answer was insufficient, it was not error to allow an amended verification.—Best v. Dunn (N. C.) 126.

§ 7. Filing and service.

Where no defense was filed at the first term, *held* not error, when the case came for trial, to strike out a plea of non est factum filed after the expiration of the appearance term.—Tucker v. Carson (Ga.) 217.

Evidence *held* to show no excuse for failure to file plea of non est factum at the first term.—Tucker v. Carson (Ga.) 217.

§ 8. Motions.

In determining sufficiency of answer, the court must pass judgment on what the same actually contains, and not on erroneous representations as to its contents, made in open court by counsel for the plaintiffs.—Bates v. First Nat. Bank (Ga.) 949.

§ 9. Defects and objections, waiver, and aider by verdict or judgment.

Objection that complaint in an action for partition did not show possession by plaintiffs within 10 years *held* waived by failure to demur.—Griffith v. Cromley (S. C.) 738.

PLEDGES.

Evidence *held* sufficient to show such a delivery of the property as to constitute a valid pledge.—Henry v. State (Ga.) 55.

Property pledged to secure a note may be resorted to to enforce payment of draft on third person given to pledgee to be applied on the note, and which the drawee had failed to pay.—Holmes v. Langston (Ga.) 251; Langston v. Holmes, Id.

Where payee of note secured by collateral converts the latter, he is liable to the maker of the note for its actual value at time of sale by him.—Harrell v. Citizens' Banking Co. (Ga.) 460.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 5.

POLICY.

Of insurance, see "Insurance."

POLLUTION.

Of water course, see "Waters and Water Courses," § 1.

POSSESSION.

See "Adverse Possession."
Of demised premises, see "Landlord and Tenant," § 5.

POWERS.

Creation by will, see "Wills," § 8.
Of attorney, see "Principal and Agent."
Of sale in mortgage, see "Mortgages," § 8.

§ 1. Construction and execution.

Where a deed reserved to the grantor power to sell and reinvest for benefit of grantees, a

execution of the power.—Ellis v. Gray (Ga.) 97.

PRACTICE.

In equity, see "Equity."
In justices' courts, see "Justices of the Peace," § 2.
In particular civil actions or proceedings, see "Contempt," § 2; "Ejectment"; "Replevin"; "Trespass," § 1.
—— condemnation proceedings, see "Eminent Domain," § 3.
Particular proceedings in actions, see "Abatement and Revival"; "Continuance"; "Costs"; "Evidence"; "Execution"; "Judgment"; "Judicial Sales"; "Jury"; "Limitation of Actions"; "Motions"; "Parties"; "Pleading"; "Process"; "Reference"; "Removal of Causes"; "Trial"; "Venue."
Particular remedies in or incident to actions, see "Attachment"; "Garnishment"; "Injunction"; "Receivers."
Procedure in criminal prosecutions, see "Criminal Law"; "Intoxicating Liquors," § 3.
Procedure of particular courts, see "Courts."
—— on review, see "Appeal and Error"; "Certiorari," § 2; "Exceptions, Bill of"; "Justices of the Peace," § 3; "New Trial."

PREFERENCES.

In assignment for benefit of creditors, see "Assignments for Benefit of Creditors," § 1.
In fraudulent conveyance, see "Fraudulent Conveyances," § 1.

PRELIMINARY INJUNCTION.

See "Injunction," § 4.

PREMIUMS.

For insurance, see "Insurance," § 5.

PRESUMPTIONS.

In civil actions, see "Evidence," § 2.

PRINCIPAL AND AGENT.

Admissions by agent, see "Evidence," § 5.
Insurance agents, see "Insurance," § 1.
Municipal agents, see "Municipal Corporations," § 7.

§ 1. The relation.

Without further proof of agency, orders for money signed by alleged agent, or agreed settlements by him of claims against the corporation, *held* inadmissible to bind it.—Amicalola Marble & Power Co. v. Coker (Ga.) 950.

Agency cannot be proved by declarations of alleged agent.—Amicalola Marble & Power Co. v. Coker (Ga.) 950.

Power of agent to deliver moneys to third party, as directed by principal, is terminated by death of principal.—Duckworth v. Orr (N. C.) 150.

§ 2. Rights and liabilities as to third persons.

Where general agent to collect receives payment in property other than money, though creditor is bound thereby as to debtor, he can refuse to accept from the agent, and hold him liable for the debt.—Holmes v. Langston (Ga.) 251; Langston v. Holmes, Id.

Where agent makes with common carrier contract to ship goods in his charge, and does carry with it authority to collect proceeds.—Walton Guano Co. v. McCall (Ga.) 469.

An agent's authority to collect notes is not shown by occasional receipts of payment in which he produced the paper and entered the credit.—Walton Guano Co. v. McCall (Ga.) 469.

Petition in action for breach of contract to sell land *held* not to set forth that the agent with whom the alleged contract was made had power to sell.—Johnson v. American Freehold Land Mortg. Co. (Ga.) 614.

Agent having authority to receive proposals to purchase property and submit the same cannot make binding contract of sale.—Johnson v. American Freehold Land Mortg. Co. (Ga.) 614.

General power of attorney to transact business of the principal construed, and *held* confined to specific objects to be accomplished and limited by the recitals made in regard thereto.—Born v. Simmons (Ga.) 956.

Where an agent is to carry on a mercantile business, and it is necessary to rent a house, the principal will be bound for the rent.—Baldwin v. Garrett (Ga.) 966.

Agency to collect a claim does not authorize agent to agree that proceeds shall be applied to a debt due by his principal.—Hill v. Van Duzer (Ga.) 966.

Under Civ. Code, § 3024, one dealing with agent of undisclosed principal can sue the principal when discovered.—Baldwin v. Garrett (Ga.) 966.

PRINCIPAL AND SURETY.

See "Guaranty."
Liabilities of sureties on bonds for performance of duties of office or trust, see "Guardian and Ward," § 3.

§ 1. Creation and existence of relation.

A bond given to stay injunction *held* sufficiently signed by principal where signed in her name by her husband at her request, and acted on by court and parties, so as to bind the sureties defending under alleged agreement with principal to sign in order to bind them.—Blankenship v. Ely (Va.) 484.

§ 2. Discharge of surety.

Extension of credit to makers of note, contrary to terms of agreement with sureties, *held* not to effect release of surety.—Rouss v. Krauss (N. C.) 146.

Evidence being found by jury insufficient to effect release of surety, *held*, that co-surety could not claim release because of the other's release.—Rouss v. Krauss (N. C.) 146.

PRIORITIES.

Of mortgages, see "Mortgages," § 3.
Of taxes, see "Taxation," § 3.

PRISONS.

See "Reformatories."

PRIVATE ROADS.

Rights of way, see "Easements."

PRIVILEGED COMMUNICATIONS.

Disclosure by witness, see "Witnesses," § 1.

PROBATE.

Of will, see "Wills," § 2.

PROCESS.

Foreclosure, see "Mortgages," § 9.
In equitable jurisdiction, see "Equity," § 3.
Particular forms of writs or other process, see "Execution"; "Garnishment"; "Mandamus."

§ 1. Service.

Where service is accepted, the officer's return can be amended so as to show the time and place of acceptance.—Foster v. Crawford (S. C.) 5: Same v. Heath, Id.; Same v. Cunningham, Id.; Same v. Poovey, Id.; Same v. Lancaster Cotton Mills, Id.; Same v. Springs, Id.; Same v. Porter, Id.; Same v. McManus, Id.; Same v. Jones, Id.; Same v. Culp, Id.

PROHIBITION.

Of traffic in intoxicating liquors, see "Intoxicating Liquors."

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Of loss insured against, see "Insurance," § 8.

PROPERTY.

See "Adjoining Landowners."
Adverse possession, see "Adverse Possession."
Dedication to public use, see "Dedication."
Particular species of property, see "Fish"; "Logs and Logging."
Protection of rights of property by injunction, see "Injunction," § 2.
Taking for public use, see "Eminent Domain."

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 7.
In criminal prosecutions, see "Criminal Law," § 9.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.

PUBLIC BUILDINGS.

See "Counties," § 2; "Municipal Corporations," § 7.

PUBLIC DEBT.

See "Municipal Corporations," § 8.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUNISHMENT.

See "Criminal Law," § 19.

QUANTUM MERUIT.

See "Work and Labor."

QUASHING.

Execution, see "Execution," § 4.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 6.
In criminal prosecutions, see "Homicide," § 5.

QUI TAM ACTIONS.

See "Penalties," § 1.

RAILROADS.

See "Street Railroads."
Carriage of goods and passengers, see "Carriers."

§ 1. Railroad companies.

Issuance by secretary of state of certificate of incorporation to purchasers at judicial sale of property and franchise of railroad company does not create corporation authorized to operate the railroad and exercise its franchises.—Watson v. Albany & N. Ry. Co. (Ga.) 324.

§ 2. Right of way and other interests in land.

Contract conveying right of way to a railroad company construed, and *held* not to authorize the company to build a line for a temporary spur track, from its main line to a point three miles distant, to which it was not authorized in its charter to build its road.—Waycross Air Line R. Co. v. Southern Pine Co. (Ga.) 641.

Where a railroad attempted to build a spur track on land of another and under a contract which did not include such right, an injunction was properly granted restraining the company from constructing the road.—Waycross Air-Line R. Co. v. Southern Pine Co. (Ga.) 641.

§ 3. Construction, maintenance, and equipment.

Civ. Code, § 2176, *held* not to prevent the construction of a private railroad within 10 miles and in close proximity to a commercial railroad.—Waycross Air-Line R. Co. v. Southern Pine Co. (Ga.) 641.

In an action against a railroad company for past damages to crops caused by the diversion of waters, and for permanent damages therefor, it is proper to require a separate finding on each issue.—Lassiter v. Norfolk & C. R. Co. (N. C.) 48.

An action for the damages caused by the diversion of waters by a railroad company is not barred by Acts 1895, c. 224, till five years after the damage is done.—Lassiter v. Norfolk & C. R. Co. (N. C.) 48.

Where, in an action against a railroad company for damage caused by the diversion of water, there were separate findings of the amount of past damages to crops, and of permanent damages, it was error for the court to limit the judgment to the permanent damage found.—Lassiter v. Norfolk & C. R. Co. (N. C.) 48.

Complaint in action for obstruction of a water course *held* bad on demurrer.—Delaney v. Georgia, C. & N. Ry. Co. (S. C.) 699.

§ 4. Sales, leases, traffic contracts, and consolidation.

Contract for lease of one railroad by another construed, and *held*, that the keeping of certain

Co. v. Augusta Southern R. Co. (Ga.) 593.

Petition in action on lease of one railroad by another *held* to sufficiently allege breach of covenants by lessee entitling plaintiff to institute action.—South Carolina & G. R. Co. v. Augusta Southern R. Co. (Ga.) 593.

Lease of one railroad to another construed, and *held* that, upon a breach by lessee of any of certain stipulations in the lease, the right of lessor to sue for forfeiture thereof was established.—South Carolina & G. R. Co. v. Augusta Southern R. Co. (Ga.) 593.

Where one of the covenants of a lease of one railroad by another provided for payment of interest on certain bonds, failure to pay such interest *held* not ground for forfeiture, where interest was paid before filing of petition.—South Carolina & G. R. Co. v. Augusta Southern R. Co. (Ga.) 593.

§ 5. Operation—Accidents at crossings.

Building and keeping in repair bridge over a private crossing *held* to render a railroad company liable for injuries resulting from defects negligently permitted to remain.—Southern Ry. Co. v. Hooper (Ga.) 232.

Evidence of how other crossings were constructed *held* inadmissible to show that crossing at which accident occurred was defectively constructed.—Raper v. Wilmington & W. R. Co. (N. C.) 115.

Dangerous condition of crossing *held* prima facie evidence of railroad's negligence.—Raper v. Wilmington & W. R. Co. (N. C.) 115.

Admissibility of evidence to show defective construction of railroad crossing at which plaintiff's intestate was killed determined.—Raper v. Wilmington & W. R. Co. (N. C.) 115.

To show railroad crossing dangerous, condition of other similar crossings may be shown.—Raper v. Wilmington & W. R. Co. (N. C.) 115.

If crossing is so constructed as to be safe to one crossing the track, that is enough, though it might be dangerous to one walking along the railroad.—Raper v. Wilmington & W. R. Co. (N. C.) 115.

Where a railway company kicks a train over a crossing without proper means to stop the train, and a person in the exercise of ordinary care is killed on the crossing, the killing is a negligent killing.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

Failure of those in charge of a moving train to keep a lookout when approaching a crossing is negligence, where such lookout would have saved life.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

Whether the sounding of a whistle when the train was 50 feet from a crossing was timely is for the jury.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

An instruction defining negligence in an action for injury at a crossing *held* proper.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

Plaintiff, in an action against a railroad company, *held* entitled to show, as bearing on defendant's negligence in backing its trains, its custom as to where it stopped its train for the discharge of passengers with reference to the crossing at which plaintiff was injured.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

Where a person was killed on a crossing by being struck by a backing train, evidence that the hack and body of deceased were pushed back by the train is admissible as showing what stopped the train, that it was kicked

crossing by being struck by a backing train, it may be shown that the conductor knew the custom of hackmen in crossing after the train had passed, and had notified them that hacks could pass the crossing after the train had passed it.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

An instruction in action for injuries at crossing properly refused which deprived plaintiff of right of recovery under Rev. St. § 1692, unless guilty of gross negligence.—Bowen v. Southern Ry. Co. (S. C.) 590.

A railway company's failure to comply with Rev. St. §§ 1685, 1692, requiring the blowing of a whistle or ringing of a bell at crossings, is negligence per se.—Bowen v. Southern Ry. Co. (S. C.) 590.

An instruction in an action for injuries did not require defendant to disprove negligence alleged, and hence not error.—Bowen v. Southern Ry. Co. (S. C.) 590.

An instruction in an action for injuries at a railway crossing *held* not erroneous, as requiring both the ringing of the bell and blowing of the whistle, when Rev. St. §§ 1685, 1692, required only one of the two.—Bowen v. Southern Ry. Co. (S. C.) 590.

An instruction *held* not to impose an absolute liability for plaintiff's injuries on defendant, on its failure to comply with statutory requirements as to signals.—Bowen v. Southern Ry. Co. (S. C.) 590.

Failure to signal when approaching crossing *held* not negligence in case of a horse frightened thereby.—Southern Ry. Co. v. Cooper (Va.) 388.

§ 6. —— Injuries to persons on or near tracks.

Where there was evidence that employés on defendant's train could have stopped the train before striking plaintiff's decedent, *held* error to grant a nonsuit.—Clay v. Macon & B. R. Co. (Ga.) 233.

Violation by railroad company of a valid ordinance is negligence per se.—Central of Georgia Ry. Co. v. Bond (Ga.) 299.

It is incompetent to show that railway employé, who has violated a city ordinance, was ignorant thereof.—Central of Georgia Ry. Co. v. Bond (Ga.) 299.

Evidence *held* to show that person killed on track was guilty of contributory negligence.—Neal v. Carolina Cent. R. Co. (N. C.) 117.

It is the duty of railroad company to have fireman to aid engineer in keeping proper lookout, when curves in road make it impracticable for engineer to keep it alone.—Arrowood v. South Carolina & G. Extension Ry. Co. (N. C.) 151.

Defective lookout kept by engineer *held* to be proximate cause of death, notwithstanding contributory negligence of deceased.—Arrowood v. South Carolina & G. Extension Ry. Co. (N. C.) 151.

Testimony that railroad company's engineer could have seen deceased, and that he did not see him when it was his duty to have seen him, is competent on behalf of plaintiff in action for causing death.—Arrowood v. South Carolina & G. Extension Ry. Co. (N. C.) 151.

Where track is used as a passway, railroad company is required to exercise greater degree of care in running trains than where track is not so used.—Arrowood v. South Carolina & G. Extension Ry. Co. (N. C.) 151.

track.—Mason v. Southern Ry. Co. (S. C.) 440.

In action for injury to child on track, evidence of omission of signals *held* admissible on the question of proximate cause.—Mason v. Southern Ry. Co. (S. C.) 440.

§ 7. —— Injuries to animals on or near tracks.

Evidence in action for killing stock *held* insufficient to sustain verdict for plaintiff.—Georgia S. & F. Ry. Co. v. Sanders (Ga.) 458.

§ 8. —— Fires.

A petition alleging fire set by negligence of agents of defendant railroad company *held* amendable by alleging that it was set by negligence of the section foreman.—Southern Ry. Co. v. Ward (Ga.) 78.

Evidence *held* sufficient to go to the jury on the question of defendant's liability for setting fire to plaintiff's land.—McMillan v. Wilmington & W. R. Co. (N. C.) 129.

Where a particular engine was alleged to have caused a fire, evidence of other fires caused by other engines, without showing their condition or the attending circumstances, *held* erroneously admitted.—Hygienic Plate Ice-Mfg. Co. v. Raleigh & A. Air-Line R. Co. (N. C.) 279.

REAL ACTIONS.

See "Ejectment."

REBUTTAL.

Evidence, see "Trial," § 4.

RECEIVERS.

Of corporations in general, see "Corporations," § 8.

§ 1. Appointment, qualification, and tenure.

Dismissal by plaintiff of equitable proceeding in which receiver has been appointed does not discharge receiver, who retains custody of assets pending order of court.—Fountain v. Mills (Ga.) 428.

§ 2. Management and disposition of property.

Where suit in which receiver has been appointed has been dismissed, the judge may retain jurisdiction over the fund in the hands of the receiver until proper petition of creditor for equitable distribution.—Fountain v. Mills (Ga.) 428.

§ 3. Actions.

Where receiver's appointment is denied, he should prove the same by a certified copy of decree dissolving the corporation and appointing him.—Person v. Leary (N. C.) 35.

§ 4. Accounting and compensation.

A receiver may be paid at stated intervals during the continuance of his functions, and need not wait until the termination of his trust.—Battery Park Bank v. Western Carolina Bank (N. C.) 39.

Under Code, § 379 (4), a receiver may be allowed commissions on both receipts and disbursements to the extent of 5 per cent. on each.—Battery Park Bank v. Western Carolina Bank (N. C.) 39.

§ 5. Foreign and ancillary receiverships.

Foreign receivers, suing in the state, must obtain leave of court.—Person v. Leary (N. C.) 35.

RECORDS.

See "Mortgages," § 2.

Transcript on appeal or writ of error, see "Appeal and Error," § 8; "Criminal Law," § 17.

REDEMPTION.

From tax sales, see "Taxation," § 6.

REFERENCE.

See "Arbitration and Award."

To master or commissioner in equity, see "Equity," § 6.

§ 1. Nature, grounds, and order of reference.

Where in an action defendant sets up a plea in bar, it is erroneous for the court to refer the cause, contrary to defendant's objection, before such plea is passed on.—Austin v. Stewart (N. C.) 37.

§ 2. Referees and proceedings.

A referee has no jurisdiction to dismiss an action which has been referred to him, on the ground that the court appointing him had no jurisdiction of the cause.—Austin v. Stewart (N. C.) 37.

§ 3. Report and findings.

Where no exception was taken to a master's finding, it was binding on the circuit judge on the subsequent hearing of the case.—Hendrix v. Holden (S. C.) 1010.

REFORMATORIES.

An association for the care of prisoners for a compensation, making its own by-laws and managed by officers of its own selection, *held* not to be a public corporation, and hence liable for its torts.—Trevett v. Prison Ass'n (Va.) 373.

REGISTRATION.

See "Mortgages," § 2.

REHEARING.

See "New Trial."

On appeal or writ of error, see "Criminal Law," § 17.

RELEASE.

See "Payment."

Of particular classes of rights and liabilities, see "Dower," § 2; "Mortgages," § 7.

§ 1. Construction and operation.

Release of a lot owner from liability for injury caused by his excavation in a street *held* to release the town from liability.—Brown v. Town of Louisburg (N. C.) 166.

Where plaintiff executed a valid contract of release for injuries, and accepted benefits thereunder, he released defendant from liability for the injuries, though full tender of the payments due under the contract was not made.—Johnson v. Charleston & S. Ry. Co. (S. C.) 851.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 3.

RELIGIOUS SOCIETIES.

Trustees of a church are not, as such, liable for lumber sold to the pastor on his individual

corporated religious society, whose name has not been recorded as provided by law.—Thurmond v. Cedar Spring Baptist Church (Ga.) 221.

Action in name of unincorporated church, purporting to be brought by named persons as its officers, *held* not maintainable or amendable.—Mutual Life Ins. Co. v. Inman Park Presbyterian Church (Ga.) 880.

REMAINDERS.

See "Life Estates."

A remainder may be created in money.—Crawford v. Clark (Ga.) 404.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 19.

REMOVAL OF CAUSES.

Change of venue or place of trial, see "Venue," § 3.

§ 1. Citizenship or alienage of parties.

A foreign corporation, which has become a domestic corporation under Pub. Laws 1899, c. 62, cannot remove the cause to a United States court, when sued by a citizen as a domestic corporation on a cause of action disclosing no federal question.—Debnam v. Southern Bell Tel. Co. (N. C.) 269.

A foreign railroad corporation, though domesticated under Act March 19, 1896, is still entitled to have a cause against it removed to the United States courts because of nonresidence.—Wilson v. Southern Ry. Co. (S. C.) 701.

A railroad company incorporated under the laws of another state is a nonresident of the state for the purpose of removal to a federal court.—Calvert v. Southern Ry. Co. (S. C.) 750.

§ 2. Proceedings to procure and effect of removal.

Though plaintiff in a suit which had been removed from a state to a federal court was nonsuited, he could bring another suit on the same cause of action in the state court, though the damages in the second suit were laid in an amount which would prevent another removal.—McIver v. Florida Cent. & P. R. Co. (Ga.) 775.

The state court cannot be deprived of its jurisdiction by the mere filing of a petition regular in form for removal to a federal court, but the petition for removal, taken in connection with the complaint, must show a prima facie right of removal.—Debnam v. Southern Bell Tel. Co. (N. C.) 269.

RENT.

See "Landlord and Tenant," § 4.

REPEAL.

Of statute, see "Statutes," § 4.

REPLEVIN.

§ 1. Right of action and defenses.

In replevin for property sold under conditional sale reserving title, plaintiff was not bound to return part of the price paid, where the value of the use of the property during the time it was held by defendant equaled the under a warrant to enforce a lien for rent, property the rightful possession of which is in another.—Southern Ry. Co. v. Sarratt (S. C.) 504.

Under Rev. St. 1893, § 2522, a third person in whose hands personal property is seized, which it is claimed is subject to a lien for rent, may, on executing bond, recover the same in an action of claim and delivery.—Southern Ry. Co. v. Sarratt (S. C.) 504.

§ 2. Proceedings for taking and redelivery of property.

Execution of recognizance for forthcoming of personal property, where bail has been required in trover, *held* not to estop defendant from denying that he had ever been in possession thereof.—Bell v. G. Ober & Sons Co. (Ga.) 904.

§ 3. Pleading and evidence.

In replevin for property sold under conditional sale reserving title, evidence as to the value of the property for hire while in defendant's possession was admissible.—Commercial Pub. Co. v. Campbell Printing-Press & Mfg. Co. (Ga.) 756.

Evidence to establish, by way of recoupment, damages sustained out of the same contract, *held* inadmissible in trover.—Bell v. G. Ober & Sons Co. (Ga.) 904.

Testimony that a bill of sale executed by a plaintiff in replevin, conveying the property claimed to the defendant, was in reality a mortgage, and had been fully paid, *held* competent to impeach the title shown by the bill of sale.—Williams v. Griffin (S. C.) 665.

§ 4. Damages.

Where the subject-matter of an action of bail trover was notes pledged by defendant as collateral security for a debt due plaintiff, and placed in the defendant's hands for collection, the measure of damages was the amount due on judgment rendered in former suit, provided the value of the collaterals equaled or exceeded that amount, and, if not, the value of the collaterals.—Holmes v. Langston (Ga.) 251; Langston v. Holmes, Id.

§ 5. Trial, judgment, enforcement of judgment, and review.

Where, in action of trover, there was clear proof of conversion of certain of the property, *held* proper to deny a nonsuit.—Bell v. G. Ober & Sons Co. (Ga.) 904.

§ 6. Liabilities on bonds and undertakings.

An obligation by defendant in bail trover construed, and *held* in substantial compliance with Civ. Code, § 4605.—Holmes v. Langston (Ga.) 251; Langston v. Holmes, Id.

Sureties in action of bail trover to recover certain securities, after plaintiff has announced election to take money judgment, cannot free themselves by tendering a portion of the property, offering to pay the money value of another portion, and accounting for balance by setting up facts which could have been pleaded by defendant as defense in the former suit.—Holmes v. Langston (Ga.) 251; Langston v. Holmes, Id.

REQUESTS.

For instructions in criminal prosecutions, see "Criminal Law," § 11.
—— to jury in civil actions, see "Trial," § 9.

RESCISSION.

Of contract for sale of goods, see "Sales," § 3.

RETROSPECTIVE LAWS.

Constitutional restrictions, see "Constitutional Law," § 4.

RETURN.

Of garnishment process, see "Garnishment," § 4.
Of process in general, see "Process," § 1.

REVENUE.

See "Taxation."

REVIEW.

See "Appeal and Error"; "Certiorari"; "Criminal Law," §§ 17, 18; "Justices of the Peace," § 3.

RIGHT OF WAY.

See "Easements."
Of railroads, see "Railroads," § 2.

RIPARIAN RIGHTS.

See "Waters and Water Courses," § 1.

RISKS.

Assumed by employé, see "Master and Servant," § 6.
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ROADS.

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See "Vendor and Purchaser."
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Of property of decedent under order of court, see "Executors and Administrators," § 6.
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On order or judgment of court, see "Judicial Sales."
Tax sales, see "Taxation," § 5.

§ 1. Requisites and validity of contract.

Evidence *held* to show that purchaser bought on his own judgment, and not on the faith of seller's false representations, made pending negotiations which led up to the sale.—Floyd v. Woods (Ga.) 225.

Where, on a sale, a contract is expressed in writing, embracing the entire agreement, containing no reference to sample, conformity of the bulk to the sample is not an agreed term.—Imperial Portrait Co. v. Bryan (Ga.) 291.

§ 2. Construction of contract.

Evidence *held* insufficient to show a sale by sample.—Imperial Portrait Co. v. Bryan (Ga.) 291.

Bill of sale purporting to show conveyance of title to president of designated corporation *held* inadmissible to show title in corporation.—Florida Cent. & P. R. Co. v. Usina (Ga.) 928.

§ 3. Modification or rescission of contract.

Where seller fails to deliver separate article of machinery purchased under entire contract, only a contract for fraud, he will waive his objections unless he acts immediately on discovery thereof.—Pearce v. Borg Chewing-Gum Co. (Ga.) 457.

Where purchaser seeks to avoid contract for fraud, he must, on discovery, announce his purpose to rescind at first opportunity.—Pearce v. Borg Chewing-Gum Co. (Ga.) 457.

§ 4. Performance of contract.

Contract to deliver complete outfit for ginning cotton for a gross price *held* an entire one, and a breach was caused by failure to deliver any specific article.—Harden v. Lang (Ga.) 100.

Where, after breach of contract of sale by failure to deliver all articles purchased under entire contract, purchaser retains articles delivered and notifies seller that he has obtained the balance elsewhere, he holds the articles received under the terms of contract.—Harden v. Lang (Ga.) 100.

§ 5. Remedies of seller.

Claim for damages for breach of contract of sale cannot be allowed by plea of recoupment in defense of trover.—Harden v. Lang (Ga.) 100.

Profits capable of exact computation may be shown in an action for breach of contract.—Gore v. Malsby (Ga.) 315.

Where firm directs an importer to import and ship certain goods at stated prices, and refuses to accept, it is liable in damages, but not to an action as for goods sold and delivered.—Maddox v. Wagner (Ga.) 609.

Breach of executory contract for purchase of goods will not support action for price.—Maddox v. Wagner (Ga.) 609.

§ 6. Conditional sales.

An agreement between principal and agent as to purchase of live stock construed, and *held* not a sale with reservation of title, to be recorded under Civ. Code, § 2776.—Evans v. Napier (Ga.) 426.

The intent of the parties to a contract for the sale of stock, and the bona fides of the transaction, *held* questions for the jury.—Evans v. Napier (Ga.) 426.

SATISFACTION.

See "Payment"; "Release."

SCHOOLS AND SCHOOL DISTRICTS.

Mandamus to school board, see "Mandamus," § 2.

§ 1. Public schools.

Where pupil, instructed to prepare a paper on a certain subject, reads a paper prepared by her father, which is disrespectful to the teacher, the pupil may be punished for failure to prepare a paper in accordance with the instructions.—Samuel Benedict Memorial School v. Bradford (Ga.) 920; Bradford v. Samuel Benedict Memorial School, Id.

Authorities of public school have power to make the writing of compositions and entering into debates a part of the school course.—Samuel Benedict Memorial School v. Bradford (Ga.) 920; Bradford v. Samuel Benedict Memorial School, Id.

Whether particular subject given by school authorities for composition is suited to the age of the pupil is a question for such authorities and not for the court.—Samuel Benedict Memorial School v. Bradford (Ga.) 920; Bradford v. Samuel Benedict Memorial School, Id.

For disobedience of proper direction, pupil *held* liable to expulsion or suspension.—Samuel Benedict Memorial School v. Bradford (Ga.) 920; Bradford v. Samuel Benedict Memorial School, Id.

Laws 1899, c. 128, providing that fines and penalties collected by towns shall be used for municipal purposes, is void, as repugnant to Const. art. 9, § 5, which provides that such fines shall belong to the county school fund.—Board of Education of Vance County v. Town of Henderson (N. C.) 158.

Under Const. art. 9, § 5, providing that the clear proceeds of all penalties and of all fines collected shall be paid to the county school fund, fines collected by a town must be paid into such fund without deductions therefrom.—Board of Education of Vance County v. Town of Henderson (N. C.) 158.

Under Const. art. 9, § 5, the proceeds of penalties recovered by a civil action by a town for violations of its ordinances belong to such town, and not to the county school fund.—Board of Education of Vance County v. Town of Henderson (N. C.) 158.

Under Code, §§ 3818, 3820, and Const. art. 9, § 5, fines collected by a town for violations of city ordinances belong to the common-school fund of the county.—Board of Education of Vance County v. Town of Henderson (N. C.) 158.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 4.

SEPARATE ESTATE.

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SERVICES.

See "Master and Servant," § 1; "Work and Labor."

SERVITUDES.

See "Easements."

SETTLEMENT.

See "Account Stated"; "Compromise and Settlement"; "Payment"; "Release."

By executor or administrator, see "Executors and Administrators," § 8.

SHERIFFS AND CONSTABLES.

§ 1. Compensation.

Where execution on foreclosure of landlord's lien and a distress warrant are placed in the hands of a constable, he is entitled to retain from the proceeds costs legitimately incurred.—Moran v. Childs (Ga.) 235.

§ 2. Powers, duties, and liabilities.

Evidence *held* to warrant finding that rules against the constable for failure to execute a writ were issued maliciously and without probable cause.—Roberts v. Keeler (Ga.) 617.

That costs on a fi. fa. have not been paid will not justify the issuance of a rule against the officer for the principal and interest, which have been paid to the plaintiff in execution.—Roberts v. Keeler (Ga.) 617.

A sheriff may show that an execution placed in his hands has been paid, as an excuse for not making the money thereon.—Roberts v. Keeler (Ga.) 617.

While sheriff, on failure to sell property on levy, is liable to attachment for contempt, in defense of a rule he can show that it was not subject to execution.—Brannon v. Barnes [illegible] 689.

A sheriff *held* not liable to amercement [illegible] failure to return an execution issued by [illegible] tice and directed to a constable.—McGlo[illegible] v. Mitchell (N. C.) 164.

SHIPPING.

See "Ferries."

SLANDER.

See "Libel and Slander."

SLEEPING CARS.

See "Carriers," § 3.

SPECIFIC PERFORMANCE.

§ 1. Contracts enforceable.

Where improvements are destroyed [illegible] deed or possession given, the vendee is [illegible] to abatement of the contract price.—Pr[illegible] Guernsey (Ga.) 796.

Specific performance of a contract to [illegible] land will not be granted where the ven[illegible] only an equitable right therein, against [illegible] there are a large number of judgment [illegible] Newberry v. French (Va.) 519.

Parties complying with the terms of [illegible] tract to devise property *held* entitled to [illegible] performance thereof, though they did [illegible] it.—Burdine v. Burdine's Ex'r (Va.) [illegible]

§ 2. Good faith and diligence.

Where a vendor has delayed performance [illegible] his contract to convey for 30 months [illegible] which time the property has greatly depre[illegible] in value, specific performance will not be [illegible] ed against the vendee.—Newberry v. F[illegible] (Va.) 519.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STATEMENT.

By witness inconsistent with testim[illegible] "Witnesses," § 3.

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—— statute of frauds, see "Frauds, S[illegible] of."

Validity of retrospective or ex post facto [illegible] see "Constitutional Law," § 4.

§ 1. Enactment, requisites, and va[illegible] in general.

Under Const. art. 2, § 14, requiring [illegible] authorizing municipalities to create de[illegible] have three readings before passing, the [illegible] tion, on the third reading of an act [illegible] purpose, of the words "majority of" to [illegible] which read, "when authorized by all the [illegible] fied voters," was immaterial.—Glenn v. [illegible] (N. C.) 167.

to make penal the killing of doves at any other place than at the bait.—Harris v. State (Ga.) 232.

Where body of penal statute is broader than the title warrants, it is unconstitutional as to matters not comprehended in the title.—Harris v. State (Ga.) 232.

Act providing for the amendment of a city charter *held* to express the subject in the title.—City of Macon v. Hughes (Ga.) 247.

Rev. St. § 1582, *held* not repugnant to Const. art. 3, § 17, providing that the subject of every act shall be expressed in its title.—Barksdale v. City of Laurens (S. C.) 661.

§ 3. Amendment, revision, and codification.

Though act passed before adoption of Code of 1895, and which was incorporated therein, ing the act.—Parks v. State (Ga.) 73.

§ 4. Repeal, suspension, expiration, and revival.

Pub. Laws 1899, c. 349, *held* to have destroyed plaintiff's pending action for a penalty, brought under Code, § 3816, notwithstanding Code, § 3764.—Dyer v. Ellington (N. C.) 177.

Act Dec. 24, 1884, repealed provisions of Spartanburg city charter relating to assessments of damages for taking land for streets, and proceedings subsequently taken under the charter are void.—State v. Tenny (S. C.) 555.

§ 5. Construction and operation.

Laws imposing a license, where there is doubt as to their meaning, are construed more strongly against the government and in favor of the citizen.—Brown v. Commonwealth (Va.) 485.

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STO

Of corporations,

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See "Railroads."

§ 1. Establis
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Where city gr
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under Act Oct.
company for
paving.—Atlan
Atlanta (Ga.)

Act Oct. 10
which city of
street railway
paving when
—Atlanta Co
(Ga.) 667.

Under Act
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SUBROGATION.

Where, at the time of the execution of a ·tgage by defendant to plaintiff, and a jun- mortgage to D., a third mortgage to N. was record and unsatisfied, the fact that N.'s ·tgage was paid by the proceeds of D.'s loan not entitle him to be subrogated to the rights N.—Gunter v. Addy (S. C.) 553.

partner who pays a partnership judgment ot entitled to subrogation, without an agree- it making him a surety for his co-partner.—ds' Adm'r v. Durham (Va.) 472.

ode, § 2855, does not change the rule that a tner paying partnership judgments is not itled to subrogation.—Sands' Adm'r v. Dur- n (Va.) 472.

ounty treasurer, who without request volun- ily paid taxes on lands of another, *held* not itled to be subrogated to rights of state and nty.—Repass v. Moore (Va.) 474.

SUBSCRIPTIONS.

n an action to determine the liability of the ers of certain subscription notes, evidence to show that the notes were given on cer- n conditions, outlined when the plans for ing the funds were adopted.—Catt v. Olivier .) 980.

n an action to determine the liability of makers of certain subscription notes to ditors, which were given on certain condi- ns, that payments were made by such kers before the conditions on which they re given were complied with *held* not a iver of such conditions.—Catt v. Olivier a.) 980.

SUIT.

e "Action."

SUMMARY PROCEEDINGS.

llection of taxes, see "Taxation," § 4.
covery of possession by landlord, see "Land- ord and Tenant," § 5.

SUMMONS.

e "Process."

SURETYSHIP.

e "Principal and Surety."

SURVIVAL.

cause of action, see "Abatement and Re- ival," § 2.

SWINDLING.

e "False Pretenses."

TAXATION.

e "Licenses," § 1.
ssessments for municipal improvements, see "Municipal Corporations," § 4.

1. Constitutional requirements and restrictions.

The act of March 9, 1897 (Acts 1897, p. 388), thorizing tolls for floating logs on certain reams, violates Const. art. 8, § 4, in that the ll authorized is for a private benefit, and not r the public good, and confers no correspond- g benefit on the owner of the logs.—Hutton Webb (N. C.) 341

§ 2. Liability of persons and property.

Commissioners of dispensary established under Act Dec. 16, 1897, *held* county authorities, within general tax act, imposing a tax on dispensary conducted by counties or municipal authorities.—Sheffield v. Board of Com'rs (Ga.) 302.

Act Oct. 16, 1889, gives no county authority to assess and collect back taxes on railroad property.—Staten v. Savannah, F. & W. Ry. Co. (Ga.) 938.

§ 3. Lien and priority.

Property subject to tax liens, as between creditors of owner, determined.—Reynolds v. Wood (Ga.) 593.

§ 4. Collection and enforcement against persons or personal property.

Where a tax fi. fa., issued and transferred prior to Code of 1895, was levied, and a claim was filed by a third person, no record of the transfer being made, the levy should be dismissed.—Funkhouser v. Male (Ga.) 57.

A tax fi. fa., transferred to one other than defendant, loses its lien, unless it be recorded as provided by law.—Funkhouser v. Male (Ga.) 57.

Property of town dispensary *held* subject to sale under execution for state taxes.—Sheffield v. Board of Com'rs (Ga.) 302.

§ 5. Sale of land for nonpayment of tax.

Levy of wild-land tax fi. fa. cannot be attacked as excessive when issued, not against the owner, but against the particular lot.—Vickers v. Hawkins (Ga.) 463.

Where alterations had been made in the entry of levy on a tax execution, it will be presumed that they were made at the time of the original entry, and burden is on objecting party to show the contrary.—Vickers v. Hawkins (Ga.) 463.

Under Act Feb. 28, 1874, as amended March 2, 1875, providing that advertisements as to tax sales should be published once a week for four weeks, where the advertisement is inserted four times in as many weeks, and the first insertion is published 28 days or more before the executions were issued, it was sufficient.—Bentley v. Shingler (Ga.) 935.

Tax execution against wild land under Act Feb. 28, 1874, need not recite that they are wild or had not been returned for taxation.—Bentley v. Shingler (Ga.) 935.

There is no provision of law that sheriffs' sales under tax executions issued under Act Feb. 28, 1874, as amended by Act March 2, 1875, should be advertised for 90 days.—Bentley v. Shingler (Ga.) 935.

§ 6. Redemption from tax sale.

One whose property has been sold cannot redeem after 12 months.—Montford v. Allen (Ga.) 305.

Two years given remainder-man in which to redeem do not apply to sales for city taxes.—Tiddy v. Graves (N. C.) 127.

§ 7. Tax titles.

Facts considered, and *held* that, as plaintiff had been lulled into security by the promise of the clerk and actions of the defendant after defective sale for delinquent taxes, equity will relieve him by annulling the deed issued thereunder.—Thomas v. Jones (Va.) 382.

TELEGRAPHS AND TELEPHONES.

Liability for injuries caused by electricity, see "Electricity."

Possession of premises by one of two tenants in common thereof, not having been adverse for 20 years, is deemed the possession of both tenants.—Conkey v. John L. Roper Lumber Co. (N. C.) 42.

THEFT.

See "Larceny."

TICKETS.

For carriage of passengers, see "Carriers," § 3.

TIMBER.

See "Logs and Logging."

TIME.

For taking appeal or suing out writ of error, see "Appeal and Error," § 6.

TITLE.

Color of title, see "Adverse Possession."
Statutes, see "Statutes," § 2.

TORTS.

By particular classes of parties, see "Counties," § 2; "Municipal Corporations," § 7.
—— agents, see "Principal and Agent," § 2.
—— employés, see "Master and Servant," § 9.
Measure of damages, see "Damages," § 2.
Particular remedies for torts, see "Trespass," § 1; "Trover and Conversion," § 1.
Particular torts, see "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Trespass"; "Trover and Conversion."
—— causing death, see "Death," § 1.

TOWNS.

See "Counties"; "Municipal Corporations"; "Schools and School Districts," § 1.

§ 1. Fiscal management, public debt, securities, and taxation.

A town may urge the invalidity of bonds voted by it in aid of a railroad, though it has paid an installment of interest thereon.—Glenn v. Wray (N. C.) 167.

The legislature may authorize a town to vote bonds in aid of a railroad, in the act incorporating such railroad, though the town charter does not permit the voting of such bonds.—Glenn v. Wray (N. C.) 167.

TRANSCRIPTS.

Of record for purpose of review, see "Appeal and Error," § 8.

TRANSITORY ACTIONS.

See "Venue," § 1.

TREES.

See "Logs and Logging."

TRESPASS.

Ejection of trespasser, see "Carriers," § 3.

§ 1. Actions.

Bare possession gives right of action against one wrongfully interfering therewith.—Bass v. West (Ga.) 244.

ness of plaintiff, a corporation, *held* not to set forth a cause of action in trespass.—Fulton Grocery Co. v. Maddox (Ga.) 647.

Under general denial in action for trespass on land, defendant cannot introduce any evidence save such as tends to disprove the allegations of the complaint.—Henderson v. Bennett (S. C.) 2.

Under Code Civ. Proc. § 144, a circuit court *held* to have jurisdiction to try action of trespass on land in county where the land is situate, though all defendants reside in another.—Henderson v. Bennett (S. C.) 2.

In determining a demurrer to a complaint for trespass on real property, on the ground that the complaint does not state a cause of action, all alleged circumstances of aggravation must be eliminated.—Rankin v. Sievern & K. R. Co. (S. C.) 997.

A complaint against a railroad company for trespass on plaintiff's land which fails to allege that defendant entered on the land to construct its road without plaintiff's consent is fatally defective.—Rankin v. Sievern & K. R. Co. (S. C.) 997.

Where a complaint for trespass alleges that defendant, a railroad company, entered on plaintiff's land and did certain acts without having acquired a right of way, the words "without having acquired a right of way" present a conclusion of law.—Rankin v. Sievern & K. R. Co. (S. C.) 997.

Where a complaint for trespass alleges that defendant, a railroad company, entered on plaintiff's land and did certain acts, and thus broke plaintiff's close, the words "thus broke plaintiff's close" must be eliminated in determining a demurrer on the ground that the complaint does not state a cause of action.—Rankin v. Sievern & K. R. Co. (S. C.) 997.

A complaint for trespass on the person which alleges no assault on plaintiff states no cause of action.—Rankin v. Sievern & K. R. Co. (S. C.) 997.

§ 2. Criminal responsibility.

Affidavit and warrant charging trespass after notice sufficiently allege the offense of entry on the land of another after notice prohibiting the same.—State v. Tenny (S. C.) 555.

Where defendants in a prosecution for trespass offered void condemnation proceedings in evidence as a justification, they were properly rejected.—State v. Tenny (S. C.) 555.

Under Code, § 3729, where defendant was indicted for unlawfully tearing down the fence of the prosecutor, evidence that he had title to the property under a verbal contract was admissible to show bona fides on the part of the defendant.—Wise v. Commonwealth (Va.) 479.

Where defendant was indicted for unlawfully tearing down the fence of the prosecutor, to refuse an instruction, if he tore down such fence under a claim to right, believing it to be his own, to acquit, was erroneous.—Wise v. Commonwealth (Va.) 479.

TRESPASS TO TRY TITLE.

See "Ejectment."

TRIAL.

See "Continuance"; "New Trial"; "Reference"; "Witnesses."
Criminal prosecutions, see "Criminal Law," § 6; "Homicide," § 5.

"Ejectment," § 3; "Negligence," § 3; "Replevin," § 5.
—— disputed claims against estate of decedent, see "Executors and Administrators," § 4.
—— suits in equity, see "Equity," § 5.
—— trial of right to property levied on, see "Execution," § 5.
Place of trial, see "Venue," § 3.
Right to trial by jury, see "Jury," § 1.

§ 1. Notice of trial and preliminary proceedings.

Where exceptions to report of commissioners to appraise homestead are placed on calendar 14 days before the commencement of the term, no further notice of trial is necessary.—Bleckley v. Shirley (S. C.) 503.

§ 2. Dockets, lists, and calendars.

Where a party, without objection, participates at an extra term of the circuit court in the trial of a cause not docketed at the preceding regular term, he will be deemed to have waived his objection that the cause was not docketed on the calendar of the preceding regular term, and the court has jurisdiction, notwithstanding Code, § 28.—Rivers v. Priester (S. C.) 543; Priester v. Whaley, Id.

§ 3. Course and conduct of trial in general.

Before defendant in action ex contractu can open and close, he must admit enough in his pleadings to make a prima facie case.—Whitaker v. Arnold (Ga.) 231.

To entitle defendant to open and close, he must admit enough to make out a prima facie case for plaintiff.—Reid v. Sewell (Ga.) 937.

§ 4. Reception of evidence.

A general objection to evidence as a whole is bad, when some of it is admissible.—Ray v. Camp (Ga.) 242.

A party's reasons for failing to subpœna a particular witness are not a proper subject of investigation.—Ray v. Camp (Ga.) 242.

A party may introduce in evidence relevant portions of the minutes of a corporation, without being required to introduce all its minutes relevant to the matter under investigation.—Fouché v. Merchants' Nat. Bank (Ga.) 256; Merchants' Nat. Bank v. Fouché, Id.

Where a party introduces immaterial evidence without objection, the other party is not thereby entitled to introduce, over objection, other illegal evidence in rebuttal.—Stapleton v. Monroe (Ga.) 428.

Where an agent's manual, showing rules of the company, was excluded from evidence in an action on a life policy, because it was not shown that the insured knew the rules, subsequent testimony to that effect did not invalidate the ruling.—Going v. Mutual Ben. Life Ins. Co. (S. C.) 556.

§ 5. Arguments and conduct of counsel.

It is error to allow counsel to argue to the jury on a basis not established by the evidence.—Georgia & A. Ry. v. Pound (Ga.) 312.

§ 6. Taking case or question from jury.

Evidence in an action against a city because of defective street warranting a finding of negligence, it was error to grant a nonsuit.—Shiflett v. City of Cedartown (Ga.) 221.

The amount of damages to be recovered is a question for the jury.—Horkan v. Benning (Ga.) 432.

Where, in action for negligence, evidence demanded verdict for defendant, it was properly directed.—Quirouet v. Alabama G. S. R. Co. (Ga.) 599.

The question being whether an employé negligently chose the more dangerous of two methods of doing work, and the evidence not demanding a finding thereon against plaintiff, it was error to grant a nonsuit.—Matthews v. Raleigh & G. R. Co. (Ga.) 926.

Where evidence was conflicting on the main issues, *held* error to direct verdict for defendant.—Binion v. Georgia, S. & F. Ry. Co. (Ga.) 938.

Where plaintiff's evidence only is introduced, and shows plaintiff's decedent guilty of contributory negligence, the court may take the case from the jury.—Neal v. Carolina Cent. R. Co. (N. C.) 117.

Verdict *held* properly directed against surety, notwithstanding breach of contract between principal, surety, and payee.—Rouss v. Krauss (N. C.) 146.

Where issues are submitted to the jury, an instruction that plaintiff cannot recover cannot be granted.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

It was not error to deny defendant's motion for a nonsuit, made at the close of plaintiff's evidence, where the evidence was conflicting, and some tended to establish plaintiff's cause of action, and other tended to show contributory negligence.—Short v. Gill (N. C.) 336.

Where the evidence is conflicting as to the facts on which plaintiff predicated his right to recover in an action for injuries, it is proper to submit the question of negligence and proximate cause to the jury.—Short v. Gill (N. C.) 336.

Evidence in an action on a life policy *held* sufficient to justify a refusal to nonsuit.—Going v. Mutual Ben. Life Ins. Co. (S. C.) 556.

Where there is any material evidence on the issues raised by the pleadings, the refusal of a nonsuit is proper.—Jenkins v. Charleston St. Ry. Co. (S. C.) 703.

A demurrer to the evidence is the proper mode of taking from the jury the determination of its weight.—Southern Ry. Co. v. Cooper (Va.) 388.

§ 7. Instructions to jury—Province of court and jury in general.

A portion of a charge wherein a correct proposition is stated is not erroneous because it fails to embrace an instruction which would be appropriate in connection with that proposition.—Lucas v. State (Ga.) 87.

What part of evidence of witness should be given most weight is for the jury.—Owen v. Palmour (Ga.) 969.

Under Code, § 413, court is not required to charge jury where question at issue is simply one of fact, and evidence is not conflicting or complicated.—Duckworth v. Orr (N. C.) 150.

The jury having been told that certain evidence was to be considered only to contradict a witness, the instruction need not afterwards be given.—Mason v. Southern Ry. Co. (S. C.) 440.

Where the charge declares the law on a hypothetical statement of facts, it is not a violation of Const. art. 5, § 26, prohibiting a charge on the facts.—Jenkins v. Charleston St. Ry. Co. (S. C.) 703.

§ 8. —— Applicability to pleadings and evidence.

Where neither pleadings nor evidence give jury a right to find damages growing out of diminished earnings of plaintiff caused by the injury, it was error to charge the jury on inquiry

An instruction on a defense not set up by the answer *held* properly refused.—City Council of Augusta v. Owens (Ga.) 830.

It is immaterial that an illustration in the charge is inapplicable, where it is not misleading.—Mason v. Southern Ry. Co. (S. C.) 440.

Where there was no evidence that horses shipped by plaintiff were unruly, failure of the trial court to instruct that carrier was not liable for injuries occasioned by their unruly disposition was not error.—Milam v. Southern Ry. Co. (S. C.) 571.

Where a request for instruction contains an abstract proposition of law, not relevant under the pleadings, it should be refused.—Long v. Hunter (S. C.) 579.

Where the question raised by an instruction was merely speculative, it was properly refused. —Long v. Hunter (S. C.) 579.

§ 9. —— Requests or prayers.

Held not error to fail to charge on contributory negligence, there being no request for such charge, and it appearing that no such contention was made.—Southern Ry. Co. v. Hooper (Ga). 232.

Refusal of a request to instruct as to a rule of law directly bearing on contested issue is error.—Central of Georgia Ry. Co. v. Bond (Ga.) 299.

Refusal of a request sufficiently covered by the general charge is not ground for a new trial. —Gramling v. Pool (Ga.) 430.

Omission to give instruction, where no request was made, *held* not error.—Cooley v. Abbey (Ga.) 786.

Where requests for particular instructions are covered by the general charge, a refusal thereof was not error.—Odum v. Creighton Min. & Mill. Co. (Ga.) 947.

It is not error to refuse to give a request to charge, when not made in writing.—Atlanta Mach. Works v. Pope (Ga.) 950.

An instruction which assumes as a fact that about which the evidence is conflicting is properly refused.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

Requested instructions which, in so far as they are correct, are covered by the charge, are properly refused.—Bradley v. Ohio River & C. Ry. Co. (N. C.) 181.

Where plaintiff's evidence was uncontradicted, and, if true, would entitle him to recover, it was not error to refuse to instruct that, if the jury believed the evidence, they should find for defendant, and to instruct that, if they believed plaintiff's testimony, he was entitled to recover.—Cowell v. Phœnix Ins. Co. (N. C.) 184.

No error can be based on the failure of the trial court to give an instruction, where no request therefor was made.—Milam v. Southern Ry. Co. (S. C.) 571.

Where defendant objected that the facts causing an alleged special damage did not appear plainly, the objection should have been raised by motion, and not by request to charge.—Long v. Hunter (S. C.) 579.

Where the proposition contained in a request for instruction was covered in the general charge, failure to give the specific instruction was not error.—Long v. Hunter (S. C.) 579.

Where appellant presented no request for a more comprehensive charge, he cannot complain on appeal that the charge given was not cannot be taken advantage of by assigning error on charge abstractly correct.—Wood v. Collins (Ga.) 423.

§ 10. Custody, conduct, and deliberations of jury.

That the jury, in returning the verdict in an action on a note, accepted a calculation made by plaintiff's attorney, is not ground for reversal, where the verdict was for a proper amount.—Keys v. Flemister (Ga.) 948.

§ 10½. Trial by court.

Where all contested questions are submitted to jury for special findings under agreement that the judge shall enter a decree thereon, the judge should consider all material facts which are not at issue in making up the decree.—Wilkinson v. Bertock (Ga.) 623.

Held error to dismiss plaintiff's complaint in an action to set aside devises in a will, without granting defendants affirmative relief against a judgment held by plaintiffs against defendants' testator.—Cooley v. Cooley (S. C.) 563.

Under Const. 1895, art. 5, § 17, failure of court to file decision within 60 days did not invalidate it.—Griffith v. Cromley (S. C.) 738.

§ 11. Waiver and correction of irregularities and errors.

Misconduct of counsel in referring to matters not in evidence *held* cured by act of the court.—O'Neill Mfg. Co. v. Pruitt (Ga.) 59.

TROVER AND CONVERSION.

§ 1. Acts constituting conversion, and liability therefor.

Assignment for benefit of creditors of property intrusted to assignor for collection for pledgee *held* a conversion.—Holmes v. Langston (Ga.) 251; Langston v. Holmes, Id.

§ 2. Actions.

While mere possession of a chattel will give a right of action for interference therewith, such possession must be in the plaintiff's own right, and not as agent of another.—Mitchell v. Georgia & A. Ry. Co. (Ga.) 971.

A petition in the name of one, as agent, who has not possession in his own right, cannot be so amended as to proceed in the name of plaintiff for the use of the real owner.—Mitchell v. Georgia & A. Ry. Co. (Ga.) 971.

TRUSTEE PROCESS.

See "Garnishment."

TRUSTS.

Charitable trusts, see "Charities."
Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."
Creation by will, see "Wills," § 8.
Effect of trust on limitation, see "Limitation of Actions," § 1.
Trust deeds, see "Mortgages."

§ 1. Appointment, qualification, and tenure of trustee.

A trustee appointed by a court of another state has no power, as such, to convey lands in the state.—Wilson v. Braden (W. Va.) 367.

§ 2. Accounting and compensation of trustee.

On final settlement, the rule for computing interest, under Civ. Code, § 3498, is to charge trustee with 7 per cent. for six years from quali-

)n, and with compound interest at 6 per thereafter.—Payne v. Bowdrie (Ga.) 89.

ecree that a trustee appointed to succeed er trustee, and in possession of certain rty, should account for the rents and s of the property, is to be construed as requiring him to account for the rents profits received by him.—Tindal v. Neal .) 1004.

ere an exception was taken to a ruling ng a trustee greater compensation than provided by the trust, it is not necessary to exceptions to subsequent reports on the ground in order to review the question on l.—Southern Ry Co. v. Glenn's Adm'r 395.

stee *held* entitled to expenses for maing a place of business, where a trust was at magnitude, in addition to his compen, though such compensation was fixed by ed of trust.—Southern Ry. Co. v. Glenn's (Va.) 395.

pensation of trustee being fixed in the he cannot receive extra compensation for imposed by the trust.—Southern Ry. Co. nn's Adm'r (Va.) 395.

ere trustee's accounts were settled semilly, and no exceptions were taken for the lowance against balances in his hands, an ion that he should be charged with incannot be made on appeal.—Southern Ry. Glenn's Adm'r (Va.) 395.

Establishment and enforcement of trust.

ugh trustee has been decreed to settle beneficiary, until he does so the relation ues, and limitation for 10 years applies ts against him.—Payne v. Bowdrie (Ga.)

il final settlement, the relation continues, rustee is liable for amounts collected after to settle in full with beneficiary.—Payne wdrie (Ga.) 89.

ere, in an equitable proceeding between e and beneficiary, it was decreed that he he fund to the beneficiary, such decree inding on the trustee, though it cut off ghts of the contingent remainder-man.— v. Bowdrie (Ga.) 89.

eceased trustee *held* to have a bare legal n the trust res, and hence the fact that his heirs became of age more than three before action brought to recover property nder mortgage foreclosure, by heirs of a iary, constituted no bar to the action.— ng v. Barden (N. C.) 17.

UNDISCLOSED AGENCY.

Principal and Agent," § 2.

UNITED STATES.

s, see "Removal of Causes."

USURY.

Customs and Usages."

Usurious contracts and transactions.

editor of an insolvent *held* not entitled to r usury voluntarily paid by the debtor bensolvency, where he instituted no progs for such purpose within 12 months he payment.—Gramling v. Pool (Ga.) 430.

lence *held* insufficient to establish defense ry in action on note.—Finney v. Equitaortg. Co. (Ga.) 461.

er of note, who induced another to sign ety in ignorance of usury, cannot set up usury as defense to trover by surety for personalty securing it, after he has paid the note and taken an assignment.—Campbell v. Morgan (Ga.) 621; Morgan v. Campbell, Id.

Purchase of note from payee *held* not usurious, as between maker and payee, because discount was more than maximum rate of interest.—Campbell v. Morgan (Ga.) 621; Morgan v. Campbell, Id.

Where agent of owner exacted from borrower a commission which, with interest, exceeded lawful charge, transaction was usurious, if the lender was to pay agent nothing for his services.—Clarke v. Havard (Ga.) 837.

Answer in action by national bank on note *held* to sufficiently allege usury as a defense.—Bates v. First Nat. Bank (Ga.) 949.

Under Code, § 3835, and Acts 1895, c. 69, payor paying his payee interest in fact usurious *held* entitled to have it allowed in an accounting with indorsee, though at the time he acquiesced in the amount the payee claimed, in order to get the indorsee to take the note.—Faison v. Grandy (N. C.) 276.

A referee's report that excess paid by payor of note over amount due was made up of "improper charges" and a claim for money paid payor's creditor above what was actually paid construed as a finding of usury; payor pleading usury and the excess not being otherwise explained.—Faison v. Grandy (N. C.) 276.

Where a contract is made in one state, to be performed in another, and the parties have contracted with reference to the interest laws of the first state in good faith, the contract must be enforced there.—British & American Mortg. Co. v. Bates (S. C.) 917; Same v. Peacock, Id.; Same v. All, Id.; Same v. Knepton, Id.

VACATION.

Of attachment, see "Attachment," § 3.
Vacating execution, see "Execution."

VAGRANCY.

Evidence *held* insufficient to sustain conviction.—Daniel v. State (Ga.) 293.

VALUE.

Limits of jurisdiction, see "Appeal and Error," § 2.

VENDOR AND PURCHASER.

See "Sales."
Specific performance of contract, see "Specific Performance."

§ 1. Requisites and validity of contract.

A vendor cannot recover on a contract for the sale of land which contains no written obligation to pay.—Davison v. West Oxford Land Co. (N. C.) 162.

§ 2. Performance of contract.

Rule for determining abatement of price, where improvements are destroyed before deed or possession given under contract of sale, determined.—Phinizy v. Guernsey (Ga.) 796.

Purchaser cannot recover for deficiency in land, where he fails to avail himself of means of information open to him before purchase, and no representation is made.—Smathers v. Gilmer (N. C.) 153.

§ 3. Rights and liabilities of parties.

Where binding contract for sale of realty has been made, and improvements are destroyed by fire before vendor conveys or vendee obtains possession, the loss is that of the vendor.—Phinizy v. Guernsey (Ga.) 796.

A vendee of land *held* not, as a matter of law, entitled to his vendor's muniments of title as at common law.—Kelly v. Lehigh Min. & Mfg. Co. (Va.) 511.

Under Code, c. 74, a bona fide purchaser, without notice of fraudulent intent of grantor or fraud rendering void the title of grantor, is protected.—Root-Tea-Na-Herb Co. v. Rightmire (W. Va.) 359.

§ 4. Remedies of vendor.

A vendee in an action for a balance due on a land contract cannot recover on a counterclaim for payments on the price made without his authority, where plaintiffs received the amount so paid as assignees for the benefit of creditors, and have paid it to such creditors.—Davison v. West Oxford Land Co. (N. C.) 162.

In an action for a balance due on a land contract, vendee cannot recover on a counterclaim for payments on the price made without his authority, where such payments were not made to plaintiff.—Davison v. West Oxford Land Co. (N. C.) 162.

A plea in an action on notes given for the price of land *held* to raise an issue as to whether the vendor was not required to deliver a bond for title on delivery of the notes.—Battery Park Bank v. Loughran (N. C.) 281.

Where a decree foreclosing a vendor's purchase-money lien was largely in excess of the judgment liens against the land, and provided for the payment thereof, the purchaser could not complain of an assignment of a note for the price by the vendor, in violation of the contract, since he is amply protected against the judgment liens.—Carper v. Marshall (Va.) 526.

A purchaser of land *held* entitled to have his damages, sustained by plaintiff's delay and failure to collect and apply on the indebtedness a bond assigned to him by defendant, set off against his liability for purchase price.—Carper v. Marshall (Va.) 526.

§ 5. Remedies of purchaser.

Plaintiff, in action for breach of warranty, makes out prima facie case when he proves that he yielded to adverse claimant, whose title was superior to that of defendant.—Lowery v. Yawn (Ga.) 294.

VENUE.

§ 1. Nature or subject of action.

Under Civ. Code, § 2334, suit against railroad company must be brought in the county where the cause of action originates, when agent resides there; otherwise, at election of plaintiff.—Devereaux v. Atlanta Railway & Power Co. (Ga.) 939.

§ 2. Domicile or residence of parties.

A creditors' suit was properly brought against the debtor in the county of his residence, and a co-conspirator, in concealing the property, *held* within the jurisdiction of the court.—Kruger v. Walker (Ga.) 794.

Under Civ. Code, § 5872, suits against joint trespassers residing in different counties may be tried in either county.—McPhaul v. Fletcher (Ga.) 938.

Under Code, § 3214, subd. 7, a circuit court judge can bring an action in the circuit court of any county in his circuit in which the defendant resides.—Harrison v. Wissler (Va.) 982.

§ 3. Change of venue or place of trial.

Under Code, § 195, the court may order a cause removed for trial to another county, when the convenience of witnesses and the ends of the judicial district.—Lassiter v. Norfolk & C. R. Co. (N. C.) 47.

VERDICT.

Directing verdict in civil actions, see "Trial," § 6.
In criminal prosecutions, see "Criminal Law," § 13.
Irregularities or defects ground for new trial, see "New Trial," § 1.
Review on appeal or writ of error, see "Appeal and Error," § 15.

VERIFICATION.

Of pleading, see "Pleading," § 6.

VESTED REMAINDERS.

Creation, see "Wills," § 7.

VESTED RIGHTS.

Protection, see "Constitutional Law," § 2.

VILLAGES.

See "Municipal Corporations."

WAGES.

See "Master and Servant," § 1.

WAIVER.

See "Estoppel"; "Insurance," § 6.
Of error on appeal, see "Appeal and Error," § 17.
Of objections to pleading, see "Pleading."
Right to appeal, see "Appeal and Error," § 3.

WARDS.

See "Guardian and Ward."

WAREHOUSEMEN.

Carrier as warehouseman, see "Carriers," § 1.

WARRANTY.

By insured, see "Insurance," § 5.

WATERS AND WATER COURSES.

§ 1. Natural water courses.

The right of an individual to use a floatable stream for floating logs is not derived from the state, but rests on the right of the public to use such highways.—Hutton v. Webb (N. C.) 341.

A complaint which shows plaintiffs' right to the unobstructed use of their plantation, and the invasion of that right by defendant in flooding such plantation by means of a water course, states a good cause of action.—Lachicotte v. Ford (S. C.) 916.

Plaintiff *held* entitled to damages for loss to health and property caused by the pollution of a stream used for domestic and dairy purposes.—Trevett v. Prison Ass'n (Va.) 373.

WAYS.

Private rights of way, see "Easements."
Public ways, see "Municipal Corporations," § 6.

WIDOWS.

r, see "Dower."

WILLS.

'Descent and Distribution"; "Executors Administrators."

table bequests and devises, see "Chari-"

ruction and execution of trusts, see usts."

Contracts to devise or bequeath.

ler a contract to devise property to a r and daughter, providing they would vith decedent during his life, the daugh-ights to the property to be devised would e defeated by her mother's death before ecedent.—Burdine v. Burdine's Ex'r (Va.)

conduct on the part of a servant who was der services in consideration of the mas-contract to devise property to her, *held* to been waived by him.—Burdine v. Bur-Ex'r (Va.) 992.

contract to devise property in considera-f future services *held* sufficiently definite, as to the property to be devised and the leration.—Burdine v. Burdine's Ex'r (Va.)

dence that illicit relations had existed be-the parties to a contract to devise prop-before it was made *held* insufficient to that the contract was founded on an im-consideration.—Burdine v. Burdine's (Va.) 992.

Probate, establishment, and annulment.

presumption *held* to arise from signatures ll that it was executed in the manner pre-d by law.—Underwood v. Thurman (Ga.)

t execution was induced by undue in-e cannot be proved by testator's declara-fter he signed the papers.—Underwood v. nan (Ga.) 788.

s not the right of propounder of will to nd that, if verdict deny probate, it shall upon what ground it is based.—Under-v. Thurman (Ga.) 788.

Construction—General rules.

nt of testator, if legal, governs in construc-f will; and if he uses words which cre-ie estate, though he designed another, his ion must yield to rules of law.—Hertz v. ams (Ga.) 409.

ere the words in a will by a testator who efore Act Feb. 17, 1854, create an estate t is to be controlled by decisions of Eng-ourts.—Hertz v. Abrahams (Ga.) 409.

interpretation of wills, intent of testator control.—Rutter v. Anderson (W. Va.)

estator is presumed to use technical words ir strict technical meanings, unless there nething in the context indicating a differ-e.—Baer v. Forbes (W. Va.) 364.

—— Designation of devisees and legatees.

l construed, and *held* that, devisee having childless, a limitation over of the estate effect.—Crawford v. Clark (Ga.) 404.

levise to A. for her separate use, and in she has no issue to B., before the act of is a devise limited upon indefinite fail-issue, which created an estate tail by im-ion under the statute de donis, and en-l into a fee simple by Act Dec. 21, 1821.— v. Abrahams (Ga.) 409.

The word "heirs" expresses the relation of persons to a deceased ancestor, and not to a living one.—Baer v. Forbes (W. Va.) 364.

§ 5. —— Description of property.

Will construed, and bequest of butchering business *held* not to pass a bank deposit.—Koss v. Kastelberg (Va.) 377.

§ 6. —— Nature of estates and interests created.

Will construed, and *held*, that wife of testator took an estate for life, with remainder to his daughters.—Cochran v. Hudson (Ga.) 71.

A wife and devisees of land under a will *held* to take vested estates at testator's death, subject only to a condition subsequent; and hence a deed by the wife and devisees passed the fee.—Little v. Brown (N. C.) 175.

A devise of testator's lands to his three children and their children, to be divided in three equal lots, the children to have entire control of such lands, gave the children an estate in fee simple.—Houch v. Patterson (N. C.) 198.

Will construed, and devise of farm to wife *held* to empower her to sell and convey the land in fee simple, if necessary for her support.—Rutter v. Anderson (W. Va.) 357.

A devise to a wife for life, and at her death to her daughter, for the benefit of her heirs, gives the daughter surviving a fee simple.—Baer v. Forbes (W. Va.) 364.

§ 7. —— Vested and contingent remainders.

Executory bequest limited upon a definite failure of issue is valid.—Crawford v. Clark (Ga.) 404.

A will probated in 1847 construed, and *held*, that the word "issue" meant children, and not issue at large.—Crawford v. Clark (Ga.) 404.

Will construed as granting a vested remainder in the heirs of a person holding a life estate, subject to open and let in children subsequently born.—Tindal v. Neal (S. C.) 1004.

§ 8. —— Estates in trust and powers.

Trust in will construed, and *held*, that it became executed on arrival of the beneficiaries at majority.—Phillips v. Lowther (Ga.) 596.

A trust, created by will executed in another state, for an adult daughter of life tenant, with remainder over for her children, in so far as it applied to property in the state in the hands of one claiming to be trustee, after the passage of the married woman's act and removal of life tenant to Georgia, was executed.—Brantley v. Porter (Ga.) 970.

Will construed, and *held*, that the legal title passed to trustees as to life estate only, and the remainders created were legal, and not trust, estates.—Brantley v. Porter (Ga.) 970.

Where a title to a note was in the beneficiary under a will, and not in the trustee, the latter could not maintain an action upon the note by virtue of his supposed office of trustee after the death of the beneficiary.—Brantley v. Porter (Ga.) 970.

Terms of a will construed, and *held*, that a life estate to testator's wife was burdened with a trust for the support and education of the testator's children, and hence not subject to sale by executrix.—Hunter v. Hunter (S. C.) 734.

WITNESSES.

See "Depositions"; "Evidence."
Experts, see "Evidence," § 10.
Opinions, see "Evidence," § 10.

§ 1. Competency.

Party defendant to action by personal representative *held* not incompetent to testify to con-

actions *held* not confidential.—Stone v. Minter (Ga.) 321.

In action against corporation for breach of contract, an agent of defendant *held* not incompetent to testify because of death of other party.—Florida Cent. & P. R. Co. v. Usina (Ga.) 928.

A party to a cause founded on alleged contract of corporation *held* incompetent to testify that contract was made by defendant through an agent since deceased.—Florida Cent. & P. R. Co. v. Usina (Ga.) 928.

One pecuniarily interested in an action by an executor *held* not incompetent to testify as to admissions by the testator, where the conversation was not addressed to the witness.—Reid v. Sewell (Ga.) 937.

Under Code, § 590, conversations with a defendant, deceased at time of trial, *held* properly admitted where such decedent was not represented in the cause after his death and the other party had introduced similar conversations.—Davison v. West Oxford Land Co. (N. C.) 162.

Under Code, § 590, children seeking to charge their deceased father's estate with proceeds of the sale of land as their guardian, *held* incompetent to prove nonpayment of the indebtedness.—Dunn v. Beaman (N. C.) 172.

Held error for the master to disregard the testimony of the mother and sisters of a child on the question of its legitimacy, merely because they were interested parties.—Cooley v. Cooley (S. C.) 563.

One who petitioned for letters of administration could testify that he paid a doctor's bill for the deceased, notwithstanding Code, § 400.—Burkhim v. Pinkhussohn (S. C.) 908.

§ 2. Examination.

A witness, being sworn, may be cross-examined, though not examined in chief.—Mason v. Southern Ry. Co. (S. C.) 440.

§ 3. Credibility, impeachment, contradiction, and corroboration.

Where witness testified that he had seen certain persons, indicted for gaming at a certain place, engaged in gaming, one of such persons on trial could show that such other de-

credit evidence of witness for opposite party.—Tiller v. State (Ga.) 201.

Material part of brief of evidence at former trial, approved by court, may be introduced for purposes of impeachment.—Owen v. Palmour (Ga.) 969.

Where party testifies in his own behalf on a second trial, he becomes original witness, and is not estopped from testifying contrary to evidence at former trial.—Owen v. Palmour (Ga.) 969.

A witness is not bound by recitals in brief of evidence at former trial, unless read over and approved by him.—Owen v. Palmour (Ga.) 969.

Testimony that witness made a certain statement just after the accident *held* admissible for impeachment.—Mason v. Southern Ry. Co. (S. C.) 440.

WORK AND LABOR.

Liens for work and materials, see "Mechanics' Liens."

Evidence *held* insufficient to show contract, implied or direct, by husband to pay his wife's mother for services in taking care of his sick wife.—Poole v. Baggett (Ga.) 86.

Where a mother receives an invalid daughter in her home, and cares for her until her death, stating that no charge will be made, she cannot recover against the daughter's husband for the value thereof.—Poole v. Baggett (Ga.) 86.

WRITS.

See "Process."

Particular writs, see "Certiorari"; "Execution"; "Mandamus."

—— certiorari to justice of the peace, see "Justices of the Peace," § 3.

—— writ of error, see "Appeal and Error."

WRONGFUL EXECUTION.

See "Execution," § 7.

YEAR.

Estates for years, see "Landlord and Tenant."

ADDITIONAL "THIRD LABEL TABLES."

In these tables are shown the page of the North Carolina Reports where each case begins, arranged in numerical order. Opposite this is given the volume and page of the Southeastern Reporter where the case is found. By this the subscriber, finding a North Carolina case cited, without the title, by volume and page of the North Carolina Reports, can readily turn to it in the Southeastern Reporter.

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1	7	565	114	7	687	239	7	789	366	7	899			{128	579	8	350	690	8	32
3	7	590	119	7	589	248	7	672	368	7	795	461	8	{131	584	8	229	697	8	14
8	7	476	122	7	674	251	7	670	369	7	883			{133	589	8	227	702	8	34
11	7	471	134	7	579	255	7	695	374	7	732	473	7	881	594	8	341	706	7	90
17	7	655	145	7	647	261	7	669	380	7	729	479	7	906	598	8	225	709	7	90
21	7	467	149	7	885	263	7	682	382	7	751	483	8	174	602	8	172	711	8	39
24	7	468	153	7	706	273	7	801	388	7	896	490	8	338	605	8	366	713	7	90
26	7	469	158	7	680	281	7	734	391	7	725	497	8	353	612	8	342	717	7	90
30	7	473	162	7	657	286	7	747	399	7	878	509	8	234	617	8	236	719	8	14
35	7	573	170	7	758	294	7	887	404	8	124	516	8	221	627	8	365	728	7	88
48	7	693	176	7	701	300	7	786	408	8	140	520	8	176	629	8	219	730	7	87
51	7	649	181	7	710	305	7	780	412	8	136	526	8	335	634	8	231	734	7	72
58	7	584	184	7	783	311	7	874	416	8	139	532	8	162	640	8	145	737	7	91
61	7	477	188	7	709	321	7	776	419	8	116	538	8	164	645	8	126	741	7	87
68	7	700	192	7	893	329	7	805	422	8	169	541	8	347	649	8	117	744	7	71
71	7	586	196	8	95	332	7	795	428	7	566	548	8	120	651	8	121	747	7	70
78	7	753	206	8	{99	347	7	890	443	8	167	550	8	215	656	8	118	749	8	36
86	7	663			{106	354	7	793	447	7	897	559	8	159	661	7	761	758	7	67
99	7	698	223	7	{770	357	8	115	452	8	345	565	8	156	679	8	361	761	7	79
103	7	661			{775	360	8	151	454	8	166	571	8	359	680	8	154	765	7	70
109	7	652	234	7	712							574	8	222	684	8	134	770	7	71

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1	8	888	52	8	882	112	9	634	209	9	139	326	9	137	411	9	414	515	9	19
5	8	770	59	9	7	115	8	919	234	10	141	330	8	925	413	9	384	519	9	43
14	8	778	68	8	901	122	9	640	236	9	437	333	9	196	442	9	310	525	9	45
17	8	768	79	8	885	126	9	638	262	9	437	334	9	294	457	9	399	529	9	41
21	8	776	86	8	893	129	8	774	264	9	394	347	9	702	465	9	545	532	9	48
25	8	887	94	8	887	133	8	912	278	9	2	376	8	926	477	9	483	540	9	42
28	8	890	95	8	767	137	9	286	284	9	635	381	9	4	485	9	403	545	9	46
34	8	896	99	8	922	166	9	554	290	9	707	390	9	302	487	9	488	550	9	49
42	8	779	105	9	495	206	9	637	319	8	915	406	9	430	491	9	200			

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1	9	445	59	9	135	131	9	621	194	9	549	282	9	197	352	9	412	410	9	200
13	9	580	66	9	319	147	9	461	203	9	393	285	9	646	353	9	409	411	9	449
14	8	913	72	9	629	159	9	298	207	9	317	296	9	567	356	9	632	413	9	582
19	9	453	81	9	190	162	9	401	213	8	111	315	9	575	364	9	577	416	8	900
27	9	582	86	9	432	165	9	382	221	9	706	322	9	549	374	9	552	419	8	814
34	9	639	90	9	641	170	9	299	226	9	571	323	9	580	379	9	489	424	9	627
40	9	644	100	9	307	173	9	300	237	9	695	328	9	406	383	9	699	433	9	626
46	9	138	109	9	492	179	9	316	261	9	491	337	9	415	391	9	433	436	9	1
50	9	194	118	9	429	182	9	284	266	9	315	344	9	410	397	9	404	438	9	548
53	9	197	122	9	458	189	9	298	270	9	192	349	9	401	403	9	435	439	10	317
54	9	208	127	9	402	191	9	283	276	9	194	350	9	411	408	9	575			

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1	10	85	127	10	170	237	10	256	389	10	554	534	10	679	702	10	159	800	10	696
4	10	87	129	10	291	242	10	167	392	10	526	547	10	701	704	10	74			1023
9	10	79	139	10	466	248	10	308	394	10	566	555	10	754	710	10	175	837	10	454
16	10	138	141	10	166	261	10	208	400	10	470	566	10	606	714	10	143	840	10	315
26	10	83	144	10	132	265	10	153	403	10	474	574	10	676	724	10	171	845	10	262
28	10	134	146	10	136	278	10	297	408	10	525	582	10	685	728	10	131	847	10	453
33	10	128	148	10	254	301	10	307	410	10	691	589	10	706	733	10	84	853	10	313
36	10	83	154	10	456	305	10	295	422	10	490	596	10	683	735	10	85	858	10	455
40	10	89	156	10	251	309	10	512	425	10	511	600	10	77	735	10	705	861	10	758
44	10	86	159	10	140	312	10	556	431	10	689	603	10	488	737	10	261	868	10	315
48	10	80	161	10	186	326	10	466	437	10	527	609	10	476	739	10	146	874	10	524
57	10	76	166	10	137	330	10	481	442	10	552	613	10	304	743	10	183	877	10	608
60	10	124	171	10	156	331	10	518	453	10	694	621	10	700	752	10	259	881	10	526
69	10	77	176	10	169	332	10	467	458	10	709	626	10	704	758	10	486	882	10	684
75	10	148	180	10	183	335	10	465	471	10	566	631	10	707	763	10	468	887	10	563
86	10	127	182	10	159	338	10	258	474	10	664	638	10	699	764	10	764	890	10	510
91	10	147			251	342	10	520	479	10	526	642	10	189	771	10	475	893	10	491
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100	10	87	214	10	295	354	10	518	484	10	666	658	10	659	780	10	257	898	10	555
102	10	133	219	10	563	365	10	516	490	10	525	673	10	664	784	10	464	900	10	519
107	10	90	221	10	258	369	10	477	491	10	669	674	10	472	786	10	463	905	10	676
112	10	142	224	10	170	379	10	313	506	10	758	679	10	457	792	10	474	908	10	554
118	10	152	229	10	190	381	10	564	515	10	609	694	10	191	794	10	469	911	10	312
122	10	210	234	10	188	385	10	471	525	10	761	700	10	158				914	10	488

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1	10	870	45	11	162	123	10	1055	180	10	988	251	11	470	363	11	311	463	11	511
3	11	164	49	11	263	126	10	1055	191	10	888	266	11	361	369	10	907	467	10	1101
10	10	902	52	11	265	127	10	1054	193	10	911	272	11	575	377	10	991	472	11	182
14	11	158	56	11	266	131	10	1017	197	10	986	278	11	571	394	11	240	476	11	589
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23	11	154	65	11	177	138	10	1003	211	10	895	301	11	460	407	11	509	478	11	242
29	10	910	72	11	179	140	11	316	213	10	889	322	11	373	411	11	415	482	10	913
34	10	871	74	11	264	154	10	903	218	10	986	328	11	175	433	11	173	484	10	897
39	10	857	78	11	251	167	10	982	222	10	1036	333	10	1020	440	11	313	490	11	329
40	11	369	87	11	177	170	10	917	228	11	160	344	11	156	446	10	914	498	10	1099
42	10	1043	90	10	858	173	10	856	236	11	245	350	11	158	455	10	912	507	10	1100
44	11	162	121	10	867	175	10	896	246	11	328	356	11	180	460	11	360			

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1	11	277	172	11	184	272	10	1045	362	10	868	467	11	514	567	10	1019	695	10	1031
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16	10	1041	192	10	1038	279	10	1045	374	11	364	473	11	516	576	11	665	701	11	284
28	10	1057	201	10	1052	282	11	356	376	11	371	478	11	515	635	11	191	711	11	517
56	11	364	205	10	997	285	11	183	381	11	590	480	11	375	639	10	872	714	11	315
63	11	187	207	10	1046	289	10	998	391	11	424	481	11	515	645	10	870	718	11	254
65	10	1048	213	10	1032	301	11	320	395	11	248	485	11	568	646	10	901	722	11	525
81	10	1002	221	10	1103	308	11	530	404	11	412	494	11	529	650	10	857	728	11	520
84	10	916	222	10	996	322	11	535	411	10	983	498	11	188	653	11	166	734	11	422
88	11	573	225	10	1028	328	11	362	422	11	261	505	11	622	660	10	854	736	11	168
95	11	510	235	11	414	328	11	283	427	11	259	512	11	590	662	10	900	752	11	370
100	11	189	239	11	327	331	10	1056	433	11	314	515	11	576	664	10	1002	758	11	360
107	11	456	242	11	284	336	11	274	436	11	514			826	667	11	357	760	11	533
114	11	255	247	10	1034	344	11	281	439	11	476	534	11	262	676	11	518	766	11	478
122	10	845	251	10	1037	347	11	321	444	11	260	537	11	590	682	11	377	787	11	512
151	10	854	255	11	282	351	11	375	448	10	1044	539	11	522	690	10	913	792	11	475
153	11	646	258	11	286	357	11	273	451	11	647	549	11	269	691	10	1026	796	11	366
168	11	536	267	11	257	359	11	273	461	11	528	553	11	822						

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1 12 124		159 12 61		303 12 272		405 12 378		546 12 432		724 12 447		853 12 253	
6 12 112		168 11 1051		305 12 279		407 12 453		552 12 447		726 12 383		856 12 251	
9 12 199		171 12 60		311 12 205		411 12 63		562 12 451		731 12 600		857 12 251	
24 12 66		173 11 1049		313 12 137		415 12 55		565 12 237		748 12 605		859 12 254	
31 12 77		175 12 52		317 12 202		420 12 109		576 12 597		766 12 389		861 11 990	
36 12 122		178 11 991		322 12 {130		430 11 1089		580 12 465		770 12 249		865 12 320	
39 10 272		181 12 198		{464		432 12 64		581 12 275		771 12 250		873 12 248	
47 12 68		183 12 120		326 12 125		437 12 46		598 12 465		772 11 962		876 12 74	
52 12 49		185 12 54		327 12 138		447 12 378		609 12 330		783 12 573		885 12 82	
58 12 58		189 11 108		331 12 203		449 12 427		617 12 288		789 12 426		890 12 112	
63 11 1052		191 12 240		334 12 43		459 12 234		633 12 316		792 12 328		895 12 114	
68 12 44		194 12 241		335 12 92		463 12 251		630 12 588		795 12 451		900 12 53	
70 12 45		196 12 245		337 12 204		465 12 252		639 12 570		796 12 378		904 12 194	
72 12 125		204 12 187		340 12 136		468 12 {261		646 12 437		798 12 329		905 12 131	
76 11 1049		214 12 197		345 12 324		{312		653 12 572		802 12 456		910 12 249	
82 11 1090		217 12 133		349 12 286		482 12 315		655 12 287		805 11 1016		913 12 115	
88 12 121		220 12 127		351 12 191		483 12 312		658 12 267		808 12 455		921 12 50	
92 12 80		231 12 195		358 12 193		486 12 462		663 12 85		810 12 455		931 11 992	
103 12 118		236 12 250		360 12 197		492 12 430		686 12 77		812 12 435		934 12 268	
110 12 190		240 12 370		362 12 332		500 12 373		695 12 254		818 12 382		944 12 439	
115 12 123		248 12 69		366 12 452		505 12 235		705 12 {257		820 12 443		948 12 441	
119 12 120		266 11 1043		368 12 452		506 12 374		{456		821 12 572		956 12 44	
123 12 236		269 12 194		370 11 1044		507 12 379		707 12 630		822 12 325		959 12 59	
128 12 242		273 12 57		386 12 139		514 12 443		710 12 464		832 12 319		962 12 598	
139 12 281		278 12 134		392 12 318		526 12 334		718 12 383		835 12 569		967 12 457	
154 12 235		284 12 434		396 12 376		543 12 588		721 12 453		841 12 574		967 12 247	
156 12 43		291 12 89											

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1 13 135		134 12 902		235 13 5		321 13 917		413 12 908		542 13 187		678 13 271	
6 13 90		147 12 895		240 13 94		324 12 957		413 13 111		544 13 207		696 13 174	
10 12 1029		150 12 911		245 12 989		327 12 909		413 13 112		547 13 212		705 13 227	
17 13 96		153 12 912		248 12 1035		333 12 987		414 12 954		554 13 191		720 13 221	
21 12 1037		157 12 895		252 12 1035		339 12 1003		414 12 956		559 13 240		724 13 136	
24 12 1041		159 12 896		255 13 93		344 12 892		425 12 913		567 13 173		729 13 294	
34 12 958		163 12 848		260 12 1031		349 12 950		440 12 1034		571 13 211		747 13 967	
46 12 994		174 12 890		262 13 15		353 12 844		441 13 11		574 13 245		750 12 1000	
56 12 952		178 12 906		266 12 1044		357 12 839		441 13 1019		581 13 215		752 12 1022	
62 12 952		178 12 907		267 12 1038		364 12 836		449 13 171		588 13 234		755 13 10	
65 13 894		182 12 985		272 12 1025		365 12 1045		457 13 161		593 13 168		760 12 1024	
69 12 836		185 12 985		276 13 112		365 13 113		458 13 166		601 13 92		765 12 1029	
75 12 892		187 12 1032		280 13 112		377 13 138		462 13 209		606 13 142		768 13 8	
78 12 897		193 12 1027		282 12 741		382 13 143		472 13 236		612 13 137		770 13 14	
88 13 164		196 12 1005		284 12 997		387 13 8		485 13 190		614 13 188		772 12 1045	
93 13 740		204 12 1028		289 12 990		395 13 167		489 13 222		616 13 137		774 13 90	
97 13 859		206 12 1037		298 12 984		399 12 1040		501 13 240		619 13 183		776 13 189	
100 12 741		210 12 989		300 12 986		399 13 1		503 13 186		631 13 139		780 13 213	
106 12 908		213 12 1027		304 12 983		405 12 1028		507 13 162		639 13 182		787 13 225	
109 12 840		215 12 993		307 12 1002		407 13 7		514 13 232		642 13 243		792 13 113	
121 12 846		218 13 2		311 12 1001		412 12 838		522 13 208		648 13 188		793 13 217	
129 12 906		230 13 1008		314 12 998		413 12 901		526 13 177		651 13 285		799 13 214	
130 12 900													

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1 13 698		114 13 889		228 13 781		368 13 1020		515 14 84		658 14 35		785 13 1019	
6 13 720		120 13 905		233 13 736		374 14 294		520 13 892		664 14 52		789 14 110	
8 13 713		124 13 797		238 13 763		385 14 86		524 14 73		670 14 106		790 14 55	
10 13 721		129 13 860		242 13 777		398 13 942		527 14 94		672 14 106		794 13 943	
19 13 701		132 13 793		248 13 769		401 13 944		534 14 301		674 14 107		796 14 63	
21 13 700		139 13 887		252 13 764		406 14 317		539 13 909		675 14 74		798 13 931	
23 13 703		145 13 789		257 13 786		412 13 935		542 14 78		679 14 297		802 13 940	
29 13 716		148 13 840		265 13 800		417 13 930		550 14 77		683 14 299		809 13 553	
33 13 714		150 13 895		270 13 775		422 13 911		555 13 795		686 14 92		813 13 939	
39 13 704		152 13 702		278 13 777		430 14 43		560 13 785		688 14 316		815 13 917	
44 13 729		154 13 772		279 14 79		455 14 64		564 13 910		692 14 303		817 13 973	
49 13 723		157 13 768		291 13 918		458 13 908		568 13 798		698 14 315		820 13 977	
52 13 734		159 13 783		299 13 792		461 13 936		571 13 799		701 14 93		822 13 733	
57 13 766		165 13 841		302 14 43		465 13 911		574 13 799		703 14 314		824 13 974	
72 13 738		173 13 862		303 14 97		466 14 91		576 13 869		710 14 90		839 13 981	
74 13 728		182 13 731		306 13 773		468 14 88		581 14 51		714 14 41		841 13 719	
78 13 718		187 13 724		306 13 779		472 13 884		585 13 944		718 13 925		846 13 980	
79 13 724		188 13 770		307 13 904		481 13 907		589 14 352		722 14 383		849 13 760	
83 13 779		192 13 779		310 13 861		484 13 908		615 14 57		730 14 385		853 13 843	
85 13 872		196 13 739		314 13 739		487 13 917		618 14 58		735 14 391		856 13 977	
93 13 867		202 13 790		316 14 28		488 13 937		623 14 49		736 14 93		859 13 784	
97 13 891		207 13 731		328 13 923		490 13 896		628 14 59		739 14 84		860 13 719	
101 13 895		209 13 784		337 13 933		494 13 865		636 13 1022		739 14 96		864 14 31	
102 13 889		212 13 761		342 13 937		501 13 879		641 14 42		764 14 107		873 13 714	
103 13 839		218 13 772		346 13 939		504 13 881		643 14 86		775 14 75		876 13 726	
105 13 871		220 13 773		349 13 920		508 14 301		652 14 96		780 14 55		878 13 736	
110 13 893		224 13 735		358 13 926		510 14 299							

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1	14 641	91	14 505	215	14 687	292	14 791	364	14 962	417	14 972	500	15 5
6	14 640	93	14 506	220	14 745	309	14 782	367	15 3	420	15 196	503	14 688
10	14 637	99	14 501	230	14 684	311	14 799	371	15 115	423	14 966	507	14 780
15	14 648	108	14 516	232	14 737	315	14 777	374	14 922	430	14 974	510	14 966
20	14 622	111	14 518	245	14 683	319	14 778	377	14 923	431	15 200	511	14 741
24	14 622	114	14 508	249	14 803	319	14 778	381	14 913	437	14 1007	513	14 796
26	14 644	119	14 512	250	14 741	319	14 778	387	15 2	438	15 193	522	14 751
29	14 639	122	14 519	251	14 734	319	14 800	393	14 924	449	14 961	525	14 781
32	14 521	131	14 511	251	14 736	325	14 857	398	14 971	456	15 197	530	15 231
58	14 650	134	14 510	259	14 748	333	14 860	400	15 197	462	14 966	538	15 261
62	14 642	137	14 652	262	14 750	338	14 802	403	15 4	463	15 1	558	14 856
67	14 645	169	14 646	264	14 749	343	14 920	406	14 971	466	15 97	560	15 103
70	14 513	175	14 687	267	14 623	345	14 920	408	14 970	484	14 968	597	15 231
73	14 521	176	14 731	277	14 779	350	14 780	411	15 4	490	14 890	599	15 116
76	14 516	183	14 685	279	14 742	353	14 861	413	14 974	491	14 752	604	14 504
84	14 514	193	14 783	289	14 778	356	14 963	414	14 973	497	14 779	609	14 387

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1	15 1033	115	15 933	206	16 386	311	16 316	409	16 226	528	16 325	665	16 173
13	15 882	120	15 941	215	16 397	314	16 229	418	16 626	529	16 326	667	16 384
15	15 882	122	15 936	228	16 416	317	16 314	422	16 471	532	16 336	675	16 229
16	15 1028	124	15 938	231	16 418	319	16 179	425	16 412	535	16 317	680	16 168
24	15 878	129	15 944	236	16 4	324	16 173	427	16 408	540	15 938	683	16 285
28	16 8	132	15 1030	243	16 337	328	16 177	429	16 415	543	16 322	685	16 315
32	15 1031	135	15 1032	246	16 338	333	16 329	432	16 415	547	16 692	687	16 338
35	15 877	138	16 6	248	16 319	340	16 325	434	16 423	572	16 424	689	16 316
36	15 886	142	15 1031	251	16 467	342	16 233	439	16 402	578	16 621	690	16 319
42	15 885	145	16 7	261	16 236	347	16 171	457	16 408	592	16 323	693	16 326
45	15 883	151	16 12	269	16 391	353	16 239	458	16 619	597	16 703	695	16 332
53	15 889	159	16 10	271	16 338	358	16 240	463	16 393	604	16 706	700	16 320
56	15 941	166	16 16	272	16 327	360	16 684	482	16 698	615	16 867	703	16 414
66	15 881	172	16 17	278	16 181	369	16 420	500	16 334	637	15 877	706	16 339
69	15 891	175	16 1	288	16 232	372	16 389	501	16 335	638	15 930	707	16 411
74	15 936	180	15 1037	291	16 174	380	16 419	505	16 321	646	15 888	715	16 543
80	15 929	183	15 934	293	16 232	384	16 465	507	16 336	647	15 1038	718	16 392
87	15 939	187	16 179	295	16 176	391	16 427	509	16 270	652	16 2	722	16 409
92	15 940	194	16 169	297	16 417	394	16 683	516	15 888	656	16 170	725	16 408
94	16 18	197	16 172	300	16 412	397	16 542	519	15 890	658	16 231	727	16 410
103	15 892	200	16 175	306	16 397	404	16 470	525	16 272	661	16 331	729	16 540
108	15 1025	205	16 422										

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1	16 1011	152	16 912	278	17 520	404	17 149	566	17 485	694	17 534	833	17 528
27	16 924	158	16 902	283	17 417	405	17 9	570	17 483	697	17 495	836	17 921
34	17 10	162	16 916	293	17 181	408	16 841	578	16 845	698	17 438	838	17 533
44	16 854	164	16 906	304	16 900	412	17 486	589	17 519	703	16 853	840	17 165
54	16 910	168	16 921	311	17 150	424	17 496	593	17 573	709	16 766	841	17 538
59	17 14	180	16 914	318	16 929	440	17 419	608	17 430	720	16 896	842	17 637
66	16 910	188	16 915	323	16 922	451	17 416	614	17 298	736	17 575	845	17 495
71	16 919	189	16 1010	332	17 157	455	16 852	622	16 911	743	16 760	848	16 909
76	16 904	191	16 902	335	17 176	457	17 72	626	17 437	747	17 537	849	16 906
79	16 931	191	16 1009	343	16 1006	458	17 423	629	17 158	751	17 536	851	17 149
83	16 903	192	17 13	348	16 759	463	17 159	634	17 439	754	17 536	854	16 1010
89	16 918	196	17 566	350	17 527	472	17 539	642	17 490	756	17 535	856	16 930
96	16 908	223	16 932	355	17 534	502	16 848	646	17 424	759	16 762	857	17 164
102	16 1021	227	16 844	356	16 1023	505	17 432	652	17 423	769	16 765	859	17 166
109	16 901	229	16 902	359	17 178	508	17 432	655	16 849	772	16 840	863	17 491
111	16 917	233	17 72	370	17 80	510	17 165	660	16 850	778	17 530	874	17 297
115	16 1008	236	17 152	375	17 160	513	17 433	661	17 77	783	17 577	878	17 167
122	16 905	243	17 296	377	17 174	524	17 436	664	16 761	791	17 532	887	16 915
127	16 759	248	17 154	385	17 79	529	17 78	671	16 850	796	17 532	889	17 528
128	16 899	253	17 155	390	17 {169	541	17 430	677	16 926	798	17 578	895	17 527
131	16 903	259	17 78		{173	546	17 426	688	16 760	804	17 579	896	17 525
134	16 1019	261	16 1023	402	17 9	558	17 676	691	16 843	816	17 583	901	17 521
141	17 69	268	10 898										

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1	18	70	85	18	89	230	18	505	306	18	501	410	18	325	505	18	708	635	18	256
6	18	56	90	18	50	236	18	203	312	18	318	417	18	705	513	18	73	638	18	211
9	18	55	94	18	53	240	18	208	313	18	252	421	18	510	521	18	668	639	18	517
16	18	85	102	18	96	241	18	208	319	18	205	429	18	672	527	18	339	641	18	657
20	18	77	123	18	165	244	18	175	321	18	206	432	18	334	532	18	696	642	18	707
21	18	72	128	18	84	249	18	174	327	18	704	437	18	693	537	18	691	645	18	51
24	18	55	130	18	84	253	18	205	332	18	513	439	18	689	545	18	689	648	18	188
26	18	76	133	18	81	256	18	499	337	18	251	442	18	698	549	18	693	651	18	698
28	18	75	142	18	341	259	18	171	340	18	504	444	18	669	551	18	701	653	18	387
30	18	88	147	18	117	267	18	170	344	18	327	453	18	500	558	18	114	655	18	657
33	18	76	154	18	87	270	18	321	348	19	160	456	18	713	566	18	311	668	18	692
36	18	83	157	18	113	275	18	70	349	18	323	458	18	387	570	18	392	669	18	249
38	18	78	161	18	92	276	18	199	355	18	503	460	18	335	581	18	254	673	18	319
42	18	79	167	18	110	277	18	320	359	18	329	463	18	715	588	18	88	677	18	383
46	18	78	171	18	117	279	18	212	361	18	711	466	18	666	596	18	653	681	18	712
49	18	167	173	18	107	281	18	252	364	18	655	473	18	665	603	18	698	683	18	498
52	18	94	181	18	103	283	18	212	370	18	328	478	18	703	610	18	330	686	18	700
55	18	52	186	18	200	284	18	251	379	18	661	481	18	687	622	18	69	688	18	507
63	18	91	190	18	202	286	18	213	389	18	714	485	18	695	624	18	166	697	18	342
73	18	56	197	18	104	288	18	320	390	18	694	489	18	717	628	18	200	711	18	515
74	18	72	203	18	209	292	18	341	394	18	712	502	18	672	631	18	169	716	18	715
76	18	94	213	18	389	294	18	337	406	18	515	503	18	690	633	18	321	722	18	394
82	18	106	227	18	107	301	18	347	408	18	339									

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1	18	971	116	19	278	252	19	158	370	19	702	509	19	370	613	19	638	780	18	971
7	18	973	121	19	269	255	19	230	373	19	239	518	19	349	617	19	664	783	18	945
8	19	106	141	19	98	262	19	152	375	19	359	524	19	599	620	19	631	787	19	88
11	18	973	145	19	99	263	19	156	377	19	359	528	19	598	621	19	364	797	19	220
13	18	949	148	19	104	274	19	701	381	19	642	530	19	374	640	19	664	812	19	146
17	18	946	151	19	351	277	19	643	383	19	666	532	19	607	643	19	639	813	19	96
22	18	943	176	19	632	279	19	699	389	19	645	543	19	598	647	19	707	818	19	376
27	18	947	178	19	109	282	19	225	392	19	767	547	19	155	649	19	637	822	19	109
31	18	943	187	19	632	284	19	235	421	19	646	550	19	606	653	19	699	827	19	146
33	18	969	194	19	146	289	19	154	422	19	365	558	19	645	659	19	640	830	19	154
39	19	102	197	19	103	292	19	147	425	19	375	560	18	964	661	19	761	832	19	153
50	19	61	201	19	105	295	19	148	429	19	701	567	19	697	670	19	659	835	19	766
54	19	63	203	19	344	298	19	152	435	19	276	571	19	706	678	19	635	840	19	275
58	19	91	212	19	146	301	19	240	436	19	365	575	19	601	683	19	643	842	19	275
62	19	62	215	19	151	304	19	153	440	19	366	580	19	703	689	19	764	844	19	275
70	19	100	219	19	232	310	19	348	450	19	668	580	20	276	690	19	646	846	19	539
76	19	226	224	19	147	313	19	277	453	19	593	585	19	665	692	19	64	850	19	364
87	19	239	227	19	645	321	19	371	465	19	347	589	19	636	697	19	362	855	19	519
89	19	106	228	19	150	335	19	361	470	19	597	590	19	377	699	19	730	868	19	607
102	19	239	228	19	639	343	19	280	474	19	367	591	19	642	718	19	362	872	19	630
104	19	159	231	19	232	349	19	234	482	19	728	594	19	667	725	19	697	873	19	961
107	19	276	234	19	764	353	19	238	488	19	760	597	19	628	728	19	363	879	19	705
108	19	92	241	18	967	356	19	279	496	19	794	606	19	631	728	19	922	895	19	797
113	19	105	248	19	150	366	19	233	505	19	636	608	19	662	770	19	93	909	19	802
115	19	145																		

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1	20	163	85	20	183	209	20	370	318	20	461	448	20	733	587	20	137	716	20	452
5	20	162	93	20	176	210	20	372	323	20	469	465	20	624	590	20	707	721	20	179
7	20	164	100	20	277	212	20	370	324	20	453	475	20	770			847	730	20	511
10	20	165	105	20	471	223	20	375	335	20	475	489	20	626	600	20	167	737	20	461
15	20	167	115	20	462	226	20	370	337	20	468	498	20	723	602	20	528	739	20	443
16	20	164	120	20	208	233	20	371	344	20	518	500	20	726	624	20	190	741	20	468
18	20	169	127	20	388			391	348	20	519	507	20	765			535	743	20	364
21	20	167	138	20	277	236	20	450	353	20	474	526	20	710	631	20	191			469
24	20	166	143	20	366	242	20	448	354	20	477	530	20	709	638	20	169	744	20	513
28	20	166	147	20	367	246	20	392	358	20	478	535	20	724	645	20	194	746	20	456
29	20	178	152	20	294	249	20	390	366	20	520	538	20	521	648	20	718	753	20	538
33	20	178	158	20	206	260	20	463	370	20	469	540	20	724	657	20	371	757	20	537
36	20	183	166	20	443	274	20	464	382	20	476	542	20	627	662	20	490	760	20	513
38	20	173	173	20	384	281	20	373	385	20	446	550	20	723	667	20	713	769	20	721
43	20	185	181	20	385	294	20	459	393	20	517	552	20	721			909	772	20	711
46	20	170	182	20	385	287	20	375	398	20	519	553	20	621	673	20	473	775	20	723
54	20	293	187	20	452	294	20	374	402	20	522	555	20	210	676	20	714	784	20	726
57	20	375	190	20	386	295	20	451	410	20	526	559	20	168	700	20	172	789	20	712
64	20	208	193	20	386	298	20	373	415	20	516	563	20	207			714	794	20	523
68	20	209	195	20	276	303	20	458	417	20	450	568	20	774	704	20	183	905	20	729
71	20	186	198	20	460	306	20	475	424	20	511	570	20	295	706	20	175	907	20	622
76	20	386	200	20	294	310	20	460	426	20	736	579	20	465	709	20	183	811	20	729
81	20	184	202	20	369										713	20	623	826	18	965

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1	21	956	122	21	202	311	21	900	499	21	175	654	21	400	797	21	917	968	21	554
12	21	397	125	21	180	315	22	9	502	21	968	655	21	429	806	22	5	972	20	1021
22	21	201	131	21	108	339	21	410	514	21	193	659	21	387	815	21	688	976	20	1014
26	23	313	137	21	176	381	21	952	518	21	175	665	21	401	817	21	691	979	21	692
30	20	1012	140	21	186	386	21	196	520	21	301	667	21	506	821	21	922	981	21	35
34	20	1022	144	21	192	389	21	296	525	20	965	670	21	392	827	21	948	987	21	700
38	20	1013	147	21	302	394	21	402	526	21	175	673	21	402	837	21	791	990	21	37
40	21	27	153	21	188	410	21	190	528	21	194	675	21	409	840	21	690	992	21	106
44	20	1013	157	21	207	413	21	191	531	21	202	678	21	559	843	21	699	998	21	189
46	20	1013	161	21	177	418	21	916	537	21	792	684	22	2	847	21	679	1003	21	430
48	20	1019	165	21	697	422	21	915	550	21	389	708	21	434	859	21	938	1007	21	204
57	21	187	170	21	181	426	21	966	558	21	298	712	21	797	871	21	696	1012	21	194
62	20	961	184	21	106	430	21	971	563	21	205	718	21	561	875	21	923	1016	21	401
64	21	39	185	21	684	437	21	198	570	21	787	720	21	550	877	22	8	1017	21	408
69	20	962	199	21	110	441	21	423	582	21	973	731	21	941	882	21	924	1033	21	693
70	20	961	202	21	178	449	21	178	593	21	401	751	21	556	923	20	962	1037	21	694
71	20	962	206	21	111	451	21	393	595	21	305	756	21	549	924	20	964	1046	21	701
73	20	963	209	21	178	460	21	693	598	21	672	761	21	562	926	21	28	1049	21	563
75	21	193	211	21	391	462	21	914	606	21	395	766	21	552	932	21	177	1051	21	563
77	20	964	223	22	16	466	21	912	614	21	407	771	21	676	937	21	698	1052	21	502
78	21	29	271	22	120	472	21	964	616	21	425	782	21	911	940	21	959	1059	21	690
87	20	1016	284	21	195	480	21	919	629	21	303	785	21	561	952	21	304	1061	21	633
93	21	31	288	21	197	491	21	302	631	21	434	788	21	558	955	21	299	1064	21	689
102	21	83	296	21	503	497	21	179	647	21	431	795	21	692	961	21	409	1068	21	674
112	21	951																		

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1	23	40	114	23	102	218	23	182	348	23	270	462	23	431	558	23	46	733	23	158
8	23	37	117	23	92	221	23	179	351	23	272	467	23	332	565	23	443	743	23	175
11	23	91	119	23	90	228	23	264	352	23	277	469	23	331	578	23	447	748	23	182
13	23	87	122	23	92	231	23	178	366	23	440	471	23	442	579	23	43	749	23	218
15	23	154	125	23	103	235	23	257	376	23	321	476	23	354	592	23	327	752	23	219
27	23	252	129	23	169	241	23	458	377	23	358	478	23	458	614	23	437	753	23	250
30	23	184	133	23	104	242	23	257	382	23	358	482	23	441	616	23	204	755	23	355
31	23	38	140	23	106	244	23	241	383	23	321	484	23	425	640	23	177	764	23	246
34	23	99	142	23	104	254	23	214	386	23	322	489	23	448	642	23	268	766	23	247
41	23	45	144	23	169	259	23	248	387	23	332	490	23	448	644	23	275	768	23	247
47	23	90	146	23	160	264	23	177	389	23	320	491	23	438	651	23	449	774	23	322
54	23	162	157	23	161	265	23	436	393	23	428	495	23	439	664	23	180	778	23	322
60	23	96	158	23	250	278	23	217	407	23	434	497	23	459	667	23	635	780	23	330
66	23	97	164	23	171	287	23	253	416	23	333	504	23	489	695	23	98	782	23	357
73	23	101	170	23	173	298	23	484	427	23	335	509	23	447	697	23	106	783	23	433
77	23	95	176	23	182	308	23	450	429	23	354	512	23	438	698	23	274	788	23	432
79	23	42	181	23	244	315	23	269	436	23	319	515	23	427	702	23	167	791	23	431
84	23	39	189	23	173	320	23	488	439	23	318	523	23	324	706	23	153	799	23	476
86	23	259	191	23	181	326	23	270	443	23	362	526	23	455	709	23	164	804	23	452
94	23	261	193	23	252	330	23	461	447	23	336	531	23	456	716	23	157	808	23	455
103	23	95	195	23	185	338	23	271	449	23	359	533	23	453	720	23	324	809	23	449
105	23	98	206	23	316	341	23	216	453	23	357	540	23	457	727	23	163	811	23	477
112	23	216	211	23	184	347	23	268	456	23	360	544	23	490	730	23	168	834	23	357

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1	23	923	188	24	483	377	24	6	564	24	361	735	24	666	919	23	961	1145	24	722
3	23	932	191	23	1006	381	24	119	566	24	357	737	24	538	926	23	933	1154	24	410
7	23	924	193	24	9	383	24	792	569	24	412	740	24	531	928	24	800	1161	24	495
9	23	923	196	24	122	388	24	736	573	24	430	746	24	517	943	24	810	1173	24	494
11	24	782	202	24	15	390	24	777	575	24	424	749	24	522	946	24	710	1177	24	414
25	23	922	215	23	973	393	24	776	576	24	364	752	24	542	952	24	711	1182	24	536
30	24	728	222	24	7	395	24	658	580	24	356	758	24	525	956	24	715	1188	23	921
33	23	976	232	24	22	397	24	736	583	24	215	761	24	740	959	23	933	1190	23	970
55	23	926	237	23	969	399	24	120	590	24	413	763	24	716	964	24	712	1194	23	1004
59	23	925	244	24	18	406	24	212	593	24	476	780	24	516	968	23	966	1196	24	708
69	23	927	265	23	1005	418	24	1	601	24	360	783	24	524	976	24	659	1199	24	712
73	23	971	266	24	7	423	24	751	607	24	429	789	24	521	981	24	797	1200	24	118
75	24	12	268	23	1007	429	24	780	612	24	484	792	24	521	986	24	671	1201	24	119
83	24	1	271	23	1005	436	24	737	624	24	114	796	24	748	989	24	711	1208	24	118
104	23	927	275	24	8	440	24	774	631	24	422	808	24	664	991	24	667	1204	24	118
105	24	10	279	23	1000	450	24	794	636	24	425	822	24	862	996	24	730	1206	24	216
112	24	778	283	24	6	457	24	723	643	24	424	832	23	921	1010	24	805	1208	24	660
127	24	792	287	24	482	472	24	114	647	24	517	835	23	924	1015	24	415	1221	24	535
129	24	730	311	24	478	476	24	364	656	24	490	837	24	530	1024	24	808	1227	24	539
132	24	706	321	24	746	481	24	217	662	24	421	839	24	668	1031	24	111	1231	24	350
138	23	972	323	24	481	486	24	417	668	24	423	840	24	714	1047	24	426	1234	24	492
142	23	959	326	24	770	495	24	357	671	24	487	842	24	713	1056	24	704	1237	24	493
147	24	744	328	24	352	503	24	541	677	24	420	845	24	738	1066	24	511	1240	24	530
152	24	746	342	24	356	509	24	209	680	24	429	854	24	668	1072	24	514	1242	24	531
156	24	796	343	24	13	518	24	210	688	23	968	864	24	768	1078	24	769	1244	24	798
159	24	703	349	24	738	526	24	218	692	24	492	870	24	786	1081	24	667	1250	24	533
162	24	729	355	24	15	532	24	367	693	24	489	888	24	709	1084	24	740	1255	24	216
165	24	797	358	24	735	542	24	116	700	24	527	890	24	671	1096	24	709	1257	24	530
168	24	359	361	24	806	545	24	351			715	900	24	771	1098	24	512	1259	24	523
173	24	366	363	24	14	548	24	365	712	24	124	912	24	670	1113	24	431	1262	24	526
179	23	1004	370	24	770	556	24	116	733	24	526	916	24	745	1131	23	928	1265	24	536

N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.
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1	25	813	115	25	794	289	25	876	422	25	1018	530	26	50	666	26	132	822	25	819
13	25	715	120	25	796	292	25	872	424	26	44	534	26	52	677	25	722	825	25	820
19	25	705	123	25	785	296	26	35	428	25	1022	536	26	128	688	25	717	828	25	858
20	25	719	124	25	785	298	25	959	432	25	963	541	26	110	693	25	854	836	25	868
26	25	711	127	25	791	300	25	970	434	25	961	544	26	111	710	25	787	841	25	510
30	25	710	130	25	861	302	26	22	441	26	33	549	26	141	715	25	786	849	25	812
34	25	708	135	26	94	307	25	971	443	26	31	553	26	131	718	25	790	853	25	812
39	25	704	150	25	972	310	25	1023	446	25	1021	556	26	171	720	25	1021	853	26	36
43	25	710	157	25	866	311	25	877	449	26	32	566	26	155	724	25	1018	856	25	871
46	25	706	159	25	793	314	25	878	450	26	33	567	26	143	728	26	161	858	26	36
50	25	789	161	25	856	318	25	1023	456	26	38	570	26	251	740	26	124	861	26	37
52	25	743	174	25	878	323	25	975	460	26	144	572	26	170	744	26	169	862	26	36
56	25	707	178	25	866	330	25	958	471	26	26	575	26	255	746	26	32	864	26	46
59	25	707	180	25	863	336	25	871	473	26	26	581	26	143	751	26	149	867	26	94
68	25	714	182	25	867	339	25	953	475	26	115	582	26	340	758	26	148	868	26	91
73	25	713	187	25	956	343	25	960	481	26	92	588	26	155	771	26	106	871	26	117
77	25	741	193	25	865	350	25	958	489	26	27	591	26	129	779	25	719	874	25	796
80	25	713	195	25	868	356	26	160	494	26	46	596	26	154	782	25	786	880	26	159
81	25	783	199	26	821	359	25	963	497	26	126	598	26	156	784	25	783	883	26	163
84	25	815	214	25	966	367	25	952	500	26	43	602	26	154			1020	899	26	112
89	25	742	231	26	38	370	26	122	502	26	43	604	26	158	789	26	121	901	26	120
95	25	789	233	26	29	380	25	951	505	26	39	606	25	781	793	26	142	904	26	1007
96	25	721	249	26	41	387	26	23	506	26	162	611	26	253	797	25	863	905	26	126
99	25	721	257	26	40	403	25	955	508	26	125	617	26	157	804	25	789	908	26	253
103	25	726	262	25	873	406	26	47	510	26	127	622	26	160	806	25	817	910	26	261
107	25	858	274	25	875	415	26	27	514	26	152	623	26	256	809	25	815	912	26	1007
109	25	792	278	25	870	417	25	954	520	26	150	641	26	337	811	26	148	915	27	277
113	25	793	283	25	705	420	25	1020	526	26	114	649	26	136	814	25	863			

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1	26	627	96	26	936	225	26	797	325	26	922	392	27	91	463	27	123	557	27	125
4	26	626	107	27	31		27	1007	327	26	940	394	27	142	465	27	143	563	26	634
6	26	628	111	26	645	231	26	925	331	26	940	397	27	81	472	27	121	565	26	629
9	26	636	118	27	45	237	26	929	334	26	1007	400	27	80	475	26	927	568	26	636
14	26	635	123	26	917	253	26	817	335	27	35	401	27	77	479	27	130	570	26	637
19	26	649	127	26	691	259	26	782	339	27	30	402	27	129	488	26	1007	572	26	643
23	27	94	132	26	644	260	26	820	341	27	32	405	27	79	489	26	633	573	26	632
29	26	650	134	26	783	264	26	812	344	27	29	408	27	90	492	26	630	577	26	774
31	26	924	139	26	690	270	26	810	346	27	28	411	27	109	495	26	643	580	26	915
36	27	37	141	27	39	277	26	782	347	27	31	417	27	128	498	26	703			1006
39	26	647	151	26	693	279	26	775	348	27	73	420	27	118	506	26	784	588	26	915
44	26	918	159	26	701	286	26	781	351	27	74	426	26	638	514	27	27	590	26	921
51	26	698	161	26	697	288	26	778	353	27	29	440	27	90	517	26	819	591	26	933
56	26	700	163	26	701	291	26	775	355	27	43	443	27	117	520	26	913	601	27	72
60	26	770	167	26	696	292	26	772	362	27	85	446	27	124	525	27	74	603	27	77
69	27	33	170	27	111	298	26	920	376	27	92	449	27	121	531	27	46	607	27	30
75	26	632	176	26	779	302	27	88	383	27	47	451	27	117	534	27	96	608	27	73
79	26	807	177	26	816	308	26	912	388	27	28	453	27	120	544	26	922	612	27	120
87	26	642	180	27	133	312	26	919	389	27	28	455	27	123	548	27	76	613	27	51
90	26	630	212	27	113	318	26	814	390	27	27	459	27	127	551	26	815	623	26	18
94	26	629				320	26	917	391	27	35	461	27	109	555	27	128			

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1	27	993	92	28	137	168	28	257	284	28	364	394	28	539	551	28	59	650	28	416
4	27	1002	94	28	64	172	28	269	285	28	545	410	28	545	556	27	1004	659	28	354
8	27	998	95	28	138	183	28	258	287	28	535	413	28	525	558	28	491	667	28	539
12	27	1001	99	28	189	186	28	271	290	28	415	418	28	515	563	28	282	669	28	549
17	27	990	101	28	63	190	28	264	295	28	412	423	28	363	569	28	551	674	28	434
20	27	1003	106	28	135	192	28	265	297	28	407	425	28	554	572	28	139	677	28	547
23	27	992	107	28	134	196	28	297	301	28	482	430	28	554	574	28	355	679	28	545
27	27	996	110	28	191	197	28	298	318	28	410	433	28	1023	578	28	518	680	28	467
29	27	1003	113	28	186	198	28	297	322	28	406	434	27	1002	579	28	492	682	28	490
31	27	994	114	28	1023	205	28	294	326	28	489	490	28	137	584	28	469	684	28	353
34	27	995	115	28	253	207	28	299	328	28	513	492	28	267	586	28	254			1002
37	27	999	118	28	190	209	28	299	336	28	519	498	28	144	589	28	140	689	31	1005
38	27	999	122	28	351	214	28	343	339	28	475	501	28	347	603	28	269			1006
46	28	18	126	28	188	224	28	471	343	28	488	504	28	137	604	28	469			1007
51	27	1006	129	28	186	237	28	293	350	28	479	506	28	265	606	28	552			1002
54	28	61	131	28	188	238	28	293	357	28	523	509	28	349	610	28	366	690	31	1005
57	28	20	133	28	191	241	28	350	362	28	362	512	28	367	612	28	366			1006
59	28	17	135	28	250	244	28	481	364	28	362	514	28	474	614	28	365			1002
62	28	62	144	28	271	248	28	349	366	28	409	519	27	991	616	28	347	691	31	1005
66	28	59	146	28	266	251	28	20	369	28	470	523	28	537	620	28	361			1006
67	28	65	148	28	358	255	28	410	373	28	404	530	28	537	623	28	409			1002
70	28	132	152	28	188	256	28	412	376	28	522	533	27	997	628	28	405	692	31	1005
76	28	295	154	28	187	258	28	368	384	28	546	538	27	988	632	28	403			1006
83	28	58	155	28	298	269	28	364	387	28	524	541	27	1007	635	28	535			1002
86	28	60	157	28	359	272	28	476	388	28	548	544	28	552	637	28	413	693	31	1005
88	28	136	166	28	292	283	28	365	392	28	486	546	28	22	643	28	517			1006
91	28	192																		

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1	29	55	169	29	91	313	30	341	475	29	720	645	30	4	806	29	330	1012	29	94
5	29	343	173	29	93	318	30	331	478	29	840	650	29	57	812	30	352	1018	29	384
31	30	349	177	29	959	326	29	359	480	29	880	661	29	60	816	29	340	1024	29	899
39	30	118	186	29	533	332	29	367	493	29	720	666	30	19	822	29	56	1031	29	381
42	29	56	190	30	337	335	29	361	498	29	944	668	30	17	824	28	963	1039	30	140
45	29	61	194	29	334	338	30	341	508	29	774	675	30	21	832	29	963	1040	30	141
52	29	353	195	29	332	340	29	844	511	29	773	678	30	19	852	29	100	1043	30	139
55	28	961	199	29	875	347	30	8	517	29	833	683	29	949	856	29	356	1045	29	223
59	29	93	206	30	319	352	29	351	524	29	848	689	30	141	862	29	894	1047	29	380
62	29	221	211	30	324	357	29	416	536	29	951	692	30	119	877	29	334	1052	30	123
64	30	318	215	29	223	360	29	770	542	29	940	699	30	304	881	29	575	1073	30	1005
67	30	312	220	29	334	365	29	827	545	29	877	711	30	120	889	29	410	1074	29	418
70	28	961	222	29	333	376	29	370	552	29	843	718	30	125	892	29	377	1076	29	353
75	29	373	226	29	352	381	29	574	556	29	841	721	30	346	902	30	117	1077	29	367
87	30	13	230	29	362	383	30	9	560	29	410	727	30	336	905	29	941	1079	29	841
92	30	327	234	29	352	388	30	9	563	29	836	731	30	321	910	29	836	1082	30	306
98	29	64	237	29	371	395	30	12	565	29	832	741	30	328	937	29	414	1092	29	952
101	29	91	242	29	414	397	29	775	569	29	831	747	30	326	940	29	578	1095	29	948
103	29	54	245	30	1	405	29	413	571	29	835	752	30	315	944	29	778	1097	29	61
104	29	96	250	29	364	406	29	366	578	29	846	753	29	1035	955	29	784	1100	31	1002
107	29	63	258	29	579	408	30	340	583	29	838	754	30	16	959	30	348			1006
111	28	962	263	29	413	409	29	370	587	29	884	755	30	24	961	30	313			1001
113	28	963	265	29	338	410	29	361	595	29	839	760	30	21	967	29	879	1101	31	1003
115	28	965	268	30	334	411	29	411	598	29	901	766	29	776	972	30	8			1005
119	29	97	270	29	362	416	30	23	599	30	314	770	30	343	977	30	115			1002
123	29	336	276	30	303	420	29	368	602	29	842	772	30	27	987	29	783	1102	31	1006
135	29	102	277	30	311	426	30	122	607	29	904	773	30	330	990	29	939			1006
141	29	101	280	30	340	434	29	719	614	30	128	775	30	335	992	29	939	1103	31	1002
145	29	97	283	29	406	437	29	577	619	30	315	779	30	2	995	30	127			1005
149	29	221	288	30	344	442	29	419	628	29	903	782	30	347	999	29	837	1104	31	1002
155	29	221	293	30	345	447	29	417	631	29	902	784	29	947	1002	30	14			1006
157	29	358	296	29	339	451	30	129	635	29	943	789	29	1034	1005	30	343			1001
161	29	783	301	30	124	463	30	348	639	30	15	790	29	781	1007	30	333	1105	31	1002
163	30	324	304	30	126	466	29	581	641	30	15	799	29	354	1010	30	334			1006
164	29	372	307	30	338	471	29	771												

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Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	31	235	103	31	381	185	31	601	280	31	652	400	31	878	596	31	855	710	31	219
7	31	346	106	31	384	189	31	476	283	31	492	406	31	715			1002	718	31	376
16	31	1005	112	31	1006	194	31	473	285	31	654	410	31	716	604	31	848	728	31	392
16	31	270	118	31	267	197	31	386	290	31	718	414	31	720	614	31	851	730	31	669
19	31	265	118	31	384	200	31	474	294	31	718	419	31	877	618	31	874	739	31	475
24	31	348	120	31	340	203	31	476	299	31	707	425	31	832	623	31	843	740	31	667
30	31	264	125	31	382	206	31	477	308	31	481	428	31	719	628	31	844	745	31	847
35	31	598	126	31	383	210	31	602	337	31	700	432	31	711	636	31	853	749	31	731
45	31	372	128	31	375	216	31	473	343	31	653	497	31	721	640	31	836	752	31	1005
51	31	288	129	31	350	219	31	491	345	31	653	499	31	722	651	31	876	753	31	731
57	31	351	134	31	382	226	31	391	349	31	627	502	31	831	656	31	879	755	31	854
63	31	267	136	31	371	229	31	471	358	31	626	508	31	827	660	31	840	758	31	852
67	31	271	138	31	655	236	31	490	362	31	858	511	31	722	671	31	833	764	31	839
71	31	381	154	31	705	239	31	475	368	31	629	534	31	670	676	31	857	769	32	1037
74	31	374	162	31	373	244	31	479	371	31	672	538	31	819	682	31	858			1038
79	31	369	164	31	470	248	31	495	379	31	826	547	31	822	685	31	835	770	32	1037
		1001	168	31	478	255	31	497	384	31	705	566	31	828	689	31	834			1038
85	31	269	170	31	388	259	31	709	388	31	671	571	31	829	695	31	218	771	32	1037
89	31	271	175	31	387	264	31	717	390	31	730	577	31	729	697	31	221			1038
90	31	371	181	31	390	267	31	493	395	31	668	582	31	873	703	31	272	772	32	1038
92	31	286	183	31	383	275	31	480	398	31	671	586	31	821	705	31	219	773	31	1003
99	31	268																		

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N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	32	318	83	32	399	214	32	681	322	32	718	455	32	884	622	32	967	803	32	548
8	32	325	100	32	392	222	32	679	328	32	720	459	32	746	626	32	964	804	32	553
7	32	326	106	32	397	229	32	557	338	32	710	467	32	799	631	32	964	807	32	552
9	32	323	111	32	393	232	32	555	342	32	714	472	32	798	638	33	138	811	32	804
16	32	319	116	32	404	234	32	554	345	32	726	478	32	804	643	32	980	814	32	798
19	32	320	123	32	388	236	32	671	347	32	726	497	32	809	651	33	151	816	32	892
24	32	317	127	32	394	251	32	558	352	32	717	518	32	885	663	33	1014	820	32	813
27	32	317	136	32	387	252	32	711	362	32	748	522	32	902	683	33	139	825	32	961
29	32	323	151	32	491	262	32	715	395	32	733	528	32	886	723	32	966	829	32	957
34	32	325	154	32	544	265	32	716	397	32	739	534	32	801	726	32	975	839	32	957
37	32	379	161	32	492	269	32	676	402	32	745	540	32	887	738	32	975	845	32	966
40	32	380	163	32	494	272	32	677	405	32	734	547	32	968	741	32	974	847	33	128
42	32	389	167	32	492	276	32	685	411	32	735	555	32	959	743	32	974	871	32	961
48	32	378	171	32	546	284	32	683	417	32	743	561	32	889	745	32	979	875	35	400
51	32	377	177	32	495	289	32	714	424	32	733	571	32	969	749	33	169			1039
55	32	384	184	32	548	292	32	687	426	32	740	574	32	960	761	33	136			1038
66	32	380	189	32	550	302	32	706	434	32	732	579	32	966	767	33	160	876	35	400
69	32	378	197	32	555	307	32	678	437	32	731	585	32	963	796	32	818			1038
72	32	383	200	32	556	310	32	675	443	32	730	591	32	968	798	32	377			1039
78	32	381	204	32	553	315	32	723	447	32	737	610	32	881	801	33	494			

N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.	N. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	34	70	124	34	227	249	34	962	370	34	530	474	34	634	582	34	633	674	34	533
8	34	103	129	34	228	251	34	411	375	34	510	480	34	554	585	34	629	690	34	537
13	34	71	133	34	246	254	34	434	380	34	444	489	34	554	588	34	552	692	34	513
17	34	100	136	34	265	256	34	412	383	34	446	491	34	634	590	34	548	694	34	543
25	34	104	139	34	266	296	34	444	385	34	499	493	34	643	593	34	687	696	34	646
29	34	99	145	34	241	301	34	442	389	34	503	496	34	557	596	34	701	702	34	553
35	34	72	152	34	245	304	34	495	400	34	511	499	34	631	603	34	109	704	34	549
38	34	193	161	34	239	311	34	443	403	34	508	503	34	709	606	34	105	707	34	650
43	34	110	172	34	268	314	34	500	409	34	441			712	609	34	197	712	34	648
45	34	107	175	34	270	323	34	497	413	34	514	514	34	641	612	34	198	718	34	651
49	34	199	179	34	273	325	34	516	419	34	544	516	34	688	615	34	235	730	34	552
59	34	105	185	34	269	329	34	446	433	34	541	519	34	684	628	34	264	733	34	706
64	34	108	191	34	271	332	34	429	435	34	537	523	34	686	636	34	247	743	35	400
71	34	106	194	34	432	337	34	550	437	34	538	525	34	685	641	34	272			1038
76	34	196	201	34	395	345	34	437	439	34	538	529	34	636	645	34	439			1039
80	34	198	206	34	397	352	34	438	447	34	542	541	34	644	649	34	448	744	35	400
83	34	242	212	34	424	353	34	531	454	34	541	544	34	645	652	34	447			1035
96	34	197	227	34	398	356	34	506	456	34	703	550	34	712	655	34	439			1039
98	34	195	234	34	400	362	34	436	464	34	641	565	34	642	658	34	440	745	35	400
106	34	227	238	34	434	365	34	512	468	34	632	568	34	654	660	34	516			1038
107	34	229	243	34	430	368	34	544	470	34	640	578	34	633	666	34	527			1039
111	34	232																		

In these tables are shown the page of the South Carolina Reports where each case begins, arranged in numerical order. Opposite this is given the volume and page of the Southeastern Reporter where the case is found. By this the subscriber, finding a South Carolina case cited, without the title, by volume and page of the South Carolina Reports, can readily turn to it in the Southeastern Reporter.

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(NOTE. The Southeastern Reporter, which did not begin publication until Feb. 1, 1887, includes only the following cases from volume 25, South Carolina Reports:)

S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
394	1	13	416	1	141	488	1	1	496	1	5	525	1	33			

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S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	11	1099	117	1	443	198	1	108	283	2	133	370	2	293	538	2	568	606	1	419
19	1	45	121	1	437	208	2	1	290	2	16	391	2	303	553	2	495		2	3
33	1	19	125	1	468	213	2	14	296	2	24	401	2	307	557	2	401	609	2	114
41	11	1096	130	1	497	219	2	4	300	2	136	415	2	314	561	2	412			119
49	1	52	136	1	502	227	1	897	304	2	116	424	2	319	566	2	507	610	2	396
70	1	159	152	1	510	231	1	893	312	2	565	431	2	287	573	2	497			265
72	1	363	155	1	465	237	1	884	317	2	389	441	2	322	581	2	576	611	2	302
77	1	160	160	2	9	244	1	890	321	2	609	450	2	474	591	2	574	612	2	396
80	1	366	169	1	597	248	2	113	327	2	391	474	2	483	595	2	616		7	71
91	1	372	173	1	707	251	1	881	331	2	612	480	2	393	599	2	699	613	7	71
99	1	413	179	1	711	256	2	385	337	2	121	490	2	486	604	2	623		2	108
101	1	414	187	1	594	258	2	19	348	2	125	497	2	490		3	113	614	7	72
110	1	421	192	1	670	270	2	130	353	2	127	506	2	501	607	12	96			
114	1	440	196	1	814	275	2	387	358	2	286	517	2	402		1	156			

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S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	2	702	87	2	858	159	3	75	240	3	225	318	3	473	456	3	860	599	4	562
9	2	618	90	3	45	164	3	82	244	3	222	324	3	538	464	4	60	602	4	564
15	2	706	92	3	842	166	3	78	248	3	297	331	3	542	472	4	148	615	4	570
22	2	621	97	3	844	171	3	84	251	3	298	340	3	546	479	4	64	621	2	841
29	2	624	107	3	846	178	3	71	262	3	337	348	3	551	493	4	71			859
39	2	834	110	3	46	188	3	196	268	3	301	368	3	477	500	4	845	622	3	90
44	2	709	126	3	65	193	3	199	272	3	340	376	3	776	514	4	74	623	3	83
50	2	634	132	3	60	201	3	202	288	3	462	385	4	49	525	4	229			221
53	2	630	137	3	55	215	3	193	295	3	465	408	3	781	549	4	145	624	3	304
68	2	837	150	3	63	221	3	211	300	3	468	419	3	787	562	4	223		4	152
71	2	849	153	3	69	226	3	214	305	3	471	425	3	790	576	5	187	625	7	356
80	2	854	156	3	68	235	3	219	309	3	606	436	3	849	591	4	240			

S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	4	790	74	5	215	164	5	348	255	5	620	373	6	158	476	6	327	583	6	843
4	4	814	81	5	218	172	5	352	258	5	622	382	6	155	481	6	330	589	6	824
16	4	792	86	5	603	176	5	355	261	5	623	388	5	831	486	6	305	605	5	479
18	4	793	101	5	464	181	5	475	268	5	721	401	5	835	499	6	309	606	5	362
23	4	796	115	5	270	188	5	480	281	5	718	406	5	842	504	6	313	606	5	363
29	4	799	119	5	272	198	5	357	285	5	727	418	5	837	521	6	321	606	5	615
38	4	805	123	5	274	201	5	485	303	5	806	431	6	286	530	6	325	607	5	601
38	9	423	125	5	333	211	5	359	313	5	810	440	6	284	534	6	333	607	5	809
50	4	810	134	5	338	218	5	593	317	5	812	442	6	290	545	6	558	607	5	827
53	4	811	143	5	343	224	5	611	325	5	816	445	6	291	559	6	564	608	6	152
58	5	165	152	5	470	233	5	597	331	5	818	454	6	295	562	6	566	609	6	577
63	5	167	154	5	347	238	5	713	345	5	823	463	6	298	565	6	577	609	9	465
71	5	84	156	5	347	247	5	599	358	6	28	466	6	300	572	6	820	609	9	465
72	5	170	157	5	471	250	5	617	364	6	148	470	6	302	580	6	818	610	7	48

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S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	6	847	61	6	905	135	7	53	239	7	291	303	7	515	414	7	811	514	7	833
4	6	894	64	6	938	140	7	56	247	7	289	325	7	501	421	7	814	520	8	83
9	6	850	72	6	907	147	7	65	254	7	485	332	7	505	426	7	610	533	8	8
15	6	853	81	6	911	152	7	60	258	7	487	343	7	510	438	7	605	544	8	1
19	6	855	84	7	35	161	7	58	260	7	490	355	7	523	447	7	618	560	8	27
22	6	857	96	6	936	170	7	72	265	7	493	369	7	529	453	7	593	584	8	195
26	6	887	102	7	42	175	7	74	278	7	597	372	7	601	466	7	817	590	8	203
31	6	859	108	6	943	180	7	76	286	6	932	381	7	614	476	7	822	597	6	848
34	6	891	113	7	44	193	7	252	290	6	934	389	7	481	491	7	838	597	6	960
45	6	897	116	7	49	201	7	296	292	7	483	395	7	743	501	7	828	598	6	937
49	6	899	124	7	67	287	7	295	298	7	499	407	7	844	510	7	836	598	7	489
54	6	902	130	7	45															

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S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	8	14	126	8	796	218	9	96	328	9	510	422	9	335	539	9	650	610	10	390
31	8	27	131	8	698	229	9	97	329	9	263	428	9	466	549	9	591	611	9	658
33	8	193	140	8	703	234	9	99	335	9	266	450	9	512	564	9	634	611	9	659
43	8	322	144	8	706	238	9	115	342	9	271	459	9	518	579	9	661	612	8	638
61	8	199	153	8	689	249	9	120	348	9	274	467	9	515	586	9	664	612	8	642
69	8	437	159	8	842	262	9	101	356	9	277	479	9	521	587	9	664	612	8	799
74	8	440	163	9	18	270	9	110	360	9	338	483	9	523	607	10	390	613	9	104
85	8	433	167	8	845	277	9	113	370	9	345	490	9	525	608	10	389	613	9	105
93	8	539	173	8	848	284	9	108	377	9	353	499	9	587	608	10	390	614	9	269
97	8	541	177	8	853	291	9	334	381	9	359	505	9	652	609	8	536	614	9	270
101	8	526	184	9	19	296	9	107	391	9	342	519	9	686	609	9	657	615	9	273
105	8	692	192	8	850	302	9	106	399	9	355	526	9	659	609	9	658	616	9	345
111	8	639	207	9	94	305	9	156	412	9	422	530	9	589	609	10	390	617	9	350
117	8	840	210	8	855	326	9	511	419	9	341	534	9	656	610	9	659	617	9	741
121	8	695	215	9	95															

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S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	9	726	151	9	782	262	9	852	342	9	1027	427	10	107	510	10	243	602	9	743
13	9	804	153	9	803	267	9	950	346	9	1033	436	10	95	527	10	340	602	9	743
36	9	729	156	9	811	276	9	953	360	9	1028	444	10	98	547	10	330	602	9	773
49	9	733	161	9	824	282	9	957	375	9	1055	453	10	101	576	10	262	604	9	813
53	9	689	171	9	792	290	9	960	378	9	1059	463	10	176	581	10	507	604	9	817
60	9	736	183	9	797	301	9	969	389	9	1058	463	10	390	588	10	54a	605	9	802
81	9	692	199	9	390	309	9	968	393	10	91	482	10	221	600	9	742	605	9	971
87	9	690	199	10	814	313	9	966	398	10	93	490	10	224	600	9	741	606	9	982
91	9	973	206	9	822	322	9	955	405	10	106	498	10	228	600	9	742	607	9	1036
120	9	765	213	9	820	326	9	964	408	10	96	498	10	1104	601	9	735	608	9	1038
125	9	777	218	9	844	330	9	961	413	10	72	504	10	226	601	11	831	608	9	1056
141	9	780	238	9	853	333	9	1037	420	10	104	504	10	1104	602	9	743	609	10	1104
147	9	775	259	9	862	337	9	981												

S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	10	578	123	10	876	215	10	956	293	10	1010	392	11	292	534	11	390	585	10	823
5	10	579	127	10	877	226	10	950	295	10	1077	410	11	339	538	11	379	587	10	879
14	10	611	130	10	874	229	10	947	299	11	96	434	11	208	547	11	391	589	10	934
17	10	772	134	10	880	238	10	946	303	10	1012	437	11	298	555	11	383	590	10	944
27	10	769	139	10	931	243	10	929	308	10	1079	441	11	211	563	11	324	591	11	204
45	10	612	142	10	932	247	10	960	314	11	97	443	11	301	582	10	550	592	10	960
57	10	616	146	10	933	249	10	963	319	11	192	455	11	349	582	10	827	593	10	1076
72	10	825	149	10	937	254	10	961	348	11	99	462	11	299	582	10	550	593	10	1074
77	10	829	155	10	936	259	10	1008	351	11	100	473	11	394	583	10	551	594	10	1011
86	11	209	160	10	941	264	10	1075	359	11	205	480	11	304	583	10	552	595	10	1073
91	10	831	165	10	952	267	10	1073	364	10	1083	492	11	337	583	10	577	597	11	96
97	10	833	171	11	86	269	11	540	365	11	206	499	11	351	583	10	604	598	10	1067
102	10	766	187	10	951	273	10	1070	369	11	82	503	11	331	583	10	1103	599	11	102
107	10	835	189	10	943	277	10	1069	378	10	1081	511	11	548	584	10	616	600	11	103
112	10	837	195	10	939	281	10	1071	383	10	1082	511	11	552	584	10	774	601	11	634
117	10	822	201	10	1007	286	11	93	388	11	207	528	11	332	584	10	824	601	11	850
121	10	875	203	10	953	291	10	1009												

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S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	11	434	151	11	641	229	11	703	293	11	971	436	12	8	582	12	556	606	12	475
25	11	386	161	11	645	231	11	702	308	12	260	442	12	5	597	11	439	607	12	474
28	11	386	164	11	684	234	11	728	312	12	11	451	12	165	597	11	438	607	12	475
39	11	440	169	11	635	238	11	689	324	11	1077	477	12	101	598	11	553	608	12	560
47	11	595	175	11	631	243	11	727	339	11	1069	487	12	98	598	11	579	608	12	665
56	11	545	184	11	697	247	11	726	350	11	1017	498	12	164	598	11	634	609	12	600
66	11	699	190	11	686	251	11	786	354	11	1065	505	12	257	598	11	634	609	12	563
83	11	682	194	11	687	255	11	758	359	11	1093	512	12	208	599	11	634	610	12	623
100	11	693	198	11	691	260	11	766	367	11	1031	522	12	367	599	11	638	610	12	623
111	11	637	202	11	760	268	11	764	389	11	1073	530	12	419	601	11	785	611	12	623
115	11	635	206	11	695	273	11	820	401	12	8	543	12	414	601	11	1068	611	12	623
117	11	624	210	11	761	276	11	787	404	11	1066	556	12	413	602	12	423	612	12	664
136	11	636	216	11	692	279	11	788	410	12	96	562	11	623	605	12	365	613	12	664
140	11	635	219	11	725	282	11	970	414	12	93	562	12	564	606	12	423	613	12	816
142	11	640	223	11	704	285	11	968	427	12	9	562	12	816	606	12	474			

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S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	12	560	85	12	932	146	13	326	236	13	417	301	13	539	417	13	602	541	13	845
9	12	367	90	12	929	154	13	323	242	13	416	311	13	542	444	13	630	554	13	853
9	12	664	99	12	934	160	13	331	246	13	473	326	13	547	452	13	650	559	13	848
13	12	666	104	12	1023	165	13	355	255	13	450	330	13	525	464	13	427	575	13	322
16	13	619	107	12	1071	169	13	332	259	13	447	345	13	530	468	13	664	576	13	322
41	12	662	109	12	1070	175	13	357	268	13	475	357	13	628	496	13	676	576	13	838
49	12	657	112	13	97	189	13	365	270	13	469	364	13	613	504	13	675	579	13	155
59	12	661	120	13	319	194	13	361	275	13	467	377	13	615	508	13	660	579	13	839
62	12	815	132	13	317	203	13	470	281	13	534	388	13	625	518	13	679	580	13	853
68	12	886	136	13	315	211	13	419	289	13	465	401	13	619	533	13	673	580	13	899
77	12	936	141	13	318	217	13	421	292	13	537									

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S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.		S. C. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	14	290	178	14	393	298	14	634	409	14	854	537	15	272	593	14	65	607	14	361
16	14	284	187	14	397	307	14	629	417	14	931	551	15	268	595	14	289	607	14	394
28	14	292	192	14	395	311	14	682	422	14	933	559	14	985	596	14	289	607	15	806
33	14	632	197	14	481	314	14	714	431	14	935	569	15	244	596	14	351	608	14	630
42	14	486	206	14	483	333	14	719	439	14	852	572	15	279	598	14	288	608	14	776
54	14	491	213	14	493	340	14	766	444	15	225	578	15	231	599	14	349	608	15	800
61	14	809	233	14	496	344	14	819	461	14	940	584	14	675	599	14	490	608	15	830
88	14	674	245	14	499	354	14	824	467	14	952	584	13	897	601	14	361	609	14	827
94	14	675	262	14	488	361	14	822	475	14	947	585	14	24	602	15	800	610	14	823
101	14	721	266	14	619	367	14	821	493	14	943	588	14	26	602	14	549	611	14	823
127	14	768	269	14	620	372	14	764	508	14	954	589	14	23	603	14	549	612	14	938
146	14	730	273	14	490	381	14	713	511	15	243	590	14	66	604	14	391	613	14	830
150	14	811	279	14	617	385	14	825	517	15	241	591	14	24	605	14	391	614	14	855
160	14	309	283	14	630	391	14	829	521	15	270	591	14	309	606	15	800	615	15	453
165	14	305	290	14	678	406	14	808	531	14	957	592	14	110	607	14	360	615	15	553
176	14	393																		

Rep.		Rep	Rep.		Rep.	Rep.		Rep.	Rep.		Rep.	Rep.		Rep.	Rep.		Rep.	Rep.		Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	14	959	80	15	348	274	15	233	368	15	591	493	15	554	563	15	706	602	15	380
10	14	982	87	15	350	279	15	208	384	15	658	497	15	544	569	15	712	603	15	429
19	15	332	93	15	352	279	15	543	404	15	605	504	15	556	576	15	721	603	15	553
27	15	336	100	15	135	287	15	377	420	15	614	515	15	599	578	15	722	603	15	512
38	15	278	110	15	357	295	15	202	424	15	597	524	15	588	582	15	732	604	15	510
45	15	267	113	15	355	302	15	137	428	15	616	534	15	602	585	15	732	605	15	511
49	14	929	125	15	204	310	15	132	445	15	723	544	15	718	588	15	800	606	15	511
60	15	342	136	15	430	322	15	359	454	15	727	551	15	709	596	15	336	607	15	544
65	15	331	197	15	372	331	15	382	468	15	733	554	15	703	598	15	382	607	15	709
69	15	344	204	15	374	344	15	426	479	15	369	554	15	704	599	15	452	607	16	770
75	15	346	218	15	562	354	15	339	487	15	559	559	15	711	600	15	380	608	16	687

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S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	16	376	102	15	736	200	15	968	319	15	965	388	16	130	468	16	143	562	16	713
7	16	192	120	15	798	214	15	954	327	15	951	395	16	151	489	16	472	572	16	688
19	16	241	123	15	917	223	15	947	335	16	35	402	16	155	513	16	481	575	16	778
40	16	370	145	15	714	231	15	950	345	16	44	406	16	132	517	16	536	579	17	681
42	16	289	145	16	770	231	16	771	348	16	88	413	16	187	520	16	537	603	15	880
56	16	280	161	15	912	239	15	956	354	16	46	417	16	134	529	16	612	604	15	928
56	16	838	174	15	922	255	16	122	365	16	29	444	16	156	537	16	614	604	15	963
73	16	368	181	15	926	269	16	960	369	16	42	452	16	128	561	16	195	606	16	35
81	16	533	187	15	924	285	15	1019	377	16	40	457	16	190	560	16	428	606	16	154
88	16	883	194	15	878	309	16	31	382	16	149	463	16	188						

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S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	16	781	129	16	609	253	16	887	319	17	724	385	17	138	464	17	223	547	16	720
34	16	185	138	17	463	258	16	892	319	17	725	393	17	136	471	17	247	547	16	839
34	16	839	158	17	701	261	16	893	326	17	28	399	17	141	485	17	226	549	16	718
41	16	286	173	17	452	263	16	1001	330	17	36	410	17	218	488	17	33	550	16	770
50	16	293	188	17	717	270	16	997	333	17	39	417	17	221	496	17	255	551	16	840
50	16	839	188	17	751	272	16	998	348	17	37	421	17	222	502	17	134	551	16	687
66	16	371	199	17	732	282	17	21	353	17	135	425	17	56	504	17	363	552	16	771
78	16	339	216	16	717	284	16	893	357	17	145	429	17	225	507	17	364	552	16	838
90	16	833	216	17	30	291	17	20	361	16	1003	432	17	244	513	17	366	554	16	830
103	16	429	221	16	779	294	16	889	365	17	147	440	17	45	519	17	358	556	17	21
121	16	771	225	16	832	300	17	22	372	17	16	440	17	725	529	17	371	557	17	29
126	16	778	228	16	774	308	17	24	379	16	995	457	17	253	547	16	719	557	17	38
126	16	895	238	17	49	319	17	31												

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S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	17	377	77	17	640	237	17	501	323	17	782	397	17	835	457	18	5	548	17	500
5	17	355	96	17	457	247	17	587	333	17	778	400	17	865	465	18	1	550	17	560
14	17	368	97	17	446	247	17	802	338	17	779	410	17	849	472	18	58	552	17	724
21	17	504	115	17	711	259	17	638	343	17	799	414	17	888	477	18	33	553	17	724
23	17	506	131	17	706	265	17	776	351	17	798	420	17	895	484	18	120	553	17	802
27	17	507	146	17	696	271	17	773	356	17	822	427	17	948	498	18	150	554	17	751
33	17	511	151	17	694	281	17	977	369	17	803	433	17	996	507	18	182	554	17	752
39	17	509	162	17	698	296	17	980	375	17	828	436	17	996	514	18	119	554	17	782
44	17	258	175	17	592	298	17	678	383	17	832	441	17	998	518	18	216	554	17	851
55	17	512	203	17	441	307	17	752	390	17	831	446	17	994	525	18	125	555	17	851
64	17	561	216	17	725	313	17	683	394	17	797	452	18	3	537	18	233	557	17	850
69	17	563																		

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S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	18	145	110	18	218	276	18	794	345	18	937	435	19	79	507	19	138	547	18	888
		889	114	18	517	284	18	798	349	18	1033	445	19	74	511	19	140	548	18	886
16	18	224	134	18	680	290	18	792	363	18	1021	450	19	68	517	19	73			797
26	18	184	154	18	268	294	18	676	373	19	5	457	19	1	520	19	142	549	18	839
31	18	264	168	18	257	298	18	919	383	19	16	465	19	72	524	19	67			891
41	18	237			891	308	18	886	390	19	15	468	19	76	529	19	132	550	18	893
59	18	247	187	18	677	312	18	1025	393	18	929	476	19	135	533	19	204	551	18	932
64	18	245	193	18	636	328	18	933	402	19	9	481	19	134	538	19	199			933
69	18	220	204	18	640	331	18	940	413	18	1030	486	19	143			886	553	18	891
80	18	177	221	18	853	334	18	935	421	19	13	490	19	186	545	18	889			932
92	18	229	244	18	802	336	18	938	426	19	4	501	19	71			942	555	18	892
104	18	213	255	18	861	342	18	936	430	18	790	504	19	187			943			

S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	19	206	109	19	283	191	19	487	304	19	617	394	19	725	508	19	856	548	19	696
23	19	286	118	19	299	195	19	494	312	19	675	399	19	{743	517	19	792	549	19	{691
29	19	215	125	19	291	198	19	489	327	19	614			{996	522	19	854			{692
37	19	192	134	19	290	201	19	495	331	19	649	408	19	858	526	19	852			690
50	19	125	138	19	288	206	19	490	337	19	{669	415	19	915	531	19	918	551	19	{691
67	19	201	143	19	{308	209	19	499			{728	423	{19	1002	534	19	913			696
70	19	203			{310	217	19	{491	340	19	619		{20	64	540	19	996			1007
74	19	218	149	19	304			{691	349	19	646	440	{19	951	542	19	976	552	19	743
81	19	65	153	19	310	220	19	458	355	19	683		{20	65	546	19	202	553	19	{748
86	19	197	163	19	305	285	19	497	363	19	685	457	{19	928			{498			{749
92	19	297	168	19	307	288	19	499	374	19	610		{20	64	547	19	{692	554	19	747
97	19	294	171	19	492	291	19	670	385	19	616	501	19	745			{695			
105	19	302	177	19	502	300	19	651	388	19	723	506	19	722						

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S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	{19	959	58	19	947	121	20	32	195	20	91	321	20	61	402	20	280	500	20	411
	{20	65	69	19	975	128	20	52	200	20	51	322	20	62	415	20	287	511	20	491
10	19	1014	71	20	18	132	20	80	203	20	91	328	20	62	421	20	279	522	20	415
14	19	1020	74	20	58	138	{19	963	205	20	159	330	20	136	424	20	290	528	20	549
17	19	1018	81	20	24		{20	64	211	20	544	342	20	161	427	20	278	543	20	481
23	19	1011	84	20	22	158	20	14	222	20	221	348	20	157	431	20	302	544	20	516
28	19	1017	88	20	25	162	19	999	271	20	240	352	20	86	436	20	298	545	20	{510
31	19	1016	92	19	1009	170	20	84	272	20	393	357	20	153	447	20	285			{539
36	19	1013	97	20	16	178	20	34	293	20	842	367	20	135	454	20	745	546	20	743
40	20	13	104	19	973	183	20	84	306	20	83	369	20	200	475	20	405	547	20	790
43	20	19	111	20	26	184	20	56	311	20	36	383	20	197	488	20	{378			
50	19	997	114	20	27	190	20	88	313	20	53	392	20	193			{540			

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S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	20	744	63	20	803	117	20	976	205	21	4	299	21	32	370	21	305	443	21	331
3	20	758	66	20	744	123	20	988	221	20	979	304	21	81	381	21	249	448	21	439
5	20	804	70	20	806	127	20	989	225	21	10	306	21	254	384	21	320	459	21	322
11	20	794	72	20	807	132	20	993	233	21	13	311	21	113	389	21	317	461	21	337
17	20	790	80	20	788	154	20	1002	246	21	21	318	21	{268	398	21	315	474	21	333
26	20	754	86	20	786	173	20	985	257	21	1			{885	403	21	328	477	21	334
29	20	706	91	20	905	176	20	980	262	21	3	329	21	272	410	21	313	486	21	322
36	20	758	103	20	971	187	20	991	264	21	8	342	21	261	414	21	324	489	21	642
39	20	759	105	20	974	193	20	972	266	21	115	348	21	256	426	21	314	528	21	886
48	20	755	108	20	1010	197	20	1009	275	21	84	355	21	259	428	21	310	547	22	341
52	20	798	114	20	975	200	20	986	287	21	250	359	21	263	436	21	277			

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Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	21	617	121	21	537	256	22	425	344	22	337	386	22	479	442	22	598	500	22	719
22	21	976	130	21	610	299	22	465	351	22	345	393	22	371	444	22	601	508	22	823
46	21	449	143	21	615	315	22	1	357	22	411	396	22	372	454	22	608	526	22	731
65	21	543	145	21	624	319	23	141	362	22	409	397	22	482	462	22	726	533	22	741
81	21	{444	168	21	540	324	22	244	364	22	419	402	22	424	470	22	605	538	22	743
		{885	174	21	616	325	{21	807	374	22	410	406	22	414	478	22	598	546	22	735
95	21	800	177	21	634		{22	306	376	22	409	413	22	446	484	22	597	548	22	724
110	21	798	183	21	635	333	22	305	378	22	412	424	22	417	487	22	734	556	21	906
116	21	641	195	22	178	335	22	306	383	22	444	430	22	470	491	22	731	557	21	885
119	21	642	227	22	108	338	22	339												

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S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.	S. C. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	22	596	83	22	747	166	22	818	312	23	50	413	23	363	512	23	617	597	23	964
4	22	881	87	22	763	181	22	789	319	23	53	457	23	281	519	23	630	602	23	952
8	22	746	91	22	802	184	22	790	323	23	64	464	23	380	534	23	628	606	23	765
11	22	755	96	22	761	186	22	738	338	23	62	470	23	383	536	23	737	611	23	946
17	22	750	102	22	748	189	22	792	344	23	143	483	23	619	537	23	865	614	23	957
27	22	779	107	22	730	216	23	13	373	23	139	491	23	628	563	23	939	621	24	85
33	22	777	111	22	781	262	22	888	380	23	31	494	23	515	570	23	942	642	24	309
46	22	757	122	22	804	265	22	882	381	23	29	496	23	622	571	23	942	651	24	56
51	22	739	127	22	759	269	22	885	388	23	49	503	{23	516	575	23	947	659	24	45
57	22	790	133	22	784	278	22	883	393	23	132		{24	288	584	23	943	663	24	53
61	22	774	146	22	767	283	22	889	408	23	137	509	23	513	590	23	950	677	23	952
69	22	763	161	22	772	291	23	54												

S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.
Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.
1	24 41	55	24 60	133	24 77	203	24 180	292	24 83	415	24 191	522	24 370
6	24 42	65	24 49	149	24 97	220	24 306	299	24 69	426	24 313	541	24 500
9	24 44	75	24 43	157	24 103	230	24 202	317	24 308	474	24 458	550	24 503
12	23 981	79	24 74	169	24 64	245	24 340	323	24 207	491	24 334	551	24 543
13	23 980	95	24 93	184	24 100	252	24 175	327	24 337	499	24 332	554	24 673
15	23 984	104	24 166	188	24 102	262	24 187	337	24 282	505	24 329	566	27 663
39	24 59	114	24 170	193	24 178	274	24 195	356	24 310	511	24 376	567	27 1008
43	24 378	128	24 96	199	24 186	282	24 198	372	24 290	517	24 383	568	24 812

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1	28 1043	40	24 1050	126	25 40	206	25 214	279	25 198	375	25 272	453	25 211
2	24 889	61	24 986	134	24 1038	211	25 59	288	25 165	387	25 283	460	25 294
9	24 926	64	24 990	139	25 54	215	25 51	297	25 162	390	25 224	464	25 744
14	24 925	67	25 113	150	25 87	225	25 38	307	25 157	393	25 285	485	25 751
18	24 1028	75	25 39	166	25 220	229	25 202	324	25 153	397	25 278	488	25 797
25	24 991	78	25 286	176	25 136	233	25 146	335	25 150	410	25 275	525	25 65
28	24 992	101	25 46	187	25 45	243	25 142	344	25 168	418	25 216	556	25 84
31	24 989	105	25 76	190	25 60	256	25 134	347	25 130	430	25 298	566	25 123
34	24 1026	117	25 48	203	24 1037	263	25 193	358	25 116	446	25 296		

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Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.
1	25 43	95	26 218	190	26 222	282	26 657	350	26 655	421	26 711	516	26 900
8	25 900	120	26 238	195	26 323	298	26 600	357	26 666	430	26 725	533	26 802
21	25 898	136	26 234	233	26 465	308	26 609	364	26 669	440	26 716	548	26 794
28	26 3	149	26 466	234	26 613	315	26 613	384	26 679	444	26 717	553	26 798
49	25 982	154	26 229	249	26 567	316	26 677	388	26 680	458	26 706	564	26 797
55	25 984	165	26 224	258	26 570	321	26 653	395	26 682	472	26 757	566	26 786
65	25 977	175	26 212	267	26 606	325	26 686	406	26 676	492	26 797	570	26 906
80	26 1	179	26 228	272	26 611	337	26 651	408	26 722	494	26 796	588	26 894
86	26 99	183	26 244	279	26 605	341	26 663	415	26 713	496	26 885		

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S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.	S. C. Rep.	S. E. Rep.
Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.	Pg.	Vol. Pg.
1	26 898	159	27 16	273	27 200	345	{ 26 990	410	27 424	461	27 471	513	27 485
4	26 884	171	27 2	285	{ 26 619		{ 29 203	414	27 451	465	27 470	518	27 523
7	26 893	188	27 1		{ 27 199	372	27 273	418	27 452	469	27 475	525	27 474
12	26 967	192	27 68	308	27 194	374	27 388	423	27 467	478	27 473	527	27 469
20	27 9	199	27 52	322	27 100	378	27 407	427	27 514	481	27 484	530	27 517
41	26 949	230	27 63	325	27 385	388	27 406	438	27 454	484	27 658	535	27 570
62	26 1001	242	27 49	329	29 1035	389	27 408	443	27 451	488	27 { 569	546	27 520
78	26 984	253	27 101	330	26 652	399	27 405	445	27 456		{ 659	550	27 526
95	26 970	265	27 106	332	{ 26 880	402	{ 27 274	449	27 652	497	27 481	560	27 512
136	26 956	269	27 99		{ 27 273		{ 29 204	454	27 487	505	27 478	563	27 551

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1	27 533	68	27 560	140	27 682	206	27 628	310	27 770	403	27 862	491	27 913
16	27 521	89	27 543	156	27 620	214	27 617	321	27 774	406	27 905	502	27 920
23	27 526	95	27 555	161	27 645	218	27 636	337	27 846	428	27 862	514	27 952
25	27 611	110	27 539	169	27 648	241	27 686	374	27 803	444	27 875	537	27 939
39	27 539	112	27 567	181	27 622	259	27 962	380	27 801	459	27 943	548	27 943
49	27 531	120	27 655	185	27 618	293	27 693	385	27 868	471	27 925	558	27 933
54	27 545	129	27 623	192	28 948	303	27 692	397	27 873				

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33	27	947
37	27	960
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45	28	13
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58	28	50
79	28	91
97	28	149
103	28	200

S. C. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.
1	29	565
25	29	390
36	29	637
54	29	406
60	29	540
74	29	537
84	29	405
88	29	394
104	29	38[illegible]
110	29	53[illegible]
120	29	62[illegible]
129	29	40

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6	30	
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1	33	731	78	34	22	237	34	390	355	34	449	409	34	695	456	35	130	524	35	210
4	33	729	88	34	22	241	34	386	360	34	939	411	34	691	463	35	196	534	35	222
7	33	737	91	34	16	252	34	405	378	34	657	413	34	689	476	35	132	540	35	214
12	33	781	96	34	11	263	34	517	379	34	660	415	35	133	479	35	135	544	35	218
28	33	787	111	34	68	280	34	409	382	34	661	420	34	961	480	35	408	549	35	194
30	33	746	119	34	26	298	33	463	385	34	658	423	35	3	493	35	129	554	35	193
38	33	799	126	34	18	304	33	464	392	34	689	426	35	1	495	35	204	558	35	221
48	33	779	136	34	80	313	33	575	398	34	695	428	35	2	505	35	203	562	35	220
54	33	719	154	34	86	320	33	750	400	34	694	431	33	454	508	35	207	565	35	260
56	33	792	173	34	73	346	33	749	402	34	692	435	34	401	516	35	215	576	35	263
69	33	796	193	34	249	350	34	627	407	34	696	446	35	136						

In these tables is shown the page of the Virginia Reports where each case begins, arranged in numerical order. Opposite this are given the volume and page of the Southeastern Reporter where the case is found. By this the subscriber, finding a Virginia case cited, without the title, by volume and page of the Virginia Reports, can readily turn to it in the Southeastern Reporter.

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(NOTE. The Southeastern Reporter, which did not begin publication until Feb. 1, 1887, includes only the following cases from volume 82, Virginia Reports:)

Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
702	1	909	734	1	124	769	1	113	806	7	881	832	1	67	853	1	185	937	1	881
706	1	92	747	1	117	776	1	105	808	1	180	859	5	87	903	5	558	946	1	908
712	1	96	751	1	193	784	1	109	813	1	182	863	1	20	913	1	325	964	7	881
721	1	102	759	1	197	789	1	84	817	1	132	872	1	189	922	1	209	966	7	883
727	1	120	763	1	200	801	5	85	827	1	137	876	1	191	932	7	883			

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1	1	387	129	2	602	267	2	433	349	2	198	451	2	743	659	3	293	768	3	376
10	1	401	141	1	901	272	2	139	355	5	369	459	2	927	664	3	295	777	3	380
20	1	392	153	1	801	281	2	643	361	5	368	478	3	131	670	3	236	784	3	525
26	1	395	157	2	193	286	5	174	365	5	372	504	2	733	674	3	238	791	3	533
35	4	370	167	1	911	288	2	511	371	5	221	512	3	123	679	3	289	801	3	439
40	1	407	195	2	278	297	3	247	375	5	175	525	5	673	689	3	343	806	6	630
46	1	410	200	2	280	300	2	435	380	5	374	533	2	724	699	3	352	817	3	710
51	1	512	204	2	26	309	2	517	383	2	608	539	3	142	704	3	348	827	3	796
53	1	705	215	2	273	312	2	518	386	5	376	547	3	120	707	3	369	838	3	801
67	1	472	227	2	33	316	2	439	392	11	879	553	3	251	715	3	372	843	3	873
75	1	477	232	2	36	319	2	195	397	2	713	581	3	149	724	3	387	851	3	703
81	1	599	238	2	31	326	2	281	423	2	737	589	4	820	736	3	349	862	3	864
94	1	607	242	2	38	331	2	283	432	2	731	633	3	260	744	3	433	882	3	707
99	5	171	246	2	746	338	5	176	436	2	727	640	3	145	755	3	383	889	5	584
106	1	803	251	2	431	343	2	200	445	3	249	648	3	529	765	3	438	910	5	276
124	1	667	255	2	143															

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1	3	878	192	4	339	313	4	724	489	5	367	627	5	539	723	6	1	840	6	142
9	5	550	198	6	12	318	4	737	492	5	364	630	6	367	726	6	129	844	6	147
26	3	882	204	4	342	331	4	734	496	5	573	634	5	527	731	10	529	847	6	144
34	4	572	210	4	584	337	4	818	509	5	542	638	5	540	742	6	10	858	6	146
41	3	885	217	4	377	341	5	21	517	5	526	642	5	579	747	6	4	861	6	230
52	3	805	221	4	372	348	5	222	519	9	1120	648	5	688	772	6	139	873	6	217
63	4	21	227	5	91	358	4	833	521	9	1121	652	5	701	778	6	212	880	6	480
72	3	876	231	4	587	376	5	507	523	9	1112	660	5	697	784	6	134	884	6	474
77	3	803	240	4	374	415	4	744	548	5	530	664	5	695	790	6	215	891	6	482
81	3	891	246	4	379	419	4	842	553	5	532	675	5	699	796	6	136	895	6	459
87	4	575	251	4	621	424	4	745	557	5	545	679	5	582	800	6	138	900	6	461
116	4	178	259	4	712	435	4	749	574	4	570	685	5	799	803	6	133	906	6	484
130	4	171	271	4	697	441	4	742	582	5	563	692	5	708	806	6	132	909	6	462
145	4	218	282	4	721	446	5	25	586	5	676	696	5	704	810	6	130	913	6	603
154	5	89	289	4	717	457	5	30	599	5	798	701	5	802	813	6	209	919	6	473
159	4	369	298	5	529	467	4	844	603	5	682	706	5	710	820	6	226	923	6	463
163	4	222	303	4	695	474	5	282	612	5	685	713	5	707	828	6	232	927	6	620
167	4	211	309	4	703	478	5	277	619	5	565	717	6	2	834	6	223	947	6	866
181	4	334																		

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Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	6	700	122	7	178	252	7	391	421	7	542	531	8	375	676	8	586	870	9	10
9	6	806	128	7	323	293	7	236	429	12	157	538	8	387	690	8	577	880	9	150
16	6	697	139	7	195	299	7	386	441	8	91	546	8	650	702	8	683	890	9	153
21	6	613	146	7	182	302	7	251	448	8	592	574	8	378	712	8	678	899	9	16
28	6	478	161	7	374	306	7	365	456	7	848	579	8	379	721	8	835	901	9	129
34	6	472	169	7	328	321	7	361	459	8	672	588	8	383	732	8	715	908	9	13
37	6	610	172	7	180	331	12	160	471	7	852	597	8	476	740	8	642	918	9	148
42	6	615	177	7	204	343	7	387	475	7	849	607	8	470	756	8	721	921	9	148
47	6	618	187	7	349	353	7	335	480	7	907	616	8	468	765	8	719	922	9	282
49	6	803	193	7	245	374	7	385	489	8	370	621	8	483	769	8	787	924	9	148
55	6	605	198	7	248	378	7	531	500	8	711	632	8	488	779	8	789	928	9	326
64	6	619	205	7	352	386	7	241	509	8	241	638	8	474	792	8	785	936	9	147
76	7	199	217	7	233	390	7	329	517	8	246	643	8	481	798	10	44	939	9	321
87	7	242	222	7	238	403	7	534	519	8	244	648	8	490	820	8	817	955	9	329
95	7	357	227	7	189	413	7	538	526	8	246	653	8	664	857	9	132	962	9	694
104	7	344	240	3	128	418	7	540	528	8	247	671	8	584	867	9	418	966	9	748
116	7	371	245	7	377	426	7	465	530	8	246									

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Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
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1	9	759	177	9	995	328	10	43	481	10	749	608	10	885	754	11	431	933	11	799
19	9	473	191	9	984	333	10	2	489	10	713	612	10	882	763	11	123	935	11	799
26	9	419	195	9	1004	337	10	51	494	10	838	618	10	925	768	11	289	938	11	978
33	9	419	201	9	988	346	10	239	501	10	886	625	10	976	778	11	789	941	11	883
35	9	417	206	9	991	354	10	569	506	10	433	629	10	927	793	11	406	946	11	878
40	9	475	212	9	1021	359	10	415	512	10	241	638	10	972	811	11	120	950	12	950
51	9	480	223	9	1024	372	10	414	520	10	507	644	10	974	817	11	238	953	11	1053
62	9	479	232	9	1003	374	10	504	523	10	238	652	10	979	823	11	121	965	11	899
67	9	616	238	9	986	382	10	420	527	10	414	658	10	924	828	11	538	969	11	794
71	9	501	248	9	1006	390	10	422	530	10	264	661	10	1005	835	11	428	975	11	829
75	9	500	256	9	1095	396	10	431	535	10	317	666	10	1007	845	11	436	981	11	881
81	9	503	270	9	1015	405	10	419	536	10	317	668	10	1063	853	11	562	988	11	885
92	9	498	284	9	1014	410	10	430	539	10	329	675	10	977	860	12	946	993	12	950
97	9	506	287	10	166	415	10	572	543	10	570	679	10	980	872	11	406	995	11	976
104	9	497	291	9	1122	421	10	686	550	10	423	681	10	1061	876	11	486	999	11	1015
109	9	584	295	9	1121	429	10	425	557	10	574	687	10	981	885	11	536	1004	11	1062
117	9	508	300	9	1123	443	10	534	568	10	605	690	11	104	892	11	565	1008	11	975
125	10	318	303	10	7	452	10	532	573	10	840	696	11	106	902	11	404	1011	11	977
153	9	1019	311	10	1	459	10	536	581	10	751	721	11	114	909	11	488	1017	11	984
158	9	999	315	10	3	466	10	745	592	10	748	740	10	1004	917	12	1	1034	11	1057
165	9	990	321	10	5	475	10	715	596	10	843	746	10	1065	921	11	795	1045	11	1063
169	9	993	323	10	6	478	10	715	604	10	884	751	10	1065	929	11	798	1050	11	983
173	9	994																		

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Va. Rep.	S. E. Rep		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Fg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	12	149	103	12	228	215	12	472	319	12	612	432	13	26	513	12	1015	641	13	100
1	12	668	110	12	147	222	12	389	323	12	614	438	12	885	521	12	1009	655	13	114
33	12	230	119	12	222	242	12	404	335	12	786	442	12	885	533	12	1054	661	13	98
41	12	105	125	12	233	245	12	339	349	12	613	444	12	800	540	12	963	669	14	123
49	12	144	130	12	348	249	12	406	354	12	618	447	12	803	545	12	972	672	13	104
59	12	2	141	12	344	253	12	403	360	12	792	451	12	801	548	12	1013	676	13	196
63	12	226	148	12	340	257	12	385	381	13	153	460	12	790	554	13	76	683	13	146
71	12	107	162	12	397	269	12	671	385	13	29	466	12	799	559	13	35	689	13	148
75	12	108	177	12	294	283	12	667	391	12	610	472	12	970	581	13	549	706	13	145
77	12	109	180	12	346	289	12	674	398	13	33	478	12	966	589	13	73	711	14	163
78	12	141	185	12	395	300	12	753	404	12	805	484	12	965	599	13	31	758	13	473
87	12	294	193	12	389	305	12	1056	410	12	750	489	12	968	608	13	22	764	13	193
94	12	108	206	12	402	313	12	678	418	12	755	497	12	1052	621	13	71	764	13	266
96	12	224	210	12	404	315	12	753	426	12	785	506	12	1048	629	13	77	787	13	262

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1	13	299	212	13	337	347	13	436	491	14	68	633	14	330	791	14	545	942	14	806
12	13	302	222	16	168	350	13	709	506	13	985	641	14	337	805	14	534	948	14	759
20	13	298	223	13	429	352	13	706	508	13	993	648	14	361	810	14	665	952	14	836
24	13	306	231	13	414	356	13	708	512	13	994	653	14	380	832	14	754	958	14	763
31	13	308	236	13	441	361	13	707	517	13	973	674	14	363	843	14	660	963	14	760
37	13	309	239	13	475	365	13	742	524	14	67	682	14	375	847	14	834	971	14	838
45	13	304	247	16	159	371	13	740	529	14	325	695	12	973	853	14	692	980	14	845
50	13	408	251	13	457	377	13	754	533	14	336	695	14	183	862	14	661	985	14	843
50	16	160	259	13	439	384	13	756	538	14	372	702	14	181	875	14	626	992	14	847
95	13	340	267	13	454	389	13	975	546	14	367	707	14	543	882	14	696	1001	14	842
116	13	350	274	13	483	396	13	802	551	14	329	716	14	365	891	14	701	1007	14	840
122	13	348	293	13	407	400	13	803	556	14	328	721	14	178	896	14	625	1012	14	849
125	13	348	296	13	431	402	14	339	560	14	535	730	14	183	900	14	627	1017	14	916
131	13	346	300	13	456	411	13	902	584	14	332	735	14	368	905	14	698	1019	14	833
136	13	392	303	13	452	416	13	899	591	14	334	742	14	672	915	14	758	1024	14	851
141	13	393	310	13	432	422	13	901	595	14	326	748	14	379	920	14	803	1029	14	976
149	13	395	317	13	479	426	13	859	600	14	344	753	14	529	929	14	691	1037	14	914
149	13	598	328	13	549	431	13	985	618	14	161	760	15	117	932	14	689	1040	14	978
172	13	398	330	13	434	456	13	914	618	14	342	778	14	532	936	14	690	1046	14	915
201	16	225	338	13	437	466	13	977	618	14	979	785	14	370	939	14	704	1051	14	974
205	13	352	343	13	438	470	13	978												

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1	15	389	196	16	730	337	15	893	455	16	360	566	16	726	713	17	3	826	17	480
87	15	507	253	15	586	341	15	862	466	16	356	570	16	725	717	17	126	832	17	325
92	15	497	258	15	584	345	15	868	471	16	357	576	16	749	722	17	4	836	17	482
96	15	504	265	15	513	376	17	324	474	16	666	606	16	880	728	17	128	842	17	475
107	15	520	277	15	549	379	16	250	491	16	671	614	16	722	739	17	132	849	17	515
113	15	498	279	15	550	384	16	275	496	16	358	624	16	874	741	17	1	858	17	471
118	15	500	282	15	509	389	16	245	503	16	665	628	16	866	745	17	323	870	17	548
132	15	388	286	15	548	393	16	252	507	16	627	632	16	875	749	17	132	873	17	552
136	15	526	290	15	547	396	16	274	513	16	663	639	16	935	755	17	229	878	17	546
154	15	513	296	15	497	401	16	246	519	16	673	645	16	933	762	17	871	885	17	549
156	15	386	298	15	865	418	16	252	524	16	661	652	16	867	767	17	228	895	17	558
160	15	657	307	15	864	427	16	277	529	16	672	675	17	470	771	17	233	900	17	553
165	15	522	312	15	899	431	16	273	533	16	662	679	17	238	780	17	124	916	14	916
171	15	517	318	15	897	435	16	279	536	16	727	690	16	865	786	17	241	921	17	231
182	15	385	324	15	896	438	16	278	543	16	689	696	17	6	794	17	235	925	17	326
187	15	525	330	15	863	441	16	342	552	16	748	703	17	127	801	17	328	930	17	518
192	15	524	332	15	894	450	16	355	557	16	877	708	17	2						

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Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	17	757	137	17	809	263	18	35	386	18	838	561	19	260	683	19	850	771	19	784
11	17	744	148	17	853	267	18	36	390	18	841	565	19	656	687	19	849	775	20	148
16	17	819	151	17	853	271	18	193	393	18	673	574	19	163	693	19	781	778	20	146
19	17	723	157	17	836	277	18	195	401	18	841	578	19	258	696	19	785	785	20	152
22	17	742	165	17	943	284	18	197	405	18	837	584	19	170	699	19	776	790	20	364
30	17	760	160	17	818	290	18	191	409	18	913	588	19	113	702	19	880	795	20	361
40	17	721	168	17	855	297	18	280	413	18	911	592	19	654	705	19	881	799	20	824
46	17	739	170	17	879	304	18	274	418	18	914	597	19	114	708	19	790	805	20	783
55	17	745	174	17	855	311	18	285	425	18	901	621	19	166	711	19	783	809	20	782
57	17	763	177	17	894	318	18	273	447	18	883	626	19	184	714	19	846	813	20	780
60	17	764	181	17	872	323	18	277	455	18	869	635	19	161	719	19	787	816	20	830
73	17	756	185	17	875	328	18	282	492	19	261	638	19	175	728	19	739	820	20	776
77	17	738	200	17	946	336	18	436	500	18	899	642	19	165	735	19	742	825	20	827
80	21	826	205	17	884	340	18	278	507	18	909	645	19	161	737	19	878	831	20	784
83	17	789	210	17	868	345	18	439	513	18	916	647	19	450	745	19	848	836	20	823
88	17	881	219	17	944	348	18	438	523	19	171	653	19	451	748	19	791	839	20	828
92	17	788	227	17	873	351	18	559	533	19	168	658	19	454	752	19	787	843	20	777
96	17	786	233	17	941	356	18	437	539	19	174			457	755	19	844	845	20	780
99	17	895	241	17	882	360	18	440	544	19	182	665	19	652	759	19	843	849	19	314
109	17	812	245	17	883	370	18	843	550	19	164	671	19	447	762	19	776	936	21	817
126	17	806	249	17	890	384	19	166	553	19	177	679	19	453	768	19	779			

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Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	20	884	134	21	279	292	21	501	384	22	165	518	22	233	608	22	504	706	22	521
18	20	946	143	21	658	297	21	480	397	21	813	527	22	348	613	22	556	714	22	513
		947	152	21	246	306	21	476	410	21	818	534	22	358	652	22	487	718	20	821
31	20	968	161	21	235	317	21	475	421	22	175	539	22	367	661	22	505	726	21	119
42	22	162	171	21	238	322	21	483	430	21	810	548	22	354	664	22	485	741	21	364
52	20	895	183	21	243	339	21	664	438	22	167	562	22	360	668	22	496	762	21	357
68	20	950	193	21	342	344	21	672	446	22	171	568	22	365	676	22	494	782	21	495
79	20	940	209	21	490	347	21	820	458	22	235	575	22	362	684	22	506	796	22	349
88	20	888	226	21	347	364	22	357	473	22	458	583	22	486	688	22	509	801	22	352
99	20	942	259	21	487	369	22	159	492	22	239	587	22	517	694	22	511	808	22	351
114	20	959	272	21	466	378	21	811	509	22	242	601	22	490	700	22	514	813	22	507
122	21	660	286	21	464															

Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
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1	22	554	124	22	856	229	23	289	345	23	749	495	23	935	601	24	234	731	24	472
13	22	600	130	22	876	238	23	303	354	23	773	510	23	891	606	24	264	738	24	358
20	22	838	144	23	32	245	23	742	367	23	767	517	23	883	615	24	251	747	24	393
24	22	523	156	23	221	253	23	293	372	23	777	521	23	880	627	24	267	756	24	390
30	22	813	162	23	226	283	23	284	377	23	763	528	23	885	636	24	246	763	24	392
34	22	811	173	23	224	289	23	288	383	23	747	534	24	229	653	24	249	769	23	643
50	22	840	177	23	225	292	23	299	392	23	744	537	24	225	661	24	221	772	22	858
59	22	809	182	23	233	297	23	781	400	23	770	540	24	226	670	24	261	780	22	874
68	22	807	188	23	229	307	23	756	408	23	769	544	24	227	680	24	223	789	22	852
71	22	845	196	23	232	310	23	757	413	23	737	549	24	229	687	24	269	794	23	784
86	22	854	201	23	285	316	23	761	446	23	857	554	24	232	696	24	280	806	23	768
91	22	806	211	23	238	320	23	765	468	23	887	561	23	909	702	24	275	809	23	915
98	22	839	216	23	298	327	23	758	484	23	895	581	24	258	710	24	345	818	23	882
102	22	815	225	23	292	338	23	751	489	23	893	590	24	255	723	24	342	834	24	272
118	22	867																		

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Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	24	472	146	24	905	268	24	928	408	25	100	498	25	548	595	25	894	711	25	1001
8	24	464	149	24	920	274	24	1016	415	25	107	504	25	546	606	25	891	719	26	19
14	24	474	153	24	908	293	25	232	424	25	105	510	25	550	615	25	882	729	25	998
20	24	463	159	24	930	322	25	99	427	25	244	518	25	530	623	23	235	736	26	246
24	24	471	176	24	911	327	24	1011	433	25	242	526	25	604		25	657	749	24	537
29	24	698	186	24	910	332	24	1020	440	25	225	534	25	661	634	25	881	765	24	236
44	24	467	189	24	833	341	25	1	447	25	543	542	25	595	641	25	884	769	25	659
64	24	466	200	24	830	349	25	5	455	25	534	546	25	596	650	25	947	775	20	892
68	24	903	214	24	825	354	25	304	460	25	537	553	25	597	667	25	893	780	20	966
73	24	913	226	24	1013	364	25	238	467	25	533	565	25	887	673	25	1003	786	22	354
78	24	920	233	24	935	374	25	3	473	25	541	569	25	888	678	25	1009	791	22	869
98	24	916	239	24	938	380	25	8	479	25	535	578	25	602	690	25	1013	810	22	864
101	24	899	249	24	1023	389	25	6	487	25	547	584	25	593	695	26	409	815	22	863
108	25	226	258	24	937	396	25	110	491	25	552	591	25	601	698	25	1004	821	23	884
138	24	896	263	24	1014	404	25	113												

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Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	26	397	146	26	421	255	26	580	377	26	874	508	27	107	616	27	509	722	27	593
12	26	388	158	26	412	263	26	826	383	26	853	513	27	429	618	27	497	730	27	586
16	26	393	165	26	417	268	26	828	393	26	847	517	27	441	622	27	463	737	27	581
24	26	385	176	26	384	279	26	832	406	26	845	532	27	434	627	27	509	741	27	596
28	26	591	182	26	510	285	26	830	413	26	875	537	27	429	647	27	493	751	27	591
60	26	386	184	26	406	291	26	943	422	26	841	547	27	438	650	27	493	756	27	813
66	26	392	186	26	424	308	26	822	427	26	941	557	27	446	659	27	606	760	27	588
73	26	395	193	26	401	316	26	821	433	26	843	572	27	432	668	27	460	766	27	590
79	26	389	198	26	419	321	26	865	439	26	878	575	27	425	677	27	504	773	27	599
82	26	406	204	26	586	338	26	844	449	27	20	580	27	436	686	27	576	775	27	595
94	26	390	225	26	511	342	26	861	460	26	834	585	27	498	695	27	490	780	27	574
102	26	426	229	26	506	350	26	840	477	26	834	589	27	464	700	27	467	787	26	402
117	26	428	233	26	575	355	26	856	480	27	24	594	27	499	703	27	507	799	26	411
127	26	415	236	26	573	361	26	850	487	27	23	608	27	459	711	27	457	804	26	853
130	26	413	244	26	576	370	26	871	493	27	70	614	27	464	716	27	583	816	27	427
140	26	416	250	26	579															

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Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	27	815	111	27	897	258	28	172	413	28	583	509	28	890	606	29	324	696	30	55
7	27	815	119	27	899	263	28	336	418	28	590	515	28	888	610	29	322	701	29	685
10	27	829	125	27	901	269	28	332	431	28	598	522	28	879	616	29	330	711	29	874
16	27	812	145	28	177	275	28	317	434	28	885	527	28	877	622	29	328	715	30	396
19	27	818	151	27	935	285	28	321	443	28	597	533	28	873	625	29	319	721	30	372
26	27	810	161	27	841	294	28	323	445	28	594	536	28	958	635	29	682	729	30	374
32	27	831	173	27	834	307	28	374	453	28	569	545	28	951	640	29	675	741	30	391
43	27	813	184	27	839	316	28	329	456	28	566	552	28	955	648	29	678	751	30	366
47	27	838	187	28	173	326	28	334	461	28	567	560	28	950	654	29	680	762	30	370
50	27	826	192	28	179	337	28	337	469	28	882	564	28	959	660	29	733	773	30	353
58	27	601	203	28	207	355	28	577	473	28	880	570	28	953	667	29	680	784	30	364
73	27	806	212	28	183	359	28	584	480	28	909	579	29	328	670	29	741	792	30	361
77	27	823	223	28	175	369	28	588	494	28	875	585	29	325	680	29	744	802	30	496
88	27	817	231	28	209	377	28	570	500	28	874	593	29	420	686	29	746	815	30	1007
92	27	807	248	28	214	386	28	573	503	28	872	602	29	321	694	29	674	818	30	464
98	27	821	254	28	1023	398	28	578												

Va. Rep.	S. E. Rep		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	30	468	119	30	440	257	31	82	372	31	525	484	31	902	588	32	44	687	32	461
5	26	508	124	30	450	265	31	63	383	31	520	489	31	895	594	32	48	693	32	485
14	30	443	131	30	460	270	31	20	387	31	523	498	31	897	598	32	46	712	32	458
18	30	472	138	31	23	272	31	8	392	31	516	503	31	904	603	32	50	723	32	479
34	30	444	141	30	491	277	31	4	397	31	515	506	31	904	614	32	64	728	32	459
41	30	442	147	30	458	285	31	528	403	31	519	510	32	295	624	32	291	733	32	778
45	30	457	152	31	7	296	31	255	411	31	817	518	31	899	636	32	42	737	32	475
50	30	463	158	31	85	306	31	503	416	31	614	521	31	901	641	32	150	742	32	464
58	30	446	165	31	78	312	31	521	430	31	604	528	31	899	644	32	39	749	32	463
69	25	545	177	31	74	318	31	518	435	31	890	534	32	54	649	32	36	754	32	472
73	30	469	191	31	72	322	31	508	442	31	609	540	32	63	658	32	455	765	32	476
81	30	462	197	31	22	330	31	507	451	31	612	543	32	49	661	32	468	775	32	467
87	30	443	201	31	10	335	31	1007	456	31	605	552	32	53	667	32	454	779	32	453
91	30	466	228	31	19	337	31	505	461	31	607	559	32	58	670	32	787	783	32	470
96	30	492	231	31	512	345	31	514	465	31	608	573	32	33	677	32	1015	791	32	780
107	30	452	238	31	67	352	31	511	469	31	894	577	32	56	679	33	1015	818	32	786
115	30	439	254	31	21	357	31	812	473	31	647	584	32	41	680	32	483	823	32	466

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Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.		Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	32	791	118	33	554	256	33	611	356	33	613	477	34	45	602	34	475	713	34	884
11	32	794	124	33	516	261	33	603	364	34	48	487	34	50	606	34	477	719	34	950
19	32	789	130	33	533	265	33	591	372	34	93	495	24	278	631	34	525	723	34	853
23	32	779	134	33	536	279	33	609	383	34	53	501	24	906	639	34	492	728	34	886
26	32	775	143	33	517	284	33	606	391	34	96	507	34	617	649	34	476	734	34	900
38	33	380	160	33	556	296	33	618	397	34	52	518	34	450	653	34	455	754	33	797
43	33	377	167	33	539	304	33	588	403	34	37	521	34	451	661	34	458	759	33	381
54	33	390	176	33	534	311	33	596	419	34	34	527	34	486	667	34	480	762	33	547
60	33	385	182	33	523	316	33	616	426	34	98	543	34	474	674	34	625	766	34	39
74	33	382	202	33	544	322	33	603	434	34	60	550	34	464	682	34	613	779	34	453
83	33	375	209	33	513	329	33	627	444	34	64	565	34	470	690	34	621	783	34	454
89	33	385	217	33	531	334	33	599	452	34	56	571	34	469	697	34	612	787	34	455
92	33	548	222	33	546	337	33	615	457	34	57	582	34	523	701	34	615	791	34	882
108	33	1015	227	33	598	341	33	586	466	34	44	588	34	472	708	34	899	796	34	696
112	33	542	234	33	620	349	33	600	472	34	66	594	34	462						

In these tables is shown the page of the West Virginia Reports where each case begins, arranged in numerical order. Opposite this are given the volume and page of the Southeastern Reporter where the case is found. By this the subscriber, finding a West Virginia case cited, without the title, by volume and page of the West Virginia Reports, can readily turn to it in the Southeastern Reporter.

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W. Va. Rep.	S. E. Rep.		W. Va. Rep.	S. E. Rep.		W. Va. Rep.	S. E. Rep.		W. Va. Rep.	S. E. Rep.		W. Va. Rep.	S. E. Rep.		W. Va. Rep.	S. E. Rep.		W. Va. Rep.	S. E. Rep.	
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	11	932	201	11	954	333	1	564	410	1	582	499	2	219	617	2	91	744	3	44
48	1	241	224	11	920	340	1	569	424	1	821	508	2	795	627	2	330	746	3	793
63	1	337	244	11	910	344	1	717	441	2	780	512	2	775	633	2	761	751	3	801
98	11	901	256	11	899	362	1	746	462	2	104	522	2	81	645	2	768	765	3	827
111	11	897	258	1	298	384	1	561	469	2	328	528	2	888	659	2	831	777	3	808
117	11	900	263	11	927	385	1	572	474	2	333	569	3	84	673	2	863	779	3	798
119	11	906	276	1	280	389	1	816	477	2	326	571	3	14	702	2	203	783	3	800
131	11	914	301	11	949	396	1	575	480	2	335	577	2	415	732	3	86	784	3	23
147	1	225	314	1	731	404	1	580	487	2	85	604	2	97	740	3	33	794	3	809
169	1	302	326	1	740	407	1	673												

W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	3	17	123	2	909	204	3	600	327	4	298	456	4	660	586	5	210	683	5	155
13	3	156	146	3	572	212	3	580	335	4	406	479	4	635	593	5	439	687	5	878
27	3	168	158	3	564	222	4	273	347	4	292	488	4	439	599	5	139	709	6	335
43	3	227	171	3	597	228	4	242	358	4	303	491	4	774	606	5	148	740	5	867
55	3	29	176	3	586	243	4	276	382	4	645	505	4	706	619	5	847	760	5	442
58	3	97	182	3	578	248	4	278	390	4	424	518	4	440	657	5	654	774	5	450
95	3	30	186	3	593	274	4	394	404	4	413	532	4	782	666	5	257	779	5	260
101	3	40	195	3	604	296	4	654	424	4	640	548	4	448	672	5	214	790	5	266
103	3	42	198	3	589	296	7	455	435	4	650	554	4	451	674	5	143	798	6	31
107	3	177	200	3	590	326	4	660	443	4	431	572	5	646						

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	5	463	137	5	461	374	6	929	459	7	447	510	7	433	608	8	267	790	8	596
9	5	297	142	6	53	380	7	11	464	7	445	516	7	452	621	8	410	798	8	570
16	6	352	156	5	643	384	7	22	468	7	452	521	8	285	633	8	274	810	8	557
44	5	301	162	6	428	390	7	24	470	7	450	540	8	398	649	8	302	819	8	391
70	5	754	220	6	485	410	7	1	473	7	436	561	8	283	659	8	493	832	8	603
82	5	321	355	6	919	424	7	9	477	7	427	566	8	295	688	8	562	836	8	600
94	5	636	358	6	920	428	7	13	483	7	411	571	8	509	701	8	363	842	8	512
108	5	457	363	6	923	442	7	439	487	7	430	576	8	616	710	8	463	851	8	616
116	5	318	364	6	924	450	7	443	491	7	413	585	8	544	736	8	743	858	8	609
122	5	315	370	6	927	453	7	424	506	7	422	601	8	298	781	8	552	865	8	612
127	5	328																		

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Fg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	9	23	66	9	362	195	9	81	297	9	215	378	9	260	463	9	901	562	9	889
6	9	48	119	9	65	203	9	176	311	9	225	387	9	209	487	9	880	566	9	891
14	9	46	134	9	61	215	9	87	319	9	252	393	9	26	504	9	890	585	9	927
21	9	40	144	9	25	232	9	220	328	9	231	406	9	255	507	9	930	594	9	925
25	9	44	147	9	26	233	9	220	335	9	237	419	9	31	519	9	898	600	9	922
30	9	38	148	9	70	244	9	180	343	9	235	432	9	875	526	9	937	606	9	919
33	9	39	164	9	212	272	9	21	348	9	245	436	9	876	546	9	935	614	9	914
34	9	41	174	9	84	277	9	36	357	9	243	444	9	873	552	9	887	628	9	910
41	9	55	177	9	85	283	9	233	364	9	240	447	9	871	556	9	886	637	9	867
46	9	57	184	9	77	289	9	228	370	9	248	464	9	863	559	9	879	640	9	863
55	9	51																		

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E Rep.	W. Va. Rep.		S. E. Rep	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	10	14	108	10	54	197	10	378	299	10	637	453	10	808	517	11	11	644	11	68
14	10	60	116	10	66	209	10	382	307	10	632	455	10	808	521	11	218	655	11	5
32	10	11	132	10	20	229	10	392	319	10	639	457	10	803	526	11	50	663	11	46
39	10	29	135	10	39	236	10	402	375	10	780	464	10	806	548	11	211	675	11	31
60	10	19	146	10	283	246	10	400	387	10	785	470	10	809	553	11	16	682	11	226
63	10	36	152	10	265	250	10	407	407	10	777	473	10	815	559	11	18	695	11	12
71	10	21	156	10	282	262	10	405	417	10	792	476	10	810	566	11	37	705	11	23
84	10	25	159	10	375	267	10	394	426	10	795	485	10	820	573	11	26	713	11	1
86	10	26	168	10	371	272	10	396	433	10	801	489	10	816	589	11	72	724	11	213
88	10	26	179	10	285	279	10	398	440	10	813	494	10	817	600	11	21	738	11	220
94	10	28	188	10	288	285	10	411	444	10	798	501	10	775	607	11	76	761	11	58
97	10	58	191	10	289	293	10	716	449	10	799	507	11	8	624	11	39	789	11	34
102	10	56																		

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	11	742	95	11	750	207	12	484	332	12	710	457	12	536	604	12	770	709	12	863
17	11	714	107	11	1004	217	12	507	342	12	713	466	12	757	609	12	778	721	12	866
23	11	718	115	11	1007	232	12	699	352	12	721	480	12	544	624	12	776	730	12	859
33	11	732	123	1	997	240	12	698	362	12	490	493	12	762	631	12	775	737	12	783
38	11	716	128	11	999	244	12	695	370	12	495	500	12	539	633	12	864	742	12	765
42	11	730	137	11	1002	252	12	519	375	12	501	514	12	583	639	12	872	748	12	851
49	11	754	139	11	1003	260	12	512	385	12	522	524	12	736	644	12	856	764	12	771
62	11	734	142	11	993	282	12	478	400	12	493	533	12	476	652	12	817	774	12	861
65	11	737	155	11	1009	285	12	702	406	12	724	538	12	532	657	12	824	783	12	1075
74	11	735	171	12	695	290	12	704	416	12	728	548	12	548	667	12	834	791	12	1078
78	11	740	172	12	767	299	12	707	421	12	729	563	12	688	672	12	918	794	12	1082
83	11	742	182	12	477	303	12	708	426	12	731	584	12	717	681	12	819	799	12	1090
84	11	737	186	12	497	310	12	527	438	12	735	597	12	832	697	12	838	804	12	1085
87	11	747	200	12	505	326	12	488	442	12	479									

W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	13	53	103	12	1106	217	13	373	320	13	1006	389	14	12	518	14	215	620	14	157
15	12	1078	117	12	1111	222	13	375	323	13	1007	406	14	17	524	14	232	634	14	223
36	13	58	124	12	1113	240	13	381	328	13	1009	418	14	22	531	14	137	647	14	319
40	13	63	139	13	45	247	13	367	333	13	1010	422	14	1	542	14	135	666	14	237
52	12	1092	143	13	59	255	13	383	337	13	1015	433	14	146	547	14	133	682	14	217
57	12	1093	155	13	49	260	13	385	347	13	1012	438	14	123	554	14	130	698	14	212
60	12	1094	167	12	1118	280	13	654	357	13	996	458	14	140	562	14	152	705	14	227
65	12	1097	174	12	1071	287	13	656	367	14	9	463	14	249	567	14	148	719	14	273
70	12	1096	186	13	46	297	13	1003	375	14	4	481	14	142	578	14	153	735	14	255
73	12	1098	194	13	67	300	13	999	384	14	7	492	14	234	588	14	243	754	14	267
84	12	1102	205	13	369	313	13	1004	385	14	8	500	14	261	605	14	279	771	14	399
95	13	42																		

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	14	444	165	14	465	277	15	74	381	15	173	489	15	214	613	15	223	713	15	423
11	14	410	179	14	407	290	15	209	391	15	171	516	15	140	635	15	149	721	15	974
22	14	414	191	14	992	304	15	156	397	15	162	524	15	185	639	15	151	729	15	982
34	14	419	200	14	995	310	15	154	423	15	62	546	15	143	649	14	989	757	15	991
46	14	423	202	14	1004	318	15	158	427	15	182	556	15	87	659	15	412	772	15	973
57	14	426	212	14	996	329	15	81	438	15	179	563	15	146	671	15	408	777	15	979
73	14	432	223	14	1001	341	15	78	445	15	177	573	15	89	681	15	416	782	15	980
84	14	436	232	14	999	350	15	85	454	15	253	582	15	64	686	15	417	788	15	977
96	14	405	237	15	66	356	15	56	466	15	93	589	15	250	690	15	419	794	15	997
100	14	440	244	15	48	374	15	54	479	15	257	598	15	245	704	15	406	802	15	1000
112	14	447	263	15	69															

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	16	368	143	16	482	287	16	488	421	16	628	571	16	804	657	17	200	757	17	316
3	16	364	159	16	564	291	16	512	425	16	544	578	16	807	665	17	197	762	17	318
15	16	437	176	16	462	297	16	525	475	16	561	580	16	807	675	17	184	778	17	299
26	16	446	180	16	457	302	16	463	486	16	597	582	16	808	679	17	181	789	17	303
38	16	489	193	16	487	305	16	675	494	16	600	598	16	802	679	17	470	797	17	312
59	16	507	197	16	464	330	16	629	502	16	435	601	16	801	687	17	188	805	17	315
73	16	501	201	16	520	342	16	587	507	16	496	604	16	796	706	17	185	808	17	378
92	16	514	215	16	527	349	16	589	520	16	363	606	16	819	715	17	210	812	17	380
108	16	519	235	16	450	355	16	591	524	16	813	623	16	793	725	17	213	828	17	397
111	16	442	242	16	570	373	16	585	538	16	825	634	17	207	738	17	305	834	17	399
117	16	440	258	16	575	377	16	602	552	16	797	641	17	195	744	17	307	838	17	413
123	16	444	266	16	578	396	16	638	565	16	803	645	17	203	746	17	308	847	17	409
130	16	453	272	16	580	407	16	633												

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	17	400	109	18	461	201	18	566	283	18	569	409	18	611	558	18	740	669	18	810
23	17	386	122	18	466	206	18	573	294	18	568	438	18	604	568	18	748	681	18	807
53	17	792	125	18	470	212	18	577	297	18	493	456	18	596	570	18	748	691	18	895
58	17	794	141	18	476	219	18	489	312	18	591	478	18	726	583	18	757	694	18	896
66	17	791	142	18	476	228	18	563	325	18	443	485	18	770	596	18	753	701	18	924
71	18	8	147	18	478	236	18	575	336	18	492	516	18	734	607	18	762	707	18	923
80	18	379	158	18	482	242	18	582	338	18	632	525	18	729	616	18	765	711	18	926
84	18	382	168	18	383	248	18	451	351	18	620	536	18	744	629	18	724	718	18	957
89	18	378	177	18	447	261	18	449	382	18	588	546	18	732	633	18	726	727	18	953
91	18	375	183	18	467	267	18	579	390	18	456	549	18	737	635	18	721	736	18	949
100	18	380	186	18	485	273	18	584	404	18	561	557	18	740	645	18	782	747	18	960
104	18	373	196	18	468															

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	19	557	148	19	540	313	19	415	406	19	527	472	20	565	549	20	585	627	20	659
17	19	588	160	19	391	320	19	421	415	19	563	475	20	566	561	20	591	638	20	663
30	19	429	179	19	398	325	19	411	422	19	378	479	20	568	567	20	599	644	20	665
35	19	385	184	19	431	332	19	417	427	19	507	489	20	572	578	20	603	658	20	686
46	19	389	196	19	521	342	19	413	432	19	531	491	20	610	579	20	612	672	20	670
50	19	565	214	19	536	346	19	379	448	19	545	497	20	604	588	20	615	689	20	691
67	19	548	226	19	399	353	19	509	457	19	874	515	20	589	602	20	576	704	20	658
75	19	553	231	19	436	357	19	382	463	19	876	521	20	583	605	20	576	706	20	676
86	19	571	272	19	401	366	19	578	464	19	876	526	20	580	607	20	595	721	20	681
108	19	514	281	19	404	394	19	510	468	19	873	535	20	576	619	20	567	732	20	696
124	19	423	294	19	409	403	19	520	470	19	872	544	20	573	622	20	593	749	20	702
142	19	551	299	19	623															

W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	20	873	111	20	849	207	21	858	300	21	735	385	22	73	484	21	752	593	21	763
15	20	854	118	20	809	222	21	738	307	21	1015	405	21	1025	491	21	774	611	21	746
36	20	817	122	20	878	224	21	723	313	21	742	413	21	1035	508	21	854	627	22	90
43	20	852	138	20	910	234	21	863	324	21	1012	420	21	874	521	21	780	675	22	83
49	20	848	160	20	926	246	22	58	331	21	733	431	21	1017	540	22	72	698	21	769
52	20	819	161	20	933	268	21	721	337	21	1011	436	21	1028	543	21	851	711	21	1037
58	20	924	169	20	927	271	21	1022	339	21	739	442	21	755	553	21	1031	718	23	310
65	20	862	177	20	930	278	21	868	349	22	66	455	21	760	564	21	878	726	23	309
87	20	812	188	20	922	282	21	1020	365	22	80	464	21	906	583	21	727	729	23	584
99	20	811	194	20	917	289	21	729	372	21	870	480	21	1019	590	21	722	758	23	650
103	20	870																		

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	23	525	131	23	527	283	23	730	407	23	593	544	23	662	620	24	644	722	24	639
8	23	523	139	23	553	289	23	556	422	23	579	548	23	663	623	24	653	732	24	597
13	23	671	140	23	698	293	23	713	428	23	874	550	23	517	638	24	649	738	24	677
19	23	666	151	23	689	313	23	721	445	23	604	559	23	664	641	24	634	744	24	679
27	23	681	160	23	539	314	23	611	455	23	608	568	23	710	654	24	632	747	24	651
37	23	{685 {702	191	23	685	321	23	567	463	23	644	574	23	795	657	24	633	754	24	596
			201	23	808	332	23	721	471	23	804	588	23	550	658	24	1002	757	24	624
59	23	599	212	23	692	339	23	571	481	23	800	593	{23	919	683	24	643	766	24	592
76	23	520	229	23	669	351	23	735	493	23	789		{26	1008	686	24	600	769	24	592
81	23	677	234	23	812	357	23	576	503	23	727	599	23	918	693	24	599	779	24	999
95	23	629	261	23	732	368	23	559	511	23	582	602	24	993	695	24	682	787	24	612
116	23	673	268	23	522	371	23	557	519	23	646	606	24	645	704	24	631	796	24	590
126	23	537	270	23	712	376	23	560	530	23	792	610	24	646	706	24	620	800	24	627
136	23	562	275	23	553	397	23	613	537	23	724	618	24	554	717	24	630			

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	24	602	126	24	564	242	24	888	357	26	181	460	26	440	566	26	189	691	26	197
10	24	606	132	24	547	246	24	875	359	26	191	465	26	291	570	26	315	703	26	444
18	24	585	137	24	554	253	24	996	365	26	176	473	26	359	583	26	188	724	26	532
23	24	685	156	24	548	263	26	281	367	26	177	486	26	179	587	26	460	735	26	452
30	24	608	170	24	544	276	26	183	372	26	433	494	26	302	602	26	536	745	26	455
39	24	633	178	24	680	286	26	278	384	26	287	514	26	348	611	26	376	757	26	551
43	24	587	182	24	682	292	26	174	395	26	297	517	26	285	633	26	357	774	26	517
52	24	566	183	24	570	295	26	182	402	26	193	522	26	515	638	26	309	783	26	262
59	24	569	205	24	561	299	26	370	414	26	270	526	26	528	641	26	300	794	26	527
63	24	580	215	24	882	309	26	179	416	26	512	535	26	187	647	26	521	798	26	252
72	24	583	218	24	878	312	26	266	420	26	437	538	26	201	663	26	312	805	26	373
77	24	994	223	24	880	323	26	175	426	26	513	542	26	294	667	26	314	813	26	421
80	24	688	229	24	886	327	26	172	430	26	516	551	26	320	671	26	442	818	26	303
108	24	578	234	24	883	333	26	204	433	26	271	560	26	311	676	26	546	822	26	539
112	24	615	240	24	885	352	26	347	454	26	363									

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
1	26	542	135	27	356	207	27	307	296	27	319	428	27	363	547	27	334	737	28	769
11	26	349	144	27	350	211	27	260	300	27	323	441	27	209	562	27	411	755	28	737
17	26	557	149	27	309	219	27	237	304	27	389	447	27	251	595	27	844	762	29	790
43	26	366	153	27	320	226	27	378	323	27	345	456	27	263	589	{27	883	765	28	717
54	26	354	162	27	310	242	27	223	332	27	325	470	27	255		{31	259	769	28	721
62	26	341	172	27	353	246	27	348	337	27	340	484	27	211	637	27	896	773	28	791
75	27	296	180	27	301	252	27	220	351	27	317	491	27	240	639	28	744	778	28	766
79	27	299	182	27	302	259	27	234	356	27	288	495	27	225	647	28	722	786	28	780
84	27	294	185	27	359	267	27	306	367	27	329	502	27	214	661	28	733	790	28	742
90	27	370	189	27	352	270	27	246	380	{27	278	513	27	268	672	28	813	796	28	831
110	27	327	191	27	397	283	27	244		{81	258	528	27	218	711	28	776	800	29	519
117	27	303	196	27	293	289	27	231	405	27	314	529	27	227	721	29	514	819	28	761
125	27	361	200	27	241	294	27	233	412	27	399	539	27	868	735	28	716	826	28	781
131	27	297																		

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
	29	984	103	28	751	237	30	150	332	30	100	466	30	171	553	30	56	644	29	1016
	28	757	109	28	747	243	28	701	335	29	999	484	29	981	561	29	1010	649	29	1020
	28	762	120	28	787	248	28	702	342	30	160	490	29	1001	566	30	109	651	30	61
	28	754	126	29	505	256	28	789	372	29	994	492	29	1003	574	30	196	659	30	216
	28	728	133	28	803	260	28	694	385	30	67	499	29	1008	587	30	76	707	30	146
	28	709	163	28	793	267	28	705	390	29	991	503	30	101	594	29	976	711	30	239
	29	1035	175	28	730	270	28	706	399	30	99	507	29	1027	598	29	1039	715	30	64
	29	503	183	28	798	278	29	509	402	29	983	512	30	73	599	30	107	725	29	1018
	28	714	197	28	699	286	28	926	406	29	1022	521	29	1031	606	29	512	730	29	1020
	28	719	202	28	763	296	28	922	413	29	1034	531	29	1006	612	30	201	734	29	1024
	28	740	210	28	696	308	28	930	414	30	183	538	30	143	626	30	78	740	30	59
	29	507	218	28	932	312	28	930	450	29	1002	546	29	1011	635	29	1014	744	30	113
	28	753	229	28	829	315	29	527	453	30	178	550	29	1013	641	29	1017			

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W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.	W. Va. Rep.		S. E. Rep.
Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.
	30	69	143	30	95	251	31	986	374	32	227	483	31	965	595	31	976	729	31	975
	29	1028	155	30	102	262	31	993	380	32	169	490	32	259	620	32	232	731	31	974
	30	206	168	31	260	275	31	991	384	32	194	516	31	937	626	32	229	734	32	218
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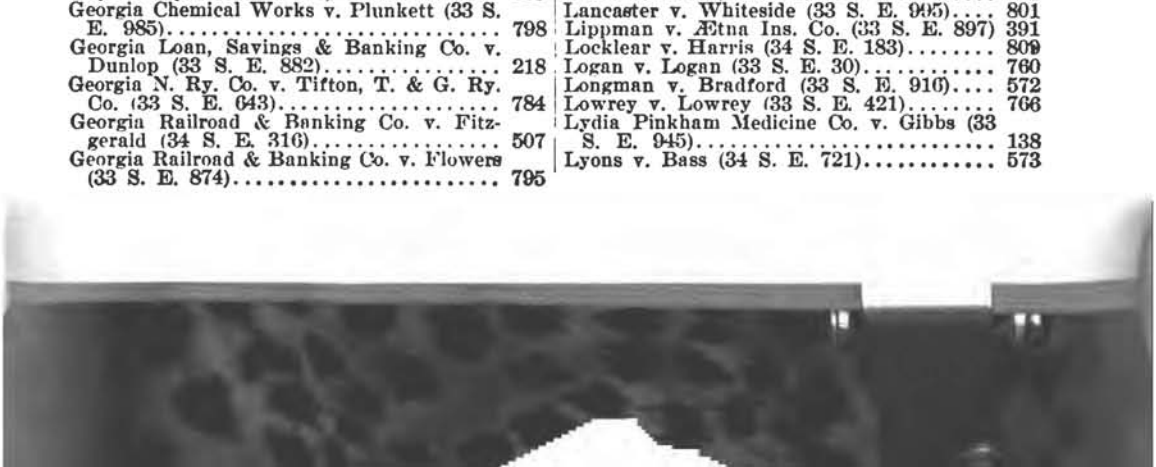

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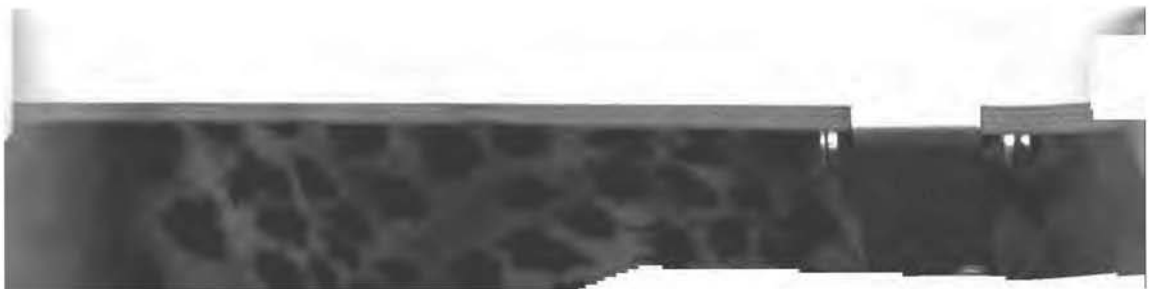

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